



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 181 OF 2014

1. KITSAO KARISA
2. SAFARI KARISA
3. CHARO KARISA.....PLAINTIFFS

VERSUS

1. KAZUNGU MJUKU
2. SHUKURU KENGA
3. GARAMA KENGA
4. JOHNSON MLEKA
5. KAHINDI KENGA
6. EVERYINE CHOLA.....DEFENDANTS

JUDGMENT

1. By an Amended Plaint dated 17th July 2015, the three Plaintiffs have brought this suit against the six Defendants jointly and severally claiming for:-

- a) *Vacant possession, demolition of the Defendants houses and eviction.*
- b) *Costs of this suit*
- c) *Interests thereon at Court rates; and*
- d) *Any other relief that his Honourable Court may deem just to grant.*

2. The basis of the Plaintiffs claims is their contention that they are the beneficial owners of all that unregistered parcel of land measuring six acres or thereabouts situated at Muyeye Village in Malindi which land they claim to have been their family land from time immemorial.

3. The Plaintiffs aver that sometime in the year 2009, their uncle by the name Kenga Iha who is the father of the 2nd, 3rd and 5th Defendants laid a claim to their said parcel of land and proceeded to sub-divide it amongst his said children. To fortify his claim on the land, the said Kenga Iha filed Malindi Senior Principal Magistrates Court *Civil Suit No. 214 of 2009; Kenga Iha Mitsanze –vs- Kitsao & 2 Others* claiming ownership of the land and seeking to injunct the Plaintiffs from its use. The said suit was heard and was decided in favour of the Plaintiffs.

4. It is further the Plaintiff's case that unknown to them their uncle's sons, the 2nd, 3rd and 5th Defendants herein proceeded to sell various portions of the land measuring 50 feet by 50 feet to the 1st, 4th and 6th Defendants and the 1st and 4th Defendants proceeded to erect residential houses on the said portions without the Plaintiffs consent and thereby denying the Plaintiffs the user of the land.

5. It is the Plaintiffs' case that the said Kenga Iha Mitsanze had no colour of right over the said parcel of land to entitle him to sub-divide it amongst his children and the 2nd, 3rd and 5th Defendants therefore had no saleable interest in the portions of land they purported to sell. It is further the Plaintiffs' case that the Defendants were at all material times aware of the dispute over the parcel of land and had notice of the defect in the Title of the seller and further that immediately they became aware of the sale of the portions of the suit property, they duly gave notice to the Defendants but the Defendants ignored the same and proceeded to erect the houses thereby necessitating this suit.
6. Despite Service of Summons on all the Defendants, only the 2nd Defendant entered appearance herein and filed a Written Statement of Defence before the Plaint was amended on 23rd February 2015. In the said Defence, the 2nd Defendant denies that the six acres of the unregistered suit property belong to the Plaintiffs or their late father and avers that the Plaintiffs were only entitled to three acres while the other three acres belonged to the 2nd Defendant's father Kenga Iha Mitsanze.
7. The 2nd Defendant while admitting the existence of Civil Suit No. 214 of 2009 in which his father was the Plaintiff denies that the Judgment decreed the property to the Plaintiffs herein. It is his case that the said Judgment only dismissed his father's prayer for a permanent injunction but made no conclusive finding on the question of the right of ownership of the respective portions of the land. It is his further case that the issue is now the subject of ELC Civil Appeal No. 11 of 2014 and that the same is pending before Court for determination and it is only after a clear decision is rendered on the issue that any of the parties can be certain of any such right.
8. The 2nd Defendant admits selling a portion of the land to the 1st Defendant and avers that there was nothing at the time of the sale to stop him from selling the said portion which had been given by his later father as an inheritance. It is his case that upon the said purchase of the land, the 1st Defendant started developing the same openly and he was never served with any Court order to stop and it would be unfair to demolish the completed rental houses now on the land.
9. At the trial hereof, the three Plaintiffs all testified (PW1, PW2, and PW3) and told the Court that the suit property is their ancestral land the same having been acquired by their late father Karisa Burashi. It was the Plaintiff's case that sometime in the year 2009, their uncle Kenga Iha Burashi laid claim to a portion of the suit property but the claim was dismissed by a panel of elders who heard the dispute. A copy of the decision of the panel of elders was produced herein and marked exhibit No. 1
10. It was further the Plaintiffs testimony that their uncle was not happy with the decision of the elders and he therefore instituted a civil case being **Malindi CMCC No. 214 of 2009; Kenga Iha Mitsanze –vs- Kitsao Karisa, Safari Karisa and Charo Karisa**. Their uncle's case against them was also dismissed by the Court on 11th March 2014. A copy of the Judgement of the Honourable L Gicheha Senior Principal Magistrate was produced herein and marked Exhibit 2.
11. It was the Plaintiff's case that notwithstanding the said decision, their uncle proceeded to sub divide the suit property into portions of 50 feet by 50 feet and allocated the same to his children, among them the 2nd, 3rd and 5th Defendants. The 2nd, 3rd and 5th Defendants then sold their respective portions to the 1st, 4th and 6th Defendants respectively. Upon taking possession of the portions sold, the 1st, 4th and 6th Defendants proceeded to build houses thereon. Photos of some of the houses built by the Defendants were produced and marked as Plaintiffs Exhibits No. 3.
12. Despite filing a Written Statement of Defence, the 2nd Defendant did not turn up to testify in support of his case following the withdrawal of his Advocate from the proceedings for alleged lack of instructions. In the said Defence he reiterates his father's claim to a portion of the suit property and avers that the Court never made a conclusive finding in Malindi CMCC No. 214 of 2009 on the question of ownership and that there is an Appeal pending in ELC No. 11 of 2014 to determine the issue.
13. A perusal of the decision of the Honourable Senior Principal Magistrate L. Gicheha (PEX 2) delivered on 11th March 2014 however shows that the claim by the 2nd Defendant's father that the suit property was ancestral land to which he was entitled to half a share was not proved. On the contrary, the Court found that the Plaintiffs herein had proved that the land belonged to their father who had purchased it from an uncle. At any rate, while the 2nd Defendant alleges that there is an Appeal pending from the decision, no evidence on the said Appeal and/or its outcome was availed to this Court.
14. It is the Plaintiffs case that the Defendants have no colour of right over the suit property. The Judgment delivered in Malindi CMCC No. 214 of 2009 confirmed that the land was indeed exclusively owned by the Plaintiffs' father. That decision is binding on the Defendants who derive their claim to the land from the fact that they are the children of Kenga Iha Mitsanze who was the Plaintiff in the case and whose case was dismissed.
15. In light of the foregoing and the uncontroverted evidence of the Plaintiffs, I find and hold that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. Accordingly, Judgment is hereby entered for the Plaintiffs as prayed in the Plaint.
16. The Defendants have 45 days from today within which to demolish the structures and houses erected on the suit property failure to which the Court Bailiff shall ensure their eviction therefrom at their own costs.
17. The Plaintiffs shall have the costs of this suit.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE