



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 78 OF 2012**

**1. DZAME MUMBA KONDE (a.k.a RUTH DZAME MUMBA)**

**2. STEVE MUMBA (Suing as the Administrator and Legal Representative of the Estate of**

**MAURICE KAMBISHERA MUMBA(DECEASED).....PLAINTIFFS**

**VERSUS**

**DENIS CHAMOTO SHERA (alias JITI).....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By their Plaint dated 23<sup>rd</sup> May 2012, Dzame Mumba Konde (AKA Ruth Dzame Mumba) and Steve Mumba suing as the Administrators and Legal Representatives of the Estate of Maurice Kambishera Mumba (the Plaintiffs) pray for Judgment against Denis Chamoto Shera (alias Jiti) (the Defendant) for: -

***(i) A declaration that the Defendant is not entitled to enter upon, remain or deal with and use in any manner whatsoever the land known as Sub-Division Number 3143 (O. No. 284/174) of Section III MN, the property of the Estate of Maurice Kambishera Mumba;***

***(ii) An order of ejectment from the said land (be) issued against the Defendant and any other person claiming under or through him, requiring him/them to remove at his/their expense the temporary illegal structure erected on sub-division No. 3143 (Original. No. 284/174) Section III MN, so as to restore it to its original state;***

***(iii) .....spent***

***(iv) An order for general damages against the Defendant for the original trespass and for his remaining in occupation and use of the temporary illegal structure for profit;***

***(v) An order for an account against the Defendant for unjust enrichment, and a direction that an inquiry is undertaken and the Defendant pays to the Estate of Maurice Kambishera Mumba mesne profits for use of the suitland and income accruing from the structures erected on the suitland for the entire period the structure will remain on part of the land; and***

***(vi) Costs of and incidental to this suit.***

2. The Plaintiffs prayers listed herein arise from their contention that the suit property which measures approximately 0.0624 Ha situated at Majengo- Kanamai Township in Kilifi County is registered in the name of the said Maurice Kambishera Mumba (deceased). On some dates unknown to the Plaintiffs in the year 2005, the Defendant erected a house without land on a section of a road reserve and in 2009 he wrongfully broke, entered upon and commenced extension of his temporary structure on a portion of the suit property.

3. The Plaintiffs aver that despite repeated requests urging the Defendant to desist from the acts of trespass and to vacate and remove his illegal structure from the suitland, he has failed or refused to oblige and is still continuing with his trespass. In addition, the Defendant is using the temporary structure as a rental house from which he draws rental income and is thus liable to account to the estate of the deceased for the use thereof.

4. The Plaintiffs assert that the Defendant has refused to recognize the deceased title to the suit property and that by reason of the matters enumerated, the Plaintiffs and the estate of the deceased have suffered loss and damage.

5. In his Statement of Defence and Counterclaim dated and filed herein on 21<sup>st</sup> June 2012 however, the Defendant denies all the averments contained in the Plaint and invites the Plaintiffs to a strict proof thereof. In particular, the Defendant asserts that the area of land which he occupies is not part of the Plaintiffs' land and states that the same falls on a Road Reserve.

6. Further and in addition to the foregoing, the Defendant avers that the deceased obtained title to the suit property through fraud and by way of his counterclaim urges the Court to proceed to dismiss the Plaintiffs' suit with costs and to enter Judgment for: -

***(a) (A Declaration) that the parcel of land known as Plot No. 3143/III/MN, falls within a Road Reserve and therefore no valid title can be issued;***

***(b) A declaration that the Defendant is on a public land and therefore cannot be evicted by the Plaintiffs; and***

***(c) Costs of this suit.***

### **The Plaintiffs' Case**

7. At the trial herein the Plaintiff called a total of three (3) witnesses who testified in support of their case.

8. PW1- Dzame Mumba Konde is the 1<sup>st</sup> Plaintiff and a housewife resident in Mtwapa. She told the Court the 2<sup>nd</sup> Plaintiff is her son and that the suit property is registered in her husband's name. PW1 testified that the Defendant and two other people trespassed upon the suit property before her husband Maurice Kambishera Mumba passed away in 2011.

9. PW1 testified that her late husband never authorized the Defendant to enter the land and that on 24<sup>th</sup> January 2011, he was given a notice to vacate but he refused claiming they were living on a road reserve. The Defendant had since proceeded to build a church on the land.

10. PW2- Edward Marenye Kiguru is a Licenced Land Surveyor practicing in Mombasa. He testified that in July 2019 he received instructions to survey the suit property located in Majengo Kanamai within Kilifi County. The purpose of the survey was to re-locate the boundaries of the parcel of land and to determine if there were any encroachments.

11. PW2 testified that he carried out the survey and submitted a Report dated 16<sup>th</sup> July 2019. That Report identifies some encroachments on the suit property. PW2 told the Court he also took photos and that there were seven structures that had encroached by different measurements on the property including the one belonging to the Defendant.

12. PW2 further told the Court the Plaintiffs' parcel of land is between two road reserves but the property itself is not on a road reserve. He however told the Court that the Defendant's structure encroaches upon a road reserve.

13. PW3- Mathias Juma Lewa is the Assistant Chief of Majengo- Kanamai Sub-Location wherein the suit property is located. He told the Court he was aware of the late Maurice Kambishera Mumba owned the parcel of land which was near his former office. At some point in time, some people started building structures on the land and the deceased lodged a complaint. The trespassers were then told to stop but they did not.

### **The Defendant's Case**

14. On his part, the Defendant(DW1) testified as the sole witness on his case at the trial herein. DW1 denied that he had invaded anyone's land. On the contrary, he told the Court he had bought the parcel of land from one Moses Kariuki in 2005 and that there were many neighbours who were present when he bought.

15. DW1 told the Court the late Maurice Kambishera once tried to evict him from the land claiming the land was his own. DW1 told the Court his parcel is between the road and the deceased's parcel of land and that he had put in a foundation thereon in 2005. DW1 told the Court the parcel he occupies is a road reserve and that the Plaintiffs have no ownership rights thereon. He further told the Court there were many people living on the road reserve and that he did not understand why the Plaintiffs had only sued him as an individual.

16. On cross –examination, DW1 testified that he had bought the house which was on the land in 2005. He told the Court they had signed an Agreement but conceded that the seller did not show him any ownership documents. DW1 further told the Court the Plaintiffs did not get the land in a regular manner even though he did not have anything to show that the acquisition was fraudulent.

17. DW1 further told the Court he was there when the Plaintiffs' Surveyor visited the land. He dismissed the Report as being full of falsehoods.

### **Analysis and Determination**

18. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses as well as the evidence adduced at the trial. I have equally perused the written submissions as filed herein by Ms Ruttuh, Learned Counsel for the Plaintiff. I was unable to find any submissions filed by the Defendant.

19. The two Plaintiffs herein are respectively the widow and son of the late Maurice Kambishera Mumba who passed away on 11<sup>th</sup> April 2011. Following his death, the Plaintiffs instituted **Succession Cause No. 150 of 2011 at the High Court at Mombasa**. On 6<sup>th</sup> July 2011, they were issued with a Limited Grant of Letters of Administration which they then used to institute these proceedings on 23<sup>rd</sup> May 2012.

20. While the Defendant cast aspersions on how the deceased came to be registered as the proprietor of the suit property, it was not in dispute that as at the time of his death, Maurice Kambishera Mumba was the registered proprietor of the parcel of land described as Plot No. 3143/III/MN measuring some 0.0624 Ha in size.

21. It is the Plaintiffs' case that sometime in the year 2005, the Defendant erected a house without land on a section of a road reserve adjacent to the suit property situated at Majengo-Kanamai within Kilifi County. The Plaintiffs further told the Court that sometimes in the year 2009, the Defendant wrongfully extended the construction of his temporary structure onto a portion of the suit property and that despite repeated requests to vacate the same and desist from the acts of trespass, the Defendant has failed and or refused to do so and persists to-date in his trespass.

22. The Defendant did not deny that he has erected the said structures. It was however his case that the portion upon which he had erected his structures is a road reserve and that the Plaintiffs have no ownership rights to the said portion and cannot therefore ask for his eviction therefrom. The Defendant further told the Court that the suit property falls on a road reserve and accused the late Maurice Kambishera Mumba of acquiring the same fraudulently.

23. As it were, Section 107 of the Evidence Act provides as follows: -

***“Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.”***

***2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”***

24. At the same time, Section 109 of the Evidence Act stipulates that: -

***“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 that fact shall lie on any particular person.”***

25. Given the above provisions, it was interesting to note that while the Defendant accused the Plaintiffs of obtaining title to the suit property by way of fraud, he did not even make an attempt to present any evidence of such fraud. On the contrary he conceded during his cross-examination that he had no evidence to back the allegations of fraud leveled against the Plaintiffs.

26. There is no doubt that fraud is a serious accusation. It must not only be pleaded but proved. As the Court of Appeal stated in **Kinyanjui Kamau –vs- George Kamau (2015) eKLR**: -

***“.....It is trite law that any allegation of fraud must be pleaded and strictly proved.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts...”***

27. Similarly, in **Vijay Morjaria –vs- Nansing Madhusing Darbar & Another (2000) eKLR**, the Court of Appeal observed as follows: -

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

28. In the matter before me, the Defendant has only made vague and general allegations of fraud in his pleadings and no attempt was made whatsoever to prove the same in the course of the trial. It follows therefore that the Defendant has failed to discharge the legal burden of proof as far as the allegations of fraud are concerned.

29. On his contention that the suit property was on a road reserve and that his structures are also on a road reserve, the Defendant again conceded that he had no evidence in support of that contention. The Plaintiffs on their part did call a Surveyor (PW2) who testified that even though the suit property bordered a road reserve, the same was not on a road reserve. Indeed, PW2 produced herein his Survey Report dated 16<sup>th</sup> July 2019 which Report points out the position of the suit property. That Report further shows that the Defendant's structures including a church he is said to have built are on a road reserve and that the same encroach the suit property by various degrees.

30. That being the case, this Court can only but uphold the Plaintiff's title. Section 26 (1) (a) and (b) of the Land Registration Act, 2012 exhorts this Court to do so in the following manner: -

***“(1) The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate, and the title of that proprietor shall not be subject to challenge, except-***

*a) On the ground of fraud, or misrepresentation to which the person is proved to be a party; or*

*b) Where the Certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

31. Having found that no evidence was adduced by the Defendant to impeach the Plaintiffs' title, it follows that I do find merit in the Plaintiffs case and find no basis for the Defendant's Counterclaim.

32. In the premises, I hereby dismiss the Defendants Counterclaim and allow the Plaintiffs claim as follows: -

*i) A declaration be and is hereby issued that the Defendant is not entitled to enter upon, remain or deal with and use in any manner whatsoever the land known as Sub-Division No. 3143 (Original No. 284/174) of Section III MN, the property of the Estate of Maurice Kambishera Mumba.*

*ii) An order of ejectment from the said land be and is hereby issued against the Defendant and any other person claiming under or through him, requiring him/them to remove at his/their expense the temporary illegal structure erected on Sub-Division No. 3143 (Original No. 284/174) Section III MN, so as to restore it to its original state within 45 days failure to which the Plaintiffs may proceed to remove the said structures at the Defendant's expense.*

*iii) General Damages for trespass assessed at Kshs 500,000/-.*

*iv) The Plaintiff shall have the costs of the suit and of the Counterclaim.*

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE