



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 3 OF 2015**

**AZZURI LIMITED .....PLAINTIFF**

**VERSES**

**PINK PROPERTIES LIMITED.....DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Plaint dated 9<sup>th</sup> January 2015, the Plaintiff averred that it is the registered proprietor of parcel of land known as Chembe/Kibabamshe/356 measuring 5.4Ha situate in Mayungu area of Malindi District; that the Defendant is the registered proprietor of parcel of land number Chembe/Kibabamshe/272 measuring 1.2 Ha (*the suit property*) and that the two land parcels of land are situate in one area and lying directly adjacent to each other, with a road separating them.
2. In the Plaint, the Plaintiff has pleaded that contemptuous of its proprietary rights and in breach of the planning of the area, the Defendant is developing a permanent structure on Plot No. 272 which has extended to the Plaintiff's plot being plot number 356 and a road reserve.
3. The Plaintiff has averred that in a joint survey report, the surveyor confirmed that the Defendant had indeed encroached on the Plaintiff's property and the road of access by 0.224Ha.
4. The Plaintiff is praying for an order directing that the Defendant demolish and remove the development offending the boundaries of parcel of land Number Chembe/Kibabamshe/356 and the road reserve. The Plaintiff has also prayed for a permanent injunction and for general damages for trespass.
5. In its amended Defence and Counter-claim, the Defendant averred that it is the registered proprietor of parcel of land known as Chembe/Kibabamshe/272 which it acquired on 6<sup>th</sup> June 2011; that having purchased the land, it constructed a perimeter wall and that the Plaintiff did not object to the construction of the said wall.
6. The Defendant averred that it commenced construction of the building on the land in the year 2012 and that plot number 272 is distinct from plot number 356; that the act of the Plaintiff to raise the issues in the Plaint is malicious because it waited until when they were almost through with the construction and that the two plots are separated by a road.
7. According to the Defendant's Defence, the two suit properties are registered under the repealed Registered Land Act and that the boundaries of the two parcels of land are "general boundaries" whose marginal error extends to about 2.5 metres and that the ground status should be used to rectify the area

map and not vice versa.

8. In the Counter-claim, the Defendant is seeking for orders of estoppel and a permanent injunction.

**The Plaintiff's case:**

9. PW1 informed the court that he works under the Malindi District Surveyor as a Surveyor; that he obtained a Diploma in Land Surveying in the year 2000 that he prepared a report in respect to the dispute herein.

10. According to PW1, the District Surveyor also prepared a report dated 9<sup>th</sup> July 2015 in respect to the dispute. PW1 produced in evidence the Registered Index Map Sheet No. 20 showing the location of the two plots.

11. PW1 informed the court that during the surveying of plots, a surveyor does not rely on the Registered Index Map alone but also consults the features that are on the ground.

12. The evidence of PW1 was that when the Plaintiff's and the Defendant's representatives visited his office, he went to the site after which he prepared his report of 6<sup>th</sup> January, 2015.

13. Although it is the Land Registrar who is supposed to settle boundary disputes, PW1 informed the court that he did not inform the Registrar after realizing that there was a boundary dispute between the Plaintiff and the Defendant.

14. PW1 acknowledged that the boundary in dispute is of a general nature; that physical features are relevant when dealing with general boundaries and that he picked three beacons which he used in preparing his report.

15. It was the evidence of PW1 that he did not know the person who fixed the three beacons that he used to prepare his survey and that his report was based on the Registered Index Map, which Map was also used by Mr. Mwanyungu, the Defendant's surveyor.

16. The evidence of PW1 was that beacons in a general boundary are not mathematically placed; that to determine the location of such a boundary, one needs to interview the people on the ground and that he did not talk to the neighbours before he prepared his report.

17. PW1 informed the court that if there is any difference between the Registered Index Map and the ground both of them may be changed depending with the circumstances and that as at the time of preparing the report the neighbouring plots being plot numbers 364, 363 and 273 had a barbed wire fence.

18. PW1 stated that he never consulted the owners of plot numbers 364, 363 and 273 neither did he ask them the reason as to why they had fenced the said plots in the manner they did; that he never mentioned the neighbouring plots in the report although he should have done so and that he picked beacons from plot 415 using the G.P.S and arrived at the conclusion he did.

19. The evidence of PW1 was that in his report, he picked walls and the beacons as the existing structures; that he did not pick the existing roads although a road is a "structure" and that he was not present when his colleague prepared the report of 9<sup>th</sup> July 2015.

20. In his findings, PW1 stated that the wall of plot number 272 (*the Defendant's land*) has encroached on plot number 356 by an area of 0.22Ha; that plot number 356 has also lost more land to plot number 364 and that although differences in area and distances are expected in a general boundary, the shape of the land has to remain the same.

21. It was the evidence of PW1 that due to the raise of the high water mark at some point, that needed to

be considered while resolving the boundary dispute in respect to the parcels of land.

22. According to PW1, the road separating plot numbers 272 and 356 has moved inside plot number 356 due to the encroachment.

23. The Plaintiff's Director, PW2, informed the court that according to the Physical Development Plan and the Maps of the area, the Plaintiff's plot (356) is separated from the Defendant's plot (272) by a road of access; that the Defendant's wall and structures have encroached on the road of access and onto the Plaintiff's land and that the said encroachment violates the Plaintiff's proprietary rights and constitutes actionable trespass.

24. In cross-examination, PW2 stated that the Plaintiff acquired plot number 356 in the year 2014; that he inspected the plot before he purchased it and that as at the time of purchasing the land, the land had a Title Deed and that he did not notice any discrepancy in acreage as at the time of purchasing the land.

25. PW2 stated that he only noticed the discrepancy when the Defendant commenced construction and that the dispute is in respect to the boundary between the two plots.

26. PW2 stated that he was shown the boundaries of the land he was purchasing; that although the dispute is in respect to the boundary, he never informed the Registrar of Lands and that there is an existing road on the ground separating plot number 272 from plot number 356.

27. It was the evidence of PW2 that he saw the wall of plot 272 while purchasing plot number 356 and that the owners of plot numbers 363, 364 and 272 have all fenced their respective plots and that the said fence is on the same line.

28. PW2 informed the court that although Plot No. 364 has also encroached on plot number 356, he has not sued the owner of the plot and that indeed this case will affect all the plots that have been fenced which are plot numbers 271, 272, 273, 363 and 364.

29. The evidence of PW2 was that he tried to resolve the dispute out of court by going to the District Commissioner but the Defendant was not agreeable.

### **The Defence case:**

30. The Defendant's Director, DW1, informed the court that the Defendant is a company incorporated in Kenya; that in the year 2010, the Defendant purchased parcel of land number Chembe/Kibabamshe/272; that the said plot borders the Indian Ocean on the South, plot number 363 on the West, plot number 271 on the East and a Dirty road on the North and that the Defendant got all the requisite approvals to develop the said property.

31. It was the evidence of DW1 that the Defendant re-fenced plot number 272 by replacing the net and barbed wire fence with a permanent wall; that in the same year, the Defendant published a notice in the newspaper declaring its intention to build a multi residential houses on the land and that no one complained.

32. According to DW1, in the year 2013, Kenya Power Company connected electricity on plot number 272 and that the electricity pillars were put on the dirty road, and so was the water pipeline by MAWASCO.

33. DW1 informed the court that in the year 2014, the Defendant started construction of the two twin villas as drawn on the approved plans and only became aware of the complaint by the Plaintiff in December, 2014 when they received summons from the District Commissioner inviting them to appear before him in his office.

34. It was after the meeting with the District Commissioner that the Plaintiff filed the suit. It was the

evidence of PW1 that it had to commission an independent licenced surveyor who found that indeed the boundary wall built by the Defendant on plot number 272 does not encroach on the existing road of access or plot number 356.

35. In cross-examination, DW1 stated that although they agreed on a joint survey, she did not agree with the findings of the District Surveyor; that they did due diligence before they purchased the suit property and that they involved the Surveyor who verified the position of the boundaries before purchasing plot number 272.

36. It was the evidence of DW1 that the District Surveyor's report was done quickly and without following the required methodology; that the Surveyor did not involve them when he went on the ground and that the surveyor did not ask them any questions which was not proper.

37. DW2, a licenced Surveyor, informed the court that he was engaged by the Defendant to re-survey plot number 272 after a dispute arose.

38. When he used the Registered Index Map to re-survey the boundaries of plot 272, DW2 informed the court that he found that there was a slight encroachment on the road reserve which was negligible because of the nature of the general boundaries in question.

39. DW2 informed the court that he used the existing undisputed boundaries to come to his findings unlike the District Surveyor who used "*boarder beacons*" as references.

40. It was the evidence of DW2 that he used the existing boundaries and plotted them against the Registered Index Map (RIM) to prepare his report which he produced in evidence.

41. DW2 informed the court that one only uses beacons while surveying if the beacons are fixed; that a fixed beacon has a number and co-ordinates and that in general boundaries, it is the owners of the land who know the boundaries of their land.

42. It was the evidence of DW1 that general boundaries are usually shown by continuous features like fences, hedges, or walls; that the Registered Index Map is not an authority while establishing general boundaries and that it is the features on the ground which are used to adjust the Registered Index Map and not the other way round. DW1 disputed the District Surveyor's report whose methodology, according to him, was wrong.

43. The evidence of DW2 was that on the ground, plot numbers 364, 363 and 272 have been fenced in the same alignment and that if the District Surveyor's report was to be accepted, then all the boundaries in the area will change.

44. According to DW2, the developments on plot number 272 are within the said plot and that there is an existing road separating plot number 272 from plot number 356.

45. In cross-examination, DW2 stated that the area in question was adjudicated in 1978; that the land was previously government land; that the boundaries must have been determined then and that he did not agree with the methodology that was used by PW1 in preparing his report.

46. According to DW2, the findings of PW1 could only be made where you have fixed boundaries; that he visited the site in the company of his Assistant and that he did not go inside the ocean to establish if indeed there were beacons in the ocean.

47. DW2 informed the court that under the law, it is the Land Registrar who is supposed to solve disputes relating to general boundaries; that it is the owners of the land who are supposed to show their boundaries and that the Registered Index Map usually has so many distortions and that is why the Land Registrar is expected to hear the owners of the land.

## **Submissions:**

48. In his submissions, the Plaintiff's advocate relied on a paper presented at the International Conference on Spatial Development for sustainable Development held in Nairobi on 2<sup>nd</sup> October, 2001 title "*The Role of the Registry Index Map in Land Management in Kenya*" by Peter K. Wanyoike.

49. The Plaintiff's counsel submitted that both surveyors arrived at a conclusion that there is encroachment by the Defendant on the public access road and the Plaintiff's plot; that there is a feeble attempt by the Defendant's witnesses to water down the importance of the Registered Index Map and that the unquestionable evidence shows that the Defendant's development has encroached on the Plaintiff's land.

50. In his Further Submissions, the Plaintiff's advocate submitted that when the court visited the *locus in quo*, PW1 showed the court that plot number 365 has fixed boundaries; that PW1 pointed out a beacon placed during the original demarcation of the Settlement Scheme and that the beacon was in tandem with the fixed boundaries of plot number 365.

51. Counsel submitted that the Defendant's wall together with its buildings have encroached into the road reserve and onto the Plaintiff's property and that the Map cannot change at the unilateral will of one or several parties.

52. The Plaintiff's counsel submitted that the Defendant's surveyor did not attend the *locus in quo* and that the Defendant did not conduct any due diligence before commencing developments on its land.

53. The Plaintiff's counsel submitted that the Defendant is compensating for the land it has lost due the action of the sea and that the Plaintiff has been forced to yield up a portion of its own property for use by the general public.

54. The Defendant's counsel submitted that PW1 did not determine the registration regime under which the two parcels of land are registered; that he admitted the boundaries in question are general in nature and that being general boundaries, the surveyor could not use beacons to establish accuracy of the boundaries as none has been fixed.

55. Counsel submitted that the relative positions of the boundaries as known by the owners is crucial; that the survey of PW1 did not consider this crucial point at all and that the said report is in violation of Section 19 and 22 of the Land Registration Act.

## **Analysis and findings:**

56. In its Pleint, the Plaintiff averred that it is the proprietor of parcel of land known as Chembe/Kibabamshe/356 while the Defendant is the proprietor of parcel of land known as Chembe/Kibabamshe/272 (*Plot No. 272*). The two plots are separated by a dirty road and are opposite each other.

57. The Plaintiff has alleged in the Pleint and in the testimony of PW1 and PW2 that the developments being undertaken by the Defendant on its plot have encroached not only on the road of access separating the two plots but also partially on plot number 356 owned by the Plaintiff.

58. The Plaintiff is seeking for an order to prohibit the Defendant from violating its "*boundaries*" as described in the Malindi District Surveyor's report of 6<sup>th</sup> January, 2015.

59. According to the report of the District Surveyor dated 6<sup>th</sup> January, 2015, the Survey was carried out "*in order to ascertain the positions of plot numbers Chembe/Kibabamshe/356 and 272 and to pick the existing structures.*"

60. According to the evidence of the District Surveyor, PW1, reference was made from the boundaries of

plot number 415 which is on sheet number 21 in making his report. PW1 stated in his report and evidence that he picked “*three corner beacons for Plot No. 356 and one corner beacon for Plot No. 271, together with an existing wall and the high water mark.*”

61. In his report, PW1 made the following findings;

- ***It was found that the wall for owner of plot 272 (the Defendant’s land) has encroached onto 356 (the Plaintiff’s plot) by an area of 0.224Ha (approximately 0.56 acres)***
- ***Plot number 356 has lost not only to 272 but also to 364 that belongs to 356 by 0.313Ha (approximately 0.7 acres)***
- ***The westerly boundaries of 271 and 272 are on line according to the Registered Index Map.***

62. In his conclusion, the report by PW1 stated as follows:

- ***In accordance with the regulations of general boundaries differences in Area and distances are expected but the shape has to be in agreement. Because of the effect of the high water mark rising further not on the whole shoreline but at some points depending on where the current is high, this has to be considered in resolving this boundary dispute.***

63. In his evidence, PW1 stated that he did not know the person who fixed the beacons mentioned in his report.

64. During cross-examination, PW1 admitted that the boundaries in respect to the two plots are not fixed but are general and that in a general boundary, the beacons are not mathematically fixed.

65. To locate the location of general boundaries, PW1 stated that one needs to interview the people on the ground and that when there is a difference between the boundaries on the ground and the Registered Index Map, both of them need to be changed.

66. The evidence of the Defendant’s Surveyor, DW1, was that there is a slight encroachment of plot number 272 on the road of access if compared with the existing Registered Index Map. However, DW2 stated that the said encroachment was negligible.

67. In his report, DW2 stated as follows:

- ***The boundaries are termed as general boundaries and cannot be defined precisely by placement of beacons unless a fixed boundary survey is done.***
- ***General boundaries are defined by physical features that are continuous in nature such as walls, hedges and fences other than beacons.***
- ***The Registered Index Map which is the only available plan for the area cannot be used alone to determine the boundary of a parcel of land.***
- ***However, the Registered Index Map can be used to show relative positions of parcels of land as defined by their physical boundaries and hence deduce the positions of other parcels by relation.***

68. In his conclusion, DW2 stated as follows:

***“In relation to that, that the incomplete developments on plot no. 272 would be within the plot. The boundary wall encroachment shown in the attached diagram should be ignored according to the general boundary survey standards and the road be its position.”***

69. The evidence produced in court shows that the Defendant purchased Plot No. 272 vide an agreement dated 3<sup>rd</sup> June, 2011. The Defendant was then issued with its Title Deed under the Registered Land Act (*repealed*) on 4<sup>th</sup> June, 2011. The approximate area of Plot No. 272 is indicated as 1.18Ha.

70. The Defendant was subsequently issued with a NEMA licence to construct on Masionnete Block,

Four Villas, servant quarters and a swimming pool on Plot No. 272 on 17<sup>th</sup> January, 2013. The said construction began and by the time this suit was filed, the construction of the villas was almost complete.

71. The evidence of DW1 was that as at the time the Defendant purchased the land, there was an existing barbed wire fence which they replaced with a wall fence after the purchase of the land.

72. On the other hand, the Plaintiff purchased the suit land in the year 2014. The Title Deed for plot number 356 was issued to the Plaintiff on 31<sup>st</sup> October, 2014. By this time, the Defendant had already put up its wall fence and was putting up villas on plot number 272.

73. PW2 informed the court that it was shown the extent of the land it was purchasing from the previous owner of plot number 356 and that indeed the Defendants wall was already in place.

74. According to PW2, there was no dispute as between the previous owner of Plot No. 356 and the Defendant. It is only after the Plaintiff was issued with the Title Deed that it realised that the Defendant had encroached on its land.

75. It is not in dispute that both plot numbers 272 and 356 are registered under the provisions of the Registered Land Act.

76. It is also not in dispute that both plots have what is known as general boundaries and that the Registered Index Map governing the two plots is found in sheet number 20.

77. I have perused the said sheet number 20(Registered Index Map). The Registered Index Map shows plot number 356 is on the opposite side of plot numbers 271, 272 and 364 with a road separating them.

78. The diagram which was prepared in 1978 shows only one plot has what seems to be fixed beacons, that is Plot No. 365. The said plot neither borders plot number 356 nor 271. All the other plots do not have fixed beacons (boundaries).

79. As I have stated above, the surveyors that appeared before the court were in agreement that the Plaintiff's and the Defendant's plots have general boundaries.

80. In his paper, *"The Role of the Registry Index Map (RIM) in Land Management in Kenya"*, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of *"General Boundaries"* or *"approximate boundaries."*

81. The paper defines *"General Boundaries"* as follows:

***"A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process."***

82. In the case of *Ali Mohamed Salim vs Faisal Hassan Ali (2014) eKLR*, this court held as follows:

***"The type of survey that generated the Registry Index Map is what was known as "general boundaries" which has been defined in Section 18(1) of the Land Registration Act, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under***

***the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”***

83. In the case of Samuel Wangau Vs. AG & 2 others (2009) eKLR, it was held as follows:

***“However, it is common ground that such maps (R.I.M) are not authorities on boundaries. Both the District Land Registrar and the District land surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the R.I.M in solving the dispute.”***

84. Indeed, both PW1 and DW2 were agreeable that for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include hedges, fences and roads.

85. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court. Section 18 of the Land Registration Act states as follows:

***“18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.***

***(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.***

***(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:***

***Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).***

86. Indeed, under Section 19 of the Land Registration Act, the Land Registrar cannot fix boundaries which are general in nature unless and until he gives notice to the owners and occupiers of the land adjoining the boundaries in question of his intention to ascertain and fix the boundaries.

87. Section 20 of the same Act requires every proprietor of land to maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries.

88. The Defendant in this matter purchased plot 272 when it was already fenced and with an existing dirty road. All the other plots neighbouring plot number 272 and abutting the ocean were fenced in a straight line.

89. When the Plaintiff purchased its land in the year 2014, it found that the Defendant’s fence in place. According to the evidence of PW1, he was shown the existing boundaries of the land he was purchasing, together with the neighbouring plots.

90. PW1 did not inform the court why he did not raise the issue of encroachment, if at all, of the wall fence that was already in existence enclosing plot numbers 271, 272, 364 and 363 as at the time it purchased plot number 356 in the year 2014.

91. In any event, PW2 has not exhibited any report to show that the acreage of the land it purchased is smaller due to the alleged encroachment.

92. Having found an existing dirty road, which is a physical feature, and the Defendant's wall in place, it was incumbent on the Plaintiff, to report any issue of encroachment by its neighbours to the Land Registrar so that he could fix the boundaries and ascertain if indeed there was encroachment.

93. Instead, the Plaintiff resorted to reporting the issue to the Assistant County Commissioner, Malindi who summoned the Defendant vide his letter dated 30<sup>th</sup> December, 2014.

94. When the efforts by the County Commissioner to resolve the dispute failed, the Plaintiff involved the District Surveyor who prepared a report, which is the basis of the current suit. The filing of the current suit before referring the dispute to the Land Registrar was contra-statute.

95. The report of the District Surveyor dated 6<sup>th</sup> January, 2015 is of no evidentiary value considering that firstly, it is not his mandate to determine disputes relating to general boundaries and secondly, he used the wrong methodology in preparing his report.

96. The report by the said District Surveyor was based on the "*boundaries of Plot No. 415 sheet No. 21 and the three corner beacons of plot number 356.*"

97. In cross-examination, the District Surveyor stated that the boundaries of plot numbers 415 and 356 were not fixed. Indeed, he admitted that he did not know the person who "*fixed*" the beacons that he used to arrive at his conclusions.

98. The said surveyor also admitted that he did not consult the existing features like roads, hedges or walls neither did he consult the owners nor occupiers of the neighbouring plots to determine the boundaries of plot numbers 272 and 356.

99. Although PW1 placed reliance on the "*corner points*" of plot number 415 which is found on sheet number 21, the witness did not produce the said sheet in evidence or the relationship of sheet number 21 and sheet number 20.

100. The findings of the Defendant's Surveyor (DW2) that the position of Plot No. 272 compared with the parcels that lie along the shoreline agrees reasonably with the Registered Index Map and that the encroachment on the road reserve is by between 1.3 by 1.6 M is consistent with what the court observed when it visited the *locus in quo*.

101. I say so because when the court visited the site, it observed that all the neighbouring plots on the shoreline shared a wall fence which was straight in line and running from numbers 272, 364, 363 and all the way.

102. If indeed plot numbers 272 and 364 had encroached on plot number 356 by more than one (1) acre as alleged in the report of PW1, the Plaintiff should have noticed that encroachment even before it purchased the land in the year 2014.

103. Although the court was shown "*a beacon*" which was deep inside plot number 364 and a few metres from the high water mark, there was no evidence to indicate when the "*beacon*" was fixed, who fixed it and whether indeed that was the beacon indicating the boundary between plot number 364 and the road or whether it was a mark to indicate the last position of the plot before the high water mark (*which is usually 60 meters to the high water mark*).

104. In the circumstances, the mark that the court was shown when it visited the *locus in quo* does not change the observation that there were already existing features depicting the general boundaries between plot number 272 and plot number 356.

105. Indeed, the law recognizes the fact that the Registered Index Maps only indicate the approximate boundaries and the approximate situation on the ground (see section 18 (1) of the Land Registration Act).

106. Consequently, it was erroneous for PW1 to place reliance on sheet number 20 and sheet number 21 alone to determine the alleged extent of encroachment of Plot number 272.

107. To the contrary, the Defendant's surveyor, DW2, used the correct methodology in determining the dispute between the Plaintiff and the Defendant.

108. Having found that the incomplete developments are within the boundaries of Plot number 272, I find that the Plaintiff has not established on a balance of probabilities that the wall and developments on Plot Number 272 have encroached on the road of access and on plot number 356.

109. In the circumstances, I find that the Plaintiff has not established on a balance of probabilities that the wall and developments on plot number 272 have encroached on the road of access and on plot number 356.

110. For those reasons, the Plaintiff's Plaint dated 9<sup>th</sup> January, 2015 is dismissed with costs and the Defendant's amended Counter-claim dated 29<sup>th</sup> January, 2016 is allowed in the following terms:

*a. A permanent injunction be and is hereby issued restraining the Plaintiff, its servants, agents or any other person acting at its behest from interfering in any manner whatsoever with the Defendant's parcel of land known as Chembe/Kibabamshe/272.*

*b. That Plaintiff to pay the costs of the suit and the Counter-claim.*

**DATED AND SIGNED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2017.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**J.O. OLOLA**

**JUDGE**