



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 274 OF 2018**

**ROBERT MWADIME NGOLO**

**SONIA WANJIRU MWADIME.....PLAINTIFFS**

**VERSUS**

**1. HENRY KALUME KATANA**

**2. HAMISI FUGO FONDE**

**3. KARISA MWALIMU NDORO alias WISDOM**

**4. SAMMY IHA**

**5. ANTHONY CHARO KARISA**

**6. WANJE KARISA**

**7. CHENJE KARISA**

**8. SAFARI KARISA**

**9. JUMA KARISA KAHINDI.....DEFENDANTS**

**JUDGEMENT**

The Plaintiffs aver that at all material times, they were and still are the registered proprietors of all that parcel of land known as Subdivision No. 3063 (Original No. 1667/2) Section III Mainland North Mombasa Contained in Certificate No. CR. 28186. The Plaintiffs aver that by virtue of the registration they were and are still the absolute and indefeasible owners of the Suit Property and are entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to the right to possession and quiet enjoyment thereof without any hindrance or restriction. The Plaintiffs learnt on 29<sup>th</sup> September, 2018 that the Defendants and their agents had unlawfully entered on the suit property without any authority or consent from Plaintiffs demolished a boundary wall that had been erected by the Plaintiffs around the suit properties, commenced the excavation of the suit property and construction of various structures and/or building thereon. The Plaintiff lodged a complaint at Mtwapa Police Station which was recorded as OB No. 55 of 610/2018 and OB 2/9/10/18 and only two individuals were arrested and the group of people including the Defendants who were together with the two trespassing managed to escape and only the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were arrested and charged accordingly. Despite the aforesaid arrest and complaint the Defendants and their agents continued to threaten the Plaintiffs and their employees and on 11<sup>th</sup> October, 2018 at night the same group who led by the Defendants again unlawfully entered on the suit properties without any authority or consent from the Plaintiffs and commenced the excavation of the suit property and construction of various structures and/or building thereon. The Plaintiff reported the matter again to the police station but the officers were adamant in not making further arrests or stopping the Defendants from proceeding with the construction works stating that they may be very violent and the only way they could be stopped was through a Court Order. That on 12<sup>th</sup> October the Plaintiff sought the assistance of the office of the County Commissioner where the Plaintiffs were also advised that the office could only intervene with a court order. That the fundamental rights and the rights of the Plaintiffs to ownership of properties as set out in the Constitution of Kenya, 2010 is threatened and is being infringed by all the Defendants. The entry by the Defendants on the suit property is procedural, illegal and unconstitutional, null and void. That Despite the aforesaid complaints and demand notice the Defendants have failed and/or refused and/or neglected to stop the trespass, threats and vacate the suit property. The Defendants' activities are getting out of hand as the Defendants are bent on assuming proprietary interest in the suit property in complete disregard of our rights as registered proprietors. The Plaintiffs have reasonable apprehension that the Defendants intend to continue trespassing onto the suit property unless evicted by orders of this honourable Court and also ordered to demolish the illegal structures already erected thereon. The Plaintiffs aver that the unlawful entry and construction aforesaid amounts to trespass on the suit property. As a result of the said acts of trespass, the Plaintiffs have been deprived

of the use and enjoyment of the suit property and have suffered loss and damage which is continuing and for which they hold the Defendants liable. The Plaintiff prays for judgement against the Defendant for:-

1. A declaration that the Plaintiffs are the lawfully registered proprietors of the Suit Property;
2. A declaration that the entry and putting up by the Defendants through their servants of various structures on the Suit Properties is unlawful;
3. A declaration that the continued existence of the said structures on the Suit Properties amounts to an act of trespass by the Defendants;
4. An order that the said structures on the Suit Properties be demolished forthwith by the Defendants;
5. An order that the Defendants do clear all the debris resulting from the demolition aforesaid;
6. A permanent injunction restraining the Defendants whether by themselves or through their servants, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the Suit Properties;
7. Damages for trespass;
8. Costs of and incidental to the suit; and
9. Any other or further relief that this Honourable Court may deem appropriate to award.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court or file any defence. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”*

It is a finding of fact the plaintiffs are the registered proprietors of the suit land parcel known as Subdivision No. 3063 (Original No. 1667/2) Section III Mainland North Mombasa Contained in Certificate No. CR. 28186. PW1 testified that on or about 29<sup>th</sup> September, 2018 that the Defendants and their agents had unlawfully entered on the suit property without any authority or consent from Plaintiffs demolished a boundary wall that had been erected by the Plaintiffs around the suit properties, commenced the excavation of the Suit property and construction of various structures and/or building thereon. Her evidence was not challenged. The plaintiffs' title is indefeasible and can only be challenged if it was issued through a fraudulent scheme which the defendants has not proved damages for trespass were not proved and the same will not be awarded. I find that the plaintiffs have has proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the Plaintiffs are the lawfully registered proprietors of the suit property;

2. A declaration that the entry and putting up by the Defendants through their servants of various structures on the suit property is unlawful;
3. A declaration that the continued existence of the said structures on the suit property amounts to an act of trespass by the Defendants and the Defendants are to vacate the suit premises within the next 60 days (sixty days) from the date of this judgment and in default eviction order to issue.
4. Thereafter a permanent injunction to issue restraining the Defendants whether by themselves or through their servants, employees, agents or through any one deriving title through him or otherwise howsoever from entering, using, occupying, leasing, transferring, charging, selling or in any manner whatsoever dealing adversely with the suit property;
5. No orders as to costs as the suit was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>rd</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**