



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

**AT MALINDI**

**LAND CASE NO. 53 OF 2010**

**CHARO KAJEMBE.....PLAINTIFF**

**=VERSUS=**

- 1. MARTIN W. SARO**
- 2. KAZUNGU SARO**
- 3. JOSEPH MWARINGA**
- 4. JOHANA KADODO**
- 5. JUSTIN KAJOGOLO**
- 6. SIKUBALI KAHINDI KHASO**
- 7. MRS MARY FURAHA**
- 8. FELIX NGUMBAO**
- 9. ROFASI SULUBU**
- 10. OMAR NDAA**
- 11. MAE K. NAULI**
- 12. MRS KADZO J. ZIRO.....DEFENDANTS**

**JUDGMENT**

**Introduction**

1. The Plaintiff moved this court by way of a Plaint dated 19<sup>th</sup> May, 2010. In the Plaint, the Plaintiff has averred that he is the sole registered proprietor of land reference number M.17 Malindi (the suit property); that the Defendants, without the consent or permission of the Plaintiff have started constructing a road access on the Plaintiff's land and that the Defendants have hired hooligans,

- thugs, watchmen and agents who are exposing the Plaintiff and his family to severe danger.
2. The Plaintiff further averred that the Defendants uprooted 30 cashew nuts trees from his land valued at Kshs.90,000. The Plaintiff is claiming for a permanent injunction restraining the Defendants, their servants, agents, employees or any other person from interfering with Land Reference M.17 Malindi and for General damages as a result of failure to yearly earn from the 30 uprooted mature cashew nuts trees.
  3. The Defendants averred in their Defence that the community has a routine of making its roads good by clearing bush after the rain seasons and when the need arises and that by long usage of the road, which use has been open and without any interruption, the community has acquired the right to use the road. The Defendants denied having cut down the Plaintiff's mature Cashew nuts trees.

#### **The Plaintiff's case:**

4. The Plaintiff, Pw 1, informed the court that his names are Charo Mbaya Kitunga Jefa alias Charo Kajambe Mbaya Kitunga. It was the Plaintiff's evidence that his land is M17, malindi measuring 143.10 acres. The Plaintiff produced in evidence the Indenture dated 14<sup>th</sup> September 1979 as PEXB1.
5. According to Pw1, he purchased the suit property from people indicated in the Indenture and thereafter fenced it. However, Pw1 stated that the fence was later brought down.
6. It was the evidence of Pw1 that on a date he could not remember, some people invaded his land, cleared and uprooted his cashew nut trees. He was informed about the invasion while away and when he visited his land, he found a road had been constructed on it.
7. He reported the incident to the sub-chief who called the Defendants. It was the evidence of Pw1 that while at the Chief's office, the Defendants informed him that they had formed an organisation with a view of creating a road on his land. The said road, according to Pw1, went through his land up to his neighbour's land where it ended. Pw1 showed the court the photographs that he took showing the road that was opened up. The photographs were annexed on the Plaintiff's supplementary list of documents which was produced in evidence by the consent of the parties.
8. Pw1 then reported the incident to the defunct Municipal Council of Malindi who informed him that they had not authorised the construction of the road. When he went to make a report to the Council, the Council realised that he had not paid land rates. He was asked to pay kshs. 57,900 which he did. A receipt evidencing the said payment was produced as PEXB 3 (b).
9. Pw2 stated that he reported the cutting down of his trees to the Agricultural Officer who made an assessment of the damaged crops. After counting the stumps, he assessed the cut cashew nut trees at Kshs. 90,000.
10. Pw1 produced in evidence the official Certificate of Postal search as PEXB 4 showing that the suit property was registered in his name as at 4<sup>th</sup> June 2012 and the map showing where the suit property is located as PEXB 5.
11. The Plaintiff informed the court that the Plaintiff damaged his crops and opened up a road on his land without his permission.
12. In cross-examination, Pw1 stated that the public was now using the road that was constructed by the Defendants. Pw1 confirmed that his land is surrounded with other parcels of land and that there is no road that exists on his land. It was the evidence of Pw1 that he accesses his land through plot number 540. Pw1 admitted that although a road was required so as to access the neighbouring plots, none existed before the Defendants created one on his land.
13. In re-examination, the Plaintiff stated that there was a main road servicing all plots commonly known as "ADC" road.
14. Pw 2 was an officer from the Ministry of Agriculture. Pw 2 informed the court that on 6<sup>th</sup> January, 2011, he received a letter from the Chief informing him to assess the damage of the crops on the Plaintiff's land.
15. With the assistance of somebody from the Assistant Chief's office, Pw 2 assessed the damaged crops. According to Pw 2, he found out that 30 mature cashew nut trees had been uprooted from the suit property. He prepared a report, gave a copy to the Chief and retained a carbon copy. Pw 2 produced his report as P EXB 6. According to the report, the value of the uprooted cashew nut trees was Kshs. 90,000.
16. In cross-examination, Pw 2 stated that he did not indicate in his report the parcel number of the

- land where he found the uprooted trees and stated that he found the road was still under construction.
17. In re-examination Pw 2 stated that whoever took him to the suit property knew the extent of the Plaintiff's land.
  18. Mr. Joseph Thaura, Pw 3, informed the court that he works with the Malindi Municipal council in the engineering department. Pw 3 stated that the Plaintiff went to his office to complain about the construction of a road on his land. Pw 3 stated that according to the Council's records, he was not aware of the alleged road.
  19. It was the evidence of Pw 3 that the suit property falls within the jurisdiction of the Council and that he knows all the roads that have been adopted by the Council.
  20. In cross-examination, Pw 3 stated that the minutes in relation to the construction of all the roads in the Municipality are kept by the Chief Executive Officer of the Council. Pw 3 confirmed that according to the map, plot number M17, M18 and M19 are landlocked and that an access road was needed.
  21. It was evidence of Pw 3 that the area needed re-planning and that before the construction of a road can be approved, the application must go through an elaborate process.
  22. In re-examination, the witness stated that before a road is constructed, all the land owners on whose land the proposed land is to pass must be consulted.

### **The Defendants' case:**

23. The 1<sup>st</sup> Defendant, Martin Wanje Saro, informed the court their family land is M16 and that he has been the Plaintiff's neighbour for many years.
24. Dw1 stated that according to the existing map, there is no road between plot number M16 and the Plaintiff's plot number M17 although there has always been a foot path which used to serve all the plots in Sabaki.
25. In the year 2008, the elders had a meeting and agreed that the area needed access roads and water. They then formed Sabaki Community Welfare Association. They had several meetings to discuss that issue, with the Plaintiff attending one of the meetings.
26. In one of the meetings, the members of the organisation agreed that all the roads should be widened. One of the roads that was to be widened was the one that went through the suit property.
27. According to DW1, there has been a road going through the suit property. The road commenced from "Kwa ndogo", through ADC farm, through M16, through M17 (the suit property) then to Sabaki primary school.
28. It was the evidence of Dw1 that the District Commissioner and the District Officer were involved in the meetings that approved the widening of the subject road and that the road is used by many people including school going children.
29. DW1 admitted that they fell the Plaintiffs' trees which were seven in number; that they did not need the Plaintiff's consent to cut down the trees and that more than fourteen people were affected and yet they have not complained.
30. In cross-examination, Dw1 stated that all the Defendants are known to him; that they were all involved in the opening up of the road and that he is a squatter on M16 together with the other Defendants.
31. It was the evidence of Dw1 that they agreed in one of the meetings that all those to be affected should not demand for compensation; that they also agreed that all the roads should be six metres wide and that they did not serve any notice on the land owners who were going to be affected with the opening up of the road.
32. Dw1 informed the court that there was an existing road going through the ADC land. The 1<sup>st</sup> Defendant confirmed that according to the existing map, there was no road or passage going through the suit property. It was the evidence of Dw1 that they opened up the road in dispute after ADC closed the road that was going through its land from the main road.
33. According to Dw1, plot number M53, 540, and M52 belong to ADC and that is where the road they used to use to access their land was before it was closed by ADC. However, a new road was opened with the consent of ADC which started from plot number M53, through M52, then to M51 where it connected with the old road that was closed by ADC. The road then connected plot M16, Plot 540, plot M19, plot M17, plot M20 before ending at the primary school.

34. The 1<sup>st</sup> Defendant finalised his testimony by stating that the disputed road was widened from the initial 1 meter width to 6 meters and that the old road was only on the ADC land.

### **Submissions**

35. The Plaintiff's advocate filed his submissions on 10th October, 2013. Counsel submitted that the Plaintiff's cause of action is trespass and establishment of a road on private property without authority of the Plaintiff, which, according to counsel, is violation of his right to property and that the general public now has access to his land.

36. The Defendants' advocate did not file his submissions.

### **Analysis and findings:**

37. It is not in dispute that the Defendants, under the auspices of Sabaki Community Welfare Association constructed or opened up a road across the suit property.

38. According to the joint Defence and the evidence of DW1, there has always been a footpath on the Plaintiff's piece of land which they decided to widen from the width of one (1) meter to six metres.

39. The Plaintiff denied that before the Defendants invaded his land and constructed a road thereon, there was a foot path or a road of any description.

40. The Plaintiff produced in evidence an indenture showing that he bought the suit property on 14<sup>th</sup> September 1979, a fact that has not been disputed. The Plaintiff also produced in evidence a map drawn to scale showing the position of the suit property, M17 and the other neighbour plots which include M16, M51, M52 and M15.

41. According to the evidence of Dw1, there used to be an old road from the Lamu-Malindi road that used to go through the land belonging to ADC, that is, M53, 540 and 52. However, due to security concerns raised by the Management of ADC, this road was closed at some particular point, forcing the residents of the several parcels of land to use a longer route to get to their homes and to Sabaki Primary School.

42. A decision was then taken by the members of the Sabaki Community Welfare Association to open a direct, shorter road which was to start from Lamu-Malindi main road and go through plot number M 16, the suit property, some other properties and then to Sabaki Primary School.

43. The map as drawn does not show the road that Dw1 stated existed as "a passage" and which they agreed to widen. An officer from the engineering department of the defunct Municipal Council of Malindi stated that the suit property fell within their jurisdiction and that according to the official records, the Council had not authorised the opening up of the proposed road. It was the evidence of Pw 3 that although the area required re-planning, no re-planning had been done in respect to plot number M17, the suit property.

44. It is therefore obvious from the evidence presented to this court that the Defendants, in their meetings with other people, decided to create an access road through plot number M17.

45. The creation of access roads through private land is governed by the Public Roads and Roads Access Act, Cap 399 (the Act).

46. It may be true, as stated by Dw1, that there has always been a passage in the form of a footpath going through the suit property connecting the other plots since time immemorial. Indeed, section 8 of the Act mandates the Minister to convert an access road into a line of public travel on the advice of the District Road Board of the area by way of a gazette notice. There is no evidence that the alleged "passage" was converted into a line of public travel by the responsible Minister as per the law.

47. Section 9 of the same Act provides that if an occupier of land has no reasonable access to his land in relation to a public road, in this case Malindi-Lamu Road, then he may apply to the District Roads Board for leave to construct an access road over any lands lying between his land and such public road. The Board is then required to serve personally or by registered post a notice to the owner or occupier of land over which the proposed road of access is to pass, calling upon the owner of such land to show cause why the proposed road of access should not be granted.

48. Where the Board allows the construction of the access road after hearing all the concerned parties, it will be required to compensate the owners of the affected land for any damaged crops. The Board is required to keep a record of all such orders and also submit them to the Registrar of Titles

- for registration.
49. That did not happen in this case. The action by the Defendants to invade the Plaintiff's parcel of land, uproot the cashewnut trees and open up a six metres road amounts to acts of hooliganism and trespass. If the Defendants and the other residents of Sabaki want to have a shorter road from the main road to their respective plots and Sabaki Primary school, they should abide by the due process of the law.
50. I have read the report that was produced in this court by Gabriel Karisa, the Divisional Agricultural Extension Officer. According to his report, and the evidence he gave in this case, he visited the land belonging to the Plaintiff and prepared an assessment report in respect to the damage that the Defendants visited on the Plaintiff's crops.
51. Pw 2 was clear that he was instructed by the Chief to prepare the said assessment, and in the company of somebody who knew the extent of the Plaintiff's land counted 30 cashewnuts mature trees that had been uprooted from the Plaintiff's land. He counted 30 trees and valued them at Kshs. 90,000. In the circumstances, I am convinced that those are the trees that were uprooted by the Defendants and not only seven (7) trees as stated by Dw1.
52. For the reasons I have given above, I find and hold that the Defendants trespassed on suit property and illegally opened up an access road. In the process, they damaged the Plaintiff's crops valued at Kshs. 90,000/=. The Plaintiff has proved his case on a balance of probabilities and I allow the Plaintiff's claim dated 19th May 2010 in the following terms:
- a. **A permanent injunction be and is hereby issued restraining the Defendants, their servants, agents, employees or any other person from interfering with land reference M. 17 Malindi.**
  - b. **Damages for trespass assessed at Kshs. 90,000.**
  - c. **Interest on (b) from the date of this judgment until payment in full at court rates.**
  - d. **The Defendants to pay the costs of the suit.**

Dated and delivered in Malindi this 6<sup>th</sup> day of **June**, 2014.

**O. A. Angote**

**Judge**