



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO. 200 OF 2014(O.S.)**

**IN THE MATTER OF: PLOT NO. TEZO/ROKA 797**

**IN THE MATTER OF: THE ESTATE OF CHARO KINDA (DECEASED)**

**IN THE MATTER OF: ORDER 37 RULE 1, 3, OF THE CIVIL PROCEDURE RULES 2010 AND SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT CAP. 21 LAWS OF KENYA**

**ALEX NZAI DZOMBO.....PLAINTIFF**

**VERSUS**

**KADZO CHARO.....RESPONDENT**

**JUDGMENT**

1. By an Originating Summons dated and filed in Court on 30<sup>th</sup> October 2014, the Plaintiff Alex Nzai Dzombo claims to be the beneficial owner of 6 acres of land comprised in Plot No. Tezo/Roka [particulars withheld] by way of acquiring them at a valuable consideration from the 1<sup>st</sup> Defendant herein and asks the Court to determine the following questions:-

**(a) Is the Plaintiff the legal/beneficial owner of 6 acres of land (which is presently part of) Plot No. Tezo/Roka/[particulars withheld] by way of acquiring it for a valuable consideration of Kshs 250,000/= from the 1<sup>st</sup> Defendant?**

**(b) Is the Plaintiff entitled to any proprietary rights or possessory interest in the 6 acres of land (which is presently part of) Plot No. Tezo/Roka [particulars withheld] by virtue of having acquired the same for valuable consideration from the 1<sup>st</sup> Defendant?**

**(c) Is the Plaintiff entitled to be declared the rightful owner of the subject 6 acres of land (which is presently part of) Plot No. Tezo/Roka [particulars withheld]?**

**(d) Are the Defendants entitled to be declared the rightful owner of the subject 6 acres of land (which is presently part of) Plot No. Tezo/Roka [particulars withheld]?**

**(e) Are the Defendants or their assignees, agents, servants or any other person claiming under them entitled to disrupt the plaintiff's enjoyment and quiet possession of the subject 6 acres of land (comprised in) Plot No. Tezo/Roka [particulars withheld]? and**

**(f) Who should bear the costs of this suit?**

2. The Originating Summons is supported by the Plaintiff's annexed affidavit sworn on 30<sup>th</sup> October 2014 the essence whereof is that:-

(i) The Plaintiff acquired the land vide a Sales Agreement dated 4<sup>th</sup> October 1997 at a valuable consideration of Kshs 250,000/=;

(ii) That since the said acquisition the plaintiff has been in occupation of the same and has developed the land by planting coconut and mango trees as well as erecting a house thereon;

(iii) The 1<sup>st</sup> Defendant Kadzo Charo Kinda sold the subject land to the Plaintiff on the understanding that she would inherit that portion of the land which was then in the name of her husband one Charo Kinda who had passed away earlier on 4<sup>th</sup> April 1985;

(iv) The 1<sup>st</sup> Defendant and her co-wife who is the 2<sup>nd</sup> Defendant have since refused to honour their part of the agreement and have failed to acquire Letters of Administration of the Estate of their deceased husband in order to enable them transfer the 6 acres portions of the land to the Plaintiff;

(v) The Defendants together with their families continue to threaten the plaintiff with forceful eviction from the subject land and have to an extent attacked them by destroying the fence the plaintiff erected thereon and cultivating part of the land; and

(vi) That the Plaintiff has spent considerable sums of money developing the land and he stands to suffer irreparable loss unless this Court intervenes and offers him protection.

3. In a Replying Affidavit sworn by Kadzo Charo, the 2<sup>nd</sup> Defendant herein on 20<sup>th</sup> August 2015, she denies that the Plaintiff is the beneficial owner of the 6 acres of land on Plot No. Tezo/Roka/ 797. It is her case that the suitland belongs to her deceased husband who passed on in 1985 and states that no beneficiary of the estate had applied for letters of administration. She further avers that the 1<sup>st</sup> Defendant who is her co-wife and is now equally deceased did not have the capacity to sell her husband's property without following the proper procedure and seeking the input of all the beneficiaries.

4. The 2<sup>nd</sup> Defendant denies that she consented to the sale of any portion of the suit property and accuses the plaintiff of exerting undue influence upon her aged co-wife who is now deceased in regard to the disputed transaction. She further states that she refused to be swayed by the Plaintiff's irregular attempt to take their land and that is why she decided to refund the sum of Kshs 250,000/= to the Plaintiff. She avers that she left the money with the area chief and it is her belief that the Plaintiff might have picked it from there as he was duly notified. The 2<sup>nd</sup> Defendant therefore concludes that the Plaintiff has no claim known in law and the prayers sought are not available to him as he is only engaging in a fishing expedition tailored to dispossess the estate of the said 6 acres of land.

5. Following the reported death of the 1<sup>st</sup> Defendant also known as Kadzo Charo Kinda, the suit as filed against her was formally withdrawn in Court on 21<sup>st</sup> April 2015. Subsequently on 4<sup>th</sup> July 2016, the Court directed that the Originating Summons would proceed to hearing by way of viva voce evidence.

6. On 20<sup>th</sup> April 2017 when the matter came up for hearing, neither the Defendant nor her counsel were in Court. The Court therefore proceeded to hear the Plaintiff's case after noting that the Defendant had previously been granted a last adjournment on 6<sup>th</sup> October 2017 when the matter had come for hearing.

7. Testifying as PW1, the Plaintiff informed the Court that he came to Court because the Defendants sold the disputed land to him but were now threatening him to leave the land. He told the Court that on 4<sup>th</sup> April 1997, he paid a sum of Kshs 100,000/= as deposit to the 1<sup>st</sup> Defendant(now deceased) and

concluded the transaction on 5<sup>th</sup> December 1998 when he paid the balance of Kshs 150,000/= for the purchase of the 6 acres they had agreed on.

8. It was PW1's case that they subsequently prepared and executed a Sale Agreement before the Area Chief. It was his case that it was then agreed that the two widows of the late Charo Kinda-that is the 1<sup>st</sup> Defendant (now deceased) and the 2<sup>nd</sup> Defendant would then move the Court to obtain Letters of Administration to enable them to transfer the land to the Plaintiff. PW1 told the Court that he funded the process and after some time a Succession Cause No. 9 of 2001 was filed at the Kilifi Law Courts. After sometime however, the Defendants refused to move on with the process to obtain the Letters of Administration and accused him of seeking to grab all their land.

9. PW1 told the Court that on 7<sup>th</sup> July 2008, the Defendant wrote to him stating that they wanted to refund his money and take their land back. By then PW1 had built a permanent house on the land and was using the land for farming. The Defendant then went to the Area Chief who wrote to the Plaintiff urging him not to carry on any further development on the land. That is what prompted the Plaintiff to come to Court to protect his interests. He however still resides on the land to-date.

10. I have considered the pleadings filed herein, the Plaintiff's testimony and the evidence placed before this Court. It is the Plaintiff's case that he entered into a Sale Agreement dated 4<sup>th</sup> April 1997 to purchase 6 acres of land from the 1<sup>st</sup> Defendant who is now deceased. Both the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants who apparently share the same name, were the widows of the late Charo Kinda who had died earlier on on 4<sup>th</sup> April 1985. It was the Plaintiff's case that the widows were poor and sought his assistance to purchase the portion of the land which it was agreed belonged to the late Charo Kinda's 1<sup>st</sup> wife for purposes of enabling the family to move forward with instituting and concluding succession proceedings.

11. I have looked at the two Sale Agreements annexed to the Originating Summons as Annexure "AND 1(a) and (b)". The first Agreement dated 4/4/1997 is in English and it shows that 6 acres of the land was sold by Kadzo Charo Kinda to the Plaintiff for Kshs 250,000/=. Receipt of the sum of Kshs 100,000/= is acknowledged. Clause 5 thereof states that it is agreed:-

*"5. That the six acres of land will belong to the purchaser after the payment will have been made"*

12. The second Agreement dated 5<sup>th</sup> December 1998 is in Kiswahili. In the 2<sup>nd</sup> Agreement, the vendor now acknowledges receipt of the entire sum of Kshs 250,000/= and states in part as follows:-

*"Ni mimi Kadzo Charo Kinda ID No..... nimeuzia Sehemu Alex N. Dzombo ID No.....sehemu ya shamba yangu (Ekari Sita) pamoja na minazi, miembe.*

*Tumeelewana shilingi mia mbili na hamsini elfu (250,000/=). Amenipa zote na hakuna deni kwake."*

13. While the 2<sup>nd</sup> Defendant denies knowledge of the Agreement, it is the Plaintiff's case that there was an understanding between the 2 widows that the portion being sold belonged to the 1<sup>st</sup> wife and that the 2<sup>nd</sup> Defendant was in agreement. A constant witness in both Agreements is one Kadzo Charo Kinda but since the two widows shared the same names, it is not clear if the Kadzo Charo Kinda indicated as a witness is the 2<sup>nd</sup> Defendant herein or the vendor who is now deceased.

14. Be that as it may, it is evident from the Replying Affidavit sworn by the 2<sup>nd</sup> Defendant on 20<sup>th</sup> August 2015 that she was aware of what was going on between her co-wife and the plaintiff. She depones at paragraph 6 thereof that she never consented to the sale of any portion of the land as the Plaintiff did not bother to involve her in any dealing over the property but (instead) exerted undue influence on the aged co-wife. She further avers that she was a grown up and hence ought to have been consulted during the transaction in question.

15. Contrary to her assertions however, it would appear that she was initially involved in the process culminating in her filing of Probate and Administration Cause No. 9 of 2001 at the Senior Resident Magistrates Court at Kilifi. A letter from the Chief's Office dated 6<sup>th</sup> May 1998 (the same day of the 2<sup>nd</sup> sale Agreement) and a subsequent one dated 4<sup>th</sup> May 2001 appear to support the Plaintiff's contention that the Defendant agreed with his co-wife at the Chief's Office to pursue the institution of succession proceedings in Court.

16. In the letter dated 6<sup>th</sup> May 1998 (Annexure "AND 3"), the Chief's Office writes to the Senior Resident Magistrate's Court as follows:-

"RE: LAND SUCCESSION

PLOT NO. 797 TEZO- ROKA SET-SCHEME

THE LAND OWNED BY CHARO KINDA

*The original allottee who was born in 1931 died on 4<sup>th</sup> December 1986 at home. He left the following defendants.*

<u>NAME</u>	<u>AGE</u>	<u>SEX</u>	<u>RELATIONSHIP</u>
1. Kadzo charo	69 yrs	F	1 <sup>st</sup> wife
2. Kadzo charo	25 yrs	F	2 <sup>nd</sup> wife
3. K c	12 yrs	M	son
4. R c	9 yrs	F	daughter
5. M c	7 yrs	F	daughter
6. R c	2 years	F	daughter

The members of the family agreed that the shamba should be inherited by Kadzo Charo First Wife on behalf of all the members of the family.

17. In the 2<sup>nd</sup> letter dated 4<sup>th</sup> May 2001, (Annexure "AND 4") the Chief again writes to the Magistrate's Court as follows:-

***"RE: KADZO CHARO KINDA ID NO. [particulars withheld]***

***KADZO CHARO KINDA ID NO. [particulars withheld]***

***This is to confirm that the late Charo Kinda who died on 4<sup>th</sup> April 1985 was survived by two wives as referred above both called Kadzo charo Kinda 1<sup>st</sup> and 2<sup>nd</sup> wives respectively.***

***The first wife Kadzo Charo Kinda is sick of dizziness and has consented (to) the 2<sup>nd</sup> wife to be sworn before me for the shamba and the affidavit is attached.***

***I therefore have no objection but to recommend the 2<sup>nd</sup> wife Kadzo Charo Kinda ID NO. [particulars withheld] to be sworn before you sir."***

18. Subsequent to the Chief's second letter, Probate and Administration Cause No. 9 of 2001 was lodged by the 2<sup>nd</sup> Defendant at the Kilifi Senior Resident Magistrate Court, on 10<sup>th</sup> May 2001(As per annexure

“AND 5” to the Plaintiff’s Affidavit). Consequently and arising from the foregoing, I am satisfied that the 2<sup>nd</sup> Defendant was all along consulted and indeed participated in the sale of the 6 acres of the land in question to the Plaintiff.

19. From the Area Chief’s 1<sup>st</sup> letter dated 6<sup>th</sup> May 1998 when the Agreement in Kiswahili was executed, it is clear that the two widows of the late Charo Kinda had agreed that the land which was to be sold should be inherited by the First wife who is the vendor herein. At paragraph 5 of the 2<sup>nd</sup> Defendant’s Replying Affidavit, the 2<sup>nd</sup> Defendant depones as follows:-

*“5. That my deceased husband had two 2 wives and my co-wife KADZO CHARO KINDA who is since deceased though he was not blessed with any children from the marriage. I confirm that the listed children under paragraph 4 are my own children.”*

20. Arising from the foregoing, it is clear to me that the two widows had agreed on the manner of the disposal of their deceased husband’s estate pursuant to which the 1<sup>st</sup> wife decided to dispose of her portion of the land to the Plaintiff. But for the sickness and subsequent death of the 1<sup>st</sup> wife it is clear to me that she was in the process of acquiring letters of administration to enable her change the title deed for Plot No Tezo/Roka [particulars withheld] to her name and thereafter transfer the subject 6 acres to the plaintiff. Due to her sickness, she on 4<sup>th</sup> May 2001 at the Area Chief’s office consented to the 2<sup>nd</sup> Defendant to inherit the land with a view to pursuing the same result.

21. It is not controverted that upon execution of the Sale Agreement and convinced that the two widows were agreed on the disposal of the estate, the plaintiff proceeded to occupy the land since 1998 and has now put in a residential house wherein he lives. The 2<sup>nd</sup> Defendant is now reluctant to proceed in the manner that was agreed by the parties and accuses the plaintiff of trying to deprive her family of the land.

22. By their conduct jointly and severally, the two widows of the late Charo Kinda led the plaintiff to believe that they would pursue the issuance of letters of administration for their deceased husband’s estate after which they would transfer the 6 acres of land to him. In reliance on that undertaking, the plaintiff proceeded to build his home on the suitland even as he continued to fund the 2<sup>nd</sup> Defendant to complete the process. Having so led the Plaintiff, the 2<sup>nd</sup> Defendant is now barred by the doctrine of estoppel from denying that which they represented to him that they shall do.

23. Section 120 of the Evidence Act gives effect to the doctrine of estoppel and stipulates as follows:-

### ***120 General Estoppel***

***When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither her nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing.”***

24. Accordingly the 2<sup>nd</sup> Defendant cannot now be heard to assert that the Plaintiff never followed due process in acquiring the land by not consulting all the beneficiaries of the estate. It is clear that as at the time of the sale, her children whom she now states in her affidavit were not consulted were all minors with the eldest being 12 years old. I am unable to see what consultation the plaintiff and her co-wife would have made other than what was agreed by the parties.

25. The upshot is that I find merit in the Plaintiff’s case. Accordingly the Plaintiff is hereby declared to be the legal/beneficial owner of 6 acres of land which is comprised in Plot No. Tezo/Roka/[particulars withheld] having acquired the same for valuable consideration. The Defendants or their assignees, agents, and/or servants or any other person claiming under them is hereby permanently restrained from interfering with the Plaintiff’s enjoyment and quiet possession of the said 6 acres of land forming part of Plot No. Tezo/Roka/[particulars withheld].

26. The costs of this suit shall be borne by the Defendant.

**Dated, signed and delivered at Malindi this 15<sup>th</sup> day of November, 2017.**

**J.O. OLOLA**

**JUDGE**