



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 336 OF 2016**

**DANIEL MBOGO KALUME.....PLAINTIFF**

**VERSUS**

**STEPHEN KAHINDI T/A LUNA PUB.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By his Complaint dated and filed herein on 9<sup>th</sup> December 2016, Daniel Mogo Kalume (the Plaintiff) prays for Judgment against the Defendant for:-

***a) A permanent injunction restraining the Defendant from encroaching on the private road reserve accessing Plot No. MN/III/1098;***

***b) An order for demolition of the part of the defendant's structure which has encroached on the private road reserve accessing Plot No. MN/III/1098; and***

***c) Any other relief that this Court may deem fit to grant.***

2. Those prayers arise from the Plaintiff's contention that he is the registered proprietor of a piece of land known as Plot No. MN/III/9146 which has been sub-divided into several plots for purposes of sale. In the process of the sub-division, a private road was created and carved out as Plot No. MN/III/10987 to enable each prospective owner to have access to his plot of land.

3. The Plaintiff avers that without any lawful excuse or authority, the Defendant has encroached on the said Plot No. MN/III/10987 where he insists on constructing a bar. Despite warnings by the authorities not to do so, the Defendant has persisted on the construction thereby necessitating this suit.

4. The Defendant, named herein as Stephen Kahindi t/a/ Luna Pub denies the Plaintiff's claim. In a Statement of Defence and Counterclaim dated 25<sup>th</sup> May 2017 as amended on 23<sup>rd</sup> October 2018 he avers that sometime in 1999, he purchased a plot measuring 54ft by 50ft whereupon he proceeded to construct a building.

5. It is the Defendant's case that he has ever since been letting the premises to various tenants who have been running the business of a bar and restaurant under various names such as Chomaland, Luna Pub and Big Apple Lounge.

6. The Defendant avers that the portion of land he purchased and he built on was carved off the larger Plot No. 742/III/MN which was later sub-divided into Plot Nos. MN/III/9146 and MN/III/4206. The Defendant further avers that as at the time of the sub-division which was done secretly and without his knowledge, he had already built and developed his plot of land which now falls within MN/III/4206.

7. The Defendant further avers that having acquired and developed his Plot No. 742/III/MN with the full knowledge and blessings of the Plaintiff's brother and mother (both of whom are now deceased) prior to the sub-divisions, he ought to have been involved and the sub-divisions ought to have been carried out with regard being given to his interests in the suit plot.

8. By way of Counterclaim, the Defendant asserts that he had during the lifetime of the Plaintiff's brother Shaban Kalume who sold the suitland requested to have the same carved out and transferred to him but the Plaintiff and his said family members were cagey and evasive on the issue. Accordingly the Defendant prays that the Plaintiff's suit be dismissed with costs and that Judgment be entered in his favour for:-

**a) A declaration that the sub-division of Plot No. 742/III/MN and thereafter Plot No. MN/III/9146 was unlawful and therefore null and void ab initio.**

**b) An order that Plot Nos. 742/III/MN, MN/III/9146 and MN/III/4206 be sub-divided afresh to carve out the Defendant's plot which measures 50ft by 54ft and the Plaintiff be compelled to transfer the same to the Defendant failure to which the Deputy Registrar be duly authorised to do so on behalf of the Plaintiff.**

**c) Costs of the suit and the Counterclaim.**

### **THE PLAINTIFF'S CASE.**

9. At the trial herein, the Plaintiff (PW1) testified as the sole witness in his case. He testified that he is the registered proprietor of Plot Number MN/III/9146. In or about 2014, he instructed PM Karanja Surveyor to sub-divide the said parcel of land. Accordingly Plot No. MN/III/9146 was split into Plot Numbers MN/III/10986; 10987; 10988 and 10989.

10. PW1 further testified that upon completion of the sub-divisions, the Surveyor placed beacons on the respective parcels of land. It thereafter came to his attention that the Defendant who was constructing a bar and restaurant had encroached on Plot No. MN/III/10987 and removed the beacons placed thereon by the Surveyor. PW1 then asked the Surveyor to re-look at the land and prepare a Report. The Surveyor prepared a Report dated 30<sup>th</sup> November 2016 confirming that the Defendant had encroached on the road reserve used to access Plot No. MN/III/10987.

11. During cross-examination, PW1 told the Court that the Defendant's house is on Plot No. 4206 and that he had bought the house without land from his elder brother Shaban Kalume who has since died. He further told the Court that the Defendant had authority to build the house and that he (PW1) was the Administrator of his brother's estate.

### **THE DEFENCE CASE**

12. The Defendant (DW1) equally testified as the sole witness in his case. DW1 told the Court that he knew the Plaintiff way back in 1991. He would later acquire the suit property in September 1994 after purchasing the same from one Grace Taabu. DW1 testified that when he purchased the land, it had a building which DW1 then refurbished and let out as a Bar and Restaurant.

13. DW1 further told the Court that in 2014, the building's makuti roof got burnt and DW1 repaired it after about two years. In 2016, DW1 renovated the house on the same spot where it was. DW1 denied encroaching on any road reserve. He further told the Court that despite the Plaintiff knowing that he had bought the land from one of his sisters, nobody ever told him about the sub-divisions that were done.

14. DW1 testified that he only learnt about the survey when the Plaintiff went to him claiming the building was half -way on the road.

15. In cross-examination, DW1 told the Court that he bought the land for Kshs 100,000/-. He denied having bought the home without land. He further told the Court that the Vendor never gave him any documents in regard to the ownership of the land.

### **ANALYSIS AND DETERMINATION**

16. I have perused and considered the pleadings filed herein, the oral testimony of the witnesses and the evidence placed before me at the trial. I have also keenly studied the written submissions and the authorities filed herein by the Learned Advocates for the parties.

17. It is the Plaintiff's case that at all times material to this suit he was the registered owner of all that parcel of land known as Plot No. MN/III/9146. At some point in time in 2014, he engaged Messrs PM Karanja Surveyor to sub-divide the said parcel of land. As a result of the subdivisions, the parcel of land was divided into four portions being:-

**i) MN/III/10986**

**ii) MN/III/10987**

**iii) MN/III/10988 and**

**iv) MN/III/10989**

18. The Plaintiff told the Court that upon completion of the sub-divisions, the Surveyor placed beacons thereon. Thereafter, it came to the Plaintiff's attention that the Defendant who was in the process of constructing a bar and restaurant had encroached on Plot No. MN/III/10987 and removed the beacons placed thereon by the Surveyor.

19. On the other hand, the Defendant told the Court that he had acquired a plot of land measuring 54 ft by 50 ft which plot was carved off the parcel of land which was then known as MN/III/742 way back in the year 2000. He produced a Copy of a Sale Agreement dated 14<sup>th</sup> September 2000 between himself and one Grace Taabu Kabaila.

20. A perusal of the said Agreement, headed Transfer of Plot Lease reveals the Defendant acquired the property for a consideration of Kshs 100,000/- and that he was to pay a monthly rent of Kshs 200/- to the Landlord who is named therein as Shabani Kalume.

21. According to the Defendant, as at the time he purchased the property, it had a building which he refurbished and let out to other tenants who operated a Bar and Restaurant business thereon. The defendant told the Court that the building made up of a makuti thatch partially got burnt sometime in 2014 and that it was later on when he proceeded to repair the same that the Plaintiff started accusing him of encroachment on the private road.

22. Indeed from the material placed before me, it was evident that the dispute started when the Defendant started renovating the premises. While the Plaintiff claims in the suit herein that the Defendant encroached upon an access road leading to Plot No. MN/III/10987, it was clear to me that the building complained about was on the land along time back before the sub-divisions were done in 2015.

23. It was further evident that the Defendant had been letting out the building to various tenants who ran it under various names such as Chomaland, Luna Pub and Big Apple Lounge. The Defendant has in this respect produced a number of tenancy agreements he had with different tenants from as far back as 1<sup>st</sup> July 2005 in relation to the said suit premises.

24. Indeed during his cross-examination and contrary to his earlier position, the Plaintiff admitted that the Defendant acquired the suit premises with the blessings of his elder brother Shaban Kalume who has since passed away. He further told the Court that the Defendant had the authority of his brother to build a house that was on the land.

25. In view of the foregoing, it was extremely pretentious for the Plaintiff to turn around some 15 years later and after the death of his brother to turn around and accuse the Defendant of encroachment on the suit premises. It was clear to me that as at the time he commissioned Messrs PM Karanja Surveyors in 2015 to survey and sub-divide the land, he was not only aware of the Bar and Restaurant business being carried out by the Defendant on the land but also the circumstances under which the Defendant came into possession thereof.

26. A perusal of the Survey Report dated 30<sup>th</sup> November 2016 and the attached Survey Plan (Pexh 3 and 4) confirms that indeed the same was carried out when the impugned building and several others marked thereon as 'A', 'B', 'C' and 'D' were already on the ground.

27. Arising from the foregoing, the claim by the Plaintiff that the Defendant unlawfully and without his authority encroached on the suit premises and insisted on constructing the bar and restaurant thereon is therefore malicious and without any basis in fact and in law.

28. On his part, the Defendant contended that he purchased the suit property and that despite his attempts to have the Plaintiff's family transfer the same to him, the family had been evasive and "cagey" about it. He accordingly urged the Court to order that Plot Nos. 742/III/MN, MN/III/9146 and MN/III/4206 be sub-divided afresh to carve out his plot measuring 50ft by 54ft and that the said portion be transferred to his name.

29. I have studied the Agreement between the Defendant and the said Grace Taabu Kabaila dated 11<sup>th</sup> July 2000 together with the Transfer of Plot Lease dated 14<sup>th</sup> September 2014. That Transfer reads in part as follows:-

***"I Grace Tabu Kabaila....***

***Being the owner of Plot situated within Plot No. 742/III/MN Mtwapa Location in Kilifi District***

***In consideration of Kshs 100,000/- paid to me by Mr. Stephen Kahindi Thoya***

***Do hereby transfer ownership of the above mentioned plot together with the tenancy of the above named person.....***

***The tenancy governs the monthly payments which is currently Kshs 200/- per month and is renewable and payable to the Landlord."***

30. The transfer was then signed not only by Grace and the Defendant but also at the end thereof by the Landlord who is named therein as Shabani Kalume. Both the Plaintiff and the Defendant agree that the said Shabani Kalume was not only a brother of the Plaintiff but that he has since passed away.

31. While the Defendant did not explain in what circumstances the said Shabani executed the transfer as Landlord, the Plaintiff while conceding during cross-examination that the building on the suit property was put up with the authority of his elder brother, also told the Court that the concerned portion of land belonged to his said brother. It was further the Plaintiff's testimony that the Defendant herein had bought the house without land.

32. None of the parties herein addressed this aspect of the dispute in their submissions. The concept of owning or buying a house without land is however a common practice in this Coastal region where a building of the type in issue herein is erected on the land belonging to another person in consideration of a monthly rent.

33. Upon a careful perusal of the Transfer dated 14<sup>th</sup> September 2000, it is apparent to me that the intention was not to sell the land to the Defendant otherwise there would be no reason why he was being required to pay a monthly rent of Kshs 200/- to the Plaintiff's elder brother Shaban Kalume who is shown therein as the Landlord. As it were, the said Shabani is now said to be deceased and while the Plaintiff claimed to be the Administrator of his estate, no evidence was placed before me to that effect and/or that as such Administrator, he had sought to terminate the lease.

34. In the premises, I was also not persuaded that there was merit in the Defendant's Counterclaim.

35. Accordingly I hereby make the following orders:-

*a) The Plaintiff's suit is hereby dismissed with costs to the Defendant; and*

*b) The Defendant's Counterclaim is dismissed with no order as to costs.*

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**