



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ELC CASE NO 238 OF 2012**

**1. ANDREW RIMBA CHENGO**  
**2. HARRISON MATHO FONDO**  
**3. MASHA DYLER GONA.....PLANTIIFFS/APPLICANTS**

**VERSUS**

**1. KAZUNGU NYUNDO**  
**2. KHASSIM NYUNDO.....DEFENDANTS/RESPONDENTS**

**JUDGMENT**

1. The three Plaintiffs brought this suit against the two Defendants vide their plaint dated 26<sup>th</sup> October 2012. The Plaintiffs pleaded that they are the legal and/or beneficial owners of all the parcel of land situate at **KANYAFUNGO/MWANAMWINGA** together with all the improvements thereon. That sometimes on or about 27<sup>th</sup> September 2012, the Defendants without any colour of right forcefully invaded the said land and started erecting structures and cultivating crops in total disregard to the legal owners' pleas. Further that the Defendants have mobilized members of their clan to invade the said parcel and proceeded to subdivide amongst themselves to the detriment of the Waparwa Clan who are the legal and/or beneficial owners of the suit parcel of land. Consequently, the Plaintiffs prays for judgment against the Defendants for:

- a. A declaration that the Plaintiffs are the rightful legal and/or beneficiary owners of the suit land situate at KAYAFUNGO/MWANAMWINGA.**
- b. A Permanent injunction do issue against the Defendants, their servants, agents and/or employees restraining them by way of mandatory injunction from entering, subdividing, wasting, damaging, intruding, trespassing and/or interfering with Plaintiffs' piece of land situate at KAYAFUNGO/MWANAMWINGA.**
- c. The Plaintiffs further pray that mandatory injunction do issue compelling the Defendants, their servants, agents and/or employees to demolish the erected structures and give vacant possession of the parcel of land situate at KAYAFUNGO/MWANAMWINGA.**
- d. Costs of and/or incidental to this suit.**
- e. Any other relief the Honourable Court may deem fit to grant in the circumstances.**

2. The suit is defended via a joint statement of defence filed on 22<sup>nd</sup> April 2013. The Defendants have denied the Plaintiffs claim and pleaded that they have settled on the land that has always been their ancestral land i.e. the Wamwathoya clan who have exercised open use, occupation and control since the 1980's. The Defendants also pleaded that the suit is fatally defective as it discloses no cause of action. They denied demand and notice of intention was issued.

3. The 2<sup>nd</sup> Plaintiff gave his evidence on 3<sup>rd</sup> May 2016. He began by stating that he is schooled up to diploma level and is an insurance broker. He knew the Defendants as invaders of their shamba. He described the 1<sup>st</sup> Defendant as his brother-in-law while the 2<sup>nd</sup> Defendant is his nephew (son to the 1<sup>st</sup> Defendant). The 2<sup>nd</sup> Plaintiff said they have lived on the suit land for a long time. That in 1914, his father and the 1<sup>st</sup> Defendant's father followed Kapombo to the military during World War I. After the war, the 1<sup>st</sup> Defendant's father requested via an informal agreement for a place to stay. The witness continued that the 1<sup>st</sup> Defendant later married his step-sister and he continued to stay on the suit land

4. That in 1973, someone called Chome Ngala claimed this land and sued the 2<sup>nd</sup> Plaintiff's grandfather known as Chara Ruwa and Ndana Chonze but the said Chome lost the case. He produced those proceedings and judgments from Kaloleni RM's Court case no 17/1973 as **Pex I (a)** and **(b)**. Mr. Fondo said the 1<sup>st</sup> Defendant's father was one of their witnesses in that case. This Plaintiff continued that the 1<sup>st</sup> Defendant's father left in 1973 but Kazungu Nyundo stayed on because of their relationship.

5. It is the Plaintiff's case that the 1<sup>st</sup> Defendant then left before his uncle called Kadenge returned to claim this land in 1995. That this uncle wrote to the Chief and subsequently filed a Case No. LDT 174 of 1999 between Kadenge and the 2<sup>nd</sup> Plaintiff's step brother called Samuel. The case was however dismissed. He continued that the 1<sup>st</sup> Defendant also sued them before the Chief. That in October 2010, the Chief advised that the Defendants to go to Kaloleni Court to confirm the genuineness of the previous proceedings. The Plaintiffs aver that the Defendants built on their land in September 2012 necessitating the filing of this suit. In conclusion of his evidence, he said he inherited this land from his father and fore fathers. That the Defendants cannot inherit what their father did not have. He urged the Court to allow their claim.

6. In cross-examination, the witness answered that he was giving evidence because he has land there which land belongs to their clan. That he took out grant of letters of administration because the land belonged to Anderson Chengo-deceased. That the 1<sup>st</sup> Defendant lives where his father lived. That in the previous proceedings, the parties therein filed the case in their individual capacities but the Waparwa clan was given the land as described in page 5 of the judgement in **case no.17 of 1973**. The witness stated that he has also inherited the land he lives on today but no succession proceedings have been done. He has neighbours bordering this land who he mentioned their names.

7. In re-examination, he said the legal owners of the suit land are the Waparwa clan where the Plaintiffs belong. That the last clan representative was Anderson Chengo Fondo hence their reason for taking out the letters of administration of his estate. That the land is in Kayafungo location although there have been changes in the administrative units. Further that no survey has been done in the area. That the individuals were sued on behalf of the clan. The Plaintiffs document filed in Court alongside the Plaintiffs were admitted in evidence by consent except for the sketch map. At this point, the Plaintiffs closed their case.

8. The Defendants called **five witnesses** with the 1<sup>st</sup> Defendant testifying as **DW1**. He stated that he lives at Mwanaminga and the Plaintiffs call him an in-law. DW1 said the Plaintiffs are claiming the land he lives on. That he inherited this land from his grandfather called Baya. He was born on the land and he has buried his relatives therein. Mr. Kazungu stated that the first occupant of the land was Mithanze who belongs to his clan (Wathoya). DW1 stated that his family comprises of the 2<sup>nd</sup> Defendant and Edward Thoya. He mentioned his neighbours such as the Mmangari, Mkiza and Mmadumbi clans' et al.

9. DW1 continued that they dug a borehole on the land with the consent of Mithanze and that no sale of

land took place between them and the Plaintiffs but only lease oranges and cashew nut trees. That the case between Chome Ngala and the Plaintiffs related to a different parcel of land. That the Plaintiffs should show who amongst their family lived on the suit land. The witness also adopted his statement filed in Court.

10. In cross-examination, DW1 said his father was called Nyundo Baya – deceased. He was not aware his father was a witness in the 1973 case. That the land in dispute herein belongs to Wathoya clan. That the case of Kadenge does not concern the land where he lives and Kadenge is a Wathoya. He stated that his father and his wife were buried in Kaloleni on a plot he bought. His deceased siblings (brothers) are buried on their own land where they lived. He denied that Fondo invited his father to this land. Shown the agreement, the witness said he did not see the signature of the seller.

11. **DW2** Kassim Nyundo is the 2<sup>nd</sup> Defendant. He is a son of the 1<sup>st</sup> Defendant. He is a pastor and businessman. That the 1<sup>st</sup> Plaintiff is his uncle while the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are his cousins. That he has settled at Mwanaminga in Kinango where he was born. DW2 states that the Plaintiffs live on the eastern side of their land. That in 1978 he was one of the clerks during the census and he enquired about this land from Chief Nyinga Biya. The said Chief told him there is a Mithanze who gave a place for a dam on their land and construction of Gotoni – Bamba road. That where Mithanze lived there are old trees. He settled on this land and there has been no case. Further that no one has dimension of their pieces of land. That in the 1973 case, all the homesteads on the land in dispute were removed but they remained there. He left the land in 1979 when he was unwell and returned in 2012. He did not know about the sale agreement and that it did not bear the signature of Nyundo Baya. He also mentioned the names of the neighbouring clans.

12. DW2 continued in evidence that his grandfather was not at home in 1973 but returned and in 1975 after losing 5 relatives they moved out again but their clan members stayed on. That their relationship with the Plaintiffs has been good until they filed this case. That on the suit land has many homesteads spread over and many trees. In cross examination, he said he built a structure on the land in 2012. He has been doing Christian Ministry in Nyanza. That his father was a driver and he never lived at home but his grandfather never left the suitland. According to the previous proceedings produced by the plaintiffs, Nyundo sold trees on the land that was in dispute. That the people living on this land are the two Defendants and they were out until 2012 when they returned. He knew Charo Fondo & Kadenge Hiha. That they are not claiming the land where Chome stayed. In re-examination, DW2 stated that he does not which land the Plaintiffs are claiming.

13. **DW3 is Kahindi Gona Ngoli** who lives in Ikanga of Kilifi District also called Mwaminga. He knew the parties to this suit. He was born in 1942. That Fondo asked for land from Gonangoli and they were welcome and given a place to build. The land belongs to them as Mparwa Fondo clan. They neighbour 1<sup>st</sup> Defendant's clan amongst others. That the Plaintiffs do not have land at Mwaminga. That they sold land to Kazungu Nyale Charo. That the Defendants land has no nexus to the Waparwas land.

14. In cross-examination he said that the date of his birth in the ID card of 1956 is not correct. That he was in prison for 9 years at Shimo La Tewa. He did not know why the 1<sup>st</sup> Defendant moved out but the 1<sup>st</sup> Defendant was present when he was being sent to prison. He denied using drugs. He also denied being paid to testify in this case.

15. **HENRY MARTIN YAA** testified as **DW4**. He belongs to the Wamangari clan who are neighbouring the Wamathoya clan. As far as he knows, the land in dispute belongs to the Wamathoya clan. That in his school days, Kizau Nyundo lived there and his wife gave him school uniform in 1965. That the case previously in Court is in Kibwabwani Location. In cross- examination, he said he is a retired Chief of Kinagoni sub-location. That there was a case between the Waparwas and the Wamangari. This area has not been adjudicated but people live as clans and they know their boundaries. He is 63 years old. He does not know Mwangoa. He knows the boundary between Wamathoya and Wamangari. He knew the 1<sup>st</sup> Defendant left this land and returned in 2012. He did not know where he had gone. The wife of Kazungu Nyundo is from the Waparwa clan. DW4 was not told that Fondo had given the

Defendants ancestors a place to live in and it was not obvious that a son in law must be given a piece of land. In re-examination, he said the land in **case no.17 of 1973** is in Kibwabwani Location. DW4 said he was born in Kinagoni and always lived there.

16. **ZEMBE KAZUNGU** testified as **DW5**. He lived in Kinagoni Location and is a farmer. He adopted his statement filed in Court in 2013. He comes from the Mawale Clan who are also neighbours to the Wamathoya on the north. The Waparwas are their neighbours to the south. That the Waparwas land is at Mwanaminga Kibwabwani, while the defendants have settled in Kinagoni Location. He is 60 years old and knows the land in dispute belongs to the Wamathoya. He was not aware of any sale between the Waparwas and the Wamathoya.

17. DW5 continued that if any person welcomes a visitor he would inform his neighbours. That he heard about the Ngala Chome case. Ngala Chome belongs to the Wakisa clan. In cross examination, he said the land is unadjudicated but the boundaries are fixed according to the clans. He was not aware of any sale. Nyundo Baya is father to the 1<sup>st</sup> Defendant. His clan does not neighbour Ngala Chome's. That the Waparwa have a habit of claiming people's land. DW5 said that if you marry you live with your wife on your property. That the Defendants moved out of this land and returned in 2012. With this evidence, the Defendants also closed their case.

18. The Advocates filed written submissions which contained the summaries of and analysis of the evidence adduced by both sides. I need not repeat the contents here having summarized the evidence as above. Now from the evidence adduced and the written submissions rendered, it is not in dispute that the two Defendants sued are living on the land being claimed by the plaintiffs. Secondly, the Plaintiffs come from the Waparwa clan while the Defendants are from the Wamathoya clan. There exists some relationship between the parties by virtue of marriage. Lastly the size of the land claimed is not given.

19. The following are the issues in dispute and which I frame for my determination:

**i. Whether the land in dispute here was the same as the land in dispute in Kaloleni land case No.17 of 1973.**

**ii. If so, whether the Plaintiff has established that the land belongs to them.**

**iii. Who bears the costs of this suit?**

20. The Plaintiffs testified that the land occupied by the Defendants belong to them. To support their evidence, they relied on the decision of a previous **case No.17 of 1973** at Kaloleni Resident Magistrate's Court. In the said Judgment, the 1<sup>st</sup> Defendant's father Nyundo Baya is one of the witnesses. PW1 referred the Court to page 6 of that Judgment which recorded the evidence of Nyundo Baya who testified on their behalf as DW2 staying on the land in dispute after having been allowed by Kapombe Rua Safari. Nyundo said he stayed there for a long time without being disturbed. The Defendants on their part stated that they were unaware their father was a witness in this case. Secondly, that the land fought for in the 1973 case was in Kibwabwani location.

21. The evidence from the proceedings in the Kaloleni case does show that the 1<sup>st</sup> Defendant's father at one point lived on the land claimed by Chome Ngala having been allowed to do so by the 2<sup>nd</sup> plaintiff's grandfather. The 1<sup>st</sup> Defendant admitted he inherited the land he lives on from his father Nyundo Baya. Therefore based on this evidence, there is a possibility that the land then in dispute in **case no.17 of 1973** has co-relation to the land currently in dispute herein and occupied by the defendants. As to whether the land is in Kibwabwani or Mwanaminga, location this is answered by DW5 who stated that there have been changes in the administration units (I believe as a government policy) but the boundaries remain the same. None of the parties adduced evidence to explain how far Kibwabwani Location is from Kinagoni for the court to understand the difference.

22. In those proceedings, **DW1 called Samuel Kitsao at page 12 said thus, "there was another old man**

***Baya of the Mwatoya clan. I asked as to why he was staying on our land. My father told me that he had asked for land and was allowed.***” It is my opinion that the Nyundo Baya lived on a portion of the land and cultivated the other portion that was claimed Chome Ngala. Consequently my finding is that the land the Plaintiffs are claiming is known part of which is currently occupied by the Defendants. Although the area has not been adjudicated, the clans however know their boundaries which even DW5 said exists on the ground and has not been altered. Therefore the averment that the Plaintiffs claim is fatal for failure to give the size of the land does not lie. DW5 accusation that the Plaintiffs are always claiming other people’s lands was not corroborated. Besides the case between Ngala Chome and the Plaintiffs’ father no evidence was presented of other claims brought by the Plaintiffs.

23. The second issue is whether the Plaintiffs have satisfied this Court that they are entitled to the land occupied by the Defendants. The Defendants took issue with the competency of the Plaintiffs suit under the provisions of **Order 1 Rule 2** of the Civil Procedure Rules on aspect to bringing a representative suit. The Defendants also submitted that the Plaintiffs brought this claim on behalf of the Waparwa clan and or as administrators of the estate of the late Anderson Chengo. The Defendants questioned whether the unsurveyed land comprised the estate of Anderson Chango so that such pleadings could be legitimate.

24. The Plaintiffs on their part submitted that Nyundo Baya admitted the land was given to his father by Kapombe Rua Safari. That Nyundo Baya put the last nail on the issue of the disputed land by the sale agreement dated 2<sup>nd</sup> September 1973 which was produced as **Pex-2**. The agreement states he sold the cashew nuts to Fondo Kapombe and that no one from his lineage can make any claim over the land. In considering the issues taken up by both parties with particular reference to Order 1 Rule 2, the suit as pleaded in the plaint is not a representative suit. There are no pleadings sworn on behalf of the 1<sup>st</sup> and the 3<sup>rd</sup> Plaintiffs other than the verifying affidavit. It is therefore my considered view that the 2<sup>nd</sup> Plaintiff swearing the verifying affidavit on their behalf without a written authority is a matter of form that does not go to the substance/root of this case. It is therefore factual to the case as no prejudice has been occasioned to the Defendants.

25. Similarly the body of the plaint does not mention anywhere that the Plaintiffs brought this suit as administrators of the estate of Anderson Chengo nor did they state that these proceedings were being undertaken by them on their own behalf and on behalf of the Waparwa clan. Further, the prayers sought are specific to benefit the Plaintiffs in their individual capacities. Therefore the submission that the land in dispute belongs to the Waparwa clan is not supported by the pleadings and/or evidence. The rules of Civil Procedure require that parties are bound by their pleadings. It is thus late in the day for Plaintiffs to introduce the issue of representation on behalf of either the Waparwa clan or Anderson Chengo-deceased as they have not amended their pleadings to indicate so.

26. The agreement of 2<sup>nd</sup> September 1973 was about the sale of trees on the land. It was drawn between Nyundo son of Baya and Masha Baya and Fondo Kapombe. The two sold their cashew nuts that was said to be on the Waparwa’s land. The agreement further stated that the land was leased to their father and they cultivated and now that they were leaving that land, they found it fit to sell their cashew nuts. Further that no one else was to make any claim over this land except the Waparwa. The Defendants challenged the authenticity of this document because there were no visible signatures of the sellers on the document. The Plaintiffs on their part interpreted this to mean that the Defendants interest over the disputed land was extinguished by the sellers.

27. The 2<sup>nd</sup> Plaintiff in his evidence stated that the 1<sup>st</sup> Defendant continued to stay on the land because of their relationship. He did not indicate which year the 1<sup>st</sup> defendant moved out before returning in 2012. Assuming the agreement is valid would reference to a land referred as leased mean the same portion that was occupied by the Nyundo Baya which he sold and surrendered his rights over? I do not think so as the agreement was specific to the portion they had been using for cultivation. Thus I conclude that this was not the land they were living on and therefore the Plaintiffs cannot use the said agreement as a basis to disentitle the Defendants over the disputed land if at all.

28. Now on the validity of and inference drawn from the agreement. The Plaintiffs are attempting to

enforce an agreement signed on September 1973. First they were not parties to this contract neither do they have letters of administration of the estate Fondo Kapombe who is referred to as the buyer. On this account, they cannot enforce any rights accruing from that agreement. Further the contract/agreement to recover land had a lifespan was twelve years from the time the right accrued as provided for under **Section 7** of the Limitations of Actions Act. Since the 2<sup>nd</sup> Plaintiff's own evidence was that the 1<sup>st</sup> Defendant continued to stay on this land by virtue of having married his step sister, his right to claim this land based on the 1973 agreement was extinguished by operation of law. The Plaintiffs are time barred from enforcing any rights accruing from the said agreement. None of them can therefore derive any rights as by law provided in accordance with the Law of Succession Act Cap 160. Therefore any reliance to this agreement does not add any value to the Plaintiffs case in terms of conferring any beneficial and or legal rights over the disputed land.

29. Given that the 2<sup>nd</sup> Plaintiff confirmed that the 1<sup>st</sup> Defendant lives on the land where his father lived long before the world war. The Plaintiffs are also living on the land where their father lived. Both parties came from separate clans. The Plaintiffs claim is on the basis that this grandfather gave the grandfather of the Defendants the land in dispute. He never called any evidence to show that they have used this part of the land that is in dispute. He also did not demonstrate to this Court that an agreement existed that the Defendants ancestry were to move out at a certain occurrence or point in time. In the absence of such evidence, it is my finding that the Defendants are entitled to this land by virtue of their ancestry whether they at one time moved out of the land or not. For this reason, I find that the Plaintiffs claim must fail.

30. In conclusion, I find the Plaintiffs case has failed for the reasons stated above and is hereby dismissed. Given the Defendants incurred expenses in defending this suit, I award them costs of suit.

**Judgment signed, dated & delivered at Mombasa this 31<sup>st</sup> day of Aug 2017**

**A. OMOLLO**

**JUDGE**