



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 229 OF 2014**

**JACKSON KATANA BAYA** (Suing on behalf of

**SAIDI KATANA BAYA & 79 OTHERS.....PLAINTIFFS**

**VERSUS**

**GARAMA CHARO & 25 OTHERS.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By their Plaint dated 9<sup>th</sup> December 2014 as filed herein on 10<sup>th</sup> December 2014, Jackson Katana Baya suing on behalf of Saidi Katana Baya and 79 others (the Plaintiffs) pray for Judgment to be entered against the 26 listed Defendants for:

*a) A declaration that the Plaintiffs are the rightful/and lawful owners of all that land which they occupy and described as the Portion known as Junju/Kilifi 79/IV/MN measuring 172.28 acres and an order that the said land be registered to the Plaintiffs' family;*

*b) A declaration that the Plaintiffs have the right to continue occupying and owning the suit properties;*

*c) A declaration that the occupation of Sections of the said Portion of land by the Defendants amounts to trespass and is null and void;*

*d) A permanent injunction restraining the Respondents or their agents, servants, workers from encroaching upon, accessing and or remaining on, or taking possession of or dealing in any manner interfering with, developing, fencing off the (Plaintiffs) referenced land known as Junju/Kilifi 79/IV/MN; and*

*e) Costs and interests of this suit.*

2. Those prayers arise from the Plaintiffs' contention that at all times material, they remain the lawful and rightful owners of the said property by reason of birth and as born out of the fact of their long residence and occupation over the said parcel of land. It is their case that over the years since 1818 they have openly enjoyed use of the land, developed homes, buried their ancestors and continue to farm and occupy the same.

3. The Plaintiffs aver that they continued to peacefully occupy and live on the land until sometime in 1956 when it was discovered that the property had been registered in the name of Vipingo Sisal Estate. That situation led to the institution of a civil suit which

was later compromised but which saw the registered owner surrender 2,852 acres of the land to the Government for purposes of being registered and conveyed to the resident occupants and or squatters dwelling thereon.

4. It is further the Plaintiffs' case that pursuant to the surrender, the local community of squatter residents set up a Committee under instructions from the Ministry of Lands to see to it that the surrendered parcel was divided according to the wishes of the people based on their historical rights. Subsequently, a portion of the land measuring 172.25 acres was allocated to Duka Kotse and family which consisted of the households of Katana Baya Duka, Ali Duka, Saida Duka and Elio Duka while the remaining portion was surveyed and allocated to other families then resident and in occupation thereof.

5. The Plaintiffs aver that the land allocated to their Doka Kotse families is yet to be registered as the Defendants who are not part of their family insist on being assigned part of the land when they neither reside nor have they developed any portion thereof. The Defendants have since encroached upon the Plaintiffs land and embarked on an illegal process of forcefully taking possession thereof and hence the orders sought herein.

6. But in their joint Statement of Defence dated 21<sup>st</sup> November 2017 and filed herein on 22<sup>nd</sup> November 2017, the Defendants aver that some of the parties such as the 17<sup>th</sup> and 24<sup>th</sup> Defendants named only as "Mr. Kamunyu" and "Professor" respectively have not been sufficiently named and or described to facilitate their proper identification and urge the Court to strike out the names of the two from the suit.

7. The Defendants however dispute the Plaintiffs' assertion that the surrendered piece of land is yet to be sub-divided. On the contrary, they aver that the parcel of land known as Junju/Kilifi 79/IV/MN measures approximately 223 Ha and that both the Plaintiffs and the Defendants reside therein. It is further the Defendants case that some of the Plaintiffs, the Defendants and other parties not named in the suit occupy a portion known as Plot No. 720 within the suit premises.

8. Further and contrary to the Plaintiffs position that they only recently moved into the land, the Defendants aver that their forefathers have lived on and cultivated the land since 1802. Like the Plaintiffs, the Defendants also assert that they have equally buried their deceased relatives on the suitland save that both parties are bona fide squatters on the land occupying separate portions thereon. Accordingly, they urge this Court to dismiss the Plaintiffs' case with costs.

### **The Plaintiffs' Case**

9. At the trial herein, the Plaintiffs called a total of three (3) witnesses in support of their claim.

10. PW1- Jackson Katana Baya is a resident of Gongoni, Kolewa and the 1<sup>st</sup> Plaintiff herein. He told the Court the land initially belonged to his ancestors before one Arab by the name Ngao sold it to a "Mzungu". Their grandparents however continued residing on the land and the Mzungu later gave it to them as a gift.

11. PW1 testified that the Mzungu bought the land in the name of Vipingo Sisal Estate and that he (PW1) sued him in 1999 after which Vipingo Sisal Estate surrendered the land measuring 2000 acres to the Government in 2014 for redistribution to the squatters numbering about 830.

12. PW1 further testified that a Committee was put up for the purpose of redistribution by the Ministry of Lands and it was agreed that everyone would be given a portion of the land they had been occupying in a process referred to as "Jembe kwa Jembe". A surveyor was called to the land and PW1 told the Court the Plaintiffs who consists of about four (4) family members had authorized him to proceed with the suit for and on their behalf.

13. PW1 told the Court that after the sub-division, some people started complaining that the land given to the Plaintiffs was too big and they refused to leave the land. He told the Court the Defendants have been on the land since 2014 and urged the Court to remove them. A Surveyor went to the land in 2010 and prepared a Report dated 2<sup>nd</sup> August 2010. He further told the Court the Defendants had no houses on the land and that the pictures in their list of documents were taken elsewhere.

14. In cross- examination, PW1 conceded that the whole of Plot No. 79 did not belong to the Plaintiffs but they owned a section of it. He told the Court the land was divided based on pre-existing boundaries. When the Surveyor had gone to the land, he indicated that the area the Plaintiffs' family occupy is 172 acres.

15. PW1 further conceded that Robert Katana and Charles Duka Katana sued herein as the 8<sup>th</sup> and 9<sup>th</sup> Defendants are his brothers. He told the Court he sued his brothers because they were opposing his ideas and asserted that they were not part of those who occupied the 172 acres. He further told the Court his brothers wanted the land divided into several small pieces when he wanted them retained as one huge piece of land belonging to the family.

16. PW2- James Kalenga Mganga is a resident of Junju Location and a younger brother to PW1's father. He told the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are brothers. PW2 testified that the suit property was surrendered by Vipingo Estate to the Government on 20<sup>th</sup> September 2011. At the time the land comprised of 2852.0 acres. PW2 told the Court the land was surrendered due to the dispute between the Plaintiff and the said Vipingo Estates.

17. PW2 further testified that those who deserved to be given the land were squatters. Other than the Duka Kotse family, he told the Court that there were four other families being those of Kalama Charo, Dolo Tumbo, Dzongo Msinga and one Mwahumbi. The land is presently occupied by the Defendants and the Duka Kotse family.

18. PW2 told the Court that the land was divided "Jembe- Kwa Jembe", a process which meant that each one be given the portion their parents had been using before. The parties then invited a private surveyor who established that the land occupied by the Plaintiffs' family was 172 acres.

19. On cross examination, PW2 told the Court that the Defendants had been issued with titles for land belonging to the Plaintiffs. He maintained that after the adjudication process was completed everyone except the Duka Kotse family were issued with title deeds for their respective portions. While stating he was not part of the Plaintiff's family, PW2 told the Court he knew the facts as he had been a Councillor and resident of the area for a long period of time. He conceded that the 8<sup>th</sup> and 11<sup>th</sup> Defendants are members of the Plaintiff's family.

20. PW3- Edward Marenya Kiguru is a Licensed Surveyor in private practice. He told the Court he was requested by the Plaintiffs Advocates to carry out a survey of a parcel of land occupied by the family of the Plaintiffs. He undertook the survey and prepared a Report dated 2<sup>nd</sup> August 2013. He told the Court the family showed him the boundary and their land was 172.67 Acres (69.880 Ha).

21. On cross-examination, PW3 told the Court he was tasked with identifying the location of the property on the Map and the acreage of the land. Having been shown the perimeter boundaries, he observed that there were clusters of houses therein. The Plaintiffs family informed him they owned the houses. He told the Court his mandate did not extend to establishing the ages of the buildings.

### **The Defence Case**

22. The Defendants jointly called two (2) witnesses who testified in support of their case.

23. DW1- Erastus Ngala Lalai is a resident of Kolewa within the suit property. He told the Court the property was initially being used as a ranch by Rea Vipingo. Sometimes in the year 1993, the squatters started fighting for the ownership of the land and in the year 1999 or thereabouts the company surrendered the land back to the Government upon expiry of their Lease for the settlement of squatters.

24. DW1 testified that the then District Land Adjudication Officer one Ezekiel Kianye, then asked the squatters to form a committee to identify the real squatters. DW1 was subsequently elected the Chairman of the Committee. Thereafter the Committee went round to identify the beacons and boundaries and to ascertain the real squatters with a genuine claim to the land.

25. DW1 further told the Court they thereafter prepared a Report which identified both the Plaintiffs and the Defendants as genuine squatters on the land. Some of the squatters were however not happy with their work and DW1 was relieved of his duties as the Chair in 2015. The 1<sup>st</sup> Plaintiff herein was one of those opposed to DW1's leadership and he came to Court to stop the distribution claiming that the land belonged to his ancestors. DW1 told the Court that he was surprised with this case as the 8<sup>th</sup> and 9<sup>th</sup> Defendants are the 1<sup>st</sup> Plaintiffs brothers.

26. On cross examination, DW1 told the Court that by the time the matter came to Court, they had distributed a total of 2679 acres with only about 100 acres more to be distributed. Everyone was being given the portion they were utilizing in a process described

as “Jembe-Kwa Jembe”. He insisted there are many other families resident in the area and it was not just the Plaintiffs’ family who occupied the land. He told the Court a total of 367 Ha was surrendered.

27. DW2- David Kahindi Samson is the Area Chief, Junju Location, Kilifi South. He told the Court he had been the Area Chief for ten years and that he knew about the dispute.

28. DW2 testified that sometimes in the year 2008, Vipingo Property Ltd surrendered to the Government three parcels of land for squatter settlement. The parcels were situated at Bureni and Gongoni Villages under Plot No. Sub-division No. 693 Section IV MN measuring approximately 367.7 Ha.

29. DW2 told the Court that the Kilifi District Land Adjudication and Settlement Officer among other land officers then went to the area and formed committees to identify the genuine squatters residing within the parcels of land. DW2 told the Court that the exercise identified both the Plaintiffs and the Defendants herein as genuine squatters and they were then listed as beneficiaries.

30. DW2 told the Court that later on, the 1<sup>st</sup> Plaintiff and some members of his family started making false claims that part of the land belonged to his ancestors. He went ahead to file this suit. DW2 however told the Court the Plaintiffs had never made any such claim prior to the surrender of the property by Vipingo Ltd. He asserted that the Plaintiffs were just squatters like the other residents.

31. On cross examination, DW2 told the Court he does not own any land in the area although some of his family members own land which they cultivate in the area. He however told the Court none of his family members had been sued herein.

32. DW2 further told the Court that more than half the area had been distributed when the Plaintiff came to Court and the distribution stopped. He reiterated that there were many families living on the land and conceded that there could have been cases involving the land before it was surrendered. He was however not aware that Vipingo were made to surrender the land because of any civil suit filed against them.

### **Analysis and Determination.**

33. I have perused and considered the Plaintiffs case and the response thereto by the Defendants. I have accordingly taken into consideration the evidence adduced by all the witnesses who testified herein, the evidence produced and the submissions as well as authorities placed before me by the Learned Advocates for the respective parties.

34. The Plaintiffs have instituted this suit seeking inter alia, a declaration that they are the rightful and lawful owners of all that parcel of land known as Junju/Kilifi 79/IV/MN said to be measuring 172.28 acres. The Plaintiffs urge the Court to declare that the occupation of the said portions of land by the Defendants herein amounts to trespass and they accordingly pray for a permanent order of injunction restraining the Defendants from encroaching upon, accessing, remaining upon, and dealing in any manner with the said property.

35. It is the Plaintiffs’ case that they have been in occupation of the suit property from time immemorial, that they have developed and cultivated the same and have buried their departed loved ones from as far back as the year 1818. The Plaintiffs told the Court that when they came to learn that the said property had been registered in the name of a third party- Vipingo Properties Ltd, they instituted a civil suit against the said third party as a result whereof the third party surrendered a portion of land measuring approximately 2,679.75 acres of land to the Government of the Republic of Kenya for the purposes of registering and formally transferring the same to the occupant squatters.

36. The Plaintiffs told the Court that pursuant to the said surrender of land, the community of squatters resident on the suit property established a committee under the instructions of the Ministry of Lands to see to it that the land surrendered was divided in accordance with the wishes of the people based on their historical rights.

37. In this respect, the Plaintiffs told the Court that the community agreed to share the land in a process that came to be known locally as “Jembe -Kwa -Jembe”, which process entailed the assignment of the land to each person taking into consideration the actual area they occupied or dwelt in on the ground. Using that formula, the Plaintiffs told the Court the Committee proceeded to sub-divide the land whereupon a portion measuring 172.25 acres was allocated to the Plaintiffs who jointly belong to the Duka

Kotse family. The balance of the land was then surveyed and allocated to other families also resident in the area.

38. The Plaintiffs told the Court that after the allocation of the land to themselves, they moved to have the same registered in their family name. To their shock and dismay however, their efforts to register the land were thwarted when a group of strangers who do not belong to their family resisted the move and insisted on being assigned part of the 172.25 acres allocated to the Plaintiffs.

39. The Defendants do not dispute being on the land. Contrary to the Plaintiffs claim that they recently moved into the land however, they also claim to have been on the land since the year 1802 and that they have also peacefully lived on the land, developed it and buried their loved ones thereon.

40. The Defendant also assert that their own families have been squatters on the land for a long period and that it originally belonged to an Arab who subsequently sold it to Rea Vipingo Estates Ltd before it was eventually surrendered by the company for the settlement of squatters. The Defendants deny that the Plaintiffs and/or their families have been the sole occupants of the land and urge the Court to dismiss their case and to allow the process of sub-divisions which had commenced to be completed in order to enable their registration as the owners of their respective portions.

41. From the testimonies of the witnesses herein, it was apparent that both the Plaintiffs and the Defendants claim to be the owners of the suit property by virtue of being squatters and arising from their long stay thereon. While the Plaintiffs told the Court that the Defendants are strangers to the suit property who did not deserve any portion thereof, the Defendants took the position that the Plaintiffs had their own distinct and separate portion of the land but now wanted to acquire the entire land including the portion occupied by the Defendants.

42. While either party claimed to have been on the disputed parcel of land for well over a century, none of them provided me with any evidence to that effect. Both parties however were in consensus that the disputed property previously belonged to a family of Arabic descent before it was sold to their benefactor-invariably referred to herein as Rea Vipingo Estate Ltd or Rea Vipingo Properties Ltd or Rea Vipingo Plantations Ltd (hereafter Rea Vipingo).

43. There was indeed no dispute that the suit property was at all times material to this suit registered in the name of the said Rea Vipingo which company decided to surrender the same to the Government of the Republic of Kenya for the settlement of Squatters. While the Defendants did not offer any explanation as to how the land came to be surrendered, the 1<sup>st</sup> plaintiff told this Court that when they realized that their parcel of land had been registered in the name of the said Rea Vipingo, they instituted a suit which culminated in the surrender of the suitland.

44. As it were, the Plaintiffs neither provided me with the particulars of the said suit nor any orders emanating to the surrender. From the correspondence produced by both parties however, it was clear to me that Rea Vipingo had been in discussion with the Government over a long period of time and that on their own volition, they decided to surrender a portion of their property for the settlement of squatters at the request of the Government upon expiry of their initial lease.

45. That much can be discerned from a letter dated 28<sup>th</sup> September 2001 from Vipingo Estates Ltd wherein the company's Director F. Kaesthi addressed the District Commissioner Kilifi District in the relevant section as follows:

***“Attached herewith please find a copy of an Estate Map showing the parcels of land to be handed over to the Kilifi County Council for settlement of squatters. This exercise has been going on since 1997/1998.”***

***The surrender documents, handled by our lawyers, Kaplan & Stratton of Nairobi are well in progress and we hope, in due course, they will be handed over to the Trustee Settlement Scheme through the Government of Kenya.***

***The areas to be handed over are.....(listed).”***

46. That process of surrender appears to have lasted until sometime in the year 2008 when the company surrendered the property by way of gift to the Settlement Fund Trustees, a Statutory Corporation established under Section 167 of the Agriculture Act, Cap 38 of the Laws of Kenya.

47. Arising from the testimonies of both parties and the correspondence placed before me, it was discernible that the Government

then decided to distribute the land under the Land Adjudication Act, Cap 284, Laws of Kenya and in that regard established a Squatter Settlement Scheme within the area. That would explain the position taken by both parties herein that after the surrender, the residents came up with adjudication committees under the Ministry of Lands for purposes of distribution and sub-division of the surrendered land.

48. It was clear to me from the evidence placed before me that those committees agreed to allocate land to the resident squatters based on the acreage of land they had previously been utilizing in what was referred to by the locals as “Jembe- Kwa- Jembe”. According to the 1<sup>st</sup> Plaintiff (PW1), his family proceeded to identify their boundaries through that process after which they acquired the services of a private Surveyor who then surveyed the land and told them that their portion was 172.25 acres. It is that size of the land that the Plaintiffs demand to be declared as their own herein on the basis that the same was their ancestral land.

49. The private Surveyor engaged by the Plaintiffs herein was Edward Marenya Kiguru who testified herein as PW3. It was his testimony that the Plaintiffs Advocates engaged him to carry out a survey of a parcel of land occupied by the family. On Cross examination however, it became clear that he was asked to identify the location of the property on a Map upon being shown by the Plaintiffs what they told him to be the boundaries of their land. The Defendants were clearly not involved in the Survey and I was unable to attach much significance to the Surveyor’s Report dated 2<sup>nd</sup> August 2013.

50. It was indeed evident that while the Plaintiffs claimed that their family occupied the 172.25 acres, there was no evidence from the District Land Adjudication and Settlement Officer who was on the ground during the exercise of adjudication that their family occupied any land of that size that was ascertained under the “Jembe- Kwa- Jembe” process that was being used to allocate land in the area.

51. It was indeed telling that while the suitland had by the process of surrender now become Government land, the Plaintiff did not enjoin the Ministry of Lands or any other Government official in their claim for what they term their ancestral land. Instead, it was clear that for some unclear reason the Plaintiffs felt that they had more entitlement to the land in comparison to the other squatters in the area. That is clear from a letter in their List of Authorities dated 16<sup>th</sup> August 2012 addressed to the District Land Officer Kilifi in which they claimed to be the genuine squatters in the land to whose families the land was surrendered.

52. When they failed to have their way with the District Land Officer, the Plaintiffs instructed Mushelle & Company Advocates who by a demand letter dated 19<sup>th</sup> April 2013 wrote to the District Officer Kikambala Division claiming there were strangers or outsiders who were attempting to encroach on the land. The Plaintiffs then demanded that the adjudication process be stopped on account that the Committee Chair was siding with their adversaries.

53. Arising from the foregoing, it was apparent to me that of the two groups herein, it is the Plaintiffs who disrupted the adjudication exercise. As at that time, no parcel of land had been adjudicated or allocated to them by the Government. Indeed, while the 1<sup>st</sup> Plaintiff in particular claimed that the land they claimed belonged to his family, it was clear that he just had his own grievances and wanted more of the land to be allocated to himself.

54. I say so because at the trial herein, it did emerge that the 8<sup>th</sup> and 9<sup>th</sup> Defendants herein are the 1<sup>st</sup> Plaintiffs blood brothers. When asked why he had sued his own brothers and termed them as strangers and outsiders in their pleadings herein, the 1<sup>st</sup> Plaintiff retorted that his brothers had opposed his ideas. He further told the Court that his family would decide if the 8<sup>th</sup> and 9<sup>th</sup> Defendants had any entitlement to the 172.25 acres they are claiming. That was a clear demonstration that those sued by the Plaintiffs herein were not people who had come from elsewhere to take advantage of the surrender of the land by Vipingo Ltd but fellow squatters whom the 1<sup>st</sup> Plaintiff in particular had disagreed with.

55. In his letter dated 11<sup>th</sup> May 2015 addressed to their Civil Litigation Department, Mombasa following the Plaintiffs threats to sue, the Kilifi District Land Adjudication & Settlement Officer Felix M. Kiteto captured the situation on the ground as follows after the surrender:

***Re: Civil Suit No. 229 of 2014***

***Matter of Sub-division and Allocation of Plot No. 79 Section 4 Mainland North Junju Sub-Location Kilifi County***

***“The Government through the Ministry of Lands, mandated the Settlement Funds Trustees to carry out a ground survey, sub-***

*divide and allocate it to local squatters as beneficiaries.*

*A Committee comprising of 18 members were appointed and the scheme was named as Gongoni Squatters Settlement Scheme whereby sub-division was done totaling to 724 plots as shown on the Map (RIMS).*

*A list of identified beneficiaries has been compiled soon to be forwarded to the Director of Land Adjudication and Settlement for issuing of letters of offer and finally title deeds.*

*Due to misunderstanding within the identified beneficiaries out of the total 223 Ha a portion of the land measuring approximately 51.9 Ha was hived off and identified as P/No 720. This office has held several meetings with an aim of solving the disputes amicably. The meetings has been very successful whereby the identified beneficiaries have accepted to proceed with Sub-division of Parcel No. 720 to ninety six beneficiaries as per a copy of the list attached including the complainant with his family members (as marked).*

*The minutes of the meeting held on 8<sup>th</sup> April 2015, copies attached resolved for the continuation of the exercise as from 5<sup>th</sup> May 2015.*

*The complainant and his family members were considered among other beneficiaries. If his claim is taken into consideration, then the ninety-six beneficiaries will miss allotment letters of offer and finally the Section will not be registered contrary to the government commitment policy of settling and issuing title deeds to squatters.”*

56. Arising from the foregoing, it was clear to me that there was no way this Court can declare the suitland as belonging to the Plaintiffs. As matters stand, the Plaintiffs are mere squatters in land which has since been gifted to, and is therefore, for the time being, Government land for all intents and purposes. The Plaintiffs have not placed anything before me to demonstrate that they have any superior interests on the land as compared to their fellow squatters presently on the land.

57. In the course of the trial herein, the parties agreed on 14<sup>th</sup> June 2018 to have the District Surveyor Kilifi to undertake a survey of the land in dispute with a view to determining the prevailing situation on the ground. The District Surveyor Athman Ngoka did carry out a survey and prepared a Report dated 16<sup>th</sup> July 2018. That Report, filed herein on 9<sup>th</sup> July 2018 established that both the Plaintiffs and the Defendants herein reside within the suit property.

58. The said Report clearly marks out the area occupied by the Defendants. It is clear from the said Report that the Plaintiffs only occupy a section measuring about 8.26 Ha and not the 127.25 acres claimed. Some of the Defendants have indeed since been issued with Title Deeds following the adjudication process that had been commenced and the Plaintiffs have not sought a cancellation of those titles.

59. In the premises, I was not persuaded that there was any merit in the Plaintiffs case. The same is dismissed with costs to the Defendants.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of November, 2020.**

**J.O. OLOLA**

**JUDGE**



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