



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 46 OF 2012**

**1. RUKIA SULIEMAN ALI**

**2. SAID JUMA MASOUD.....PLAINTIFFS**

**=VERSUS=**

**1. SAID MAHFUDH AWADH**

**2. ABDULMAJID SAID MAHFUDH**

**3. HAMID SAID MAHFUDH**

**4. MAJIDA SAID MAHFUDH.....DEFENDANTS**

**J U D G M E N T**

**Introduction:**

1. In their Amended Complaint dated 31<sup>st</sup> January, 2014, the Plaintiffs have averred that at all material times to the suit, they were the owners or entitled to a piece of land within Maweni Malindi controlled by Kilio Cha Maskini Welfare Society and that the suit property is known as 411/014/KMC/90.
2. According to the Plaintiffs' Complaint, it came to their attention that sometimes in August, 2008, the Defendants had encroached on their land and caused to be erected a house thereon; that the Defendants did not have permission to develop the suit property and that the Defendants have persisted with the trespass.
3. The Plaintiffs are seeking for a permanent injunction, a mandatory injunction and an order for vacant possession of the suit land.
4. In their Defence, the Defendants averred that they are the owners of the suit property.

**The Plaintiffs' case:**

5. The 1<sup>st</sup> Plaintiff, PW1, informed the court that the 2<sup>nd</sup> Plaintiff is her husband while the 1<sup>st</sup> Defendant is her brother-in-law. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are her nephews.
6. The 1<sup>st</sup> Plaintiff relied on her Affidavit dated 29<sup>th</sup> July, 2010 in which she stated that she purchased a piece of land within Maweni Malindi together with the 2<sup>nd</sup> Plaintiff from Mr. Twahir Said Mohamed.
7. According to PW1, they entered into an agreement of sale with Mr. Twahir and "Kilio cha

- Maskini Welfare Society”.
8. According to PW1, her late sister, Asiya S. Ali, is the one who was taking care of the suit property; that the 1<sup>st</sup> Defendant was her sister's husband and that sometimes in August, 2008, it came to her attention that the 1<sup>st</sup> Defendant had encroached on her piece of land.
  9. PW1 stated that her land is where the Defendants are constructing a house.
  10. According to PW1, there are three plots that were purchased by the late Asiya following each other, with her plot being on the right side of the 1<sup>st</sup> Defendant's house, while the plots for Abdul Suleiman and the 2<sup>nd</sup> – 4<sup>th</sup> Defendants' are behind the two plots.
  11. According to PW1, her late sister used to use her plot to plant maize but was later on involved in a fatal road accident.
  12. It is after her sister's death, according to PW1, that the Defendants encroached on her land.
  13. It was the evidence of PW1 that the suit property was purchased by her late sister on her behalf, after she sent money to her; that she saw the plot before her sister died and that her late sister bought a separate plot for her children too.
  14. According to PW1, her late sister entered into an agreement of sale with Mr. Twahir before she died on her behalf and that Mr. Twahir and Kilio cha Maskini were one and the same thing.
  15. Twahir's brother, PW2, informed the court that the 1<sup>st</sup> Plaintiff's late sister, Asiya, informed him that she wanted to buy his plot for her sister, the 1<sup>st</sup> Plaintiff.
  16. PW2 informed the court that he had allowed his brother, Twahir Said Abubakar, to be registered as the owner of the plot when he acquired it.
  17. It was the evidence of PW2 that after meeting the 1<sup>st</sup> Plaintiff and agreeing to sell the plot, he introduced her to his brother, Mr. Twahir, who signed all the relevant documents including the one held by the Committee of Kilio cha Maskini. It was his evidence that he also pointed out the land to the 1<sup>st</sup> Plaintiff.
  18. It was the evidence of PW2, that when the 1<sup>st</sup> Plaintiff's sister died, he again showed the 1<sup>st</sup> Plaintiff together with her parents her plot.
  19. According to PW2 the plot she sold to the 1<sup>st</sup> Plaintiff is the one that the Defendants are constructing on a house.
  20. According to PW2, every squatter had her plot within plot number 411 and that people used to identify their plots using neighbours' houses.
  21. It was the evidence of PW2 that it is the 1<sup>st</sup> Defendant's wife, the late Asiya, who told him that she was buying the plot on behalf of the 1<sup>st</sup> Plaintiff. According to PW2, the plot in dispute abuts the road.
  22. In cross examination, PW2 stated that the Defendants' plot is next to the plot he sold to the 1<sup>st</sup> Plaintiff.
  23. PW3 stated that the Defendants have been her neighbours for over 20 years; that the 1<sup>st</sup> Defendant's wife (deceased) was her friend and that told her that she had bought the suit land for her sister.
  24. The deceased's own plot, according to PW3, abutted the plot she bought for the 1<sup>st</sup> Plaintiff which also abutted the road.
  25. It was the evidence of PW3 that she was very close to the late Asiya and that they were in the same “chama”.
  26. The evidence of PW3 was that the Defendants have proceeded to put up a house on the land that the deceased bought for the 1<sup>st</sup> Plaintiff.
  27. According to PW3, the house behind the suit property belongs to the 1<sup>st</sup> Plaintiff's brother.
  28. Another neighbour of the Defendants, PW4, informed the court that she has been staying in Maweni for over 20 years; that she was a friend to the deceased and they used to meet in her house for their “chamas”; that when they were in the “chama”, the deceased showed them the plot that she had purchased for the 1<sup>st</sup> Plaintiff who was upcountry then and that the 1<sup>st</sup> Defendant has since developed the said plot.
  29. In cross-examination, PW4 stated that the deceased bought two plots, one for the 1<sup>st</sup> Plaintiff and another one for her brother; that her brother's house is behind the suit property that she bought for the 1<sup>st</sup> Plaintiff and that the deceased never bought the suit property for her children.

30. PW5 stated that he was the chairman of "Kilio cha Maskini" which was formed for the sole purpose of purchasing plot No. 411 from the owner so as to settle the squatters on the land.
31. According to PW5, they sold the open spaces of plot no. 411 so as to raise the purchase price of Kshs.2,000,000.
32. PW5 stated that the 1<sup>st</sup> Defendant's late wife, Asiya, who was a squatter, requested to purchase a portion of the suit land.
33. According to PW5, next to the 1<sup>st</sup> Defendant's house was a plot with an old house which belonged to Mr. Twahir. It was the evidence of PW5 that the deceased decided to buy that plot for her sister so that they could be close to each other.
34. PW5 informed the court that Twahir agreed to sell the house and the plot to the 1<sup>st</sup> Plaintiff and that an agreement was entered into between Mr. Twahir and the 1<sup>st</sup> Plaintiff.
35. According to PW5, the late Asiya bought three plots, one for her children and two for her brother and the 1<sup>st</sup> Plaintiff respectively.
36. PW6, Twahir Said Mohamed, informed the court that on 7<sup>th</sup> September, 2010, he met the 1<sup>st</sup> Plaintiff who was in the company of his brother Abudulkadir, in his house in Kisumu Ndogo estate.
37. When they met, PW6 stated that the 1<sup>st</sup> Plaintiff was complaining that the 1<sup>st</sup> Defendant was constructing a house on the plot that Asiya had bought for her.
38. It was the evidence of PW6 that the late Asiya had told them that she was purchasing the land for her sister.
39. It was the evidence of PW6 that the late Asiya entered into an agreement in respect of the suit property on behalf of the 1<sup>st</sup> Plaintiff and that him, PW6, was holding the plot in trust for his brother Abdikadir.

#### **The Defence case:**

40. The 1<sup>st</sup> Defendant, DW1, informed the court that her late wife, Asiya, bought the first plot where their house stands while he was in Saudi Arabia.
41. DW1 stated that later on, the 1<sup>st</sup> Plaintiff requested his late wife to purchase a plot for her which she did.
42. It was the evidence of DW1 that her late wife bought two plots abutting the road for her children and bought another plot for the 1<sup>st</sup> Plaintiff behind the two plots.
43. According to DW1, he is the one who gave to the 1<sup>st</sup> Plaintiff all the documents in respect of the purchase of her land after the death of his wife and showed her the plot that had been purchased for her.
44. DW1 stated that before his wife died, he had put up a foundation on the disputed land and that the 1<sup>st</sup> Plaintiff had initially agreed to take up the plot behind their two plots until she realised that the plot had a dispute.
45. In cross-examination, DW1 stated that there was no agreement between Twahir and his late wife or his sons in respect to the suit property.
46. The 4<sup>th</sup> Defendant, DW2, stated that the 1<sup>st</sup> Plaintiff is his aunt while the 1<sup>st</sup> Defendant is his father.
47. It was the evidence of DW2 that in the year 2009, the 1<sup>st</sup> Defendant informed him that the 1<sup>st</sup> Plaintiff was demanding for Kshs.120,000 because they had allegedly developed her land; that it is their late mother who started constructing on the land and that when the 1<sup>st</sup> Plaintiff attended the funeral, she was given all the documents for the land that had been purchased for her.
48. According to DW2, her late mother bought the suit property for them which is on the side of their house.
49. It was the evidence of DW2 that the 1<sup>st</sup> Plaintiff sent to their late mother money to buy for her a plot in the same locality behind their two plots and that his mother put up a foundation on the disputed land in the year 2005 while he was in forth form.
50. The evidence of DW3 was that she was an official of "Kilio cha Maskini" in the year 2003.
51. According to DW3, the late Asiya bought plots for her brother, her children and the 1<sup>st</sup> Plaintiff.

52. According to DW3, she neighbours the Defendants' plot on the left and that the plot that was purchased by the late Asiya for her children is the one which used to be occupied by Mr. Abdikadir.
53. According to DW3, she has been a neighbour of the Defendants' since the year 2003 and that she never saw the 1<sup>st</sup> Plaintiff until when Asiya died. That is when she started claiming for the plot.
54. Both the Plaintiff's and the Defendants' advocates filed their respective submissions in which they rehearsed the evidence by the witnesses. I have considered those submissions and the authorities.

### **Analysis and findings:**

55. The Plaintiffs and the Defendants are related. The 1<sup>st</sup> Plaintiff is a sister to the late Asiya, who was the 1<sup>st</sup> Defendant's wife. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the sons and daughter of the 1<sup>st</sup> Defendant and the deceased was their mother.
56. It is not in dispute that the deceased bought three (3) portions of land in Maweni, one for the Plaintiffs, her brother and the third one for her children. The only issue for determination is the identity of the plot belonging to the Plaintiffs.
57. From the evidence, both the Plaintiffs and the Defendants are claiming the plot fronting the murram road and not the one behind the suit property.
58. Both the 1<sup>st</sup> Plaintiff and the Defendants are agreeable that the 1<sup>st</sup> Plaintiff sent to the deceased money so that she could buy for her a plot in Maweni, which plots were controlled and managed by "Kilio cha Maskini Welfare Society". It would appear that neither the Defendants nor the Plaintiffs were present when the late Ms Asiya was purchasing the three plots.
59. Indeed, from the evidence, the 1<sup>st</sup> Defendant was at all material time in Saudi Arabia while the 1<sup>st</sup> Plaintiff was in Machakos. The 3<sup>rd</sup> Defendant, DW3, was a child and still in school.
60. It is Abdulkadir Said Ahmed, PW2, who initially owned the suit property before he sold it to the late Asiya.
61. According to the evidence of PW2, he had allowed his brother, PW6, to be registered as the owner of the plot. PW6 therefore held the suit property in trust for PW2.
62. Indeed, PW6 informed the court that he agreed to sell the suit property to the late Asiya after his brother, PW2, authorised him to do so.
63. According to the evidence of the initial owner of the plot, PW2, the deceased informed him that she was buying the suit property for her sister, PW1. This was in 1998.
64. PW2 informed the court that when Asiya died, PW1 approached him in the company of her parents and he showed them the plot that Asiya had bought for the 1<sup>st</sup> Plaintiff.
65. The evidence of the deceased's friends and neighbours, PW4 and PW5, was that the deceased had shown them the land which she had purchased for the 1<sup>st</sup> Plaintiff. According to them, the land that they were shown by the deceased is the suit property.
66. Both the Plaintiffs and the Defendants are alleging that the late Asiya purchased the suit property for them.
67. According to the evidence of DW1 and DW2, the deceased purchased the suit property for her children and even commenced construction of a house on the land before she died.
68. DW1 informed the court that when the deceased died in the year 2006, he showed the 1<sup>st</sup> Plaintiff her plot and gave her all the documents that were in his possession. At that particular point, according to DW1, the 1<sup>st</sup> Plaintiff did not raise any complaint.
69. PW1 produced in evidence an undated agreement that was entered into between Mr. Twahir (PW6) and herself. This handwritten agreement is behind another undated agreement that was entered into between Mr. Twahir and "Kilio cha Maskini".
70. The 1<sup>st</sup> Plaintiff also produced in evidence an agreement dated 16<sup>th</sup> December 1993 showing that it is Abdalla Suleiman who initially purchased the suit property from "Kilio cha Maskini" before he transferred it to Abdikadir, who allowed his brother, Twahir, to hold it in trust for him.
71. In a letter dated 4<sup>th</sup> May, 1998, the late Asiya requested the 1<sup>st</sup> Plaintiff to send her money for the purpose of processing a title deed for the land that she had purchased for her.
72. An undated agreement between the 1<sup>st</sup> Plaintiff and "Kilio cha Maskini" was also produced. The agreement refers to house number 014/k/a/m/90.

73. To prove that the late Asiya purchased the suit property for her sons, DW1 produced an agreement that was signed on 27<sup>th</sup> April 1993.
74. Indeed, in his Affidavit, which he relied on in evidence, the 1<sup>st</sup> Defendant informed the court that the suit property was bought by his late wife for her sons on 27<sup>th</sup> April 1993. In the Affidavit dated, 18<sup>th</sup> August, 2010, DW1 deponed as follows:-

**“5. THAT the above named persons are my sons and daughter and the plot was bought for them by their late mother Asia Suleiman (now deceased).**

**6. THAT my sons are abroad and they used to send money through their mother for purposes of buying them a plot**

**7. THAT this plot was purchased on the 27<sup>th</sup> April, 1993 and my sons have been paying in installments since.”**

75. It is therefore obvious from the evidence of DW1 that the land that his late wife bought for her children was bought in 1993 with Abdulmajid, Hamid and Majida being the purchasers as per DEXB1. The said children paid for the plot in installments.
76. If that is so, then the land that was bought for the 2<sup>nd</sup> – 4<sup>th</sup> Defendants cannot be the suit property because the suit property was sold by PW2 together with PW6 in the year 1998, with the purchase price being made in a lump sum.
77. The evidence before this court shows that PW2 and PW6 had a house on the suit property and when they sold the land to the deceased in the year 1998, the deceased demolished it and started cultivating the land.
78. The two friends and neighbours of the deceased (PW3 and PW4) and the then Chairman of “Kilio cha Maskini” (PW5) were categorical that the deceased informed them that she was purchasing the suit property from Mr. Twahir for her sister. By that time, she had already purchased another land for her sons and daughter.
79. The 1<sup>st</sup> Defendant must have waited until his wife died in the year 2006 to claim that his sons and daughter are entitled to the land that had been sold by Mr. Abulkadir and Twahir and not the land that was purchased for the children in 1993.
80. The documents and evidence produced before this court by the 1<sup>st</sup> Defendant himself shows that his children are entitled to the land that was purchased in 1993, by which time Mr. Abdikadir and Twahir had not offered their land for sale.
81. Although the Defendants' counsel has submitted that the agreements relied on by the Plaintiff do not meet the requirements of Section 3(3) of the Law of Contract Act, it is instructive that the Defendants have not also shown that they have an agreement in respect to the suit property that meets the requirements of Section 3(3) of the Law of Contract Act so as to be entitled to the suit property.
82. In any event, the agreements that the parties are relying on were made before Section 3(3) of the Law of Contract Act was amended in the year 2003.
83. Before the amendments of 2003, an oral agreement for sale of land would pass if a party satisfies the court that he either took possession of the suit property in part performance of the oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract.
84. PW2 and PW6 testified of their involvement in the sale of the suit property to the Plaintiffs. They have neither disputed nor challenged the sale. Consequently, Section 3(3) of the Law of Contract Act does not apply.
85. The totality of the evidence before me leads to only one conclusion: the property that the deceased bought for the Plaintiffs is the one that was owned by Abdikadir and Twahir, which is the land abutting the road and next to the 1<sup>st</sup> Defendant's house, and not the one that is behind. That is what the neighbours, the initial owners and the then Chairman of Kilio cha Maskini told this court. This court has no reason to doubt their testimony.
86. For those reasons, I allow the Plaintiffs' Plaint dated 29<sup>th</sup> July, 2010 in the following terms:

**(a) A permanent injunction be and is hereby issued directed at the Defendants restraining the Defendants, servants and or agents, and or anyone of them from trespassing into or remaining on the plaintiff portion of land known as 411/014/KMC/90 and situated within Maweni and controlled by Kilio cha Maskini Welfare Society in Malindi.**

**(b) A mandatory injunction be and is hereby issued requiring the Defendants, their servants and or agents to demolish the house and any other developments made by the Defendantson the Plaintiffs piece or parcel of land known 411/014/KMC/90 and situated within the Maweni area controlled by Kilio cha Maskini Welfare Society in Malindi and remove the debris resulting from the said demolition forthwith and in any event within 45 days of service of this order and failure of which the Plaintiffs be at liberty to engage the services of a contractor who will demolish the said house and any other development made by the Defendants on the said land and curt away the debris issuing therefrom and the cost incurred thereby be paid by the Defendants in any event after 45 days of today's date.**

**(c) The Defendants to give vacant possession of the Plaintiff's piece of land aforesaid within 45 days from today's date.**

**(d) The Defendants to pay the costs of this suit.**

Dated, signed and delivered in Malindi this 22<sup>nd</sup> day of April, 2016.

**O. A. Angote**

**Judge**