



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 19 OF 2017**

**HARRY SHIDAH ELIJAH**

**SIDI BAYA CHAI.....PLAINTIFFS**

**VERSUS**

**ROVING INVESTMENTS (AFRICA) LIMITED**

**MAYUNGU REAL ESTATES LIMITED.....DEFENDANTS**

**JUDGMENT**

1. By a Plaint dated and filed herein on 3<sup>rd</sup> February 2017, the Plaintiff Harry Shidah Elijah and Sidi Baya Chai pray for:

*a) An order cancelling the registration of the defendants as the owners of the said property situated at Chembe Kibabamshe Village within Kilifi County in the Republic of Kenya containing by measurement 8.8 hectares of thereabouts and known as Title No. Chembe/Kibabamshe/350 and for an order to the Land Registrar-Kilifi Land Registry to register the Plaintiffs as owners of the said suit property in their capacity as the administrators of the estate of the deceased and issue them with a Title Deed without requiring the Plaintiffs to produce the original Title Deed for the said suit property or any other document for purposes of the registration other than the Court Order, the Grant of Letters of Administration and Certificate of Confirmation of Grant.*

*b) Costs of this suit.*

*c) Interest thereon at Court rates.*

2. The Plaintiffs' claim is premised on their contention that they are jointly the Administrators of the estate of James Munga Chishenga(deceased) who was at all material times the registered proprietor of all that parcel of land known as Chembe/Kibabamshe/350.

3. It is the Plaintiffs' case that sometime in the year 1998, the deceased engaged one Kazungu Diwani, the proprietor and director of Roving Investments (Africa) Ltd (the 1<sup>st</sup> Defendant) to procure a buyer for the suit property. To facilitate the arrangement, the deceased deposited the original title deed for the suit property with Mouko & Company Advocates.

4. The Plaintiffs further aver that the said Kazungu Diwani secretly and fraudulently collected the title from the said Advocates and caused the title therefore to be transferred to the name of the 1<sup>st</sup> Defendant. Thereafter on 26<sup>th</sup> November 1998, the 1<sup>st</sup> Defendant again fraudulently sold and transferred the suit property to Mayungu Real Estates Ltd (the 2<sup>nd</sup> Defendant). It is the Plaintiffs' case that as a result of the said acts of the Defendants, they have been deprived of their title in the suit property and they have hence suffered loss and damage.

5. By an application dated 24<sup>th</sup> March 2017, the Plaintiffs sought leave of the Court to be allowed to serve the Defendant by way of substituted service after they failed to trace them for service. The said application was allowed on 3<sup>rd</sup> May 2017. From an Affidavit of Service filed in Court on 7<sup>th</sup> August 2017 and sworn by Patrick Shujaa Wara Advocate, it is evident that the Plaintiffs gave notice of the institution of this suit vide the Sunday Nation Newspaper of 2<sup>nd</sup> July 2017 by which notice they also required the Defendants to Enter Appearance in the case within 21 days of the advertisement. The Defendant however neither entered appearance nor filed a defence and the matter therefore proceeded by way of formal proof.

6. In support of their case, the Plaintiffs called Harry Shidah Elijah (PW1) as their sole witness. PW1 told the Court that the land belonged to James Munga who died on 24<sup>th</sup> August 2008. PW1 and his mother Sidi Baya Chai were issued with Letters of Administration on 14<sup>th</sup> May 2013(PEX 2).

7. It was PW1's case that he got to know the Defendants when he went to transfer the land from his father's name. His father had been having a title deed that was issued to him on 26<sup>th</sup> April 1991(PEX 3). According to PW1, his father wanted to sell five acres of the land in 1999 and that is when he sought the help of the 1<sup>st</sup> Defendant's director-one Kazungu Diwani. The two proceeded to Mouko & Company Advocate's office where the title was left in safe custody.

8. PW1 testified that it later emerged that the title was released to the said Kazungu Diwani on 2<sup>nd</sup> September 2006 in the absence of PW1's father. Later they sued the Defendants at the National Land Commission but the Defendant failed to turn up even after being summoned. The Commission finally determined on 3<sup>rd</sup> August 2016 that the land in issue belonged to the Plaintiffs and it gazetted its findings in 2017(Pex 8). The Defendant have however never surrendered the titles for cancellation hence this suit.

9. I have considered the Plaintiffs' testimony and the evidence adduced before this Court. I have equally considered the submissions filed by the Plaintiffs Advocates herein.

10. The two Plaintiffs are a son and his mother. They instituted this suit in their capacity as the Administrators of the Estate of James Munga Chishenga who, according to a copy of the Death Certificate produced herein (PEXH 1) died on 24<sup>th</sup> August 2008 aged 71 years. The Plaintiffs produced a copy of the Original title deed for the suit property from which it was evident that their father was issued with a title deed for the land on 26<sup>th</sup> April 1991.

11. It was the Plaintiffs' testimony that the deceased wanted to dispose of five acres of the land that measures 8.8 acres prior to his death. Subsequently, he approached one Kazungu Diwani, a director of the 1<sup>st</sup> Defendant to help him to get a buyer. To facilitate the transaction, the title deed was deposited with an Advocate for safe keeping.

12. As it turned out, the title was released by the Advocate to the said Kazungu Diwani who proceeded to transfer the title to the name of the 1<sup>st</sup> Defendant. Later the 1<sup>st</sup> Defendant would also in unclear circumstances transfer the property to the 2<sup>nd</sup> Defendant.

13. According to PW1, they had all along been in physical possession and use of the property and they have been unaware that the land had been sold to the parties until they sought to have the same transferred to the names of the Administrators of the Estate.

14. The Defendants did not enter appearance or file any response to the Plaintiff's case despite being served. In the circumstances the Plaintiffs' evidence herein remains uncontroverted and I am satisfied that they have proved their case on a balance of probabilities.

15. Accordingly, I hereby enter Judgment for the Plaintiffs and grant orders as prayed at paragraph (a) of the Plaint.

16. The Plaintiffs will also have the costs of this suit.

**Dated, signed and delivered at Malindi this 14<sup>th</sup> day of December, 2018.**

**J.O. OLOLA**

**JUDGE**