



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

**AT MALINDI**

**ELC PETITION NO. 5 OF 2011**

**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 DIRECOTR OF SURVEYS**
- 7. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
- 8. THE MUNICIPAL COUNCIL OF MALINDI**
- 9. THE OFFICER COMMANDING OF POLICE DIVISION, MALINDI**
- 10. GIMALOWI COMPANY LTD**
- 11. EXEMPLER LIMITED**
- 12. SHARIFF M. MOHAMED**
- 13. P. N. NDOLO**
- 14. LA MARIANA LTD**
- 15. MALINDI MUSKETTERS LTD**
- 16. SHARIF N. HABIB**
- 17. HILDEGARD JUNG**
- 18. DANIEL RICCI.....RESPONDENTS**

AND

ITAKEY INVESTMENTS LIMITED.....APPLICANT

**R U L I N G**

**Introduction:**

1. What is before me is the Notice of Motion dated 5<sup>th</sup> November, 2015 by the Interested Party/Applicant. In the Application, the Applicant is seeking for the following reliefs:-

**(a) That this honourable court be pleased to order that the Applicant, Itakey Investments Limited, be joined as a party to this suit for the reason that they are the owners of all that land known as Chembe/Kibabamshe/549 and 599 which was originally known as Chembe/Kibabamshe/358.**

**(b) THAT this honourable court be pleased to set aside the Judgment and decree of this honourable court dated 30<sup>th</sup> October, 2015 as the hearing proceeded without the applicant against whom the Judgment of the court is directed and whose properties may be demolished by virtue of the said Judgment despite their having not been accorded any hearing and that this honourable court do order the matter be heard afresh to enable the applicant participate in the hearing.**

**(c) THAT the cousts of this application be provided for.**

**The Applicant's case:**

2. The Applicant's director has deponed that the Applicant purchased parcel of land known as Chembe/Kibabamshe/549 and 599 which were subdivisions of plot 358 from Kenya Commercial Bank for Kshs.37,393,938.50.

3. According to the Applicant's director, the Gimalawi Company Limited, the 10<sup>th</sup> Defendant, lost the suit properties after failing to settle the loan they owed Kenya Commercial Bank Ltd; that the Applicant bought the said land on 18<sup>th</sup> July, 2014; that after the titles were issued to the Applicant, it submitted its building plans for approval and that after getting approvals from the County Government and NEMA, the Applicant commenced construction of buildings on the land and has so far spent over Kshs.70,000,000.

4. According to the Applicant, the Petitioner has all along been aware that the Applicant owns the suit property; that the Petitioner never informed the Applicant of the pending suit and that the execution of the said Judgment would infringe on the Applicants fundamental rights and freedoms as enshrined in the Constitution.

5. The Applicant's director deponed that the Judgment of the court having been directed at the 10<sup>th</sup> Respondent, who is not the owner of the subject properties, the execution of the same against the Applicant would be unfair and unjust as the same would be tantamount to condemning an innocent person without hearing him.

**The Petitioner's/Respondent's case:**

6. The Petitioner's Company Secretary deponed that throughout the trial, the 10<sup>th</sup> Respondent's counsel, James Orenge & Co. Advocates, were always served with hearing notices; that he has always seen Mr. Antonella Braccin in the 10<sup>th</sup> Respondent's property and that Mr. Antonella has always referred to this Petition every time the Petitioner wanted to undertake developments.

7. It is the Petitioner's case that it was never made aware of the changes of proprietorship of the 10<sup>th</sup>

Respondent's land; that it has spent a lot of money in the execution of the Judgment of this Court and that it is unfair for the Applicant who was aware of the Petition to wait until Judgment has been entered to seek the setting aside of the orders.

**The 13<sup>th</sup> and 14<sup>th</sup> Respondents case:**

8. The 13<sup>th</sup> and 14<sup>th</sup> Respondents filed their Grounds of Opposition in which they averred that the court lacks jurisdiction to entertain the Application having heard the suit on merit; that the Applicant has not disclosed the substance of his defence and that the 10<sup>th</sup> Respondent was properly represented in these proceedings by the firm of J. A. B Orengo.

**15<sup>th</sup> and 18<sup>th</sup> Respondents' case:**

9. The 15<sup>th</sup> and 18<sup>th</sup> Respondents deponed that they supported the Petition during trial; that when the Petition was filed, the 10<sup>th</sup> Respondent was still the owner of the land in question; that there are a multiplicity of suits filed against the 10<sup>th</sup> Respondent that the Bank must have known that there was a problem when the Petition was served by way of advertisement in the Daily newspaper.

**The 8<sup>th</sup> Respondent's case:**

10. The Malindi Subcounty Town Administrator deponed that the issues raised in the current Application have already been determined by the Court; that the Application has been made too late in the day and that the Application does not meet the threshold of setting aside a Judgment.

11. In its Grounds of Opposition, the 8<sup>th</sup> Respondent averred that the Applicant's remedy is as against Gimalowi Company Limited for failing to disclose the existence of the suit.

**Submissions:**

12. The Applicant's counsel submitted that the Applicant is a necessary party because the mandatory orders of this court are directed to the 10<sup>th</sup> Respondent; that this court is enjoined under Rule 5(d) and (e) of the "Mutunga Rules" to order the joinder of a party in the proceedings at any stage and that the Applicant, being the owner of the suit property, is a necessary party.

13. Counsel submitted that the failure by the Applicant to tender evidence was occasioned by the fact that the 10<sup>th</sup> Respondent, have failed to pay the bank lost interest in the suit and that having bought the suit property from the bank, the Applicant should be heard.

14. The Petitioner's/Respondent's counsel submitted that the Transfer documents annexed on the Applicant's documents have not been registered; that the titles in respect to the suit property are still in the name of the 10<sup>th</sup> Respondent and that the Applicant has not filed a draft reply to the Petition.

15. Counsel submitted that one of the Directors of the 10<sup>th</sup> Respondent is also a director of the Applicant; that the Applicant has not demonstrated that the structures are not standing on a public road and that no survey report has been annexed to the Supporting Affidavit.

**Analysis and findings:**

16. The Applicant is seeking to set aside the Judgment of this court so as to be able to defend the Petition.

17. In the Judgment of 30<sup>th</sup> October, 2015, this court issued a mandatory injunction compelling the 10<sup>th</sup> and 11<sup>th</sup> Respondents to re-open a public road that they had blocked. The effect of the order of the court was to have the buildings which had been put up by the 10<sup>th</sup> Respondent on parcel of land number

Chembe Kibabamshe/549 and 599 (the suit properties) to be brought down.

18. Indeed, upon the delivery of the Judgment, the Petitioner together with the County Government of Kilifi mobilised equipment for the purpose of bringing down the buildings on the suit property.

19. Although the 10<sup>th</sup> Respondent was served with the Petition and appointed counsel, neither the 10<sup>th</sup> Respondent nor its counsel participated in these proceedings.

20. Indeed, save for the Grounds of Opposition, the 10<sup>th</sup> Respondent did not file an answer to the Petition. The court did not therefore consider the 10<sup>th</sup> Respondent's case viz a viz the Petitioner's claim.

21. The Applicant has deponed that the 10<sup>th</sup> Respondent charged the suit properties to Kenya Commercial Bank and when it was unable to re-pay the loan, the Bank sold the suit properties to the Applicant.

22. The Applicant has exhibited the copy of the Title Deeds for Chembe/Kibabamshe 549 and 599 which shows that the two parcels of land were charged to Kenya Commercial Bank on 20<sup>th</sup> November, 2011. The said copies of the Title Deeds shows that the 10<sup>th</sup> Respondent borrowed Kshs.30,000,000 from the Kenya Commercial Bank and used the Title Deeds as security.

23. The Applicant has exhibited the Transfer by Chargee which shows that, the Bank transferred the suit properties to the Applicant for Kshs.37,393,938. The Transfers were duly registered on 18<sup>th</sup> July 2014 by the Land Registrar.

24. After the Transfers were registered, the evidence before this court shows that the Applicant was issued with the Title Deeds for the two parcels of land on 18<sup>th</sup> July, 2014 free of any encumbrances.

25. The Applicant then obtained approvals from the County Government of Kilifi and from the National Environment Management Authority (NEMA) to put up a tourist hotel. The Applicant deponed that it has spent over Kshs.70,000,000 to put up the said hotel.

26. This Petition was filed on 19<sup>th</sup> May, 2011. in the Petition, the Petitioner averred that the 10<sup>th</sup> and 11<sup>th</sup> Respondents have built a wall completely closing and blocking the public road running from Chembe/Kibabamshe to Watamu.

27. It would appear from the Title Deeds exhibited by the Applicant that by the time the Petition was filed, the 10<sup>th</sup> Respondent had already charged the two properties to the Bank.

28. It would also appear that as at the time of filing the Petition, the 10<sup>th</sup> Respondent was not servicing the loan and was not interested in defending the Petition. That explains why it never filed an answer to the Petition and did not participate in the trial of the Petition.

29. There is no evidence before me to show that before the Petition was filed, an official search was conducted by the Petitioner, in respect of plot numbers 549 and 599. If a search had been conducted, it may have shown that the two plots had been charged to KCB, thus necessitating the service of the Petition on the Bank as an Interested Party.

30. Having not informed the Bank of the pending suit, the Bank proceeded to sell the suit property to the Interested Party, who, according to the deposition of its Director, has developed the property.

31. Although the Petition was served on most parties by advertisement in the newspaper, it would have been impossible for the bank to have known that the Petition was in respect of the suit property.

32. Considering that the mandatory order that was issued by this court is final in nature, the Applicant's buildings will be demolished without it being heard.

33. The rules of natural justice and the provisions of Article 50(1) of the Constitution dictates that a party should not be condemned unheard. In view of the seriousness and ramifications of the Judgment of this court, the Applicant has a right to be heard on the Petitioner's Petition.

34. This court has the inherent jurisdiction to set aside its Judgment if it is convinced that the said Judgment will affect a party who should have been heard but was not heard. It cannot be said that once the court delivers its Judgment, then it folds its hands and cannot re-open the case under whatever circumstances. Such a holding would be a travesty of justice especially in a case where a party who should have joined in the proceedings was not joined.

35. In the circumstances and considering that the only issue in the Petition is whether the suit properties have encroached on a public road, this court shall not delve into the issue of whether the sale of the suit properties to the Applicant by KCB was procedurally done or not. That is an issue which has not been raised in the Petition.

36. Suffice to say that the Applicant has demonstrated that the Judgment of the Court shall adversely affect him. Having not joined Kenya Commercial Bank in these proceedings when the Petition was filed, and in view of the ramification of the orders of this court, I find and hold that the Applicant is a necessary party in these proceedings and ought to have been heard. Consequently, the Applicant should be joined in these proceedings and be given an opportunity to ventilate its case.

37. For those reasons, I allow the Application dated 5<sup>th</sup> November, 2015 with no order as to costs.

Dated, signed and delivered in Malindi this **16<sup>th</sup>** day of **September**, 2016.

**O. A. Angote**

**Judge**