



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CIVIL CASE NO. 38 OF 2017**

**FREDRICK ALUSHULA MUSITA ..... 1<sup>ST</sup> PLAINTIFF**

**JOHANNES STROH BERGE ..... 2<sup>ND</sup> PLAINTIFF**

**= VERSUS =**

**KAZEHA NGALA .....DEFENDANT**

**J U D G E M E N T**

1. By a plaint dated 14<sup>th</sup> February 2017, the two plaintiffs brought this suit claiming that the defendant had constructed structures which blocked the passage/road that serves their property L.R No. 11535 (Original No. 3264/2) Section I Mainland North. The plaintiffs pleaded that the passage/road also enable members of the public to access the public beach. The plaintiffs aver that the defendant's structure does not have a toilet or shower therefore he answers call of nature in the open near the pathway and showers thereabout thus raising dire health, sanitation and environmental concerns.

2. The plaintiffs proceeded to list the particulars of illegalities and nuisance committed by the defendant as follows;

- a) **Building without procurement of necessary and proper approvals form the County Government of Mombasa and other relevant authorities.**
- b) **Building in contravention of the Physical Planning Act and the rules thereto.**
- c) **Blocking the public pathway hence hampering and handicapping the plaintiffs from gaining swift access to their land hence infringing the plaintiffs' rights to access the land.**
- d) **Infringing the plaintiffs constitutionally protected right to equitable access to land.**
- e) **Littering waster, obnoxious materials and scattering object all over.**
- f) **Obstructing the plaintiffs' access to their land.**
- g) **Health, sanitation and environmental concerns brought about by the defendant's conduct.**

3. Consequently the plaintiffs pray for judgement in the following terms;

- a) **A mandatory injunction for the removal of the defendant's structures and all objects which are illegally on the access path and/or road adjoining and/or providing access to Land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**
- b) **In the alternative, an order authorizing the plaintiffs to remove the defendant's structures and all objects which are illegally on the access path and/or road adjoining and/or providing access to Land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**
- c) **A permanent injunction restraining the defendant from building, illegally occupying, placing, installing and in any manner whatsoever from interfering with the access path and/or adjoin and/or providing access to land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**
- d) **That the O.C.S Nyali Police to offer assistance to the plaintiff in order to ensure peace and order is maintained.**

e) **Any other orders as shall be deemed fit to be granted by the Court.**

f) **Costs of the suit.**

4. The defendant entered appearance on 25<sup>th</sup> April 2017. He also filed list of documents in support of their case on 26<sup>th</sup> November 2018 and his witness statement on 17<sup>th</sup> January 2019.

5. Hearing commenced on 22<sup>nd</sup> November 2018 with the evidence of the 1<sup>st</sup> plaintiff, Fredrick Musita. Mr. Musita stated that he lives in Nyali on the property registered in his father's name. He relied on his witness statement filed in court on 14/2/2017 and produced the documents contained in their list as exhibits in support of their case. In his statement Mr. Musita stated that they are sub-lessees of a portion of L.R No. 11535/I/MN from the head lessor who is his father. He continued that next to the property is a passage/road whose function is to enable both persons and motor vehicles gain access to the suit property and other residential homes.

6. He averred further that the defendant was on 13/2/2012 evicted from a neighbouring plot No. 3270/I/MN pursuant to a court order obtained in MSA HCCC No. 265 of 2003 between Dr. Jacob Ngucie Vs Kazeha Ngala. Consequently to the eviction, the defendant moved on to the public path and installed thereon temporary structures where he now lives. It is the plaintiffs' further evidence that the defendant has placed objects and unwanted materials all over the said access road. That the plaintiffs development on their property has been greatly hampered by the presence of the defendant on the access road as the vehicles involved in the construction are unable to gain access. That they reported the defendant to the County Government but received no positive action. In regard to the defendant's documents, the plaintiff said it refers to a different land.

7. In cross-examination, the witness said he is forced to gain access to his plot through his parent's plot. That the public uses the path to the beach but people have to be careful because of the presence of goats, jikos and mattresses everywhere. That the deputy registrar's report did not mention open defecation. That the defendant's documents are irrelevant because the case herein is about blockage of access road. In re-examination, the witness stated he believed the defendant came to the public access after his eviction.

8. Jane Wangari testifying as **PW2** adopted her witness statement dated 28/6/2018. She stated that she is a purchaser of parcel No. 3270/I/MN. That the defendant was one of the squatters who sued the original owner in HCCC 265 of 2003 but lost the case. Ms Wangari stated that she removed the squatters but they still tried to come back. This made her to fence the property using a brick wall round the plot and install a gate. That after their second eviction in 2016, the squatters moved to the open space next to her land. That they had no toilets, cooked using open fires and had questionable visitors thus posing a security risk.

9. **PW2** in cross-examination said the people evicted are still squatting outside her gate. That Kazeha is on the road separating her plot and the plaintiffs parcel. **PW2** said she had lodged a Criminal Case against the defendant's family in Shanzu Court. She was unaware if they had been acquitted. That the title to plot No. 3270 is in her name. This marked the close of the plaintiffs' case.

10. The defendant gave his testimony on 9/7/2019. He stated that he lives in Vikwatani within Nyali Constituency. He relied on his documents filed in Court on 26/11/2018 in support of his case. The defendant averred that he was living in his home since 1960's then some people filled with greed came to claim the land. He added that he used to work for the family of Fred Musita. That Jane Wangari (PW2) is claiming his land.

11. In cross-examination, the witness said **PW2** is the one who removed him from where he had built and used to live. That when he moved out of Jane's land, he put small structures on the road where he lives with his 9 children, 2 wives and 7 grandchildren. DW conceded that he had no title for the land where he was evicted from or where he currently lives. That the documents he produced relate to PW2's land where he was evicted from. He concluded that he will move out of the access road as soon as their case with Jane Wangari (PW2) ends. In re-examination, the defendant admitted he is occupying the road but said the access used by Fred to his home is far from where he lives. This marked the close of defence case.

12. During the pendency of this case, the deputy registrar visited the locus in quo and filed her report on 8<sup>th</sup> March 2018. In the report, it is indicated there was no representation by the defendant but the Deputy Registrar recorded that she was satisfied that defendant's advocate was informed of the visit on 19/2/2018 and a return of service duly filed. The Deputy Registrar observed that **"outside the gate of the suit property i.e. the area at the entrance to the suit property are shanties. The shanties are approximately 4 metres from the gate. That there were women and children cooking at the front of the gate. The shanties cover the entire free area of the front of the suit property. She enquired on how they sleep having seen mattresses placed at a corner and was told they sleep outside the gate of the suit premises. That the area outside the gate was filthy and dirty due to the shanties and quite different from the surrounding areas."**

13. The plaintiffs filed their submissions on 26/7/2019 while the defendant filed none. The plaintiff's submissions gave a summary of the evidence adduced and cited the Case of **Jayendra Raichand Shah Vs Clara Elisha Bebora (2013) eKLR** to support their case. They urged the Court to find in their favour.

14. From the evidence adduced, the defendant admits he is living on the road of access. He counted the members of his family to include 2 wives, 9 children and 7 grandchildren. The defendant further admits that he came to occupy the impugned road after being evicted from the neighbouring plot No. 3270/I/MN by PW2. The report of the Deputy Registrar corroborated the evidence of the plaintiffs that the defendant and his family live on shanties constructed in front of the plaintiffs' gate. The plaintiffs have thus proved that the defendants have blocked the road of access and is also making the environment unclean.

15. Article 43(1)(b) of the Constitution grants **"every person the right to accessible and adequate housing and to reasonable standards of sanitation."**

Article 42 provides that, **"every person has the right to a clean and healthy environment which includes;**

42(b) to have obligations relating to the environment fulfilled under Article 70.

Article 70(1) provides thus;

**“If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.”**

16. This Court is called to balance the rights under Article 43(1)(b) with the right to a clean and healthy environment of both the defendant and the plaintiffs. The defendant did not blame the plaintiffs for his woes on the issue of housing. The defendant instead stated that he will move out as soon as his case with PW2 was concluded. However he did not have the details of the stated case nor indicate at what state it was. The defendant has also not taken steps to demand from the County or National government the realisation of his rights under Article 43 of the Constitution. He is thus exposing both the plaintiffs and himself with his actions and inactions without any solution in sight.

17. Therefore, the defendant must be ordered to move from the road where he lives with his family both for his benefit and the benefits of persons entitled to use the road/environment. I am thus satisfied that the plaintiffs have proved their case against the defendant. Accordingly, I enter judgment in favour of the plaintiffs' and order that;

**(a) The defendant is given 3 months from the date of service of the decree upon him to voluntarily vacate the road of access existing between plot numbers L.R 11535/I/MN and 3270/I/MN.**

**(b) In default of compliance with prayer (a) above;**

**(i) A mandatory injunction shall issue for the removal of the defendant's structures and all objects which are illegally on the access path and/or road adjoining and/or providing access to Land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**

**(ii) In the alternative, an order be issued authorizing the plaintiffs to remove the defendant's structures and all objects which are illegally on the access path and/or road adjoining and/or providing access to Land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**

**(iii) A permanent injunction restraining the defendant and or his family or agents from building, illegally occupying, placing, installing and in any manner whatsoever from interfering with the access path and/or adjoin and/or providing access to land Reference No. 11535 (Original Number 3264/2) Section I Mainland North.**

**(c) The O.C.S Nyali Police Station to offer assistance to the plaintiffs in order to ensure peace and order is maintained during the execution of the decree.**

**(d) Each party to meet their respective costs of the suit.**

Dated and signed at BUSIA this 4<sup>th</sup> day of June 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically by email this 9<sup>th</sup> Day of June, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE