



REPUBLIC OF KENYA



**Kalugo v Mae & another (Environment and Land Appeal 16 of 2023)
[2024] KEELC 7157 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 16 OF 2023
FM NJOROGE, J
OCTOBER 29, 2024**

BETWEEN

MWAMBOGO T KALUGO APPELLANT

AND

KAHINDI MAE 1ST RESPONDENT

STEPHEN M MAE 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Hon. E. K. USUI, CM, in Malindi ELC Case No. 229 of 2011- Kahindi Mae & Another v Mwambogo T. Kalugo, dated 18th October, 2023)

JUDGMENT

1. By a Memorandum of Appeal dated 27th October, 2023, the Appellant, dissatisfied with the Judgment and Decree of Honourable E. K. Usui dated 18th October, 2023 in Malindi in Environment and Land Case No. 229 of 2011 -Kahindi Mae & Another vs Mwambogo T. Kalugo, appeals against the whole of the said Judgment and Decree on the following grounds:-
 1. That the learned trial Magistrate erred in law and fact in finding that the suit land initially belonged to the Respondents' father and that it was left in the hands of their uncle who had no legal capacity to sell it to the appellant;
 2. That the Learned Magistrate erred in law and fact in finding that the respondents are the lawful owners of the suit land;
 3. That the Learned Magistrate failed to properly evaluate the evidence and as a result arrived at a wrong decision.



2. The background to this appeal is that the suit in the lower court was filed by the present respondents who sought orders of permanent injunction restraining the appellant or his agents from howsoever interfering with the suit property. The basis of the respondents' claim before the lower court was that they were the lawful owners of the suit land measuring 3 acres and that sometime in March 2011 the defendant without any justifiable cause trespassed thereon and carved out a portion measuring about 1 acre, alleging that it was his.
3. Defence was filed in that lower court case denying the claim. The appellant denied that there was any land in the Sabaki area measuring 3 acres which belonged to the respondents or that he had entered into any land owned by the respondents. He alleged that the land that he is in occupation of measures 1.5 acres and that he had purchased it from one Kenga Munga Mutile on 30/1/2005, that he had taken possession and developed it with houses and farming activities. He also fenced the same for security purposes. He admitted that his is unregistered land.
4. No land reference number was given by both parties for the land that they purported to claim.
5. In the present appeal the Appellant has sought to have the appeal allowed and the Judgment and decree made on the 18th Day of October, 2023 be set aside and be substituted with a Judgement and Decree dismissing the Plaintiff's suit with costs.

Evidence Before the Trial Court.

6. PW1 Kahindi Mae told the court that the 2nd Plaintiff is his younger brother. He adopted his statement and further stated that they lived in Sabaki for a long time and later settled in Gongoni, according to him, they left their piece of land in Sabaki in the care of their grandmother who later passed away.
7. It was his testimony that when his younger brother Stephen Mae moved back to Sabaki, he informed him that he found a stranger by the name Martin Kalugo living on their land; that they decided to follow up on the matter and were informed that their uncle, Kenga Munga sold the said property to him at Kshs. 14,000/-. That upon inquiring from their uncle, he admitted that he sold their piece of land to Martin Kaluga without their consent because of his financial problems.
8. He stated that in an attempt to solve the matter as a family, they decided to raise the Kshs. 14,000/- which was handed to their uncle to refund Martin Kalugo his purchase price and ask him to vacate. He also told the court that the said, Martin Kalugo refused to take the refund and said that he wanted the land instead.
9. On cross-examination, he stated that he did not have title deed for the 2 acres that he bought. He stated that he got the report that the land had been sold in 2013 and that he saw that the person had built two new houses. He told the court that together with his late father they had bought the suit land at Kshs. 25,000/-.
10. PW2 Stephen Manyesho adopted as his evidence-in-chief a statement filed on 6th August, 2018. His evidence was that they left Sabaki and moved to live in Gongoni leaving the land in the care of their grandmother who later passed on; that their uncle took their parcel of land without their consent and sold it to Martin Kalugo at Kshs. 14,000/-; that the matter was reported to the chief who advised the defendant to leave the suit plot; that they agreed to pay him back the Kshs. 14,000/- but the defendant refused the offer claiming that he incurred more expenses in erecting two mud huts and that he would only move out if he was compensated for his expenses. that upon being refunded the money, Martin Kalugo refused to vacate their land and is still cultivating the land.



11. On cross-examination, he stated that the plot is 3 acres which was their father's, Mae Karisa Ndubi; that their father bought it in 1967 from one Kahehe Kiberenge but there was no agreement; that they left Sabaki in 1979 to Gongoni, leaving their grandmother on the suit land. He reiterated that they gave the defendant money as refund of the purchase price but he refused to take it.
12. DW1 Mwambogo T. Kalugo adopted as his evidence-in-chief his statement dated 16th June, 2012. He further stated that on 30th January, 2005 he entered into an agreement for sale with Kenga Munga Mtile in which he agreed to sell to him 24 cashew nut trees on a one and half acre parcel of land situated at Sabaki Village at Kshs. 14,000/-; that on that day he paid Kshs. 8,000/- and the agreement was reduced into writing with Dena Kalama and Ferdinand Kahindi as witnesses.
13. He also stated that he took possession of the plot and started developing it by clearing the land and building two semi-permanent houses and also planted 40 casuarina trees, 3 coconut trees, 2 banana plants and 9 sugarcane plants. That on 2nd August, 2006 he paid the balance of the purchase. According to him, one Martin Saro came into the property and claimed that the suit property belonged to him; that the dispute was referred to the local administration but it could not be resolved. Further, he told the court that he has carried out extensive development on the said property by clearing and planting. He further stated that some of his trees were destroyed by people who were laying claim to the land.
14. DW2 Ferdinand Kahindi adopted as his evidence-in-chief his witness statement dated 16th June, 2012. He further stated that on 30th January, 2005 he witnessed an agreement for sale between Kenga Munga Mtile and Mwambogo T. Kalugo in which Kenga Munga Mtile agreed to sell to him 24 cashewnut trees on a one and a half acre parcel of land situate at Sabaki village at the price of Kshs. 14,000/-; that on that same day, he paid a sum of Kshs. 8,000/- and the agreement was reduced into writing with all parties signing. He also stated that Mwambogo T. Kalugo took possession of the plot and started developing it by clearing the land, building 2 semi-permanent houses; he also planted casuarina, coconut, banana and sugarcane trees. Further, that one Martin Saro came to the suit property claiming that the same belongs to him, the dispute was referred to the local administration but it could not be resolved.
15. The appeal was heard by way of written submissions with the Appellant filing submissions dated 11th April, 2024 through the firm of J.K Mwarandu & Company Advocates. Counsel submitted that the learned magistrate failed to properly evaluate the evidence as a result of which she arrived at the wrong decision to the effect that the respondents were the lawful owners of the suit land and that the suit land initially belonged to the respondent's father and that it had been left in the hands of their uncle who had no legal capacity to sell it to the appellant. He further submitted that the 1st Respondent testified that his father bought the suit land from one Kiberene Kwahela in the year 1971 and that they later migrated to Gongoni and left the suit land with their grandmother but that testimony contradicts his testimony in cross-examination where he stated that the suit land was owned by his mother and that Kenga Munga used to cultivate the land and harvest cashew nuts.
16. It was his submission that given the fact that no evidence had been adduced on when the grandmother died and when the respondent's uncle allegedly took possession of the suit land, that the finding by the trial court was not based on any evidence or fact that could lead to that presumption. Further, there is no mention that the suit land had been left in the hands of the respondent's uncle Kenga Munga and it was therefore an erroneous finding that the suit land had been so left under his care upon the demise of the respondent's grandmother.
17. He also submitted that the allegation that the suit land had initially been purchased by the respondent father was not proved and the same remained a mere allegation; that if the suit land belonged to the respondents' father then the respondents had no locus standi to institute the suit for want of a grant



of letters administration intestate of the estate of their father. He relied on the case of Sisilia Nyakoe & Another vs The A.G & 4 others, H.C.E.L.C Petition No. 12 of 2014.

18. The Respondents on the other hand filed submissions dated 7th June, 2024 through the firm of Richard O. & Co. Advocates. Counsel relied on the testimony in the Record of Appeal which does not mention any land or plot, or describe or refer to any land or measurement. He relied on the provisions of Section 107 (1) of the *Evidence Act*. According to him, the land initially belonged to the Respondents' father who later left it in the hands of their grandmother whom upon her death left it in the hands of Kenga Munga. He submitted that Kenga Munga did not have any legal right to deal with the suit property neither could he sell the same to the Appellant. He relied on the case of Danson Kimani Gacina & Another v Embakasi Ranching Company Ltd (2014) eKLR. It was his submission that all the evidence points back to the original owner who is Mae Karisa Ndubi, the Respondent's father and that the trial magistrate was correct by arriving to a just decision that the Respondents are the rightful owners of the suit land.

Analysis and Determination.

19. I have considered the appeal as well as the submissions cited by counsel and in my view the only issue for determination is whether the appeal is merited.
20. The suit property is not registered and the parties are in dispute as to whom the legal owner is. Though citizens may have unregistered interest in land, legal title is only declared in respect of registered land. The plaintiffs aver that that they left Sabaki and moved to live in Gongoni leaving the land in the care of their grandmother who later passed on; that their uncle took their parcel of land without their consent and sold it to the appellant at Kshs. 14,000/-. According to them, in an attempt to resolve the matter as a family, they decided to raise the Kshs. 14,000/- which was handed to their uncle to refund Martin Kalugo the consideration that he had paid so that he may vacate. According to PW1, the appellant refused to take the money and said he wanted the land and not the money.
21. The appellant on the other hand, stated that on 30th January, 2005 he entered into an agreement for sale with Kenga Munga Mtile in which he agreed to sell to him 24 cashew nut trees on a one and half acre parcel of land situated at Sabaki Village at Kshs. 14,000/-; that on that day he paid Kshs. 8,000/- and the agreement was reduced into writing with Dena Kalama and Ferdinand Kahindi as witnesses.
22. The appellant has submitted at length about the contradictions in the testimonies of evidence of the parties and in my view, this being unregistered land, the acreage of the suit land that the parties seem to refer to is not clear. The appellant alludes to the fact that the suit property was sold to him by Kenga Munga Mtile who is the Respondent's uncle.
23. I have had the opportunity to peruse the sale agreement relied upon by the appellant. The agreement is to the effect that Kenga Munga Mtile sold to the appellant 24 cashew nut trees at a purchase price of Kshs. 14,000/-. There is a marginal notation that purports to read "1.5 acres" in the agreement but it does not appear to be part of the main writings in that document and its authorship is unknown. It is the evidence of the plaintiffs that Kenga Munga was the respondents' uncle and also PW1's brother. Mtile does not deny being related to the Kahindi Mae and Kabwere Mae, the former who is the 1st plaintiff.
24. It is common ground that the dispute regarding the suit land was taken to the local administration for resolution. Both PW1 admitted that it was taken to the village elder and later to the Assistant Chief. DW1 stated that it was taken before the Assistant Chief, Sabaki Location and subsequently before the District Officer, Malindi Division. Among the appellant's exhibits at the trial was a letter from the District Officer dated 16/11/2011. That letter gives a different narrative to the effect that the land used



to be the plaintiff's father's but he sold it in the mid-1970s and vacated to another place called Magarini when he was accused of practising witchcraft in the area. That statement of an administrator, borne by the appellant's own documentary evidence, clearly identifies the suit land as having been owned by the plaintiff's father. Interestingly, the letter does not state expressly to whom the land was sold. It only states that he purchased it from the "previous owner". According to the appellant, that previous owner was Kenga Munga. However, upon scrutiny of the evidence of the defence, there is no clear evidence of how the same land came to be transmitted from Mae Karisa, the plaintiff's father to Kenga Munga, his brother so that he could have any interest to sell to anyone else including the appellant. It is not therefore clear how Kenga Munga managed to appropriate his brother's land after Mae Karisa left the area. This court is alive to the fact that in customary settings in Kenya clans often occupied one large area. It is therefore possible that Mae Karisa's land was adjacent to or abutted Kenga Munga's. Indeed, the appellant's evidence contains another letter or document purportedly authored on 15/6/2011 by one Morris Kazungu Samson as a village elder, whose contents make it clear, at least from the inclusion of several Munga surnames, that the Munga family may have inhabited the same area.

25. I would not hold the opinion that when Mae Karisa departed from the area upon being found to be a witch, his right to occupy the land became extinct. There is no basis for that sort of holding. Even perchance that were the case, he still had offspring and it was not demonstrated to the trial court, and indeed it would be an obnoxious and repugnant position to hold, that as late as in the 1970s, a decade in which civilization of the African society was quite advanced, his innocent offspring could have been effectively and automatically disinherited by the traditional oathing ceremony that found their father to be a witch. For the same reasons, it would also be totally unacceptable to this court that Mae Karisa's own brother Kenga Munga assumed the former's landed assets upon his departure without any clear land transmission mechanisms and became entitled to the free use thereof as well as disposal.
26. It is clear to this court that there was indeed a sale transaction that occurred between Kenga Munga and the appellant in which the land was sold to the appellant. However, the appellant never demonstrated to this court that Kenga Munga had any interest in the land to sell to him. In a clear allusion to the Latin maxim and principle of *nemo dat quod non habet*, the trial court correctly noted as follows:

“It is clear that the land initially belonged to their (respondents’) father who vacated the same leaving it in the hands of their grandmother. The fact that it is the plaintiff’s father who initially owned the suit property is not disputed by the parties herein. when their grandmother passed on the land was left in the hands of their uncle who sold the same to the defendant. The sale was obviously without the legal capacity of a vendor as one can not sale (sic)that which they do not own.”
27. It is not lost on this court that though Kenga Munga recorded a witness statement which is at page 23 of the Record of Appeal, he never appeared in court to testify in support of the defendant's case. Consequently, all cross-examination that would have shed light on the propriety of his acquisition of his brother's land could not be done. However, that omission also deeply dented the appellant's case too.
28. Having perused the evidence and the exhibits that have been presented before this court, this court finds that the said Kenga Munga did not have any right to sell Mae Karisa's land. It also finds that the respondents are still entitled to that land. That land is or includes that portion that is occupied by the appellant. This court finds no ground upon which to interfere with the judgment and decree of the trial court. that judgment was sound and flawless in its reasoning. Consequently, the appeal herein lacks merit and the same is hereby dismissed with costs.



**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON
THIS 29TH DAY OF OCTOBER, 2024.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

