



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 49 OF 2016**

**JAPHET NOTI CHARO.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**KAZUNGU FONDO SHUTU & 6 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

**Introduction:**

1. This matter was commenced by the Plaintiff after the death of Kirimo Fondo (the deceased) who was allegedly killed by a mob.

2. The Plaintiff has filed an Application dated 8<sup>th</sup> March, 2016 in which he is seeking for the following orders:

(a) **THAT pending the hearing and determination of this suit, an injunction be issued restraining the Defendants by themselves, agents, servants and any other person claiming interest through them from burying the remains of the late Kirimo Fondo within the Plaintiff's homestead in plot number M5 belonging to the Plaintiff/Applicant herein.**

(b) **THAT the OCS Malindi police station be directed to ensure compliance of the orders herein.**

**The Plaintiff's/Applicant's case:**

3. In his Affidavit in support of the Application, the Applicant deponed that the Defendants' and the deceased's homestead is situated at a place known as Muyeye within Malindi town; that the Defendants have trespassed into his homestead and started digging a grave with the intention of resting the remains of the deceased and that the land in dispute between the Defendants and himself pending before this court is far away from his homestead.

4. According to the Plaintiff, plot number M5 is his and that his family is completely different from that of the Defendants; that the Defendants' grandfather was a brother to his grandfather and that while he is the heir to the Estate of Charo Wa Shutu, the Defendants are the heirs of Fondo Shutu.

**The Defendants'/Respondents' case:**

5. The 1<sup>st</sup> Defendant deponed that plot number M5 is family land; that the deceased and his family live on the said land and that all the other family members live on M5.

6. According to the 1<sup>st</sup> Defendant, the Plaintiff admitted in the pleadings that he filed in the lower court that M5 is family land; that the letter of allotment annexed on the Plaintiff's Application is illegal and that in any event, plot M5 is a big area which is occupied by many other people who do not belong to the family and that those people are not parties to this suit.

#### **The Plaintiff's further affidavit:**

7. In his Supplementary Affidavit, the Plaintiff deponed that his grandfather, Shutu Masha, was born and brought up in Madunguni area before acquiring another land in Garash.

8. It is the Plaintiff's deposition that Shutu Masha married three wives namely Kambizi, Kashutu and Kwekwe; that his father, Charo wa Shutu was born of Kwekwe while the Defendants' father, Fondo Shutu, was born of Kashutu.

9. It is the Plaintiff's case that all the sons of Kashutu, the deceased's grandmother, moved to Muyeye (including the deceased's father) while his father, Charo Wa Shutu (the deceased's uncle), acquired land known as M5.

10. According to the Plaintiff, his mother, Kwekwe, was buried at their ancestral home in Madunguni, which is the ancestral property, and that his late father, Charo Wa Shutu, decided to bury the patriarch, Shutu Masha, in the suit property to avoid the expenses of transporting his body to Madunguni.

11. The Plaintiff has deponed that Charo Wa Shutu also decided to bury the Defendants' father, Fondo Shutu, on M5 because he had not established a home in Muyeye.

12. It is the Plaintiff's deposition that the Defendants initially opened a grave in Ganda with the intention of burying the remains of the deceased before forcefully opening another grave within the suit property.

13. It is the Plaintiff's case that the deceased should be buried at their ancestral home in Madunguni or Garash and that the relationship between the family of Charo Wa Shutu and Fondo Shutu has deteriorated.

#### **Submissions:**

14. The Plaintiff's advocate submitted that plot number M5 has not been registered and cannot therefore be said to belong to the Shutu Masha family; that the Defendants have not given an explanation as to why they cannot bury the remains of Kirimo Fondo at Muyeye and that Shutu Masha was buried on plot M5 as per the wish of Charo Wa Masha and so was the deceased's father.

15. The Defendants' advocate submitted that the plot originally known as Plot M5 is a big block comprising of more than 195 hectares and that the said land host more than 500 people some of whom have title documents, including Kenya Industrial Estates and Kenya Airports Authority.

16. Counsel submitted that for the court to issue an injunction in reference to plot M5 is to invite chaos and friction amongst the whole village and Government institutions.

17. The Defendants' advocate submitted that the Plaintiff is only holding a portion of M5 on behalf of the family and that all of the deceased's kins and family members were buried on the suit property.

#### **Analysis and findings:**

18. The deceased, Kirimo Fondo, was murdered by unknown assailants. His body is lying in the mortuary awaiting the decision of this court as to where he should be buried.

19. It is the Plaintiff's case that the deceased cannot be buried on a piece of land known as M5 because the said land belongs to his late father, Charo wa Shutu.
20. On the other hand, the Defendants' case is that the land known as M5 belongs to the family of Shutu Masha and not the Plaintiff or his late father alone.
21. It is not in dispute that the Plaintiff's late father, Charo wa Shutu and the deceased father, Fondo Shutu, were the sons of the late Shutu Masha, although of different mothers.
22. It is also not in dispute that Shutu Masha, Fondo Shutu and Charo Wa Shutu were all buried on a portion of land known as M5.
23. The Plaintiff's case, as I understand it, is that his father, Charo Wa Shutu acquired land known as M5 to the exclusion of the patriarch, Shutu Masha.
24. It is the Plaintiff's deposition that his grandfather, Shutu Masha, was born and brought up in an area known as Madunguni and acquired another land in Garash.
25. In the initial Affidavit, the Plaintiff deponed that the deceased's homestead is situated at a place known as Muyeye within Malindi and that is where he should be buried.
26. In the same Affidavit sworn on 8<sup>th</sup> March, 2016, the Plaintiff deponed that plot number M5 was his. The Plaintiff annexed on the Affidavit a letter of allotment dated February 1997 for "Block M5 Malindi" measuring 195 Ha together with an official receipt for Kshs.3,500 dated 22<sup>nd</sup> September, 2015.
27. In the Supplementary Affidavit sworn on 21<sup>st</sup> March 2016, the Plaintiff deponed that his late father, Charo Wa Shutu acquired land known as M5, and out of his magnanimity, buried his late father, Shutu Masha and the deceased's father, Fondo Shutu, on the land.
28. From the Plaintiff's two Affidavits, it is not clear whether the Plaintiff's case is that he is the one who was allocated plot number M5 in the year 1997 or it is his father, Charo Wa Shutu, who acquired the land while working with the then Municipal Council of Malindi.
29. The uncertainty of whether it is the Plaintiff or his father or grandfather who was allocated a plot known as M5 is further compounded by the documents annexed on the Defendants' Replying Affidavit.
30. According to the 1<sup>st</sup> Defendant's Affidavit, plot number M5 belonged to the patriarch, Shutu Masha.
31. The 1<sup>st</sup> Defendant deponed that the deceased and his family live on plot M5 and that all the family members have been buried on this land. The photographs of some of the graves of the family members were exhibited by the Defendants, including the grave of Shutu Masha.
32. To show that plot M5 belongs to the entire Shutu family, the Defendant annexed on the Replying Affidavit documents referring to plot M5 as belonging to the "Shutu" family.
33. One of the letters annexed on the Replying affidavit is the one dated 12<sup>th</sup> May, 1998 authored by the then Chief of Malindi Town.
34. In the letter, the Chief stated that Charo Shutu Masha has a big family of "38 wives, 4 brothers and 49 married sons," and stays as a squatter on plot M5.
35. There are other correspondences produced by the Defendants showing the long running dispute between the Plaintiff and the other family members of "Mzee Shutu".
36. Indeed, Ms Khaminwa & Khaminwa advocates did a letter dated 28<sup>th</sup> July, 1998 addressed to the

Commissioner of Lands in which they stated that their clients had been rendered squatters on their ancestral being M5.

37. In the said letter, the firm of Khaminwa & Khaminwa advocates were categorical that their clients' grandfather (Shutu Masha) was a police officer and is the one who settled on the land known as M5.

38. In fact, the Defendants have exhibited some letters of allotment showing the allocation of some portions of plots within plot M5 marked as A, B, C and D to some of the members of the family of Shutu.

39. Other than the numerous disputes between the Plaintiff and the Defendants in respect to some portions of M5, this court is aware of the fact that plot M5 has since been subdivided and title documents have been issued to individuals. The authenticity and legality of those title documents are at different stages of litigation, with some of the matters having been concluded.

40. Considering that the Plaintiff's claim that he was allocated the entire plot known as M5 is contradicted by his own Supplementary Affidavit in which he states that plot M5 was allocated to his late father Charo wa Shutu, and in view of the numerous correspondences and letters of allotment showing that some portions of M5 are occupied and owned by the family members of Shutu Masha and third parties, it would be wrong for this court to find, prima facie, that M5 belongs to the Plaintiff or to his late father.

41. I say so because the Plaintiff has admitted that indeed the Defendants' father and grandfather were buried on a portion of the suit property and the fact that some of the Defendants also live on that land.

42. Further more, this court is alive to the numerous suits that are pending in this court between the Plaintiff on the one hand and the Defendants and third parties on the other hand in respect of plot number M5.

43. In view of the fact that there is no evidence before me to show that the deceased was not entitled to any portion of M5, and considering that the Plaintiff's grandfather and the deceased's father were both buried on a portion of M5, and without stating whether the deceased and the Defendants are entitled to any portion of plot M5, I am of the view that the deceased's remains should be interred next to the remains of his late father, which is within plot number M5.

44. Indeed, it would appear from the photographs that the locations where the Defendants' father and Shutu Masha were buried is the family's grave yard, and not the Plaintiff's homestead.

45. For those reasons, I dismiss the Plaintiff's Application dated 8<sup>th</sup> March, 2016 and make the following orders:-

**(a) The deceased, Kirimo Fondo, to be buried next to where his late father, Fondo Shutu, was buried.**

**(b) The OCPD, Malindi police station to enforce this order by supervising the said burial.**

**(c) Each party to pay for his or her own costs.**

Dated and delivered in Malindi this 1<sup>st</sup> day of April, 2016.

**O. A. Angote**

**Judge**