



**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 19, 20, 21, 22, 23, 25(C), 27, 40, 47, 50, 60, (1) (b), 62 (1),  
64, 165, 262 and SECTION 19 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA  
2010**

**AND**

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

**AND**

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

**AND**

**IN THE MATTER OF: MALINDI HIGH COURT CIVIL SUIT NOS 52 OF 2007, 69 OF  
2007, 46 OF 2008, 56 OF 2008, 31 OF 2009, 40 OF 2011, MALINDI MISCELLANEOUS CIVIL  
APP. 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/KIBABAMSHE LOCATED AT MAYUNGU MALINDI**

**BETWEEN**

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

**AND**

- 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 AND SETTLEMENT**

**8. THE MUNICIPAL COUNCIL OF MALINDI**

**9. THE OFFICER COMMANDING POLICE DEVISION,  
MALINDI**

**10. GIMALOWI COMPANY LIMITED**

**11. EXEMPLER LIMITED**

**12. SHARIFF M. MOHAMED**

**13. P. N. NDOLO**

**14. LA MARINA LTD**

**15. MALINDI MUSKETTERS LTD**

**16. SHARRIF N. HABIB**

**17. HILDEGARD JUNG**

**18. DANIEL RICCI.....RESPONDENTS**

## **J U D G M E N T**

### **Introduction**

1. This matter was commenced by way of a Constitutional Petition dated 18<sup>th</sup> May, 2011 and filed on 19<sup>th</sup> May 2011.

### **Pleadings:**

2. In the Petition, the Petitioner averred that it is the registered proprietor of a leasehold interest in parcel of land known as Chembe/Kibabamshe/374 (the suit property) which has been developed with a perimeter wall around it and a number of villas, apartment blocks and swimming pools.
3. According to the Petitioner, adjoining the suit properties are parcels of land numbers Chembe/Kibabamshe 362, 419, 358 (and its various subdivisions) and 371; that there is a public road that runs between the suit property and plot number 358 (and its various subdivisions) and that the said road connects Malindi to Watamu.
4. The Petitioner has further averred that there is another road between the suit premises and plot number Chembe/Kibabamshe 362 enabling access to the sea.
5. The Petitioner has averred that in Malindi HCCC No. 52 of 2007, the court ordered that the boundaries be fixed by the Registrar and that subsequently, the Registrar prepared a report dated 8<sup>th</sup> February 2008; that the Petitioner's relied on that report and filed HCCC No. 39 of 2009 and that unknown to the Petitioner, a consent order was recorded in HCCC No. 52 of 2007 quashing the Registrar's report and authorizing a further report by different registrars and surveyors.
6. The Petitioner's case is that subsequently, the Registrars and Surveyors invaded the suit properties and erected beacons the effect whereof about 50% of the Petitioner's land was handed over to the 10<sup>th</sup> Respondent in order to enlarge his land being plot number 358.
7. It has been averred in the Petition that thereafter, the 10<sup>th</sup> and or 11<sup>th</sup> Respondents built a wall completely blocking the public road connecting Chembe/Kibabamshe to Watamu; that the fresh

beacons also showed that the public access road to the ocean became part of the 10<sup>th</sup> Respondent's land and that the 10<sup>th</sup> Respondent blocked the public road serving the suit premises and leading towards Watamu by building villas thereon.

8. The Petitioner is seeking for various mandatory orders including an order compelling the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents to demolish the villas built on the public road between the original plot 358 and 374; an order of prohibitory injunction against the 10<sup>th</sup> and 11<sup>th</sup> Respondents from trespassing on plot 374 and a declaration that the road serving the suit premises enabling the Petition access the property either from Malindi or from Wataum and the road between the suit premises and plot 362 are public roads.

#### **The 1<sup>st</sup> to 9<sup>th</sup> Respondent's case:**

9. The Attorney General filed Grounds of Opposition on behalf of the nine Respondents.
10. In the Grounds of Opposition, the Attorney General averred that the orders being sought are a nullity and that the rules of natural justice have been breached. The Attorney General did not file a Replying Affidavit to clarify the issues of facts raised by the Petitioner and the other Respondents.

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

11. The Town Clerk of the defunct Municipal Council of Malindi deponed that the Petitioner submitted building plans for development of plot 374 on 26<sup>th</sup> May 2009; that the Council granted the Petitioner provisional approval; that the council received an objection from the 10<sup>th</sup> Respondent that the Petitioner had encroached on its land and that after deliberations, it was agreed that the Ruling on boundary dispute by the Kilifi Land Registrar was inadequate and an independent surveyor was appointed.
12. According to the 8<sup>th</sup> Respondent, it allowed the Petitioner to proceed with the proposed developments as long as the same was carried out 20 meters off the disputed boundary.
13. According to the Town Clerk, Edward Kiguru Land Surveyor duly prepared a survey report dated 27<sup>th</sup> October 2009 which confirmed that indeed the proposed developments on plot 374 (the suit property) encroached on plot number 358 belonging to the 10<sup>th</sup> Respondent.
14. The Town Clerk deponed that the Council commissioned another surveyor, a Mr. Tsuma, who confirmed that the proposed developments on plot 374 encroached on plot 358.
15. It is the Council's case that the Report of the District Land Registrar dated 8<sup>th</sup> February 2008 was quashed by the court in Malindi HCCC No. 52 of 2007.

#### **The 10<sup>th</sup> Respondent's case:**

16. The 10<sup>th</sup> Respondent's counsel filed a Notice of Preliminary Objection in which he averred that the Petition is an abuse of the court process and that the Petitioner is seeking to re-litigate on Constitutional platform matters that have already been adjudicated and ought to be adjudicated before the civil process. The 10<sup>th</sup> Respondent did not file a Replying Affidavit.

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

17. The 13<sup>th</sup> and 14<sup>th</sup> Respondents' case is that the 14<sup>th</sup> Respondent is the owner of plot number 419 and that a public road runs between the suit premises.
18. On 25<sup>th</sup> July 2013, this court directed the parties to proceed with the hearing of the Petition by way of viva voce. The Petitioner's surveyor and director testified on 22<sup>nd</sup> October 2014.

#### **The 15<sup>th</sup> and 18<sup>th</sup> Respondents**

19. According to the deposition of the 18<sup>th</sup> Respondent, he is the owner of Plot numbers

- Chembe/Kibabamshe 371 and 362 respectively, that he is suffering a situation similar to the Petitioner's thus the filing of HCCC No. 40 of 2011 which was filed as a result of the fixing of the new beacons by the Chief Land Registrar on 1<sup>st</sup> April 2011.
20. According to the 18<sup>th</sup> Respondent, there is an existing road between plots 371 and the 11<sup>th</sup> Respondent's plot number 359 (or its subdivisions) and that there is another existing road between plot number 371 and 362 and 374.
21. The 18<sup>th</sup> Respondent deponed that because of the current demarcation carried out by the Chief Land Registrar and a team of surveyors, the existing road between plot numbers 371 and 359 has been closed by the 11<sup>th</sup> Respondent; that the 15<sup>th</sup> and 18<sup>th</sup> Respondents were not parties to HCCC No. 52 of 2007 and that the owners of the neighbouring plots were not invited before the current report was prepared.

### **The Petitioner's evidence:**

22. The Petitioner's surveyor, PW1, informed the court that upon being instructed by the Petitioner, he ascertained the position of parcel of land number 374 (the suit property) including the adjacent roads whereafter he prepared a report dated 5<sup>th</sup> December 2013.
23. According to PW1, his report is based on the map that was prepared in 1997 which shows the shoreline. When he did an overlay, it was his evidence that he established that the shoreline had never moved.
24. PW1 took photographs showing the developments on plot number 374 and plot number 358. The developments are opposite each other.
25. According to PW1, on the ground, there is a stone wall in the foreground of the developments of both plots which has blocked the road that is supposed to separate the two plots. The road between the said plots should be 15 meters wide.
26. The blocked road, according to PW1, is the road that comes from Malindi through Chembe/Kibabamshe to Watamu. The stone wall blocking the road, according to PW1, was erected by the owner of plot number 358 the 10<sup>th</sup> Respondent.
27. PW1 showed the court the photographs he took which shows where the beacons of plot 358 ends (currently) which, according to him, actually consumes the entire 15 m road that separates plot 358 and the suit property..
28. Other than the wall, PW1 pointed to the court part of the building on plot 358 which has also encroached on the road.
29. According to PW1, when he compared the road in the Registered Index Map and the road on the ground, he found that the road on the ground had been pushed inside plot 374 (the suit property) by 10 meters which collaborates with the mutation report that he obtained from the Director of Surveys.
30. PW1 informed the court that the impugned wall did not only block the 15 meter road but also blocked another road measuring 10 meters.
31. In conclusion, PW1 informed the court that the reduction in size of plot number 374 was due to the failure to reposition the 15 meter road and the movement of the road on the ground inside plot 374 by 10 meters. PW1 agreed with the first report of the District Land Registrar that was done in the year 2007.
32. In cross examination, PW1 informed the court that the second report by the Chief Land Registrar was in respect to different parcels of land and that he neither agrees with that report nor with the report of Mr. Edward Kiguru.
33. The evidence of PW2, the Petitioner's director, was that the Petitioner has put up twenty one (21) apartments on plot number 374.
34. It was the evidence of PW2 that the Petitioner purchased the suit property in 1996 and that at the time of the purchase, the beacons in respect to the suit properties were visible.
35. According to PW2, although they have put up a provisional wall around plot number 374, the actual wall of their plot is supposed to move inside what is purported to be plot number 358; that at the time of purchase, the map showed the roads of access and that there was a road in between plot number 358 and 374 which connects Malindi and Watamu.
36. PW2 informed the court that the Petitioner cannot now access plot 374 from Watamu because the

10<sup>th</sup> Respondent has blocked that access; that the size of her plot has been reduced by 11 meters and that the plots which have affected her plots are numbers 358, 359 and 371.

### **The Respondent's evidence:**

37. The 13<sup>th</sup> Respondent appeared on his own behalf and on behalf of the 14<sup>th</sup> Respondent as DW1.
38. DW1 agreed with the Ruling of the Registrar of 8<sup>th</sup> February 2008.
39. All the other Respondents closed their cases without calling witnesses.
40. I have considered the submissions filed by the parties in this matter. I have also considered the authorities that have been filed.

### **Analysis and findings:**

41. The main complaint in the current Petition is that the 10<sup>th</sup> and 11<sup>th</sup> Respondents, who are the proprietors of Chembe Kibabamshe 358 (and its subdivisions) and 519, which is a subdivision of plot 359, respectively have built a wall completely closing and blocking the public road from Chembe/Kibabamshe to Watamu and the public access to the sea.
42. The Petitioner is seeking for orders of mandamus to issue, amongst other orders, to have the said two roads opened up for use by the Petitioner and the other proprietors of the neighbouring plots.
43. The 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 18<sup>th</sup> Respondents are supporting the Petition.
44. It is not in dispute that the Petitioner is the registered proprietor of parcel of land known as Chembe/Kibabamshe/374 (the suit property). It is also not in dispute that neighbouring the suit premises are parcels of land known as Chembe/Kibabamshe 362, 419, 371 and 358.
45. Although there was no evidence that was placed before the court, it was alleged that plot number 358, owned by the 10<sup>th</sup> Respondent, was subdivided to create plot numbers 548 and 549. Plot number 548 is said to have been subdivided further to create plot numbers 599 and 600.
46. The Affidavit of the 15<sup>th</sup> and 18<sup>th</sup> Respondents shows that the 15<sup>th</sup> and 18<sup>th</sup> Respondents are the registered owners of Chembe Kibabamshe 371 and 362.
47. According to the Affidavits of the Petitioner's director and the 18<sup>th</sup> Respondent, there is an existing road between plot number 371 (owned by the 15<sup>th</sup> Respondent) and plot number 359 (or its subdivision plot number 518 and 519 owned by the 11<sup>th</sup> Respondent).
48. It is the contention of the Petitioner and the 18<sup>th</sup> Respondent that there is another public road between plot numbers 371, 362 and 374.
49. The issue for determination is whether indeed there are two public access roads which have been closed by the 10<sup>th</sup> and 11<sup>th</sup> Respondents and if so whether the court can order the said roads to be opened up.
50. Before the filing of this Petition, a dispute arose on the issue of the boundaries between the 11<sup>th</sup> Respondent herein (the owner of plot 519 whose original no. is 359) with owner of plot number 358, the 10<sup>th</sup> Respondent.
51. The 11<sup>th</sup> Respondent filed Malindi HCCC No. 52 of 2007 in which neither the Petitioner nor any of the Respondents herein were parties. Indeed, the Defendants in that case were the 10<sup>th</sup> Respondent's agents.
52. According to a copy of the order of the court in HCCC No. 52 of 2007 that has been annexed on the Petitioner's Supporting, the court made the following order in that suit:

**“THAT the Land Registrar Kilifi to visit the land parcel in issue and any of the land surveyor of Kilifi and or Malindi to demarcate the boundary of Land Parcel Number 519 Chembe/Kibabamshe, parcel number 599/Chembe/Kibabamshe and parcel number 549/Chembe Kibabamshe and furnish the court with the report within 45 days.”**

53. Plot number 519 is a subdivision of plot 359 and owned by the Plaintiff in that case (and the 11<sup>th</sup> Respondent herein) while plots number 599 and 549 are owned by the 10<sup>th</sup> Respondent herein and

- whose agents were the Defendants in HCCC No. 52 of 2007.
54. Upon receipt of the above order in HCCC No. 52 of 2007, the Land Registrar conducted a detailed inquiry, which, according to his report, included interviewing the owners or representatives of plot numbers 519, 358, 357, 374 and 419. After the inquiry, the Land Registrar delivered his detailed Ruling dated 8<sup>th</sup> February 2008.
55. The notes by the Registrar that were filed in HCCC No. 52 of 2007 on 18<sup>th</sup> July 2008 shows that the Registrar visited the site on 17<sup>th</sup> September 2007 and on 16<sup>th</sup> January, 2008 in the company of three surveyors from Malindi, an official from the Land Department, the 10<sup>th</sup> Respondent's surveyor, and representatives of plot numbers 374, 358, 419, 359, 371 and 362.
56. The Registrar observed that some developments on the ground were not in consistent with plots as demarcated in the Registered Index Map which he annexed on his report as Appendix III.
57. The crux of the detailed Ruling of the Registrar dated 8<sup>th</sup> February, 2008 was that the Registered Index Map (RIM) position should be adopted as the correct position of boundaries and roads..
58. It would appear that the Plaintiff and the Defendants in HCCC No. 52 of 2007 were not impressed with the Ruling of the Registrar because on 10<sup>th</sup> December 2010, the parties in HCCC No. 52 of 2007 entered into a consent quashing the report of 8<sup>th</sup> February 2008.
59. In the said consent, the parties agreed to allow the Chief Land Registrar to appoint another Land Registrar, other than a Land Registrar from Kilifi; Malindi or Mombasa to visit and demarcate the boundaries between “parcel of land number Chembe/Kibabamshe/519 and 548, 549 and 599 (all originally parcel number Chembe/Kibabamshe/358 only.”
60. It is obvious from the above consent that the dispute over boundaries that was before the court was between the proprietor of plot 519, who was the Plaintiff therein (and the 11<sup>th</sup> Respondent herein) and the owner of plot 358 which had been subdivided into 548, 549, 599 and 600 and owned by the 10<sup>th</sup> Respondent herein. Neither the Petitioner nor the 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 18<sup>th</sup> Respondents were parties in that suit.
61. Indeed, Mr. Charles K. Ngetich, the Registrar of Titles, Nairobi prepared two reports, one dated 1<sup>st</sup> April 2011 and another one dated 19<sup>th</sup> August 2011 in respect of plot numbers 519 and 548, 549 and 599 (originally parcel number 358) pursuant to the above consent order. In the report, the said Registrar stated as follows:

**“We visited the site on 1<sup>st</sup> April 2011 with all the aforesaid parties and carried out a ground check on parcels 519 and 548 on the upper side. The portions were found to be agreeable with the map (RIM) collected from the survey office. The two parties also agreed on the position of the wall being constructed between two parcels 519 and 548. the wall under construction covers a distance of approximately 222 meters as at this moment. At about that point we found a wall running across the two parcels, the owners of who are not part to the suit....”**

62. In the Report of 19<sup>th</sup> August, 2011, the Chief Land Registrar stated as follows:

**“On the last day of our visit to the site we were accompanied by a surveyor who was interested in the position of the lower road for purpose of opening it, and we placed four boundary points on the upper side of that road for his guidance”**

63. The reports by Mr. Ngetich did make any conclusion on the existing or blocked roads, and one wonders whether he understood his brief. Suffice to say that Mr. Ngetich's reports showed that there was no dispute between the 10<sup>th</sup> and 11<sup>th</sup> Respondent's boundaries.
64. It is therefore obvious that the reports by Mr. Ngetich did not at all consider whether the wall that had been put up by either the 10<sup>th</sup> or the 11<sup>th</sup> Respondents indeed blocked any of the two public access roads.
65. It is therefore not true, as argued by some of the Respondents' counsels that the issues being raised in the current Petition were litigated upon in HCCC 52 OF 2007. In fact, the Petitioner, the 13<sup>th</sup>,

- 14<sup>th</sup>, 15<sup>th</sup> and 18<sup>th</sup> Respondents were not involved at all when Mr. Ngetich prepared his two reports which was adopted in HCCC No. 5 of 2007.
66. The Petitioner's surveyor, PW1, produced in this court a detailed report dated 5<sup>th</sup> December 2013 together with a certified copy of the R.I.M, a typographical map together with photographs representing the position of the developments on plot numbers 358 and 374.
67. PW1 took photographs showing the developments on plot 374 and plot 358. The developments are opposite each other.
68. According to PW1, on the ground, there is a stone wall in the foreground of the developments of both plots which have blocked the road that is supposed to separate the two plots. The road between the said plots should be a 15 metre road.
69. The blocked road, according to PW1, is the road that comes from Malindi through Chembe/Kibabamshe to Watamu. The stone wall blocking the road, according to PW1, was erected by the owner of plot 358, the 10<sup>th</sup> Respondent.
70. PW1 showed the court the photographs he took which shows where the beacons of plot number 358 ends (currently) and which consumes the entire 15 m road.
71. Other than the wall, PW1 pointed to the court part of the buildings on plot 358 which have also encroached on the 15M road.
72. The report by PW1 on the actual position of the two roads that have been blocked by the wall constructed by either the 10<sup>th</sup> and 11<sup>th</sup> Respondents was not challenged by Respondent's surveyor(s).
73. Indeed, neither the 10<sup>th</sup> nor the 11<sup>th</sup> Respondents or their respective surveyors testified in this matter. The Chief Land Registrar did not also testify.
74. Having perused the evidence presented before me, I am satisfied that the subdivision of plot number 358 by the 10<sup>th</sup> Respondent into various sub-plots distorted the initial location of two roads that were in existence as per the Registered Index Maps Sheet numbers 19 and 20.
75. Indeed, considering that the Registered Index Map has never been amended to reflect the subdivisions of plot number 358, any attempt by the 10<sup>th</sup> Respondent to move and block the roads that existed before the said subdivisions were done is an illegality and infringes on the rights of not only the Petitioner to access his land and the ocean but also the 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 18<sup>th</sup> Respondents.
76. It is clear that after PW1 visited the suit properties, he came to the same conclusion that the Registrar of Lands had arrived at in his report of 8<sup>th</sup> February 2008 to the effect that the roads that are depicted in the R.I.M should be opened up for use by not only the Petitioner but the general public.
77. If the 10<sup>th</sup> Respondent has developed any part of the 15 meters road as shown in the report produced by PW1, then the said developments should be brought down by the County Government of Kilifi.
78. The 10<sup>th</sup> and 11<sup>th</sup> Respondents cannot use the consent order that they entered into in HCCC No. 52 of 2010 to deprive the Petitioner the right to access her land and the ocean using a public road demarcated on the Registered Index Map which was produced in evidence.
79. Indeed, it was because of the prejudice that the consent of the parties in HCCC No. 52 of 2007 is likely to occasion to other proprietors of the suit properties that the court in HCCC No. 52 of 2007 stayed HCCC No. 52 of 2007, 69 of 2007, 48 of 2008, 56 of 2008, 31 of 2009 and 40 of 2011 pending the hearing of this Petition.
80. For those reasons, I make the following orders:

**(a) A mandatory injunction be and is hereby issued compelling the County Government of Kilifi, the Successor in law of the 8<sup>th</sup> Respondent, to identify the location of the road and open up the said road, leading to Chembe/Kibabamshe from Malindi to Watamu using the Registered Index Map, diagram number 19 and 20 and the report of Geodata Land Surveyors & Consultants dated 5<sup>th</sup> December 2013 which was produced as PEXB1.**

**(b) A declaration be and is hereby issued that the road serving**

**Chembe/Kibabamshe enabling the Petitioner to access the suit property either from Malindi or from Watamu and the road between the Chembe/Kibabamshe 374 and plot 362 leading to the ocean as depicted in the Registered Index Map and report of Geodata Land Surveyors of 5<sup>th</sup> December 2013 are public roads and should be opened up forthwith for use by the Petitioner and members of public.**

**(c) A mandatory injunction be and is hereby issued compelling the 10<sup>th</sup> and 11<sup>th</sup> Respondents to forthwith re-open the public roads that they closed in April 2011 which road serves plot numbers Chembe/Kibabamshe 374, 359, 371 and 358 (and its subsequent subdivisions) 357, 273, 363, 372, 373, 362 and in default the Petitioner be authorised to do so with adequate security at the costs of the 10<sup>th</sup> and 11<sup>th</sup> Respondents.**

**(d) A mandatory injunction be and is hereby issued compelling the 10<sup>th</sup> Respondent to demolish the villas and other developments standing on the public road between the original plot number Chembe/Kibabamshe 358 (and the subsequent subdivisions thereof) and Chembe/Kibabamshe/374 as captured in the Registered Index Map diagram 19 and the report of Geodata Land Surveyors & Consultants (PEXB 1) and to remove the debris and other obstructions arising therefrom and in default the Petitioner to do so at the 10<sup>th</sup> Respondent's costs.**

**(e) An order of injunction be and is hereby issued restraining the 10<sup>th</sup> and 11<sup>th</sup> Respondents from trespassing or removing upon or entering or building any structure, wall, house or other developments on any part of Chembe/Kibabamshe/374.**

**(f) The Kilifi County Government to close any purported road which has been open up in the locality of the suit property but is not in the R.I.M.**

**(g) The OCS, Watamu police station to enforce these orders.**

**(h) Each party to bear its/his own costs.**

**Dated and delivered in Malindi this 30<sup>th</sup> day of October 2015.**

**O. A. Angote**

**Judge**