



**Mbaruk & another v Chengo (Environment & Land Case  
167 of 2018) [2023] KEELC 200 (KLR) (23 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 167 OF 2018**

**NA MATHEKA, J  
JANUARY 23, 2023**

**BETWEEN**

**KENGA KUTSOA MBARUK ..... 1<sup>ST</sup> PLAINTIFF**

**RICHARD NZAI RUWA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KIMERA BOZO CHENGO ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs aver that they are and have been the beneficial owners of all that unsurveyed parcel of land situated at Mutulu Trading Centre along Mariakani - Bamba Road in Kilifi County measuring approximately 150 Acres. The Defendant has consistently interfered with the Plaintiffs' said parcel of land and purported to sell portions thereof without the Plaintiffs consent and used the proceeds on his own. The Defendant has without any colour of right whatsoever interfered with the Plaintiffs said parcel of land and has even sold big portion of the said parcel of land to third parties. By reason of the matters aforesaid the Plaintiffs and their families have been deprived of the use and enjoyment of the said land and have thereby suffered loss and damage. The Defendant has threatened to kill the Plaintiffs if they push further to reclaim their land and the criminal case is before the police. The Defendant also threatens and intends unless restrained by this Honourable Court to continue to interfere with the Plaintiffs' said land and their peaceful and quiet enjoyment and possession of the same and threatens and intends unless restrained by this Honourable Court to continue to trespass thereon. The Plaintiffs pray for judgement to be entered against the Defendant for;
  - a. A mandatory injunction to restrain the Defendant by himself, his servants and or agents or otherwise howsoever from trespassing, interfering with or alienating or selling or continuing in occupation of the Plaintiffs' said parcel of land situated at Mwanamwinga Location, Kilifi County measuring approximately 150 Acres and to demolish and remove any structures erected thereon.



- b. Damages for trespass.
  - c. Costs of this suit and interest thereon at court rates,
  - d. Any other and or further relief that his Honourable Court may deem fit and just to grant.
2. The Defendant avers that he is the beneficial owner of all that parcel of unsurveyed land measuring approximately 150 acres situated at Mutulu Village, also referred to as Kwa Bozo Village, Vigaroni Sub-location, Mwanamwingi Location, Kilifi County. The Defendant avers that the suit property is ancestral land that has belonged to his family since around the year 1940. The Defendant avers that his late father Mzee Bozo Chengo Koi purchased the suit property around the year 1940 and the Defendant's family have lived there ever since. The Defendant further avers that on moving onto the suit property his father acquired prominence and stature in the area until the said area was, and still is, alternatively called Kwa Bozo Village by the residents. The Defendant avers that his ownership of the suit property is recognized by all the elders of the area and has never been challenged in all the decades the Defendant's family has owned the suit property. The Defendant further avers that in the year 2012 the family was compensated when Kenya Power and Lighting Company's electricity poles passed through the suit property. This compensation was common knowledge to all the residents of the village and no one, including the Plaintiffs, made any claim to ownership of the suit property. The Defendant avers that the 1<sup>st</sup> Plaintiff was born and raised at Digo, where his grandfather is buried, and the 2<sup>nd</sup> Plaintiff's father was born and died at Mwarandinda, Ganze, where he was buried. The Defendant therefore avers that the Plaintiffs are outsiders to Kwa Bozo Village and could therefore have no claim to the suit property on the basis that it is their ancestral land or on any basis at all. The Defendant avers that he has lived on the suit property since birth and the Plaintiffs have never had occupation thereof and their claim on the suit property amounts to an attempt to grab the suit property.
3. This court has considered the evidence and submissions therein. PW1, Kenga Kutsoa Mbarack testified he and his family are and have been the beneficial owners of all that unsurveyed parcel of land situated at Mutulu Trading Centre along Mariakani - Bamba Road in Kilifi County measuring approximately 150 Acres. The Defendant's father was welcomed there by his grandfather to graze their animals. The Defendant has consistently interfered with the Plaintiffs' said parcel of land and purported to sell portions thereof without the Plaintiffs consent and used the proceeds on his own. That they were tenants and he is not aware of any compensation by KETRACO. PW2 Richard Nzai Ruwa corroborated PW1's evidence. That they is a road between their homes but this is not the boundary. PW3 Katana Charo Dulo testified that the Plaintiffs and the Defendants are neighbours but he does not know how the Defendant came to live on that land but knows that side belong to the Bozos. PW4 Kazungu Karisa Kalume gave evidence that his grandfather told him the story of how the Defendant's grandfather was invited by the Plaintiffs. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that;
- Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
4. This is known as the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows;
109. 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 the fact shall lie on any particular person.



112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
5. The two provisions were discussed in the case of *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* (2005) 1 EA 334, in where the Court of Appeal held that;
- " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."
6. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant depending on the circumstances of the case.
7. In the case of *Evans Nyakwana vs Cleophas Bwana Ongaro* (2015] eKLR it was held that;
- " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."
8. In the instant case I find that the Plaintiffs have failed to established the facts on a balance of probabilities. The Plaintiffs admit the land is unsurveyed and have no documents to produce. What they know is that the Defendant and his family are tenants and they are the beneficiaries of the suit land. Their evidence is all hearsay. DW1, Kimera Bozo Chengo testified that his family moved onto the suit land in the 1940s after buying the land. His father was very rich and the area is called Kwa Bozo as it was a stage for milk collection and this is not disputed by the Plaintiffs. That he sold his land after a case in Kaloleni was concluded. DW1 produced a letter from the Village Elder confirming the land belonged to his father. He also produced another letter from the Chief confirming that an electricity poll had passed through their land for purposes of compensation. DW2 Kazungu Kanubi Popo testified that the Defendant's father bought the land and his father was the witness. DW3, Karisa Katana Keye who is the Mzee wa Mtaa testified that his family together with the Defendant's family bought the land. In the absence of any evidence to the contrary I find that the said portion of unsurveyed land belongs to the Defendants family and not the Plaintiffs as alleged.
9. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau vs George Thuo & 2 Others* (2010) 1 KLE 526 stated that:
- " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."



10. In this case the court is not satisfied that the Defendant's family were tenants from the evidence adduce before me it is unlikely that that is so. I find that the Plaintiffs have failed to prove their case on a balance of probabilities and the same is dismissed with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JANUARY 2023.**

**N.A. MATHEKA**

**JUDGE**

