



REPUBLIC OF KENYA



**Mwero v Osman & 11 others (Environment & Land Case 42 of 2021)
[2024] KEELC 6081 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 42 OF 2021**

**AE DENA, J
SEPTEMBER 18, 2024**

BETWEEN

KADZOYO CHONDO MWERO PLAINTIFF

AND

**AHMED MOHAMMED OSMAN 1ST DEFENDANT
MGANGA KADZOMBA 2ND DEFENDANT
ALI BEJA 3RD DEFENDANT
NDEGWA DUNCAN MUNGUMI 4TH DEFENDANT
ABDALLA MBUJA 5TH DEFENDANT
MUNGUMI CHIVUMBA 6TH DEFENDANT
NTAMAWI SOMBO KADZANI 7TH DEFENDANT
JOSPHAT CHIVUMBU MUNGUNI 8TH DEFENDANT
SAMMY CHITSANGANYO MUNGUMI 9TH DEFENDANT
SAID MBUU KIVUMBI 10TH DEFENDANT
JUSTUS CHIMONI 11TH DEFENDANT
ORANGE TYRES 12TH DEFENDANT**

JUDGMENT

1. 1 The Plaintiff Kadzoyo Chondo Mwero, claims to be the legal, beneficial owner of ancestral, unsurveyed parcel of land situated at Kibaoni Village in Samburu trading center within Kwale County measuring one hundred [100] Acres (hereinafter be referred to as the suit property) Vide a plaint filed



before court on 5/11/2020 it is averred, the Defendants are mere trespassers on the suit property. It is stated that the 2nd to 12th Defendants are illegally interfering, constructing houses, fencing and selling portions of the suit property to various persons including the 1st Defendant, despite the knowledge that the suit property belongs to the Kadzoyo family.

2. It is further stated that the Defendants have no right over the suit property which is ancestral land as they are not part of the Kadzoyo family. That the Defendants have demolished the Plaintiffs fence and desecrated the family graveyard causing irreparable harm hence this suit.
3. The Plaintiff prays for judgment against the Defendants for; -
 - a. A declaration that the Plaintiff is the legal owner of the suit parcel of land which is all that ancestral, unsurveyed parcel of land situated at Kibaoni Village in Samburu Trading Centre within Kwale County containing by measurement one hundred [100] Acres.
 - b. A mandatory injunction to order that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th Defendants forthwith vacate and or remove their structures and plants from the Plaintiffs ancestral, unsurveyed parcel of land situated at Kibaoni village in Samburu trading center within Kwale County containing by measurement one hundred [100] acres of thereabout.
 - c. An eviction order directing the Plaintiff to evict the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 12th Defendants from all that ancestral unsurveyed parcel of land situated at Kibaoni Village in Samburu Trading Centre with Kwale County containing by measurement one hundred Acres [100] of thereabout.
 - d. An order directing the officer commanding station Mombasa police station to supervise and provide security during the eviction exercise.
 - e. Costs and interest
 - f. Any other relief the court may deem fit

Defence

4. 4 The 1st Defendants statement of defence was filed before court on 1/4/2021. The 1st Defendant denies the contents of the plaint save for the descriptive nature of the parties. The 1st Defendant, avers he is the legal beneficial owner of the suit property known as plot no 3,4,5,6,7 and 8 being 1.75 acres situated at Zone 052 at Kibaoni/Chirahi T Centre along Nairobi-Mombasa highway in Samburu. It is further stated that on 13/5/2013 one Mohammed Ahmed Ali purchased 3.5 Acres at Kibaoni from one Mohammed Ahmed Ali a relative of the 2nd and 3rd Defendants. That on 27/2/2020 the 1st Defendant purchased 1 acre of land at Kibaoni village from Mr. Mohamed Ahmed Ali for Kshs 2,200,000/- while on 8/4/2020 the 1st Defendant purchased 0.75 acres from Mr. Mohamed Ahmed Ali for Kshs 1,800,000/-.
5. 5 The 1st Defendant states that the Plaintiff's property is situate on zone 043 and not on zone 052 and 055 where the 1st Defendants plot is. The 1st Defendant maintains that he is not a trespasser on the suit property and is in possession of the same legally as the owner having legally purchased the same from one Mohammed Ali Ahmed. It is stated that the Defendants have never interfered with the Plaintiffs home and the graveyards as the same still exist to date. That the matter was at some point adjudicated before the Assistant County Commissioner Samburu and a decision made to the effect that the Plaintiff was not the owner of the suit property. The 1st Defendant pleads that the suit against him is misconstrued and the same ought to be dismissed with costs.



6. The 2nd and 3rd Defendant's statement of defence is filed before court on 17/1/2022. It is averred that the property at Kibaoni belonged to one Ngala Magudu the 2nd and 3rd Defendants grandfather. That the Plaintiff's grandfather sought the permission of the 2nd and 3rd Defendants grandfather to live on the same and which was granted. That the Plaintiff was all along aware of this fact. It is further stated that on 13/5/2013 one Mohammed Ahmed Ali purchased 3.5 Acres at Kibaoni from one Denis Ngala Chimega a relative of the 2nd and 3rd Defendants. On 27/2/2020 the 1st Defendant purchased 1 acre of land at Kibaoni village from Mr. Mohamed Ahmed Ali for Kshs 2,200,000/- while on 8/4/2020 the 1st defendant purchased 0.75 acres from Mr. Mohamed Ahmed Ali for Kshs 1,800,000/-. That the properties purchased by the 1st Defendant lie on zone 052 and zone 055 on the Nairobi Mombasa highway at Samburu while the Plaintiffs purported zone is in 043.
7. The 2nd and 3rd Defendants further state that that no one has interfered with the Plaintiffs home and graveyard as alleged and the same exist to date. That the issues of ownership were placed before the Assistant County Commissioner and who resolved the same. That it is the Plaintiff who is in violation of the Defendants' rights to ownership and occupation of the suit property. The Defendants pray that the plaintiffs suit is dismissed.
8. The rest of the Defendants did not enter appearance. An affidavit of service sworn by Shem O.Abudho on 5/7/21 is on record confirming service.
9. Together with the suit, the Plaintiff filed an application for temporary orders of injunction dated 5/11/20 under certificate of urgency restraining the Defendants from constructing, selling portions of the land or in any manner interfering with the suit property. The application was opposed. The court issued orders that the status quo be maintained with regard to the Plaintiffs home and graveyard and there be no interference from the Defendants pending the hearing and determination of this suit on merit.

Hearing

10. The case proceeded for hearing on 2/3/2022, 7/6/23, 1/11/23 and 5/2/24.

Plaintiffs Case

11. PW 1 Kadzoyo Chondo Mwero the Plaintiff testified that his land had been sold by the 2nd Defendant. That the shamba is family land measuring 100 acres. It is split by Nairobi/Mombasa highway. He stated that he was 75 years old and had lived in this shamba since birth. That his grandfather had lived there before. That the only person left in the shamba are his siblings two siblings and their children. One had passed on and was buried on the land. According to PW1 the suit property including is the entire Samburu South where it is situate is not adjudicated. The witness testified that the 1st Defendant was known to him. That the 1st Defendant is not a resident of Samburu but purchased the land from the 2nd defendant and who they are not related absolutely.
12. On his relation to the rest of the Defendants, the Plaintiff testified that he is not related to 3rd defendant but knew him as 2nd defendant's brother. That the 4th to 9th Defendants were his neighbor's also born in Samburu whom he knew since they were young except the 11th defendant who was a buyer. The witness further testified that the 2nd Defendant and 3rd Defendant came from very far. That the two had taken part of his land which was about 4 acres and it is what had brought the said witness to court. That they had fenced the land including the family graves. That he has to go round to exit his plot. That the graves are more than 20 years old and belong to his parents and other family members.



13. The witness also adopted the statement dated 5/11/2020 as his evidence in chief and produced documents in the list dated 5/11/2020 “PEX 1-4”. PW1 further testified the letter of allotment was in respect of the land on the other side of the road, though it did not indicate the acreage. He reiterated it was his letter of allotment. That he did not have title. He stated that he never attended any meetings with the area chiefs as he was not involved neither was he involved with surveyor. That it was his brother who attended the meetings and signed documents. That he was from the Mvande clan and the defendants were from the Mwamundu clan. That the determination by the chief that the suit property belonged the Mwamundu clan was because the chief was from the said clan.
14. On cross-examination the witness testified that he had a claim over the land because of the letter of allotment. That there have been several disputes over the land including another dispute in 2015 and which was before Dorcas Mwangi (defendant’s bundle at page 18). She was not a Mwamundu. He denied that he was found guilty in a criminal matter over destruction of the fence to a plot of the suit property but admitted to having paid a fine of Kshs 26,000. The witness admitted that the graves are still intact.
15. On re-examination PW1 clarified the case at Mariakani was for demolition of the fence.
16. PW2 Zinga Salim Mwero adopted his statement dated 5/11/2020 as his evidence in chief. He stated PW1 father and his father were siblings. The land belonged to their grandfather Mwero Mwando who had 4 wives and was a burial site for the family. He testified that the land is about 100 acres, divided into two by the Nairobi – Mombasa highway immediately near Samburu town about 30 meters away. That the disputed portion is on the left hand side of the road as you go to Nairobi, about 5 meters from the road. The disputed portion is about 2 acres the graves aren’t fenced they are very near the 1st defendant’s side. When referred to the 1st Defendant witness statement at paragraph 2 (read out), he testified that he knew Denis Ngale Chimega, that he was their neighbour, but had later left for Mackinon road and that he had no power to sell the suit property.
17. On cross-examination PW2 stated that he came from the Mwero family. The farm belongs to his grandfather Mwero Kadzoyo and Robert Kadzoyo Chondo the Plaintiffs father who was his father’s brother. The allotment was given to Kadzoyo’s father. He stated that the plots allotted were 50’x100’. When referred to the agreement dated 2/4/2021 he denied having knowledge of the contents thereof. That Chiduti Chondo Mwero is his cousin though deceased. He further denied knowledge of the agreement of 30/8/2020 but admitted to knowing Kunzi Kawiri Mwero as his cousin and so was Zinga Ngawero Mwero. He stated that the Plaintiffs house was still on the land and so were the graveyards.
18. On reexamination PW2 indicated that the money received by his cousins was never shared with his family. The Plaintiffs case was marked as closed at this juncture.

Defence Case

19. DW1 Ahmed Mohamed Osman adopted his statement filed before court as evidence. He stated that the Plaintiff was known to him as he was his neighbor on the suit property. That he bought the land in 2020 about 1 acre from Mohamed Ahmed Ali. He added 6 plots thereafter at Ksh. 300,000/= each totaling 1.8 million. Before he bought the land he investigated the land where Mohamed told him he bought the same from the Mganga family and he explained how Mganga got the land. He stated that the Plaintiffs land and the graves were distinct from the suit property as the fence between them was present and had not been destroyed as alleged. the witness produced the agreement with Mohamed Ahmed Ali as DEX 1 and 2.



20. The witness stated that he had confirmed with the chief that the land belonged to Mohamed as per the letter dated 13/5/2013 DEX 3. That at one point the Plaintiff and another invaded the land and destroyed the fence. The matter was heard before the court in Mariakani where the two were found guilty and fined Kshs 30,000/- and produced the Judgement as DEX 4 and 5 as a bundle.
21. On cross-examination DW1 stated that his land was distinct from that of the Plaintiff. That he was on zone 52. He stated that a survey was undertaken though he did not have a report. The witness maintained that he had bought 6 plots from DW5. On the sale agreement dated 27/2/2020 (DEX 1 and 2) and the one dated 8/4/2020 DEX 6 which referred to the plots he had purchased, he stated that the same did not bear the plot numbers as the numbers had not been issued at the time of the purchase. He denied blocking the access to the grave site and stated that the same can be accessed to date.
22. DW2 Mganga Kadzomba Ngala testified that the plot currently occupied by the Plaintiff belongs to him. He stated that the issue had been resolved before the chief but the Plaintiff had refused to vacate the said plot. The witness admitted to having sold land to the 1st Defendant. That the said land was close to where the Plaintiff resides but the portion he sold did not belong to the Plaintiff. The witness further asked the court to adopt his statement filed before court.
23. On cross-examination he testified that his grandfather had invited the Plaintiff's grandfather on the land. That the Plaintiff's family was buried on the land. He further stated that he had moved out of the land and left the Plaintiff thereon. That it is his brother who was now deceased that had sold the land to the 1st Defendant. That he had moved to Taru and was not on the land at the time of his testimony before court. On reexamination the witness stated that the Plaintiff was present when the land was being sold to Mohammed and he did not object.
24. DW3 Ali Mwagudu Ngala adopted his statement filed before court as part of his evidence. He stated that the Plaintiff was known to him as a neighbour in Samburu. It was his evidence that the land currently occupied by the Plaintiff belonged to him and his family. That their parents and Kadzoyo's lived together and built their houses on the suit property. He stated that ownership of the land had been subject of dispute resolution before the chief which the Plaintiff attended. He stated that the Plaintiff was aware of the sale to the 1st Defendant and was being untruthful. The elders determined that the land belonged to Mwamundu clan. The Plaintiff is not a Mwamundu. After the Chief's decision Denis got a buyer Mohamed Ali and the plot was sold with no objection from Kadzoyo. That the Chief decided that the graveyard and where Kadzoyo lived should not be sold and that they had complied.
25. On cross examination he testified that Kadzoyo's grandfather was invited by his grandfather to the suit property. He stated that the Plaintiff's house and the graveyard had not been interfered with. He maintained that the land belonged to his clan and not to the Plaintiff as alleged. On re-examination the witness clarified that the land was not sold to the plaintiff. That despite him being in occupation of the same, the land belonged to the Mwamundu Clan.
26. DW4 Suleiman Mundu the area Chief of Samburu location Kwale adopted his statement filed before court as evidence. It was his evidence that the Plaintiff was well known to him. That sometime in the year 2011 issues with the suit property were referred to him when landowners in Samburu wanted to deliberate on the plan by the Kwale County Council to extend the town plan of Samburu. That he summoned the Plaintiff and some of the Defendant's family as per the proceedings produced in the Defendants list of documents page 17 and 18 of the Defendant's bundle which he produced as evidence. That it was decided since the Plaintiff had resided on the land for a long time, he was to be given a portion while the rest of the land was subdivided between the Mwamundu i.e. Ngala's and they were given allotment by the county council in 2010 (County Council of Kwale). The witness stated



- that he knew the 1st Defendant had purchased part of the subdivided portions as he had been a witness in the agreements DWEX 7. He stated that at the time of such purchase the Plaintiff was present and was aware of the sale. The land sold was in zone 052, 3.5 acres. That the sold parcels are distinct from the Plaintiff's portion. That DW4 is the brother to Kadzoyo the Plaintiff and was aware about the sale but he didn't object. On cross examination the witness confirmed that he had witnessed the signing of the agreements for the purchase of the land by the 1st Defendant. He stated that to his knowledge, all the documents pertaining subdivision of the land and ownership were at the lands office in Kwale.
27. DW5 Mohamed Ahmed Ali a director with Mombasa Maize Millers adopted his statement dated 17/1/2022 as part of his evidence. He stated that he had bought 3 ½ acres of land equivalent of 19 plots from the 2nd Defendant and sold out 14 plots to the 1st defendant. That Plaintiff was known to him, that at the time of purchase of the land, it was discovered that the same was short of 0.6 acres out of the 3 ½ he had bought. That a complaint was made to the DO and it was resolved that though the land belonged to the 2nd Defendant, the same was being occupied by the Plaintiff who had houses thereon and graves. That it was agreed that the said portion was not to be interfered with and has remained same to date. That the graves and the houses belongs to Plaintiff are on the 0.6 portion.
28. On cross examination DW5 testified that he had bought 2.9 acres equivalent to 20 plots for 300,000/= and sold to 1st Defendant for 2.2 million and 1.8 million a total of Ksh. 4 million. That he had sold 5 other plots to someone else at 400,000/= each. That he had proof of ownership which was 14 letters of allotments and rates. (see the plaintiff's bundle item 12). He stated that the land was not part of a ranch and that he had been paying county land rates. He denied destroying any houses on the land or paying any of the defendants off so that they would not raise claims on the same.
29. DW6 Fredrick Chuphi Chidunga a Land Surveyor with Kwale County Government stationed at Kinango County referred to the report dated 25/04/2022 under the defendant's further list dated 16/6/2022. He further referred to the development plan and the same map that exists for the Samburu trading center. It is his testimony that he had been requested by the 1st defendant for a clarification on zones 052, 055 and 043 vis a vis the development plan. That he found that 052, 055 and 043 are available on the ground and also on the development plan. The difference is the locality 52 and 55 were near to each other. Zone 43 was about 1.85 Km away. The former 2 touch the Nairobi – Mombasa highway. Zone 043 is far from 052 and 055.
30. On cross examination DW5 testified that he did not carry out a survey, it was an interpretation of a map. That the place does not have titles. On re-examination he stated that Zones 52, 55 and 43 are not commercial. They are in trading center. That's what they are trading center. The locality of the 1st Defendant is in 052 and 055 and not 043. The defence case was marked as closed.

Submissions

Plaintiffs Submissions

31. The Plaintiffs submissions are dated 29/4/2024 and were brief in nature. It is submitted that the Defendants actions have caused the Plaintiff suffering and occasioned an injustice. That the family claiming ownership of the land have failed to prove the same in evidence. The court is invited to analyse the evidence and to conclude in favor of the Plaintiff.

Defendants Submissions

32. The 1st 2nd and 3rd Defendant's submissions are dated 16/4/2024. The Defendants have given a summary of the evidence adduced before court and an analysis based on their case. It is submitted that



the Plaintiffs claim is on a portion of the suit property and not the whole 100 acres as captured in the pleadings. That prior to the purchase of the land, the purchaser ensured that all members of the Beja family clan had consented to the said sale. That the Plaintiff has failed to demonstrate to court by way of evidence any ownership rights over the suit property and how the alleged ownership was conferred to him by his grandfather.

33. The Defendants submit that the plaintiff was only allowed to be in occupation of a portion of the land and the same did not mean that he had ownership rights over the same. The allegations of destruction of property and the graves are refuted and it is stated that no proof of such destruction has been presented before court. The court is urged to dismiss the Plaintiffs suit.

Determination

34. Having outlined the pleadings, evidence and submissions as presented, the main issue for determination is whether the Plaintiff has proved his case against the Defendants to the required standard.
35. It is the Plaintiff's case that the suit property belongs to him by virtue of being a beneficiary of the Kadzoyo family the original and legal owners of the suit property. The Plaintiff refers to the property as ancestral land and states that the same has been with his family for ages as evidenced by the graveyard on the same upon which his forefathers are buried. It was his evidence in chief that the same belonged to his grandfather. The Defendants have on the other hand stated in evidence that the suit property belongs to the Beja family and who through their forefathers invited the Plaintiffs grandfather to the land for shelter only and did not confer ownership rights upon him. It is stated that indeed a portion of the land is inhabited by the Plaintiff and the same is with the permission of the Beja family.
36. The burden of proof lay on the Plaintiff to prove that he is the beneficial owner of the suit property as alleged by dint of the alleged ancestry. Section 107 of the *Evidence Act* Chapter 80 of the Laws of Kenya, provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
37. It is clear from the pleadings and evidence led that the suit property has no title. PW1 confirmed during his oral testimony that he does not have title to the property including DW6 the County Surveyor. I think it would be important firstly to look into judicial precedent for guidance on the requirements to prove ownership of unregistered land. Justice Onguto (as he then was) in *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR in determining the issue as to who between the Plaintiff and the defendants was the owner of an unregistered plot stated thus:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds



or documents which assist in proving not only dominion of unregistered land but also ownership.

The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.” (Emphasis is mine)

38. In buttressing his claim before court the Plaintiff produced copies of allotment letter dated 14th August 1997, Copies of demand letters sent to the Defendants, Photographs showing the suit parcel of land, Photographs showing the ongoing activities on the said land and Photographs showing the fence erected by the 1st Defendant.
39. The Plaintiff places reliance on the allotment letter dated 14th August 1997 in laying claim on the suit property. I have perused the copy attached to the list of documents. The same has been issued by the County Council of Kwale and is addressed to one Robert Kadzoyo Chondo. The Plaintiff in his evidence testified to being Robert as indicated in the letter. From the allotment letter, it is indicated that the Plaintiff has been allocated Plot No 16 zone 0/43 at Kibao Chirau market for residential purposes. From this information it can first be deduced that the allotment letter was specific with the portion to be issued to the allottee and which was a plot. While PW1 stated that the letter of allotment did not show any acreage, PW2 stated the plots were 50 X 100 in measurement. I went back to the pleadings to first satisfy myself of the size of land being claimed.
40. From the Plaint it became apparent that the Plaintiff lays claim over 100 acres of land and this becomes clearer from both the description of the subject matter of the suit and the prayers sought in the Plaint. The prayers have been enumerated at the outset of this judgement. Based on the letter of allotment the claim of the 100 acres by the Plaintiff at this point fails. It is trite that parties are bound by their pleadings – see the case of *Joseph Mutua Nziu Vs. Orient Insurance Company Ltd* (2015) eKLR cited by the Defendants and *Electoral & Boundaries Commission & Another Vs. Stephen Mutinda & 3 Others* (2014) eKLR. Moreover, having stated this the court did not have any evidence before it that the Plaintiff owned 100 acres.
41. On the above alone and based on the Plaintiffs pleadings, the Plaintiffs claim should fail.
42. But having stated the above and going for substantive justice, it is evident from the proceedings that the land in dispute is but a portion. PW1 told the court that the 2nd and 3rd Defendant had taken part of his land which was about 4 acres and it is what had brought him to court which to me means it is not the 100 acres. Again, the photos produced by PW1 above depicted a small portion of land. PW2 testified that the land belonged to their grandfather Mwero Mwando who had 4 wives and was a burial site for the family and that the disputed portion is about 2 acres.
43. The court noted there was also some confusion with the location of the land depicted in the letter of allotment. PW1 explained in his evidence in chief, the letter of allotment was in respect of the land on the other side of the road. Again this goes to confirm that the property referred to in the letter of allotment is not the subject of the portion forming the subject of the Plaintiff claims. DW1 told the



court that he bought land in Zone 52 and which was confirmed existed in the report dated 25/04/22 produced by DW6 the Kwale County Government Surveyor. His evidence was that he was able to look at the Development plan for Samburu Trading Center and his interpretation was that Zone 43 was about 1.85 Km away. The letter of allotment showing zone 43 could therefore not be relied upon by this court in proof of the ownership of the 100 acres or even the portion claimed.

44. The sale of the property to one Mohamed Ahmed Ali DW5 is not disputed. The 1st Defendant has produced before court several agreements in proof of having purchased several plots. It is his case that the said plots were purchased from DW5 and who in his testimony before court admitted to having sold the plots to the 1st Defendant. The said witness further stated that at the time of purchasing the 3.5 acres from the 2nd and 3rd Defendants, the Plaintiff was present and well aware of the transactions. That it was during the sale that it was discovered that the portion sold was short of about 0.6 acres and the said portion formed part of what the Plaintiff occupied. To me this evidence resonated with PW2 evidence that the graves were very near the 1st defendant's side. DW5 further evidence was that the Plaintiff was not willing to relinquish the said portion and a dispute arose. According to the Defendants, there was a dispute that was referred to the Assistant County Commissioner where it was agreed that the Plaintiff was to retain this portion and the graveyard. This is confirmed in the proceedings chaired by Dorcas Mwangi -see page 18 - 20 of the Defendants bundle). The proceedings were produced by DW4 Chief Samburu location. He confirmed the proceedings were documented. PW2 and who is the brother to PW1 conceded in cross examination to attending the said meeting.
45. The Defendants vehemently deny any interference with the Plaintiff's occupation. DW1 stated that his shamba was fenced and Kadzoyo's houses and the graves were not in the fenced area. Infact this was corroborated by PW2 who indicated in cross examination thus 'today if you visit site the graves are still there as well as Kadzoyos house.' It was his evidence in chief that the graves are not fenced. Further PW1 indicated in cross examination there is a fence near the graves meaning the graves are not within then fence.
46. I have had the chance to interrogate the issue of the Plaintiff having been aware of the sale. I note that the PW1's brother (Chiduti Chondo Mwero) were aware of the sale and had no objection as pointed by DW4 in his evidence in chief when commenting on the agreement dated 8/4/20 between Ahmed Mohamed Osman and Mohamed Ali. For me by the time the land was sold to DW5 in 2013 the 2011 decision had already been made that Kadzoyo would be allowed to be where he is and I agree with DW4 clarification in this regard during cross examination. I had no evidence placed before me that DW1 bought land belonging to the Plaintiff but the evidence availed is that he bought land in a different zone 52.
47. I think the Plaintiff place is where he is as well as the grave yard as decided by the elders as seen in page 18-20 of the Defendants bundle. Indeed, DW1 Mohamed Ali Mohamed the 1st Defendant clearly stated he gave up the portion of 0.6 acres, lays no claim for it and had abided to the County Commissioners decision.
48. I think I have said enough to show why this suit is for dismissal. Having failed to prove his stake on the land, there is no justification based on the evidence on record to warrant the grant of the reliefs sought by the Plaintiff against the Defendants.
49. As to costs, Section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. It is trite that costs usually follow the events. In the instant case, the Plaintiff is the unsuccessful party and is therefore not entitled to the costs of the suit. The 1st 2nd and 3rd Defendants who participated in the suit will therefore have the costs of the suit.



50. The upshot is that the Plaintiff has failed to prove his case to the required standard of balance of probabilities. The suit is hereby dismissed.

Orders accordingly

JUDGEMENT DATED SIGNED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2024

AE DENA

JUDGE

Mr. Birir for the Plaintiffs

Ms. Esajee for the 1st 2nd & 3rd Defendants

No Appearance for the rest of the Defendants

Mr. Daniel Disii – Court Assistant

