



**Mussaji & another v Mussaji (Environment & Land Case
149 of 2019) [2022] KEELC 3662 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 149 OF 2019
NA MATHEKA, J
MAY 17, 2022**

BETWEEN

SHABBIR IBRAHIM MUSSAJI 1ST PLAINTIFF

ONALI EBRAHIM MUSSAJI 2ND PLAINTIFF

AND

MOIZ EBRAHIM MUSSAJI DEFENDANT

JUDGMENT

1. The plaintiffs' claim is that at all material times to this suit, the 1st plaintiff, 2nd plaintiff and the defendant are joint registered proprietors of the following parcels of land:
 - a) Parcel of land of Title Number Mombasa/Block XVI/252;
 - b) Parcel of land of Title Number Mombasa/Block XVI/253;
 - c) Parcel of land of Title Number Mombasa/Block XVI/1388
 - d) Parcel of land of Title Number Mombasa/Block XVI/1390
2. That on the aforementioned suit properties, there are developments which are primarily and mainly being utilized as commercial premises in the form of inter alia shops, showrooms and stores. That the defendant is currently solely and exclusively holding and utilizing the premises situated on the suit properties. The defendant has primarily leased the afore-said premises situated on the suit properties to Tenants, as a result of which he is drawing financial benefits there from and denying the plaintiffs use of the same to the prejudice of the plaintiffs despite them having equivalent proprietorship rights with the defendant. That given that the plaintiffs and the defendant are co-proprietors of the suit properties, the plaintiffs are entitled to the same benefits being drawn from the suit properties by the defendant, together with all rights and privileges appurtenant to their status as proprietors thereto. That the plaintiff are the parties paying land rates which are payable and accruing for the suit properties.



The plaintiffs aver that pursuant to being the registered proprietors of the suit properties, the afore-said actions of the defendant are inconsistent and in contravention of their inalienable rights to property as provided for under the law. The plaintiffs prays for the following orders against the defendant;

- a) An order that the plaintiffs be deemed to be Landlords in respect all tenancies that currently exist and ones which shall in the future exists on the suit properties and the Plaintiffs be equally entitled to all rents and other income being derived from the suit properties, i.e.
 - i. Parcel of land of Title Number Mombasa/Block XVI/252;
 - ii. Parcel of land of Title Number Mombasa/Block XVI/253;
 - iii. Parcel of land of Title Number Mombasa/Block XVI/1388;
 - iv. Parcel of land of Title Number Mombasa/Block XVI/1390
- b) An order that the plaintiffs shall equally together with the defendant have equal rights with the defendant to possession and all other dealings involving the suit properties, and should the defendant do anything without the consent and permission of the plaintiffs, then the defendant's actions shall be void and of no consequence in law.
- c) Costs of the suit be granted to the plaintiffs.

3. The defendant states that he is the sole owner of all properties mentioned in this suit and was the sole proprietor of Moiz Boutique which he later transformed into a limited liability company known as Moiz Boutique Limited and gave the plaintiffs equal shares thereof without any form of payment to the said shares so distributed yet the defendant had properties registered in his personal name which he subsequently and voluntarily transferred to the company without any consideration at all. The defendant further states that it was an agreement between himself and the Plaintiffs that with time they will also invest in the company by paying a significant amount as Directors but to-date no monies has been paid instead they now want to take over management and control of the entire company and have failed to furnish accounts of the company as required on its memorandum and article of an association. The defendant further states that he incorporated Moiz Boutique as a business name on 14th August, 1987 and did manage the same until it was transformed into a limited liability company on 2nd September, 1996 and the defendant had acquired Plot No. Kwale/DianiDianiBeach/Block/812, KwaleComplex/17, Kwale/DianiComplex/134 and LR No. MN/I/5321 after which he acquired plot no. Msa/Block XVI/252, Msa/Block XVI/253 and Msa/Block XVI/1390 which properties were registered in the name of 1st and 2nd plaintiffs and the defendant out of the proceeds of the said properties. The defendant prays for the Plaintiff to be dismissed and the;

1. 1st and 2nd Plaintiffs do provide full accounts for Moiz Boutique Company Limited from 1996 to -date.
2. Declaration that the 1st and 2nd Plaintiffs have not made any contributions towards Moiz Boutique Limited hence the Defendant is the sole proprietor of all properties.

4. This court has carefully considered the evidence and submissions herein. 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.”



5. 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.”

6. This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra v 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. Hon Justice Munyao Sila 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”.

7. It is not in dispute that the 1st plaintiff, 2nd plaintiff and the defendant are joint registered proprietors of Parcel of land of Title Number Mombasa/Block XVI/252; Parcel of land of Title Number Mombasa/Block XVI/253; Parcel of land of Title Number Mombasa/Block XVI/1388 and Parcel of land of Title Number Mombasa/Block XVI/1390. The Plaintiffs testified that sometime in 2000 they agreed and jointly purchased the suit properties in their personal names and hence they should equally benefit from the same. That the said properties do not belong to Moiz Boutique Limited in which the three are Directors and equal shareholders. That there is another case pending before the High Court in which the parties seek to distribute the company properties which do not include the suit properties in this case. DW1, the defendant testified that the suit properties are his as the same were bought from the proceeds of Moiz Boutique Limited which he owns as he is the only Director who contributed hence his counterclaim. That this suit is rejudicata /subjudice as there is a similar suit being HCCC No.39 of 2020 Moitz Ebrahim vs Moitz Boutique & 2 others.

8. It is a finding of fact that the litigants are brothers and that the suit properties are registered in their joint names. It is also a finding of fact that they are Directors and shareholders of Moiz Boutique Limited. Be that as it may, I find that the suit properties in this case were registered jointly in the names of the 1st and 2nd plaintiffs and the defendant and not in the company's name. No evidence has been adduced of how the same were purchased and that they were held in trust for the said Company. Section 107 of the [Evidence Act](#) cap 80 of the laws of Kenya states that;

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

9. No evidence has been adduced that the properties belong to the defendant alone and/or to the said Company. Moiz Boutique Limited is a separate legal entity and is not a party to this suit. I find this suit is not resjudicata/subjudice as the subject matter is different. I find that the defendant has not adduced



any evidence that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. I find that the suit properties are jointly owned in equal shares between the 1st, 2nd plaintiffs and the defendant personally. In Civil Appeal No 246 of 2013 between *Arthi Highway Developers Limited v West End Butchery Limited and others* the Court of Appeal the court expressly declared the indefeasibility of title except on allegation of fraud. It declared;

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

10. Consequently, I find that the defendant has failed to prove his counter claim and the same is dismissed with no orders as to costs as the parties are brothers. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. An order that the Plaintiffs be deemed to be Landlords in respect all tenancies that currently exist and ones which shall in the future exists on the suit properties and the Plaintiffs be equally entitled to all rents and other income being derived from the suit properties, i.e.
 - i. Parcel of land of Title Number Mombasa/Block XVI/252;
 - ii. Parcel of land of Title Number Mombasa/Block XVI/253;
 - iii. Parcel of land of Title Number Mombasa/Block XVI/1388;
 - iv. Parcel of land of Title Number Mombasa/Block XVI/1390
2. An order that the plaintiffs shall equally together with the defendant have equal rights with the defendant to possession and all other dealings involving the suit properties, and should the defendant do anything without the consent and permission of the plaintiffs, then the defendant’s actions shall be void and of no consequence in law.
3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF MAY 2022.

N.A. MATHEKA

JUDGE

