



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kambi & 3 others v Chome & 9 others (Environment & Land Case  
54 of 2019) [2023] KEELC 494 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 494 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 54 OF 2019**

**MAO ODENY, J  
JANUARY 30, 2023**

**BETWEEN**

**CHARLES PASI KAMBI ..... 1<sup>ST</sup> PLAINTIFF  
JOSHUA RADHI ..... 2<sup>ND</sup> PLAINTIFF  
AGNES KABIBI PONDA ..... 3<sup>RD</sup> PLAINTIFF  
COLLINS CHOME NGONYO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**GIBSON CHOME ..... 1<sup>ST</sup> DEFENDANT  
CHRISTOPHER KAMBI ..... 2<sup>ND</sup> DEFENDANT  
KENNEDY MADARAKA ..... 3<sup>RD</sup> DEFENDANT  
KIPONDA KAMBI ..... 4<sup>TH</sup> DEFENDANT  
NGALA KAMBI ..... 5<sup>TH</sup> DEFENDANT  
GEORGE KAMBI ..... 6<sup>TH</sup> DEFENDANT  
ELIZABETH KAMBI KIPONDA ..... 7<sup>TH</sup> DEFENDANT  
JUMWA KAMBI ..... 8<sup>TH</sup> DEFENDANT  
MAPENZI KAMBI ..... 9<sup>TH</sup> DEFENDANT  
HELLEN KAMBI ..... 10<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. By a Plaint dated 10<sup>th</sup> July 2019, the Plaintiffs herein sued the Defendants jointly and severally seeking the following orders: -
  - a. A permanent order of injunction restraining the defendants either by themselves, their agents, servants from interfering with the plaintiffs' parcel of land known as Kilifi/Roka/944 in any manner whatsoever.
  - b. Eviction of the defendants from the suit property Kilifi/Roka/932, Kilifi/Roka/943 and Kilifi/Roka/944.
  - c. An order to compel the defendants either by themselves, their agents and/or servants and/or family members to forthwith lift and/or remove the restriction placed on the 19<sup>th</sup> January 2006 or any other date thereafter so registered as against Kilifi/Roka/932, Kilifi/Roka/943 and Kilifi/Roka/944 and any encumbrances as registered against the suit property.
  - d. Removal and/or lifting of entry no. 5 dated 14<sup>th</sup> June 2006 in Kilifi/Roka/932 and Kilifi/Roka 943 and entry no. 3 dated 14<sup>th</sup> June 2006 in Kilifi/Roka/944.
  - e. Costs of the suit.
  - f. Any other relief this honourable court deems fit to grant
  
2. The Defendants filed a statement of defence denying the Plaintiffs' claim and a Counter-Claim against the Plaintiffs seeking the following orders; -
  - a. The Plaintiffs' suit against the defendants be dismissed.
  - b. An order compelling the plaintiffs by themselves, their agents and/or servants and/or family members forthwith remove and/or demolish any structures erected on the parcel of land known as Kilifi/Roka/932, Kilifi/Roka/948 and Kilifi/Roka/944 and any encumbrance registered against the said parcel of land.
  - c. Eviction of the Plaintiffs from the suit property Kilifi/Roka/932, Kilifi/Roka/943 and Kilifi/Roka/944.
  - d. A permanent order of injunction restraining the Plaintiffs by themselves, their agents and/or servants and/or family members from interfering with the parcel of land known as Kilifi/Roka/932, Kilifi/Roka/948 and Kilifi Roka/944 in any manner whatsoever.
  - e. That the titles issued be nullified to allow subdivision as ordered by the Senior Resident Magistrate's Court Kilifi.
  - f. The costs of this suit and counter-claim.
  - g. Such other orders as may be expedient in the interest of justice.



## Plaintiff's Case

3. PW1- Charles Pasi adopted his Witness Statement dated 10/7/2019 and produced a bundle of documents as exhibits in the list of documents filed in court. PW1 told the court that he has a title deed to the suit Plot No. Kilifi/Roka/943 and that the Defendants have been interfering with his enjoyment of the suit land which he acquired in 1966 through adjudication.
4. PW1 stated that he cleared the bushes, planted coconut trees and developed the parcels of land. That prior to the issuance of title deeds they were issued with allotment letters in respect of the plots whereby they paid the SFT loans and title deeds issued to them.
5. It was PW1's testimony that they took possession and on 15<sup>th</sup> August 2004 they had a family meeting whereby they resolved the registered owners to stick to their respective plots and no further harvesting of crops from other peoples farms so as allow the family to live in peace.
6. PW1 further stated that the Defendants remained in their allocated portion until one of the Defendants refused to share with the others the portion belonging to the Late Mzee Paul Kambi Ngala.
7. PW1 stated that the Defendants filed a claim before the Bahari Land Dispute Tribunal claim No. 17 of 2004 whereby the Tribunal found that the 6 plots be divided into equal portions of 9 acres each and to be allocated to Jumwa Fondo Kambi (deceased), Esther Thithe Kambi (deceased), Esteher Kadzo Kambi, Elizabeth Pola Kambi, Sera Nzingo Kambi, Kanze Kambi, Mapen zi Kambi, and Jumwa Kambi.
8. PW1 told that court that they were dissatisfied with the Award and filed an Appeal to the Provincial Land Appeals Committee vide Appeal No 37 of 2005 but the Land Disputes Tribunal Act was repealed.
9. He stated that on 4<sup>th</sup> May 2005 a Reference was filed before the District Land Adjudication Settlement Officer Kilifi captioned "Dispute on Plot Nos, 930, 931, 932, 943, 944 and 945 Tezo/Roka Settlement Scheme and upon deliberations the District Land Adjudication and Settlement Officer held that the plots belonged to the registered owners.
10. It was PW1's testimony that their titles were first registration which were acquired regularly hence the Land Disputes Tribunal had no jurisdiction to hear and determine the dispute and urged the court to grant the orders as prayed and dismiss the Defendants' Countclaim with costs. On cross examination by Mr. Muli, he stated that he has a title to the suit land and that the Tribunal award has not been overturned.
11. PW2- Joshua Radhi adopted his Witness Statement dated 10/7/2019 and produced as exhibits a bundle of documents as per the list of documents. He told the court that his plot is No. 944 Roka. He testified that he is the 1<sup>st</sup> born of the late Paul Kambi Ngala and that the Defendants have their parcels of land but want the 72 acres to be amalgamated and divided according to Paul Ngala Kambi's wives. He added that he is aware of the tribunal's decision. On cross examination by Mr. Muli, he stated that the late Paul Kambi Ngala had 9 wives and about 45 children. He also told the court that the late Paul Kambi had 12 acres of land in Roka and the tribunal had resolved that the parcel of land be divided to the 9 wives and having been dissatisfied with the decision, they appealed but never followed up with the appeal.



## Defendants' case

12. DW1-Gibson Chome adopted his Witness Statement dated 15/10/2019 and informed the court that in 1962 they were registered by the settlement scheme and they have been staying on the parcel of land with no problem until 1984 when their father died. He further told the court that the dispute was resolved by the Land Disputes Tribunal that ordered all the parcels of land be subdivided and given to the wives of their late father.
13. It was DW1's evidence that the Plaintiffs were aggrieved by Award of the Bahari Land Disputes Tribunal and filed an Appeal at the Provincial Land Dispute Appeal Committee No. 382 of 2005 which upheld the decision of the Bahari Tribunal with costs to the Defendants.
14. DW1 further stated that the Plaintiff being aggrieved by the Appeals Tribunal decision filed an appeal in Malindi High Court vide Civil Appeal No 28 of 2009 which has never been prosecuted to date.
15. That the Land Disputes Tribunal Award was adopted on 30<sup>th</sup> march 2006 vide Kilifi Senior Resident Magistrates 'Court No. 37 of 2005 which has never been overturned.
16. DW2 Elizabeth Pola Kambi also adopted here statement filed in court on 15<sup>th</sup> October 2019 and stated that she got married to Paul Kambi Ngala in 1958 and reiterated the evidence of DW1 and urged the court to dismiss the Plaintiffs' case and allow the counterclaim as prayed.

## Plaintiff's Submissions

17. Counsel filed submissions and identified 6 issues for determination on as to who are the rightful owners of the suit properties, whether the Plaintiffs hold the suit properties in trust for the entire family, whether the Defendants should be compelled to remove the restrictions on the suit properties, whether the Defendants are entitled to the prayers in the Counterclaim, whether the court has jurisdiction to hear the matter and who should pay the costs of the suit.
18. Counsel relied on the provisions of Sections 24, 25 and 26 of the *Land Registration Act* and the case of Propwa Company Limited v Justus Nyamo Gatondo & another [2020] eKLR and submitted that the Plaintiffs have proven that they have titles to the suit properties which titles were lawfully obtained under their names thus they are the legal proprietors of the suit properties.
19. Counsel further submitted that there was no evidence that the suit properties were procured fraudulently and that they were intended to be held under trust for the family and cited the case of Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR where the court held that the onus lies on a party relying on the existence of a trust to prove it through evidence.
20. On the issue of removal of the restriction lodged on the suit properties counsel relied on the case of David Macharia Kinyuru v District Land Registrar, Naivasha & another [2017] eKLR and submitted that the Plaintiffs have demonstrated that they are the legal owners of the suit land hence the court should exercise its powers under Section 78 (2) of the *Land Registration Act* and remove the restriction.
21. On the issue as to whether this court has jurisdiction to hear and determine this case, counsel submitted that the issues that were before the Tribunal were succession and distribution of the deceased estate whereas the current dispute is on proprietorship of the suit properties and relied on the case of C K Bett Traders Limited & 2 others Vs Kennedy Mwangi and another (2020) eKLR.
22. Counsel submitted that whereas the parties were the same, the issues and circumstances are different and that the determination at the Tribunal did not cover the issues of ownership. Further that the Tribunal did not have the jurisdiction hence any decision emanating therefrom was null and void and



not capable of being enforced. Further that the Tribunal did not have jurisdiction either to deal with issues of succession and distribution of the estate.

23. Counsel relied on the case of *Moses Makokha Osanya v Elekia Mabosio Marenga* [2018] eKLR in which the Court relied on the case *Joseph Karobia Gicheru vs. Michael Gachoki Gicheru* [2013] eKLR where the court held that “where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio and that no amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end”
24. On the issue whether the Defendants ‘claim of adverse possession is legitimate, counsel submitted that the Defendants claimed that they are entitled to the suit properties as they, together with their families occupied, lived, buried their loved ones on the suit properties for over 20 years and that they have continued to live on the properties to date and are utilizing the same as a community.
25. It was counsel’s submission that contrary to the Defendant’s assertions, the Plaintiffs reiterated that they, together with their nuclear families, and the extended family (who the Defendants herein form part) lived harmoniously together as a family on the 6 parcels of land, as one and that the Defendants did not at any point exclusively live on the said parcels of land in the absence of the Plaintiffs.
26. Counsel relied on the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the court held that a person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession. It is not sufficient to prove that he enjoyed the use of the land in common with the true owner.
27. Counsel urged the court to allow the Plaintiffs’ claim as prayed and dismiss the Defendants ‘counterclaim with costs.

### **Defendants’ submissions**

28. Counsel identified issues for determination and submitted that there exists an authentic court order from a court of competent jurisdiction vide SRM’s Court Land Dispute No. 37 of 2005 Kilifi dated 30<sup>th</sup> March 2006 by Hon. C Obulutsa (SRM). That the said order was delivered in presence of the Plaintiffs and their advocates and being aggrieved by the order, they filed an Appeal to the Provincial Appeals Committee and the Plaintiffs further being dissatisfied with the ruling of the Provincial Lands Appeal Committee filed an Appeal on 24<sup>th</sup> June 2009 in the Malindi High court of Kenya which appeal has never been prosecuted.
29. Counsel further submitted that the suit is res judicata as it involves the same parties, same suit properties involving same dispute that was determined by the ruling issued in SRMS Court Land Dispute No. 37 of 2005 dated 30<sup>th</sup> March 2005
30. Counsel also submitted that the Plaintiffs are guilty of laches and that the Defendants are entitled to the suit land by way of adverse possession as they have occupied the suit parcels for over 20 years.

### **Analysis and Determination**

31. The issues for determination are as follows: -
  - a. Whether this suit is proper before this court.



- b. What is the position where a matter is pending hearing and determination of an appeal and another is filed in a court with concurrent jurisdiction?
32. The brief history of this case is as enumerated by the parties on how the suit parcels of land were acquired through adjudication in the TEZO/ROKA Settlement Schemes.
33. It is on record that the Defendants filed a claim before the Bahari Land Dispute Tribunal claim No. 17 of 2004 whereby the Tribunal found that the 6 plots be subdivided into equal portions of 9 acres each and to be allocated to Jumwa Fondo Kambi (deceased), Esther Thithe Kambi (deceased), Estehar Kadzo Kambi, Elizabeth Pola Kambi, Sera Nzingo Kambi, Kanze Kambi, Mapenzi Kambi, and Jumwa Kambi.
34. It is further on record that the Plaintiffs were dissatisfied with the Award and filed an Appeal to the Provincial Land Appeals Committee in Mombasa vide Appeal No 382 of 2009 whereby the Appeals Committee upheld the decision of the Land Disputes Tribunal in favour of the Defendants vide a Ruling dated 29<sup>th</sup> April 2009.
35. The Plaintiff being aggrieved by the ruling, filed an Appeal vide a Memorandum of Appeal dated and filed on 24<sup>th</sup> June 2009 in the High Court of Kenya at Malindi being HCCA No. 28 of 2009 MALINDI of which the Plaintiff's herein never prosecuted the same to date.
36. The Plaintiffs admitted that they never prosecuted the Appeal and told the court that they had agreed the that parties would stay on the parcels that they occupy and have titles to.
37. The Plaintiffs never told the court of the fate of the Appeal, whether it was withdrawn, whether there was a consent which was extracted with the verbal terms that he told the court, whether it is still pending hearing and determination or whether it was dismissed for want of prosecution.
38. The question is, why did the Plaintiffs file this current case instead of pursuing the appeal that was in respect of overturning the decision of the Provincial Land Appeal's Committee as was provided for by Law and Procedure.
39. If the Plaintiffs want the court to believe that they had agreed not to pursue the Appeal, then it was incumbent upon them to either produce evidence of such agreement either through a consent filed or a confirmation by the parties that they so entered in such agreement. This was not the case.
40. The Award of the Land Disputes Tribunal which was upheld by the Provincial Land Appeal's Committee and adopted as a Judgment of the Court has not been set aside. It is still subsisting therefore it follows that it is a valid order until it is set aside.
41. The Plaintiffs' argument was that the Tribunal did not have the jurisdiction to hear and determine the matter hence the award was null and void. These are the issues that were supposed to be determine in the Appeal which the Plaintiff filed in the High Court but abandoned. That was the right process and forum to impeach the award on the ground that the Tribunal lacked the requisite jurisdiction.
42. In the case of Munga Mbodi Mwenda v Muguza Jangwata Jindwa & another [2014] eKLR Angote J held that: -

“I hold the view that in instances where the Land Disputes Tribunal had already delivered its award, and the award was duly adopted by the subordinate court, such an award remains valid even where an appeal was pending before the Appeals Committee.



Upon the repeal of the Act, all the appeals which were pending before the Appeals Committee should be transferred to the Environment and Land Court and dealt with in that court in its appellate jurisdiction. In situations where fresh matters are filed in this court, if a party shows that the same issues had been dealt with and decided by the Land Disputes Tribunal and the subordinate court, then this court can only deal with those issues as an appellate court and not otherwise.

43. It is on record that an award was adopted as an order of the court and that there is an appeal that was filed challenging the award in the High Court and therefore this court cannot deal with a fresh matter which is not an appeal.
44. In view of the above I find that the court has no jurisdiction to deal with this matter. The upshot is that both the Plaintiff's and the Defendants' cases are dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

