



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC CIVIL SUIT NO. 2274 OF 2007**

**LENSOL LIMITED .....PLAINTIFF**

**VERSUS**

**SIMON MUCHAI MUNGAI .....1<sup>ST</sup> DEFENDANT**

**PETER KAMAU MBUTHIA.....2<sup>ND</sup> DEFENDANT**

**HUMPHREY MWANGI WAWERU .....3<sup>RD</sup> DEFENDANT**

**MORRISON K. MAINA .....4<sup>TH</sup> DEFENDANT**

**K. MAINA NDUNG’U .....5<sup>TH</sup> DEFENDANT**

**EPHANTUS KANJA MWANGI.....6<sup>TH</sup> DEFENDANT**

**JANE KAMANDE KARIUNGU .....7<sup>TH</sup> DEFENDANT**

**MACHARIA NGUGI .....8<sup>TH</sup> DEFENDANT**

**JUDGMENT OF THE COURT**

The Plaintiff brought a suit against the Defendants by way of a Plaint dated 14<sup>th</sup> November 2007. The Plaintiff claims that he has at all times been the registered owner of the parcel of land being known as Land Reference Number 209/9500/2 (hereinafter referred to as the suit property), having purchased the same from its original owners. Further, that on or about February 2007, the Defendants trespassed upon the Plaintiff’s suit property and the Plaintiff has by reason thereof been deprived of the use and enjoyment of the said property and has thereby suffered loss and damage.

The Plaintiff is seeking the following substantive orders in the said Plaint:

1. Damages for trespass.
2. An order for the eviction of the Defendants from the suit property.
3. A mandatory injunction restraining the Defendants by themselves, or their agents and/or servants

from interfering with the ownership of the Plaintiff's suit property being Land Reference Number 209/9500/2.

#### 4. Costs of this suit.

Summonses were issued on 14<sup>th</sup> August 2007 and the Defendants filed a Defence dated 18<sup>th</sup> March 2008. In the meantime the Plaintiffs had filed a request for judgment dated 5<sup>th</sup> March 2008, and interlocutory judgment was entered against the Defendants on 14<sup>th</sup> March 2008. The said judgment was set aside by this court (Hon. Angawa J.) on 17<sup>th</sup> July 2008, and it was ordered that the suit proceeds under Order 1XA Rule 8 and Order IX B of the Revoked Civil Procedure Rules.

The Defendants in their Defence aver that they took possession of the suit land in the 1980's, and have had exclusive and continuous possession thereof. Further, that if the Plaintiff has a title as alleged in the Plaintiff then the same is held in trust for the Defendants, the Plaintiff's title have been extinguished by virtue of Defendants' adverse possession of the suit for more than twelve years since issuance of such title document. Further and without prejudice the foregoing. The Defendants also averred without prejudice to the foregoing, that by virtue of the Government Lands Act (Cap 280), any allocation of the suit land to the Plaintiff or any of its predecessors in title was null and void for having failed to comply with the requirements of valuation, gazette notice and public auction which are mandatory for such allocations.

Several other averments were made by the Defendants in their Defence, namely that they ought to have been given first priority and/or option having settled on the land by the time the allocation was being done; that the Plaintiff is in breach of several conditions in the Grant to title and has no *locus standi* to file this suit; and that there are hundreds of people occupying the suit property and the Plaintiff ought to have enjoined them in the suit or filed this suit as a representative suit.

The suit was set for hearing on 21<sup>st</sup> November 2011. This Court, having satisfied itself that a hearing notice was duly served on the Defendants in good time as attested by the Affidavit of Service sworn by Micheal K. Rotich on 17<sup>th</sup> November 2011 and filed on 18<sup>th</sup> November 2011, proceeded to hear the Plaintiff *ex parte*. The Plaintiff called two witnesses to give evidence on his behalf. One of the witnesses, M. Lee Ngugi, in also filed a witness statement dated 29<sup>th</sup> June 2011.

The Plaintiff's first witness (PW1) was Mr. Lee Ngugi, and his testimony given in court and from his written statement is that he is Chairman of the Plaintiff company, which is the registered owner of the suit property. The suit property measures about 31/2 acres and is situated in Dandora, Nairobi, along Kangundo Road. Further, that *vide* an Agreement of Sale dated 29<sup>th</sup> December, 1993 between Mr. Dickson Jomo Kebatta and Mr. Samuel Mwangi Maina (the Vendors) and Fine Garments (Kenya) Limited (the Purchaser), the suit property was sold to the said Purchaser for a valuable consideration of Kshs.2,995,000/=. PW1 who was a director of the said Fine the Purchaser signed the Agreement on its behalf.

PW1 further testified that on or about 12<sup>th</sup> May 1997, the suit property was then transferred to the Plaintiff Company for a valuable consideration of Kshs.2,995,000/=:, and the Registrar of Titles registered the said land in the Plaintiff Company's name on 27<sup>th</sup> October 1997. Further, that the Plaintiff Company has been the registered owner of the said parcel of land to date, has never transferred the suit property to anyone else since then, and still has in its possession the original title with regard to the suit property.

PW1 continued his testimony by stating that sometime in 2007, the Plaintiff company received information that certain persons had invaded the said land and without authorization and/or consent erected illegal structures for occupation. The Plaintiff company then hired services of M/S Alexander James Private Investigators to find out the status of the land. The said investigators compiled a report and found out that the Defendants herein had occupied the suit property and constructed both permanent and temporary buildings on thereon. Upon receipt of this information, the Plaintiff Company filed the instant suit seeking amongst others an order for the eviction of all the Defendants from the suit property to enable it commercially develop it.

PW1 produced the Plaintiff's bundle of documents filed on 16<sup>th</sup> June 2008 as Plaintiff's Exhibit 1, and which included the sale agreement between Mr. Dickson Jomo Kebatta and Mr. Samuel Mwangi Maina and Fine Garments (Kenya) Limited dated 29<sup>th</sup> December 1993; an undated transfer between Mr. Dickson Jomo Kebatta and Mr. Samuel Mwangi Maina and Lensol Ltd; a copy of certificate of title with respect to the suit property showing that the transfer to Lensol Ltd was registered on 27<sup>th</sup> October 1997; and the report by M/S Alexander James Private Investigators dated 17<sup>th</sup> September 2007 and the annexures thereto.

The Plaintiff's second witness (PW2) was Mr. Alexander James Ndegwa, a licensed private investigator and process server of the High Court. He produced his licence Ref. No. JD/HC/NBI/P5/27 in court as evidence. PW2 testified that he was instructed by a firm of Advocates, Ndung'u A. Nyaga & Co. Advocates, to investigate land in Dandora on Kangundo Road belonging to the Plaintiff Company, and was given a copy of the title and map of the suit property. He was to inquire as to the location and status of the land. The witness testified that he then hired a firm of private surveyors who found that the said land had been encroached by persons who had put up permanent and semi-permanent structures on the suit property. Further, that he then put up a notice on the suit property stating that the same was private property, and reported the matter to the District Officer, Embakasi Division. PW testified that the said District Officer then instructed the area Chief, Kariobangi South Location to identify the persons on the suit property, and the Defendants were so identified in a letter from the said Chief dated 24<sup>th</sup> September 2007.

The witness further testified that the said Chief summoned the Defendants to appear before him for a meeting, and at the said meeting the Defendants produced a Title Deed purporting that the same was issued to them by the Commissioner of Lands. The witness also testified that he was also present at the said meeting and was given a copy of the said title. The witness testified that he wrote a letter to the Registrar of Titles at the Lands Office inquiring whether the Defendants' Title Deed was genuine, and that the Principal Registrar of Titles wrote to him on 4<sup>th</sup> October 2007 and confirmed that the purported Title Deed was never registered by the Ministry of lands.

The witness referred the Court to his report, to which was annexed the letter from the Chief, Kariobangi South Location dated 24<sup>th</sup> September 2007; the said Defendants' Grant/ title to the suit property shown to have been issued on 24<sup>th</sup> August 2005, the witnesses letter to the Registrar of Titles dated 3<sup>rd</sup> October 2007, the reply to the said letter by the Principal Registrar of Titles dated 4<sup>th</sup> October 2007, and photographs showing the structures erected on the suit property.

After the close of evidence the Plaintiff's Advocate was directed to file written submissions, and the said submissions dated 2<sup>nd</sup> December 2011 were filed on 5<sup>th</sup> December 2011. The Plaintiff's Advocate in the submissions reiterated the above stated facts as testified to by the witnesses, and contended that the Plaintiff Company duly purchased the suit property for valuable consideration and the said property was duly registered in its favour. Further, that there has never been any allegation that the Plaintiff company was a party to any fraud or misinterpretation, and the Advocate relied on Section 23 of the Registration of Titles Act (Cap 281) which provides that a certificate of title issued by the Registrar to any purchaser of land is to be taken by the courts as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof. It is further provided in the said section that the said title is not subject to challenge except on the ground of fraud or misinterpretation to which the purchaser is a party.

The Advocate also submitted that the Defendants have not disclosed any right or interest in the suit property and therefore cannot claim ownership, and their filed Defence is a sham which ought to be dismissed. Further, that the Defendants have not produced any *prima facie* documents to claim any interest in the suit land. The Advocate in this respect relied on the Court of Appeal decision in **Nairobi Permanent Markets Society & Others Vs. Salima Enterprises & Others**, EALR (1995 – 1998) 1 EA. and the Ugandan High Court decision in **Osotraco Ltd Vs. Attorney General** EALR (2003) 2 EA for the submission that a registered proprietor is entitled to vacant possession of a suit property where there is encroachment, and that if a person in wrongful possession refuses and/or fails to vacate, then the registered proprietor is entitled to issue an eviction notice.

It was submitted that the Plaintiff's right of ownership to the suit property is undisputed, and that it had proved beyond all probability that the orders sought ought to be granted and that the Defendants' Defence be dismissed with costs I must however point out that the cases cited by the Plaintiff are distinguished by the fact that in the present case unlike in the cited cases, both the Plaintiff and Defendants claim to be the registered proprietors of the suit property.

I have carefully read and considered the pleadings, evidence and submissions made in this suit. There are three issues for consideration. The first is which party as between the Plaintiff and Defendants is the lawfully registered proprietor of the suit property. The second issue is whether the Plaintiff has established on a balance of probabilities rights of possession over the suit property for the orders sought to be granted. The third issue is whether the Defendants are trespassers on the suit property.

On the first issue, both the Plaintiff and Defendant have produced titles to the suit property. The Plaintiff's copy of title issued under the Registration of Titles Act, shows that the suit property was first registered by the Registrar of Titles in the names of Dickson Jomo Kibata and Samuel Mwangi Maina on 12<sup>th</sup> May 1997, and transferred to the Plaintiff on 27<sup>th</sup> October 1997. The said copy of title was certified as a true copy by the Registrar of Titles on 21<sup>st</sup> September 2006. The Defendants' copy of title shows that they were granted title to the suit property by the President of the Republic of Kenya, which grant was witnessed by the then Commissioner of Lands, Judith Marylyn Okungu in the presence of the Registrar of Lands on 24<sup>th</sup> August 2005. The said Title is also indicated to be drawn by D. Onono, the Registrar of Titles.

Upon perusal of the two titles, I noted that the acreage of the suit property in the two titles is different, with the Plaintiff's Title showing acreage of 1.369 hectares and that of the Defendants showing acreage of 2.514 hectares. The Plaintiff's title also showed a Transfer I.R No. of 73222, while that of the Defendants did not bear any Grant IR No. The Plaintiffs are registered as lessees for a term of 99 years with effect from 1<sup>st</sup> April 1979, while the Defendants are registered as joint tenants for a term of 99 years with effect from 1<sup>st</sup> September 1997. The Annual Rent in the Plaintiff's title is Kshs 33,750/=, while that in the Defendants' title is Kshs 160,000/=. Finally, the survey plan numbers in the two titles are different, with the Plaintiff's title referring to Survey Plan Number 179700, and that of the Defendants' to Survey Plan Number 261769.

The Plaintiff did produce as evidence a letter purporting to have been written by the Principal Registrar of Titles dated 4<sup>th</sup> October 2007, stating that the purported Title Deed to the Defendants was never registered by the Ministry of Lands. No witness was however called from the said Ministry to give evidence and verify this assertion. This notwithstanding, the issue of conflicting titles over the same property has been the subject of various court decisions, including the Court of Appeal decision in **Wreck Motors Enterprises vs Commissioner of Lands, Civil Appeal No 71 of 1997** and this Court's (Lenaola J.) decision in **Gitwany Investments Limited vs Tajmall Ltd and 3 Others H.C.C.C No 1114 of 2002**.

This Court is persuaded by the decisions in the two above-cited cases that where two titles are issued with respect to the same parcel of land, if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail, and is absolute and indefeasible under section 23 of the Registration of Title Act. I cannot in the absence of further evidence make a finding of fraud in the acquisition of the Plaintiff's or Defendants' titles, and must therefore find that in the circumstances the title issued to the Plaintiff, being the first in time, is the valid title.

The second issue for determination as to the Plaintiff's right to possession of the suit property, and it is an established principle of law that trespass to land is a direct interference with the possession of another person's land without lawful authority. The Court of Appeal in **M'Mukanya v Mbijiwe 1984(KLR) 761** held that the tort of trespass is a violation of a right to possession, and that the Respondent in that case needed to prove on a balance of probabilities that he had the right to immediate and exclusive possession of the suit land, which is different from ownership. The Court of Appeal further held that exclusive possession supporting a claim for trespass does not necessarily mean continuous physical possession and occupation, and that once a person had paid due rent and had been given a plot number upon allocation,

he is presumed to be in possession and to sue for trespass.

In addition, in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, it was held by the Court of Appeal that an absolute and indefeasible owner of land is entitled to take proceedings in trespass. Further, that the Registration of Titles Act gives a registered proprietor title upon registration, and unless there is any other person lawfully in possession such as a tenant, that title carries with it legal possession. Having found that the Plaintiff's title prevails over that of the Defendants, it is also the finding of this Court that the Plaintiff is the absolute and indefeasible owner of the suit property as provided for under section 23 of the Registration of Titles Act, and entitled to possession of the suit property, This Court also finds that the Plaintiff is deemed to have been owner and in legal possession of the suit property from the date of transfer of title of the suit property to it on 27<sup>th</sup> October 1997.

The final issue for determination is whether it has been established that the Defendants are trespassers. The Plaintiff gave evidence that the Defendants have occupied the suit property from 2007, and produced photographic evidence showing the structures put up by the Defendants on the suit property in the investigators report produced by PW2. This evidence was not rebutted by the Defendants.

The Court of Appeal in **M'Mukanya v Mbijiwe 1984 (KLR) 761** also held that the Appellants in that case were not legitimate allottees of the disputed land, because at the time of the purported allocation of that land to them the local authority had no such land to allocate, as the same been leased to the Respondent and which lease had not been determined. The Appellants, having no legal right to the plot were therefore trespassers, and the fact that they truly believed that they were allottees was of no consequence and did not negate the tort. This reasoning equally applies to the Defendants in the present case, and particularly so because they failed to bring any evidence to prove the averments in their Defence of a better title to the suit property.

In light of the foregoing reasons and findings, I find judgment for the Plaintiff as against the Defendant as follows:

- a) The Defendants are hereby ordered to vacate the parcel of land known as Land Reference Number 209/9500/2 within three (3) months from the date of this judgment. In default, an order for eviction to issue.
- b) The Defendants by themselves, or their agents and/or servants are restrained from interfering with the ownership of the Plaintiff's suit property being Land Reference Number 209/9500/2.
- c) The Plaintiff is awarded a global figure of 40,000/= Kenya shillings as against the Defendants being damages for trespass.
- d) The Plaintiff shall have the costs of the suit.
- e) Interest on (c) and (d) above at court rates.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_24<sup>th</sup>\_\_\_\_ day of

\_\_\_\_April\_\_\_\_, 2012.

**P. NYAMWEYA**  
**JUDGE**