



**REPUBLIC OF KENYA**

**IN THE ELC**

**AT MOMBASA**

**ELC CASE NO. 231 OF 2013**

**LUCKY MWADZALA JAKA.....PLAINTIFF**

**VERSUS**

**JULIUS KATANA KITHI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff moved this court by way of a plaint dated 17<sup>th</sup> October, 2013 and filed on 18<sup>th</sup> October, 2013 seeking the following reliefs:

**1. A permanent order of injunction be issued restricting the defendants his wife, his servant and agent or otherwise however from dealing , stepping and/or trespassing on all that suit property and the manner in which the defendant can compensate the losses and damages to be assessed, which he intentionally and/or knowingly caused.**

**2. Costs and interest.**

2. The plaintiff has averred that at all material times he was and is the owner/proprietor of unsurveyed parcel of land situate at Kwa Tonolo village of Kawala Kadzonzo sub location within Kaloleni District. That in the year 1980, the plaintiff's father, Victor Jaka Chamli bought about 8 acres of land from one Karisa Katana Mato and took possession and before enjoying rights of possession, ownership and use over the said land peacefully from 1989. The plaintiff father avers that in the year 2003, the defendant made claims of ownership of the suit property claiming that he has inherited it from his late grandfather. That the matter was resolved by the area assistant chief and village elders who decided that the suit land rightfully belonged to Victor Jaka Chamli. That being dissatisfied with the said decision the defendant moved to the District Officer's office where the matter was fixed for hearing before the District land Tribunal Elders but the defendant failed to turn up during the hearing.

3. The plaintiff states that his father stayed peacefully on the suit land together with his family until his demise on 25<sup>th</sup> July 2011. The plaintiff further states that he took it upon himself to protect his father's property as an heir. The plaintiff further states that a year after the demise of his father, the defendant forcefully entered the suit land and evicted the plaintiff's servants and began erecting structures on it. That the matter was reported to the police who failed to take action against him. According to the Plaintiff, the defendant has began cultivating and erecting structures on the suit land and despite demand has persisted, hence this suit.

4. By a statement of defence dated and filed on 18<sup>th</sup> November, 2013 the defendant denied the plaintiff's claim. The defendant's substantive defence is that the plaintiff lives in Rabai sub-county and does not have any ancestral land within Kaloleni sub county. The defendant avers that he is living within his ancestral land which comprises the suit land. He denied that the plaintiff's late father purchased the land, noting that if he did so, there was no consent from the defendant and his family members. The defendant avers that there has never been any land dispute over the suit land and urged the court to dismiss the plaintiff's suit with costs.

5. When the matter came up for hearing on 20<sup>th</sup> September, 2018, only the plaintiff attended and testified as PW1. An application for adjournment was made by the defendant's counsel but the court found that the same was not merited and therefore disallowed it. In his evidence the plaintiff stated that he had sued the defendant who has grabbed his land. He stated that survey was carried out in the year 2017 and that he was allocated plot No. 1527 together with his mother and brother. He produced an adjudication letter for Rabai Adjudication Area, Jimba/ /Kaliangombe Adjudication Section plot no. 1527 as p. exhibit 1. In their three names and urged the court to grant the orders.

6. I have considered the evidence on record and the pleadings filed. The plaintiff avers that in the year 1989, his father, Victor Jaka Chamli bought about 8 acres from Karisa Katama Mato. That the deceased had a peaceful stay with his family until his death on 25<sup>th</sup> July 2011 when the defendant trespassed on the land and forcefully took possession. In paragraph 10 of the plaint, the plaintiff avers that he took it upon himself to protect his father's property as an heir.

7. The issue that arises is whether the plaintiff has *locus standi*, capacity or enforceable right in law to bring the suit herein against the defendant before obtaining grant for letters of Administration.

8. In this suit the plaintiff has pleaded in the plaint that he has brought the suit as heir of his deceased father. In my view, the plaintiff should have complied with the provisions of the Law of Succession Act, Cap 160 Laws of Kenya by obtaining grant for letters of administration before filing the suit. In the absence of the grant for letters of administration, the plaintiff cannot claim to be the heir or beneficiary of his father's land. Without a grant of representation or a special limited grant ad colligenda bona, the plaintiff has no legal capacity to sue the defendant as yet for the land the deceased's estate may be entitled to. The plaintiff, in my view, does not have the *locus standi* to sue the defendant over the suit land.

9. In his evidence the plaintiff produced the document for plot No. 1527 which is in his name and that of his mother and brother. In the plaint, the claim herein is over unsurveyed parcel of land. The pleadings have not been amended to indicate Plot No. 1527. Parties are bound by their pleadings. The plaintiff may have a claim over plot no. 1527. But the subject matter of the suit herein is the land that allegedly belonged to the plaintiff's deceased father.

10. The upshot is that the plaintiff's suit is incompetent and the same is hereby struck out. Each party to bear his/her own costs.

Dated, signed and delivered at Mombasa this 18<sup>th</sup> Day of December, 2018

**Hon. C. Yano**

**Judge**