



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 46 OF 2010**

**SAMUEL CHARO KITSAO & 34 OTHERS.....PLAINTIFFS**

**VERSUS**

**MOMBASA CEMENT LIMITED.....DEFENDANT**

**JUDGMENT**

1. This suit was filed by an initial 35 Plaintiffs herein on 13<sup>th</sup> May 2010. It was subsequently on 15<sup>th</sup> May 2014 consolidated with ELC No. 23 of 2011 which was filed by 11 Plaintiffs on 14<sup>th</sup> February 2011 against the same Defendant. In both consolidated suits the Plaintiffs are seeking orders of injunction to restrain the Defendants from entering, taking over and/or dealing with their respective parcels of land.
2. The genesis of the Plaintiffs' suit is their contention that they had been all residing for many years in their respective portions of land situated at Vuma-Maweni/Takaungu village within Kilifi District and that their rights and interests were adjudicated upon and were ascertained in accordance with the law. However sometime in October 2009, the Defendant Company moved onto the Plaintiffs parcels of land and started fencing the same, cut down the Plaintiffs trees and stopped them from cultivating and/or excavating coral blocks therein.
3. It is the Plaintiffs case that the Defendant has no colour of right over their respective parcels of land and that the Defendants activities are denying the Plaintiffs the use of their land. Despite demand made and notice of intention to sue, the Defendant has refused to stop the said activities hence necessitating this claim.
4. In their Defence filed in respect to this suit on 11<sup>th</sup> June 2010, the Defendant states that the Plaintiffs were the initial allottees of the mentioned Plots of land. It was however their case that the rights and interests of the Plaintiffs were however yet to be determined in light of Mombasa HCCC NO. 134 of 1991 which was pending determination.
5. That notwithstanding, the Defendant contends that sometime in October 2009, it willingly approached a number of the Plaintiffs with a view of buying from them their respective parcels of land and compensating them for the developments thereon. The said Plaintiffs accepted the offer and the purchaser of their plots was done on a willing seller, willing buyer basis. Otherwise the defendant denies trespassing or encroaching on the Plaintiffs parcels of land save for those it purchased as aforesaid.
6. At the trial herein, the Plaintiff called 12 witnesses in support of their case.
7. PW1- Samuel Charo told the Court that he is a farmer in Vuma/Maweni in Takaungu. He told the Court that the Plaintiffs have been occupying separate individual Plots in the area since time immemorial. In 1991, an adjudication process was undertaken in the area and each one of the Plaintiffs was allocated a Plot. The adjudication process was complete on 25<sup>th</sup> June 1991. PW1 produced a copy of the Adjudication Register (Pexh 1) and a copy of the Notice of Completion of the Adjudication Register (Pexh 2) in support of this position.
8. PW1 further testified that sometime in the month of October 2009, the Defendant Company through their servants and/or agents entered into their portions of land and started fencing them off, cutting down trees planted thereon and generally stopped the Plaintiffs from accessing their respective portions of land. It was his case that the Defendant which runs a cement factory near their parcels of land was doing so in order to arm twist and/or coerce them to sell their parcels of land as the Defendant intended to use them for excavation of limestone to be used in its cement factory.
9. PW1 told the Court that the Defendant had then gone ahead to damage their land. He produced photos which according to him showed the destruction and damages done by the Defendant on the various portions. PW1 further testified that subsequent to the destruction, the Defendant had now gone to the extent of claiming to have bought various portions owned by the Plaintiffs from 3<sup>rd</sup> parties and even from people who were already dead as at the time of the alleged purchase.

10. PW1 gave a list of some of the Plots alleged to have been bought by the Defendant as follows: Plot No. 568 owned by Peggy Mkambe but which was allegedly sold by one Samuel Charo Kahindi; No. 432 and 488 owned by Gohu Toya Tsofa but which were sold by one Mwenda Kenga Karisa; No. 499 owned by Kahindi Wanje Nyale but sold by Kazungu Wanje Nyale and No. 504 owned by Mwangudza Mwaringa Jambo but sold by Kahindi Lewa Biry.

11. Other according to PW1 were Plot No. 587 owned by Karisa Mzungu but which was allegedly sold by one Mary Zawadi Karisa; No. 605 owned by Safari Shindo Mzanzu but sold by Shindo Msanzu Baya; No. 389 owned by Kaingu Ushuru Mcharo but sold by Kahindi Karisa Kasukari and Tabu Karisa Kasukari.

12. There was also Plot No. 441 owned by Kinyaka Deche Katsaku sold by Mrima Kinyaka Deche; No. 437 owned by Charo Toya Tsofa but sold by Josephine Were Charo; No. 382 owned by Karisa Baya Yaa sold by Charo Karisa Ngwaru; No. 380 owned by Sulubu Kitsao Kithi but sold by Evans Katana Kalume; No 379 owned by Ngumbao Tsuma Nzai but sold by Charo Karisa Ngwaru; No 368 owned by Luvuno Kaloki Mwachiro but sold by Alfred Mwangudza Kaloki; No. 222 owned by Sylvester Daniel Munga but sold by Kadzo Hande Hamisi and Plot No. 706 owned by Rose Ngala but sold by Patrick Oராஜா Kinagu and Mohamed Ali Suleiman.

13. PW1 produced copies of some of the Agreements alleged to have been executed by the parties (Pexh 5 and 6). It was his case that in most of the cases, the Defendant bought the said portions of lands from 3<sup>rd</sup> parties after being informed that the owners had passed away while in fact the owners were still alive. PW1 concluded by stating that the Defendant refused to stop their activities on the land even after their Advocates on record wrote a demand letter to the Defendant raising a number of complaints. It was therefore his prayer that an injunction order be issued against the Defendant and that they be condemned to pay the costs of this suit.

14. PW2- Charo Toya Tsofa (13<sup>th</sup> Plaintiff) on his part told the Court that his Plot was No. 437. He has been cultivating this parcel of land and planting food crops thereon even before the adjudication was done. He told the Court that sometime in February 2010, the Defendant through its employees trespassed onto his Plot and started clearing it and excavating limestone without his consent. PW2 further supported the testimony of PW1 and told the Court he did not know Josephine Mere Charo who is alleged to have sold his Plot to the Defendant on 14<sup>th</sup> January 2010. It was his case that contrary to the Defendants allegations he was neither dead nor had he given any authority to the said Josephine to sell the land on his behalf.

15. PW3-Karisa Baya Yaa on his part told the Court that he was allocated Plot No. 382. He has been using the Plot for farming. But sometime in February 2010, the Defendant trespassed onto the Plot and started clearing the same. Thereafter they started excavating the same for limestone and PW3 is no longer able to utilize the land. It was his testimony that Charo Karisa Ngwaru who is said to have sold the land to the Defendant by an Agreement dated 14<sup>th</sup> May 2010 was not the owner of the land.

16. PW4- Karisa Mzungu told the Court that he was allocated Plot No. 587 during the adjudication process. He had been using the land even before the adjudication for farming. In February 2010, the Defendant trespassed into the land and started excavating limestone thereon. He told the Court that Mary Zawadi Karisa who was said to have sold the land to the Defendant on 3<sup>rd</sup> February 2010 was neither the owner thereof nor his agent.

17. PW5-Constance Philip Chiko on her part told the Court that her husband Charles Hanington Kadenge had purchased Plot No. 552 from one Kazungu Kenga Karisa at Kshs 110,000/-. Later they constructed a permanent residential house thereon at the cost of Kshs 300,000/-

18. PW5 told the Court that sometime in September 2010, the Defendant using bulldozers demolished the house and proceeded to construct a road across the Plot without their consent. She produced photographs of the house. PW5 told the Court that her husband died on 21<sup>st</sup> November 2011 and she was granted Letters of Administration and Litem to prosecute this Claim. She produced the grant in Court and told the Court that Mwenda Kenga Karisa who is alleged to have sold the land to the Defendant on 30<sup>th</sup> November 2009 was not the owner thereof.

19. PW6- Dorris Runga told the Court that in 1991 her husband Sylvester Daniel Munga was allocated Plot No. 222 Takaungu Adjudication Section. They took possession of the land and erected a permanent residential house. Sometime in September 2010, the Defendant demolished the house using bulldozers and proceeded to construct a road across the Plot. They are hence no longer able to use the land. PW6 told the Court that Kadzo Pande Hamisi who is said to have sold the land on 20<sup>th</sup> April 2010 was not the owner of the land and had no authority to sell the same.

20. PW7- Joram Richard Kaingu told the Court that he owns Plot Nos. 131 and 507. He has been cultivating the same. In February 2010, the Defendant entered the land, cleared it and started excavating limestone. PW7 told the Court that he has never sold his land to the Defendant and/or consented to its use by the Defendant.

21. PW8-Kaingu Ushuru Mcharo on his part told the court that he was allocated Plot No. 457 Takaungu upon adjudication. Later he bought Plot No. 378 from one Charo Kasuku Baya for Kshs 70,000/-. In February 2010, the Defendant trespassed onto the said Plots and began excavating limestone. It was his case that Evans Katana Charo who is alleged to have sold Plot No. 378 to the Defendant on 26<sup>th</sup> January 2010 did not own the land and had no authority to sell the same.

22. PW9- Suleiman Katana Karisa told the Court that Ngumbao Tsuma Nzai (the 2<sup>nd</sup> Plaintiff herein) is his uncle. PW9 told the Court that his uncle who was unable to attend Court was the owner of Plot No. 379. When he was born, his uncle was staying in the land, and he was registered as the owner upon adjudication. Later in 2010, the Defendants took over the land and started excavating limestone. It was his case that Charo Karisa Ngwaru who was said to have sold the land to the Defendant was not the owner thereof and had no authority to do so.

23. PW10- Haanu Karisa Toya told the Court that he owns Plot No. 433 which was allocated to him after adjudication. He told the Court he sold Plot No. 132 Boyani Scheme to the Defendant but not No. 433 which they took and started excavating.

24. PW11-Mugeni Baya Gege told the Court that he owns Plot No. 784. He told the Court he never sold his land to the Defendant.
25. PW12- Nyale Shoka told the Court he owns Plot Nos. 226 and 408. The Defendant took over his parcels of land and built a road thereon. He never allowed them to use the land which initially belonged to his father.
26. Despite being given time between 22<sup>nd</sup> June 2015 when the Plaintiffs closed their case and 4<sup>th</sup> December 2017 to call their witnesses, the Defendants never did so.
27. I have considered the Plaintiffs testimony and the evidence adduced before this Court. I have equally taken into account the Plaintiffs' Advocates submissions herein.
28. It was the Plaintiffs' case that they have been residing on their respective portions of land from time immemorial and that in the year 1991 the said portions of lands were allocated to them upon completion of an adjudication process. A copy of the Adjudication Register was produced by PW1 as Plaintiffs Exhibit No. 1.
29. A perusal of the Adjudication Register reveals that the 1<sup>st</sup> to 34 Plaintiffs in the original case (ELC 46 of 2010) were respectively allocated Plots Nos 31, 355, 361, 363, 362, 368, 379, 377, 380, 381, 382, 389, 437, 433, 436, 441, 482, 260, 416, 408, 410, 539, 605, 604, 603, 488, 484, 480, 484,481, 447, 449, 450, 784, 587 and 586.
30. The said Register further reveals that the 1<sup>st</sup> to 11<sup>th</sup> Plaintiffs in the subsequent suit consolidated herewith (ELC 23 of 2011) were allocated Plot Nos. 519, 499, 432, 507, 457, 511, 568, 706, 222 and 504 respectively. On her part PW5 testified that they acquired Plot No. 552 by way of purchase from the original allottee one Kazungu Kenga Karisa.
31. It was the Plaintiffs testimony that on various dates between October 2009 and September 2010, the Defendant which owns a cement factory situated near the suit properties unlawfully took over the suit properties and commenced excavation of limestone therefrom.
32. According to PW5 and PW6, they took possession of their respective parcels of land and proceeded to construct residential houses thereon. It was however their testimony that sometime in the year 2010, the Defendant moved into their respective parcels of land and flattened their houses with the use of bulldozers after which the Plots were turned into access roads through the suit premises. It was the Plaintiffs testimony that the road which was constructed by the Defendant is used by the Defendant's lorries for transporting limestone which is excavated from the Plaintiffs parcels of land to the Defendant's cement factory situated nearby.
33. It was the Plaintiffs testimony that when they confronted the Defendant as to why it was taking over their properties, the Defendant informed them that it had purchased the suit properties. From a number of agreements produced herein in a bundle as Plaintiff Exhibit 4, it is apparent that a number of the suit properties were purchased from 3<sup>rd</sup> parties who had very little to do with the actual ownership of the land.
34. At the same time it is apparent that while indeed some of the Claimants to the parcels of land were long dead at the time of filing of this suit as admitted by PW1 during his cross-examination, the Defendant was misled into buying some of these parcels of land from proxies who represented to them that some of the parties herein are dead. This is evident from the Further Replying Affidavit of Hasmukh Patel, the Defendant's Managing Director filed herein on 23<sup>rd</sup> July 2010 in response to an application for injunction filed by the Plaintiffs.
35. From Paragraph 5, 6 and 8 of the said Further Replying Affidavit, it is evident that the Defendants only relied on alleged burial permits for some of the parties herein to purchase the land from the said proxies. Thus having stated earlier in the Replying Affidavit and their Defence that the Plaintiffs were dead, the Defendant's Managing Directors turns around at the said paragraphs 5, 6 and 8 of the Further Replying Affidavit to state as follows:-

***5. That in response to the averments of Paragraphs 3 of the said Supporting Affidavit, I am now informed by the Chief, Takaunga Location, which information I verily believe to be true and correct and which I wish to rely upon that the 9<sup>th</sup>, 13<sup>th</sup>, 26<sup>th</sup> and 34 Plaintiffs are indeed alive (Annexed hereto and marked as 'HP-1' is a copy of the Affidavit of Raphael B. Karisa).***

***6. That I am further informed by the Chief which information I verily believe to be true that other than the Plaintiffs stated at Paragraph 5 as being alive, the rest, that is the Plaintiffs numbers 22, 15, 8, 17 and 35 are indeed dead as per the burial permits exhibited thereto while Plaintiffs 6, 16, 7 and 19 are also dead according to the Chief's Letter though no burial permits were obtained by the families.***

***8. That further it is also strange that Plaintiff No. 15 would swear an affidavit when the burial permit clearly shows that he is deceased.***

36. Clearly therefore the Defendant had no right to enter into and takeover the parcels of land belonging to the Plaintiffs listed at paragraphs 5 of the Further Replying Affidavit. At the same time and as can be seen at paragraphs 10, 11 and 12 of this Judgment, a number of the Plots concerned were sold by parties that were neither known to nor had authority of the Plaintiffs to sell the same.
37. The Defendant did not testify despite being given a period of almost two years to offer evidence in rebuttal of the Plaintiff's testimony. Accordingly, no evidence was placed before me to contradict the Plaintiff contention that the 3<sup>rd</sup> parties who sold the land to the Defendant had no beneficial or other interest in the suit properties. If those 3<sup>rd</sup> Parties had no saleable interest in the Plots they purported to sell, the agreements executed with the Defendants were incapable of conferring any interest upon the Defendant in regard to the impugned properties.
38. In the foregoing circumstances, I am persuaded that the Plaintiffs have established their case on a balance of probabilities. Accordingly, I

enter Judgment for the Plaintiffs as prayed in the Plaintiff.

39. The Defendants are hereby granted 30 days within which to pull the fence erected around the Plaintiffs parcels of land and to vacate the suit premises forthwith.

40. The Plaintiffs shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 11<sup>th</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**