



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

**AT MALINDI**

**ELC CIVIL CASE NO.159 OF 2015**

**CHARO DIDA NASORO.....PLAINTIFF**

**=VERSUS=**

**1. KONDE MALINGI CHAI**

**2. CHARO BARUA NYAMBU**

**3. CHIRIBA BARUA MALINGI**

**4. LAND ADJUDICATION OFFICER (FORMERLY KILIFI DISTRICT)**

**5. LAND REGISTRAR, KILIFI COUNTY (FORMARLY KILIFI DISTRICT)**

**6. ATTORNEY GENERAL**

**7. SURYA DEVELOPMENT LIMITED**

**8. THE COUNTY GOVERNMENT OF KILIFI.....DEFENDANTS**

**R U L I N G**

1. The Preliminary Objection by the 3<sup>rd</sup> and 7<sup>th</sup> Defendants is dated 9<sup>th</sup> March 2015.
2. According to the 3<sup>rd</sup> and 7<sup>th</sup> Defendants (the Defendants), the Plaintiff's suit is inherently incompetent, void and bad in law for being brought in a representative capacity without the leave of the court.
3. It is the Defendant's case that in any event, the Plaintiff's cause of action is statute barred and lodged in a court without jurisdiction by dint of Sections 26 and 27 of the Land Adjudication Act.
4. The Defendant's counsel submitted that the suit before the court is a representative suit; that no leave was sought before the suit was filed or after the filing of the suit and that having filed the suit on behalf of his clan or family, the Plaintiff should have filed the written authority of the members of the said clan.
5. Counsel submitted that in any event, the allegations raised in the Plaint should have been raised with the relevant bodies during the adjudication process.
6. Having not complained about the adjudication, counsel submitted that the suit is time barred.
7. The Plaintiff's counsel submitted that the Plaintiff is not suing the Defendants on behalf of his clan.
8. According to counsel, the issue of the Plaintiff's clan has been raised in the Plaint to explain the

- historical injustices that arose during the issuance of titles after the adjudication process.
9. In any event, it was submitted, the issue of obtaining leave before commencing a representative suit is a technicality and is not mandatory.
  10. The Plaintiff's counsel submitted that the fraud the Plaintiff is complaining about happened after the adjudication process had been completed and not during the adjudication.
  11. This suit was commenced by way of along Plaintiff dated 9<sup>th</sup> September 2013.
  12. In the Plaintiff, the Plaintiff has averred that at all material times, he was the registered owner of parcel of land known as Mwapulu/Magogoni/341 which he holds on his own behalf and on behalf of the Nasoro Mramba sub-clan, the lineage of the Mwachipa clan.
  13. According to the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were illegally registered as owners of parcel of land number Mwapulu/Magogoni/317 while the 3<sup>rd</sup> Defendant was irregularly registered as the owner of Mwapulu/Magogoni/964 which he then transferred to the 7<sup>th</sup> Defendant.
  14. The Plaintiff then went into great details on how the Mwachipa clan held the suit land and how the land was declared an adjudication section in 1992.
  15. It is the Plaintiff's case that after adjudication, he learnt that indeed his parcel of land which he all along believed to be about 47 acres had been irregularly and illegally been apportioned leaving 0.62 Hectares in his name.
  16. The Plaintiff's main prayer in the Plaintiff is for a declaration that parcel of land known as Mwapulu/Magogoni/342, 317 and 964 should be registered in his name on his own behalf and on behalf of the Dida Nasoro lineage.
  17. Order 1 Rule 8 (1) and (2) of the Civil Procedure Rules provides as follows:

**“8(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against anyone or more of them as representing all or as representing all except one or more of them.**

**8(2). The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”**

18. Where a suit is representative in nature, the person bringing such a suit is supposed to give a notice to the people he represents. The leave of the court to bring such a suit is no longer required under the 2010 Rules.
19. The Plaintiff's claim is that during the adjudication process, he was registered as the owner of Mwapula/Magogoni 342 measuring 47 acres on his own behalf and on behalf of the Dida Nasoro lineage.
20. The Plaintiff has not averred in the Plaintiff that he has filed the suit on behalf of the Nasoro lineage or any clan per se.
21. The suit was principally filed by the Plaintiff alone because he is the one who had been registered as the proprietor of the 47 acres both as a beneficiary and trustee during the adjudication process.
22. Consequently, it can not be rightly argued that the Plaintiff should have given notice to the members of his clan before or after instituting the suit. The Plaintiff had every right to file the suit in his name alone and bring out the history that culminated into the registration of the suit property in his name and not in the name of each member of his clan.
23. For those reasons, I shall dismiss the Defendant's Preliminary Objection on the basis that the suit was brought in a representative capacity without the leave of the court or without a notice being issued.
24. The Defendant's second objection is that by dint of Sections 26 and 27 of the Land Adjudication Act, the Plaintiff's cause of action is statute barred and lodged before a court without jurisdiction.
25. According to the Defendants, the issues raised in the Plaintiff should have been raised by the Plaintiff during the adjudication process.
26. The Defendants' argument is premature considering that the allegations in the Plaintiff are that the fraudulent dealings in the suit property arose after and not during the adjudication process.
27. In any event, whether the alleged fraudulent dealings in parcel of land number Mwapulu/342

- which initially measured 47 acres was during or after the adjudication process can only be known with certainty after trial and not at this stage.
28. For those reasons, this court cannot state at this stage that the suit is time barred or that this court does not have jurisdiction.
29. I say so because in cases where fraud is alleged, time only start running from the time when the fraud was discovered. Secondly, the issue as to whether the court has the jurisdiction to deal with the suit property or not can only be determined after evidence is tendered to ascertain whether the alleged fraud was committed during the adjudication process or after the adjudication process was completed and titles issued.
30. For those reasons, I dismiss the Preliminary Objection dated 9<sup>th</sup> March 2015 with costs.

**Dated and delivered in Malindi this 25<sup>th</sup> day of September 2015.**

**O. A. Angote**

**Judge**