



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**PETITION NO. 5 OF 2011**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 19, 20, 21, 22, 23 25(C), 27, 40, 47 50, 60(1) (B), 62(1) (H), 64,165, 262 AND SECTION 19 OF THE 6<sup>TH</sup> SCHEDULE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE SURVEY ACT, THE REGISTERED LAND ACT, THE PUBLIC ROADS OF ACCESS AND PHYSICAL PLANNING ACT, THE LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF: REGISTRATION SECTION OR BLOCK KNOWN AS CHEMBE/KIBABAMSHE/ MAYUNGU/ MALINDI**

**AND**

**IN THE MATTER OF: MALINDI HIGH COURT CIVIL CUIT NOS. 52 OF 2007, 69 OF 2007, 46 OF 2008, 31 OF 2009, 40 OF 2011,56 MALINDI MISCELANEOUS CIVIL APPLICATION NO. 17 OF 2009 AND ALL MATTERS PENDING IN THE HIGH COURT AT MALINDI RELATING TO ANY BOUNDARY DISPUTE IN THE REGISTRATION SECTION KNOWN AS CHEMBE/KIBABMSHE LOCATION AT MAYUNGU, MALINDI**

**BETWEEN**

**MERRY BEACH LIMITED.....PETITIONER**

**VERSUS**

- 1. THE ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF LANDS**
- 3. THE CHIEF LAND REGISTRAR**
- 4. THE DISTRICT LAND REGISTRAR, KILIFI**
- 5. THE DIRECTOR OF PHYSICAL PLANNING**
- 6. THE DIRECTOR OF SURVEYS**
- 7. THE DIRECTOR OF LAND ADJUDICATION & SETTLEME**
- 8. THE MUNICIPAL COUNCIL OF MALINDI**
- 9. THE OFFICER COMMANDING OF POLICE DIVISION, MALIN**

10. GIMALOWI COMPANY LTD

11. EXEMPLER LIMITED

12. SHARRIFF M. MOHAMED

13. P.N. NDOLO

14. LA MARIANA LTD

15. MALINDI MUSKETTERS LTD

16. SHARIF N. HABIB

17. HILDERGARD JUNG

18. DANIEL RICCI.....RESPONDENTS

AND

ITAKEY INVESTMENTS LIMITED.....INTERESTED PARTY

**RULING**

1. By an application dated and filed herein on 1<sup>st</sup> November 2018 the Petitioner Merry Beach Ltd prays for orders:-

***3. That the Petitioner be authorized as per clause 80(c) and (d) of the Judgment herein to execute the Judgment and decree herein with the aid of Geodata Land Surveyor & Consultants who are to identify the public access road on the ground as per their report and realise the execution expenses from the 10<sup>th</sup> and 11<sup>th</sup> Respondents.***

***4. That the Deputy Registrar be directed to sign warrants to the Court Bailiff, OCPD and OCS Watamu for purposes of execution herein.***

***5. That the costs of this application be provided for.***

2. The said application is supported by an affidavit sworn by one Walter Kilonzi, the Petitioner's Company Secretary and is premised on the grounds:-

***i) That Judgment was delivered herein on 30<sup>th</sup> October 2015;***

***ii) That the said Judgment and decree directed the 8<sup>th</sup> Respondent to identify the location of the Road and open up the Public access roads that were blocked by the 10<sup>th</sup> and 11<sup>th</sup> Respondents in April 2011 by demolishing all offending walls and villas;***

***iii) That on 31<sup>st</sup> July 2018 the Court directed the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents to proceed to the ground within 30 days and do physical identification of the public access road to enable the demolition to take place within 45 days;***

***iv) That on the contrary the 2<sup>nd</sup> Respondent proceeded to do another report contradicting the report relied on in the Judgment and proceeded to file the same;***

***v) That the 2<sup>nd</sup>, 8<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Respondents have now moved on the ground and began implementation of the new Report; and***

***vi) That the Respondents have confirmed to act with impunity and are not willing to comply with the Court orders.***

3. The application is opposed. In a Replying Affidavit filed herein on 4<sup>th</sup> January 2019 by the Honourable the Attorney-General for the 1<sup>st</sup> to 7<sup>th</sup> and 9<sup>th</sup> Respondents through the Government Surveyor one Lee Dzoro, the Respondents aver that in compliance with this Court's directive; they proceeded to the site on 5<sup>th</sup> September 2018 and by use of the RIM and other reports, they carried out a verification and produced a Report. A copy of the Report dated 21<sup>st</sup> September 2018 and filed herein on 2<sup>nd</sup> October 2018 is attached to the Affidavit.

4. It is the 1<sup>st</sup>, 7<sup>th</sup> and 9<sup>th</sup> Respondents case that the road has since been opened for public use as demonstrated by the 8<sup>th</sup> Respondents and any other demolition or action that falls outside the areas identified in the map will be encroaching on private property.

5. On their part, the 8<sup>th</sup> Respondent filed Grounds of Opposition to the Petitioner's application stating that:-

1. ***The application is not merited and is an abuse of the process of the Court.***
2. ***The application is overtaken by events as the access road has been properly identified in accordance with the Orders of this Court and the 8<sup>th</sup> Respondent has opened the same in accordance with the Court's Judgment and orders issued herein;***
3. ***The application is full of ill motives and lacks candour and proper grounds;***
4. ***The Report of the District Land Surveyor and the County Surveyor was filed pursuant to the directives of the Court and was in accordance with Order (a) of the Judgment of the Court (Angote J) dated 30<sup>th</sup> October 2015 in accordance with the Registry Index Map 19 and 20 and according to the Geodata Land Surveyor & Consultants dated 5<sup>th</sup> December 2013;***
5. ***Under the County Government Act and the Physical Planning Act, the 8<sup>th</sup> Respondent is the sole entity mandated to plan for the roads and roads of access within its jurisdiction and that function has been undertaken to completion in accordance with the orders of the Court.***

6. In addition the 8<sup>th</sup> Respondent filed a Replying Affidavit sworn by one Kerongo Ondieki emphasizing their position.

7. I have considered the application and the various responses thereto. I have equally considered the submissions, of the Learned Advocates for the parties.

8. This suit was filed in the year 2011. From a perusal of the file herein, the same arose from boundary disputes within the land registration Section known as Chembe/Kibabamshe. As a result of the disputes, a number of suits were filed involving the Petitioner and the 1<sup>st</sup> to the 18<sup>th</sup> Respondents.

9. In one of those suits being HCCC No. 52 of 2007, the 11<sup>th</sup> Respondent sued several parties alleging encroachment on its property. Pursuant to a Court Order therein issued dated 10<sup>th</sup> December 2010, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein prepared a report on the boundary disputes in the said registration section and demarcated the boundary between the suit properties which were then registered in favour of the then 10<sup>th</sup> Respondent and the 11<sup>th</sup> Respondent's property.

10. Thereafter, according to the Petitioner the 4<sup>th</sup> Respondent accompanied by surveyor's and Police Officers stormed into the Petitioner's property described as Chembe/Kibabamshe/374 together with some armed members of the public and proceeded to erect fresh beacons. It was the Petitioner's complaint that as a result of the said invasion, 50% of its said property was hived off and granted to the 10<sup>th</sup> Respondent. The Petitioner further complained that after the invasion, the 10<sup>th</sup> and 11<sup>th</sup> Respondent erected structures blocking access roads from the appellant's property to the sea at Watamu. The resultant situation led to the filing of this Constitutional Petition.

11. In a Judgment delivered on 30<sup>th</sup> October 2015, this Court (Angote J) issued a mandatory injunction compelling the 10<sup>th</sup> and 11<sup>th</sup> Respondents to re-open the public road that they had blocked. The effect of that order as Angote J himself explained at paragraph 17 of a Ruling he subsequently delivered on 16<sup>th</sup> September 2016 in regard to a different application herein, was to have the buildings which had been put up by the 10<sup>th</sup> Respondent on parcels of land numbers Chembe Kibabamshe 549 and 599 to be brought down.

12. That Judgment and decree was to be effected by the 8<sup>th</sup> Respondent through the use of a Registry Index Map diagram number 19 and 20 and a Report thereon prepared by Geodata Land Surveyors & Consultants dated 5<sup>th</sup> December 2013 which report had been produced by the Petitioner as an exhibit in the proceedings. It is that Judgment and the decree emanating therefrom which the Petitioner seeks to execute by this application.

13. According to the Respondents however, the said Judgment and decree have been complied with and the application before me is actuated only by malice and ill will.

14. In my Ruling delivered herein on 31<sup>st</sup> July 2018, I had directed that the 8<sup>th</sup> Defendant acting in consultation with the 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants do immediately proceed to identify the access road as per the Judgment of this Court delivered on 30<sup>th</sup> October 2015. That exercise was to be done within 30 days.

15. From the material placed before me, it is evident that my directions are yet to be complied with. From annexure LR 2 of Lee Dzoro's Replying Affidavit aforesaid, it is apparent that the Respondents went to the land to justify their actions which had initially led to the institution of this Petition. That must be the reason the Report purports that the roads separating the Plots were generally in their correct position. That was no longer an issue for determination by the District Surveyor or even the 8<sup>th</sup> Respondent as the Judgment of 30<sup>th</sup> October 2015 had already determined the Report that was to be used in effecting the decree.

16. From the Supplementary Affidavit of Walter Kilonzi filed herein on 30<sup>th</sup> January 2019, it is apparent that the Report dated 5<sup>th</sup> December 2013 generated by Geodata Land Surveyors and Consultants has not been followed and/or implemented.

17. This is the fourth year since Judgment was entered in favour of the Petitioner herein. That is indeed a very long time considering that this Petition was filed in 2011. This Court cannot fail to take into account the pain of the successful Petitioner wanting the fruits of its Judgment

for so many years, only to be confronted at every stage with a fresh cycle of litigation.

18. The standpoint of the Constitution is the principle that delayed justice amounts to injustice. Our Courts which are the Constitution's dedicated mechanism for delivering justice are cautioned against permitting injustice through delays at Article 159(2) (b) of the Constitution in the following terms:-

***“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-***

***a) .....***

***b) Justice shall not be delayed.”***

19. Courts therefore have an obligation to see a steady pace of litigation, terminating within a reasonable time-frame. In that regard and having considered the prevarications and delays occasioned by the Respondents herein, I am persuaded that the Petitioner's application has merit. The same is allowed in terms of Prayer Nos. 3 and 4 thereof.

20. The Petitioner shall also have the costs of this application

**Dated, signed and delivered at Malindi this 9<sup>th</sup> day of April, 2019.**

**J.O. OLOLA**

**JUDGE**