



Kenya Breweries Limited v County Government of Mombasa & 11 others (Environment and Land Case 46 of 1996) [2025] KEELC 6538 (KLR) (1 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 46 OF 1996
SM KIBUNJA, J
OCTOBER 1, 2025**

BETWEEN

KENYA BREWERIES LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA 1ST DEFENDANT

ABDULWAHID A MOHAMED 2ND DEFENDANT

ANNE JEPNGETICH 3RD DEFENDANT

HAWA LUL BASHIR 4TH DEFENDANT

LUCY SALIKU MUKHONGO 5TH DEFENDANT

NANCY NJERI MAINA 6TH DEFENDANT

SHAHKARAM SHAHDOST HAJI 7TH DEFENDANT

JAMES KIOKO 8TH DEFENDANT

THE NATIONAL LAND COMMISSION 9TH DEFENDANT

THE REGISTRAR OF LANDS, MOMBASA 10TH DEFENDANT

THE DIRECTOR OF SURVEY 11TH DEFENDANT

ABSA BANK KENYA PLC 12TH DEFENDANT

JUDGMENT

1. Through the Further Further Further Further Amended plaintiff, dated 1st August 2022, the plaintiff sued the defendants seeking for:



- a. “A declaration that the certificate of title lease in respect of the plaintiff’s suit property known as title No. Mombasa/block 1X/133 is valid and currently in force.
 - b. A declaration that the subdivision over the plaintiff’s suit property known as title number Mombasa/block 1X/133 to form title numbers Mombasa/block 1X/210, Mombasa/block 1X/211, Mombasa/block 1X/212, and Mombasa/block 1X/213 and Mombasa/block 1X/214 respectively is illegal, null and void.
 - c. An order do issue to cancel the charge registered in favour of the 12th defendant on or about 7th August 1997 against the title number Mombasa/block 1X/213.
 - d. A permanent injunction against all the defendants restraining them by themselves, servants or agents from developing, transacting, intermeddling and/or in any way to deal with the plaintiff’s plot property known as title number Mombasa/block 1X/133 or any part thereof.
 - e. An order for eviction of the 2nd, 3rd, 4th, 5th, 6th, and/or 7th and 8th defendants from the plaintiff’s suit property known as title number Mombasa/block 1X/133, and/or any portion thereof under whatever description including title numbers Mombasa/block 1X/210, title number Mombasa/block 1X/211, Mombasa/block 1X/212, title number Mombasa/block 1X/213 and title number Mombasa/block 1X/214.
 - f. Compensation for the value of the encroached portion of the suit property as better particularized in paragraph 14F(a) hereof, in the alternative to reliefs prayed for in paragraphs (a) to (cc) hereinabove.
 - g. Special damages as better particularized in paragraph 14F(b) hereof.
 - h. Exemplary and aggravated damages.
 - i. Costs of this suit.
 - j. Interest thereon.”
2. The plaintiff averred inter alia that it is the registered lessee of Mombasa/block 1X/133, measuring 1.55 acres, the suit property, from the 1st defendant for a term of 99 years from 1st April 1948. That it had erected four blocks each containing 12 flats on part of the said property leaving a portion thereof for future developments. It claims that they have been paying rates, rents and other outgoings as are necessary due to the 1st defendant, but the same was later the 1st defendant declined to receive payments alleging that the suit property does not exist in their records. The plaintiff detailed the historical origin of the suit property, starting from 1st April 1948 when the Municipal Board of Mombasa, predecessor to the 1st defendant, leased a piece of land measuring 1.55 acres to East Africa Breweries Limited (EABL), predecessor to the plaintiff, for a stand premium of Kshs.2,535, pursuant to a lease agreement dated 8th May 1953, for a term of 99 year, out of the head lease measuring 64 acres, known as subdivision 115 section IX (L.R NO. 1149), issued by the Governor on behalf of the Queen of England. The said lease was registered in Mombasa Registry in Volume B13 Folio 16/78 File 1560. In a lease agreement and a supplemental agreement dated 25th June 1954, EABL transferred the leasehold interest over the suit property to Herman Anton Andrae through an assignment of lease dated 16th November 1954 registered in Volume B13 Folio 69/1. The Municipal Board of Mombasa also issued a written consent on 4th August 1955 for that transaction. The said Herman Anton transferred his leasehold interest to his wife Joy Amelia Andrae through an assignment of lease dated 6th July 1960, which was registered in Mombasa Registry, as Volume B13 Folio 165/15 File 1617 together with a written consent from the Mombasa Mayor dated 20th July 1960. By a court order issued in Miscellaneous Civil Application No.



142 of 1971 on 26th October 1971 and under the Mental Treatment Act CAP 248, the property was transferred to Hugo John Pax Nitch Smith, being the receiver of Joy Amelia. It was further ordered on 28th June 1971 that the suit property be sold to the plaintiff for a sum of £25,000, and that the receiver was to sign all documents relating to the suit property. The said order was registered in Mombasa Registry Volume B13 Folio 236/81 File 1634. The plaintiff further averred that in that original lease agreement, there was a clause that if the Municipal Board was to plan and subdivide Land Number 115 of Section IX, it would hive off 1.55 acres and issue a lease in favour of the plaintiff, and have the same registered while maintaining the same terms and conditions as the said lease agreement.

3. The plaintiff further averred that sometime prior to 1974, the 1st defendant carried out a subdivision of Mombasa/ block IX/126 under the head lease and hived 1.55 acres which resulted in creation of Mombasa/block IX/133 and Mombasa/block /IX/134 which are the suit property and the remainder of the 64 acres respectively. Subsequently, the RIM was amended on 29th September 1974 to reflect the subdivision, and finally Mombasa/block 1X/133 was registered in the plaintiff's name in 1992. That in May 1995, the plaintiff got to know that the 1st, 10th and 11th defendants had in total disregard to the plaintiff's interests in the suit property, illegally carried out a re-planning of the suit property that resulted to creation of following subdivisions:
 - a. Mombasa/block 1X/210, that was leased to 2nd defendant who transferred it to 7th defendant, who in turn transferred it to 8th defendant.
 - b. Mombasa/block 1X/211, that was leased to 3rd defendant who transferred it to 4th defendant.
 - c. Mombasa/block 1X/212 that was leased to 5th defendant who transferred it to 4th defendant.
 - d. Mombasa/block 1X/213 that was leased to 6th defendant who has charged it 12th defendant's predecessor, to secure a sum of Kshs.700,000.

That the plaintiff wrote to the 1st defendant with copies to other public entities including the 11th defendant, lodging a complaint. That though the Permanent Secretary, Ministry of Local Government responded to the said letter in June 1992 indicating action was being taken, the 1st defendant wrote a letter in 1996 threatening to demolish the plaintiff's fence/boundary in a bid to enforce the boundaries of the plots illegally created on the suit property, prompting the plaintiff to file this suit. That as the said subdivisions were done without its consent, they should be declared illegal, null and void.

4. The plaintiff set out the particulars of fraud and or mistakes on the part of the 1st, 9th, 10th, and 11th defendants after paragraph 14D of the plaint. Below that, the plaintiff set out the particulars of fraud attributed to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 12th defendants. The plaintiff accused the defendants of colluding and interfering with the plaintiff's suit property with a view of keeping it from the plaintiff's reach, and unjustly enriching themselves. That as a result of the defendants' action, the plaintiff has lost a substantial portion of its property whose value would be given at the trial. The plaintiff pleaded the following consequential costs that it seeks compensation:
 - a. Surveyors fees of Kshs.250,000 plus court attendance costs of Kshs.25,000.
 - b. Physical Planners fees of Kshs.266,800 plus attendance fees/expenses of Kshs.50,000.
 - c. Land valuers fees of Kshs.300,000 plus court attendance charges of Kshs.20,000.
5. Through the Further Further Further Further Amended statement of defence filed on the 5th September 2022, the 1st defendant opposed the plaintiff's claim inter alia averring that after the plaintiff was granted a 99 years lease over parcel Mombasa/block 1X/133 from 1st April 1948, it failed or



neglected to register it, and it therefore remained vested with the 1st defendant. that despite the court order in Miscellaneous Civil Case No. 142 of 1971 in which the suit property was to be sold to the plaintiff and the Receiver authorised to sign the relevant documents, it was not actualized as no sale agreement or transfer was signed between the parties. That the registration of the court order at the Mombasa Registry did not confer ownership of the suit property to the plaintiff. That the condition on the lease that in the event the 1st defendant was to plan and subdivide plot No. 115 of Section 1X it was to hive off 1.5 acres in favour of the plaintiff does not apply as the plaintiff was a total stranger to the suit property. That the 1st defendant prepared a new scheme in respect of plot number 1X/133, and the RIM was changed, new plots created and the suit property no longer exists. That the 1st defendant had legal capacity and authority to allocate the plots created thereof to the other defendants as detailed in the plaint. That the title document the plaintiff has relied on was invalid as it was issued on 28th December 1992, years after the re-planning and issuance of titles over the subdivisions in 1991. That the suit is res judicata and an abuse of court. That the plaintiff has been paying rates for Mombasa/block 1X/214 and not Mombasa/block 1X/133, that does not exist and the plaintiff's suit should be dismissed with costs.

6. The 3rd defendant opposed the plaintiff's claim through the amended defence dated 14th March 2011, in which she among others disputed that the subdivisions created by 1st defendant were illegal. She averred that plot number 211 was created and transferred to Swaleh Hassan Ali in November 1990, well before the plaintiff's plot was created. That plot 211 was later transferred to her and the plaintiff does not have a better title to it than hers. She denied the plaintiff's allegations of fraud and averred that the suit is time barred.
7. The 4th defendant opposed the plaintiff's claim through the statement of defence dated 13th June 2011, among others disputing the plaintiff's claim that the creation and allocation of the plots was illegal. That the re-planning that gave rise to the allocation was determined by Hon. Mr. Justice Serگون in Mombasa Misc. Appl. No. 244 of 2001 to have taken place between 25th September 1986 and 21st January 1988, which is the time the plaintiff's cause of action arose, and therefore its claim is time barred. The 4th defendant denied the plaintiff's allegations of fraud and mistake. That the 4th defendant has no claim over plot number 113 claimed by the plaintiff, which is different and separate from plots numbers 211 and 212. That the plaintiff's suit should be dismissed with costs.
8. The plaintiff's claim is opposed by the 5th defendant through the defence dated 15th January 2010 in which she inter alia averred that she procedurally and lawfully acquired parcel No. Mombasa/block 1X/212 in 1990, and subsequently transferred it to a third party on 28th May 2009, and has no proprietary interest over it. That the plaintiff's claim was subject matter in HCCC No. 244 of 2001, where it was found lacking, and the current suit is accentuated by malafides and is incapable of enforcing the reliefs sought. That the suit is an abuse of the court process and should be dismissed with costs.
9. In his defence the 8th defendant denied the allegations of fraud and stated that he does not have any lease in his name or possession of Mombasa/block IX/210. He averred that he was wrongly joined to the suit.
10. The 10th and 11th defendant admitted that the plaintiff is the owner of the suit property, but denied doing any re-planning or subdivisions over the suit property. They averred that the suit property is incurably and fatally defective and ought to be struck out as the subject matter was dealt with in the Mombasa High Court Misc. Civ. App 12 of 1999 and Mombasa High Court Misc. Civ. App. 244 of 2001.



11. No pleadings were traced on record for the 2nd, 6th, 7th, and 9th defendants. The court was informed by counsel for the plaintiff that the claim against the 7th defendant had abated, and that the 12th defendant was released from the suit by consent, after discharging Mombasa/block 1X/213.
12. In reply to the 1st defendant's defence, the Plaintiff averred that the court order referred to authorized Mr. Hugo John Pax to execute all conveyances and instruments in disposition of the estate of Joy Amelia Andrea, and that registration of the order was sufficient to vest ownership of the suit property on the plaintiff without the need for execution and registration of the conveyancing instruments. Further that the failure to register a transfer did not vest the suit property in the 1st defendant, but rather the suit property remained under the estate of Joy Amelia Andrea. That the amendment of the RIM for the suit property to create new plots was unlawful. On whether this suit is res judicata the plaintiff stated that the previous suits were not heard on merit but were dismissed on account that they were filed 6 months after the date of the decision or proceedings sought to be quashed. In reply to the 3rd defendant's defence, the plaintiff claimed that the leasehold interest was established in 1953 and transferred to the plaintiff in 1971 before creation of plot 211. That No. 232 of 2006, which was an appeal against H.C Misc. App 244 of 2001, the Court of Appeal held that the High Court never determined the date on which the plaintiff became aware of the offending decisions which led to accrual of cause of action. In reply to the 4th defendant's defence, the plaintiff stated that the plot 211 encroaches on the suit property, and that plot 212 was unlawfully created out of the suit property. In reply to the 5th and 8th defendants' defence, the plaintiff joined issue with their averments. In reply to the 10th and 11th defendants defence, the plaintiff also joined issue with their averments and further stated that they are estopped from feigning ignorance.
13. The plaintiff called Karen Mate Gitonga, legal officer, Henry Muthoka Mwau, registered physical planner, Stanley Omuchemi Matende, registered surveyor, Samuel Ngoyo, facilities manager, and Blaise Musau, valuer, who testified as PW1 to PW5 respectively. They adopted the contents of their filed witness statements as their respective evidence in chief. PW1 inter alia reiterated the contents of her statement and the plaint on how the plaintiff acquired title to the suit property. She informed the court that the 12th defendant is no longer a party in the suit as it had discharged their charge over plot No. 213. She added that the 1st defendant had amalgamated the suit property with plot 134 for purposes of re-planning and subdivision in 1988, and as a result the plaintiff lost 0.82 acres of the initial 1.55 acres. That despite the 1st defendant's action, the plaintiff still possesses the original title to the suit property. It was her testimony that the court order of 26th October 1971 was registered against the title, and she assumed that a transfer of the suit property to the plaintiff was carried out even though she had not seen the conveyancing documents. She testified that the plaintiff built the four apartment blocks in 1953 before the 64 acres of land plot 126 was subdivided into plots numbers 133 and 134, under the survey plan registered on 11th November 1968 and authenticated on 22nd July 1974. She clarified that the plaintiff was not issued with title to the suit property after the 1974 subdivision, and it was not until 1992 when they were issued with a certificate of lease. She produced a certificate of official search done on 10th June 1999 indicating that the plaintiff is the owner of the suit property. She admitted that the order of 1971 did not mention Mombasa/block IX/126 or the suit property as it touched on plot 1149/IX/115. She also admitted that she could not produce evidence of how the 5th defendant was involved in fraud but added that there was no development on plot No. 212. PW1 was not able to tie the 8th defendant to ownership of the suit property as the 8th defendant denied in his pleadings being the owner of plot 210. She further testified that she could not tell whether the subdivision scheme in the survey plan FR 16/92 or F/R 97/45 was approved, or authenticated by the Director of Surveys. She confirmed that from the certificates of search done on 19th June 1999 and 16th February 2017, the suit property was still in the name of the plaintiff, and there is nothing to show that



the title to the suit property had been closed on subdivision. That plot No. 115/R is the one in the agreement to lease dated 8th May 1953 and is the same number in the proposed subdivision scheme by the 1st defendant that is marked “197A” in the plaintiff’s bundle of documents. She added that the lack of approval or authentication of proposed subdivision and survey plan “197B” and “197C” shows that the re-planning and subdivision were irregular.

14. PW2, a registered physical planner relied on his statement dated 3rd August 2022 and he explained that the agreement of lease at page 158 of the Plaintiff’s bundle of documents refers to plot 115, which is what appears in the court order of 1971. He added that the parent title No. 115 is what gave birth to plot No. 126 and upon further subdivision the suit property was created. He confirmed having visited the suit property twice with Stanley Matende, PW3, and thereafter prepared a report dated 20th July 2022. He told the court that the beacons at the front of the suit property were intact but the beacons at the back were not visible due to the encroachment. He faulted the Land officer for approving subdivision of parcel No. 115 without seeking the plaintiff’s consent and approval of the Director of Surveys, vide his letter dated 25th September 1986. He testified that had the Director of Surveys approved the subdivision of plot No. 115, the resulting plots would have been given number 133, the suit property, and the remainder would have been left as plot No. 115/R, instead of 134. The “R” after 115 represented the remainder. He added that the subdivision done in 1988 by the 1st defendant was over plot 115/R, which did not exist, as it had already been subdivided into plots 126, and later plots 133 and 134. That the approval of the 1st defendant’s re-planning and subdivision was only by the Land Officer, and that of the Physical Planner and a Surveyor, was not obtained. He admitted that the survey map marked “219A” is an official government map, and that the amendment made on 18th May 1990 resulted in plot 218 to 232. Furthermore, he admitted that in “219A” map, plot No. 126 is under block X and not IX. He also admitted that the map does not have block IX/132 to 134. He stated that the said letter by the Land Officer was not copied to the Commissioner of Lands, though it ought to have been. That the creation of plots Nos. 210 to 214 has affected the use of the four blocks constructed by the plaintiff because tenants would not have any recreation space, as it is the portion encroached by the said plots. That entry No. 10 in the survey map marked “219A” shows that the original plot for in respect of plot Nos. 191-215 is the amalgamated suit property and plot No. 134.
15. PW3, a registered surveyor relied on his statement dated 3rd August 2022, and confirmed having assisted PW2 during the site visits. He faulted the Director of Surveys for being involved in amendment of the RIM of the suit property to create plot Nos. 210 to 214 without approval of subdivision scheme. He testified that at the time of his investigations plot No. 126 existed, and it is as a result of its subdivision that plot Nos. 133, suit property, and 134 were created before 1974. He added that the subdivision plan of 1988 by the 1st defendant referred to plot 115/R, but it incorporated the suit property and plot No. 134, which already existed as per map “197 C”, which he pointed out that the said map is for plot No. 156. He further testified that he had not seen the survey plan for plot No. 115/R. That plot Nos. 210 to 214, which were created out of the suit property, totalled to 1.615 acres, without factoring the access road which was also inside the suit property. With regard to the difference in acreage he stated that the extra acres for the above plots lies in the neighbouring plots. PW3 took the court through the procedure for allocation of government land at that time, which started with an application letter to the Commissioner of Lands, who after a ground report would cause a PDP to be drawn, and later a letter of allotment is issued and thereafter a cadastral survey is conducted, and Deed Plans prepared and consequently a title is processed. The witness faulted the 1st defendant for not doing its part of forwarding Deed Plans to the Land’s office for titling as per the 1953 agreement of lease with the plaintiff. According to his observations during the site visit, the beacons for plot Nos. 210 to 213 were inside the suit property. There was also encroachment by some other plots, but added that plot No. 214 was reserved for the plaintiff, and that he was informed that it had a title. He also



mentioned that survey plans “197B” and “197C” were approved by the Director of Surveys, but were not certified as true copies of the original. He also observed that although the plaintiff’s title to the suit property was issued on 28th December 1992, the green card that is at page 200 of the plaintiff’s bundle of documents show that it was issued on 28th November 1992. Interestingly, he stated that he has not seen any document showing that plot No. 126 came from plot No. 115. He added that plot No. 115 did not exist at the time of the subdivision plan of 1988.

16. PW4, relied on his statement dated 17th March 2017 as and stated that he works in Knight Frank Kenya Ltd which has been managing the suit property since 2006 on behalf of the plaintiff, and that part of their duties is to pay rent and rates for the suit property. He also informed the court that the chain link fence erected by the plaintiff was demolished by the Municipal Council of Mombasa.
17. PW5 relied on his statement dated 4th August 2022 and stated that he worked with Crystal Valuers Limited which deals with property management and valuations. He stated that he was given instructions by the plaintiff’s counsel to establish the value of the suit property as well as the value of plot Nos. 210 to 213. He explained that his valuation did not include the development but he used comparable value from nearby properties.
18. The court conducted a site visit to the suit property on 25th July 2025. PW3 lead the court through the plots Nos. 210 to 214. He pointed out three beacons of the suit property but fourth one was inaccessible due to the developments and closed gate next to the Church building. He also pointed out the extent of plot No. 214 and the access road passing through the plot that is blocked at the point it meets the coffee sisal factory on plot No. 212. On the lower side after plot Nos. 210, 213 and 214 are semi-permanent and temporary structures all the way to the ocean that was reported to be plot No. 134. The church building that should be on plot No. 209, encroaches partly on plot Nos. 210 and 211. PW1 was recalled for further cross-examination and testified that the suit property and plot 134 were amalgamated to produce plot No. 115/R, which is the plot number in the subdivision plan. That the plot number in the memorandum of agreement dated 8th May 1953, between the plaintiff and the 1st defendant, refers to plot 1149. He reiterated that the suit property and plot No. 134 came from plot No. 126, which also emanated from parcel No. 115/R. He stated that the survey for the suit property was done on 25th September 1986, but at the time the title was being issued, the suit property no longer existed. He also admitted that although the RIM at page 20 of the plaintiff’s supplementary bundle of documents indicated that amendment was done on 23rd September, the year was not visible, and could not confirm if it was amended on 23rd September 1974. He was also clear that the RIM did not contain any plot referred to as No. 115/R.
19. The 1st defendant called Paul Manyala, County Director of Mombasa Physical and Land Use Planning, who testified as DW1. He relied on his statement dated 19th October 2022, as his evidence in chief and testified that the suit property was formerly plot No. 115/R. He testified that a subdivision scheme was prepared, circulated and approved by the Land Officer and Physical Planning office. He stated that in 1948, the defunct Municipal Board had sublet to the plaintiff 1.55 acres on condition that should the council wish to re-plan, it would reserve 1.55 acres for the plaintiff. He narrated that the said agreement for lease was registered under the *Registration of Documents Act* in 1954, and that later in the same year the plaintiff subleased to the said property to Herman. That the lease was registered under plot No. 115 for 1.55 acres, and Herman later transferred the lease to his wife as confirmed by the assignment of lease dated 6th July 1960. He added that the property reverted back to the Plaintiff under the High Court order of 26th October 1971, and it was a condition that the property would be sold to the plaintiff but there is no documentary evidence to confirm whether the sale was done or not. He added that in 1974 the Municipal Council initiated subdivision of plot No. 115/R and circulated to the relevant agencies the subdivision scheme plan which was approved by the Director of Surveys. He further stated that



plot No. 115/R was then subdivided into plot Nos. 132, 133, and 134/IX. That a further subdivision of the suit property in the same year created plot Nos. 210 to 214, and plot No. 214 was allocated to the plaintiff. DW1 stated that the six conditions placed in the letter dated 25th September 1986 before subdivision were met by the 1st defendant and nobody raised any objections. It was his testimony that as the suit property belonged to the 1st defendant at the time of subdivision, it cannot therefore be faulted for carrying out the subdivision without the plaintiff's consent. That the 1st defendant's role in the subdivision ended after circulating the subdivision scheme which was approved and forwarded to the Director of Surveys. He referred to the green card for the suit property at page 281 of the plaintiff's list of documents that indicated that the suit property was registered to the Government of Kenya and that the plaintiff owned plot No. 214, and added that it has been paying rates for the said plot. He further told the court that the 8th defendant neither owned any of the properties subdivided from the suit property, which are plot Nos. 210 to 214, nor paid rates for any of those plots. He referred to the yellow cards at pages 259, 260 and 179 of the plaintiff's bundle of documents and stated that they are used for rating purposes only. He disputed the contents of the yellow card at page 179 that indicated the suit property existed in 1953, and added that yellow cards are created from title deeds. He testified and that a document of plot ownership must be presented to the 1st defendant before opening a yellow card. DW1 further testified that the subdivision scheme for plot No. 115/R was approved by the Commissioner of Lands on 9th February 1998. He admitted that the 1st defendant did not do any subdivision of plot No. 115/R in 1974. That the subdivision was done in 1986, and that on 12th January 1988 the suit property and plot 134 were consolidated under survey plan F/R No. 197/95 resulting to plot No. 156 and other subdivisions. DW1 conceded that the suit property existed in 1988, but it was not in existence in 1992 when title over it was issued to the plaintiff. He added that the 1st defendant did not take any steps to cancel the plaintiff's title. DW1 further testified that after the subdivision, the plaintiff was allocated plot No. 214 because it had structures on it. He stated that the 1st defendant subdivided the original 64 acres of land to create block IX/ 132, 133 and 134 as per the survey plan at page 17 of the plaintiff's supplementary bundle of documents, but could not tell whether the 1st defendant sought consent before subdividing the suit property. it was his testimony that the purpose of the 1986 re-planning was to achieve order and was initiated by the 1st defendant. He denied that the creation of plot Nos. 210 to 214 resulted to encroachment onto parcel No. 133. He insisted that the suit property was part of plot No. 115/R as per the subdivision plan at page 18 of the plaintiff's supplementary bundle of documents.

20. The 8th defendant testified as DW2, and relied on the contents of his statement dated 2nd November 2020, as his evidence in chief. He stated that he is not the registered owner of plot No. 210 and it is not in his possession.
21. Sheila Soila, the Land Registrar, testified as DW3 and adopted her witness statement dated 7th December 2023, as her evidence in chief, and produced the green cards at pages 281 to 283 of the plaintiff's consolidated bundle of documents as exhibits. She was categorical that the suit property is intact and still registered with the plaintiff. She could not give the history of the suit property, but added that if the suit property had been a subdivision, that would have been noted on the green card, and it was not. She testified that the registration of the court order under the [Registration of Documents Act](#) did not confer title, but registration of an interest to land makes the document valid by giving it legal effect and served as notice to others.
22. The learned counsel for the plaintiff two sets of submissions dated 13th December 2024 and 24th June 2025, while that for 1st 4th, 8th, 10th & 11th defendants filed their submissions dated 11th February 2025, 17th February 2025, 14th January 2025 and 22nd April 2025 respectively, that the court has considered.



23. From the pleadings, evidence and submissions tendered, the following are the issues that arise for the court's determinations:
- a. Whether the plaintiff has locus standi to institute and prosecute this suit.
 - b. Whether the suit is statute time barred.
 - c. Whether the suit is res judicata.
 - d. What is the relationship between parcel Mombasa/block 1X/133, suit property, and the 1.55 acres out of Mombasa/block 1X/115, leased to the plaintiff by the 1st defendant [Municipal Board of Mombasa] under the agreement of lease dated 8th May 1953.
 - e. Whether Mombasa/block 1X/133 was available for re-planning and subdivision by the 1st defendant without consent of the plaintiff.
 - f. Whether parcels Mombasa/block 1X/210 to 214 created by the 1st defendant encroaches on the suit property.
 - g. Whether the 1st defendant could legally and lawfully do the re-planning and subdivision of the suit property and proceed to do conveyancing of the resultant parcels Mombasa/block 1X/210 to 214, without approval by the 10th & 11th defendants.
 - h. Whether the 2nd, 3rd, 5th, and 6th defendants acquired valid and good titles to their respective parcels that emanated from the re-planning and subdivision of the suit property.
 - i. Whether the plaintiff is entitled to exemplary, aggravated and special damages.
 - j. Who should pay the costs?
24. The court has carefully considered the parties' pleadings, oral and documentary evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions:
- a. The retracing by the plaintiff of the title to Mombasa/block 1X/133, suit property, to the 64 acres given to the Municipal Board of Mombasa, predecessor to the 1st defendant, by the Governor on behalf of the Queen on 1st April 1948, has not been disputed. Also not disputed is the agreement of lease dated 8th May 1953, for 1.55 acres between the Municipal Board of Mombasa and East Africa Breweries Limited [EABL], predecessor to the plaintiff, for a term of 99 year, out of the head lease measuring 64 acres, known as subdivision 115 section IX (L.R NO. 1149). The term of the said lease is yet to expire. The said lease was registered in Mombasa Registry in Volume B13 Folio 16/78 File 1560. It has also not been contested that the said property was through a supplemental agreement dated 25th June 1954, leased by EABL to Herman Anton Andrae through an assignment of lease dated 16th November 1954 registered in Volume B13 Folio 69/1. The Municipal Board of Mombasa also issued a written consent on 4th August 1955 for that transaction. Thereafter, the said Herman Anton transferred his leasehold interest to his wife, Joy Amelia Andrae, through an assignment of lease dated 6th July 1960, which was registered in Mombasa Registry, as Volume B13 Folio 165/15 File 1617 together with a written consent from the Mombasa Mayor dated 20th July 1960. By a court order issued in Miscellaneous Civil Application No. 142 of 1971 on 26th October 1971 and under the Mental Treatment Act CAP 248, the property was transferred to Hugo John Pax Nitch Smith, being the receiver of Joy Amelia. The court further ordered on 28th June 1971 that the suit property be sold to the plaintiff for a sum of £25,000, and that the



receiver was to sign all documents relating to the suit property. The said order was registered in Mombasa Registry Volume B13 Folio 236/81 File 1634. The plaintiff's contention that there was a clause in the original lease agreement to the effect that if the Municipal Board was to plan and subdivide Land Number 115 of Section IX, it would hive off 1.55 acres and issue a lease in favour of the plaintiff and have the same registered while maintaining the same terms and conditions as the said lease agreement, has also not been contested, by the 1st defendant.

- b. However, while the plaintiff takes the position that the suit property's title reverted to it after the 1971 court order, the 1st defendant has disputed that claiming pointing out that there are no conveyancing documents signed by the said receiver giving effect to the court order by transferring the leasehold interest over the suit property back to the plaintiff. The 1st defendant's position is that the court order was not self-executing, and the title remained in the name of Joy Amelia, through the appointed receiver. It further took the position that as the original lease was only registered at the Documents Registry and never registered at the Mombasa Titles Registry, no title to the suit property had ever passed to the plaintiff or to the sub-lessees, and therefore the property remained that of the 1st defendant. The plaintiff has defended their claim to the suit property insisting that it is the registered proprietor of the leasehold interest and a certificate of lease has been issued to it as confirmed by the green cards and certificates of official searches. That further, the 10th and 11th defendants, who are the custodians of Land Registry and Survey Records had in their pleadings and evidence confirmed the validity of its title to the suit property, and denounced knowledge of the re-planning and subdivision of the said property by the 1st defendant.
- c. Though the 1st defendant appear to say that the plaintiff's interest over the suit property never crystalized for failure to register the original lease, and the sublease thereof, with the Mombasa Tiles Registry, the fact that it gave consent to the subleasing of the same land to Herman Anton Andreae, and the assignment to his wife, confirms it the interest to have crystalized. Further, when subdividing the 64 acres the 1st defendant hived off a 1.55 acres portion, being Mombasa/ block 1X/133, in accordance with the clause in the original lease agreement, which goes to show it recognized the interest had indeed crystalized. The 1st defendant's act of reserving Mombasa/block 1X/214 for the plaintiff after the re-planning and subdivision can only be further evidence that it recognized its leasehold title under the 1953 lease agreement. The 1st defendant has not tendered any evidence to explain the rational or purpose of hiving off a portion of 1.55 acres being Mombasa/ block 1X/133, if it was not in compliance with the clause of the original lease agreement. It follows therefore that the plaintiff is with jurisdiction to institute and prosecute this suit when its interest to the suit property is infringed upon.
- d. Having considered the findings in (a), (b), and (c) above, and there being no evidence adduced to rebut or challenge the plaintiff's contention that it did not know of the re-planning and subdivisions before 1992 due to the 1st defendant's concealment, and the fact that the plaintiff remained a rate payer in the 1st defendant's records and received rates for the suit property up to 1995, the court finds the suit having been filed in 1996 is not statute time barred.
- e. The 1st and 3rd defendants averred in their statements of defence that this suit is res judicata. The averment of the suit being res judicata was denied by the plaintiff who submitted inter alia that in the absence of pleadings and decisions of those previous suits being availed to the court so as to confirm the issues raised thereon and determined, it would be onerous and unfair to expect the court to ascertain whether the issues herein had been determined in the previous suits. The plaintiff further pointed out that Mombasa High Court Civil Application No. 12 of 1999, Republic versus Municipal Council of Mombasa *exparte* Kenya Breweries Limited



and Mombasa High Court Miscellaneous Civil Application No. 244 of 2001, Kenya Breweries Limited versus Municipal Council of Mombasa & 4 Others were dismissed preliminarily on the grounds that the applications for leave to prerogative remedies/judicial review orders were filed after a period of six months from the date of the decision or proceedings sought to be quashed. That further the Court of Appeal had in Civil Appeal No. 22 of 2006 made a finding that the High Court had never determined the date on which the plaintiff became aware of the offending decisions for purposes of determining when the cause of action arose.

- f. The Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another versus Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR) held that:

“58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former judgement or order which was final;
- b) The judgement or order was on merit;
- c) The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

That applying the above decision of the Supreme Court of Kenya to the facts disclosed in the instant suit, I find no evidence has been tendered to show that the issues raised herein were issues in the previous litigations and have already been determined on merit. The previous litigations detailed above were over applications for leave to apply for judicial review remedies, and were dismissed at the preliminary stages. It is trite that judicial review proceedings are primarily concerned with the legality and propriety of the process used to reach the impugned decisions as opposed to the merits or fairness of the decision itself. I therefore find the issues raised in this suit over the suit properties and between the parties herein were not decided on merit in any of the listed previous litigations. Accordingly, this suit is not res judicata.

- g. That in view of the findings in (a), (b) and (c) above, on the origin of the Mombasa/block 1X/133, suit



property, plaintiff's title to the said land and 10th & 11th defendants' recognition of the same, the 1st defendant's claim of right to re-plan, subdivide, and allocate portions thereof to third parties, while the lease is still in force, without either the plaintiff's consent/approval or surrendering its leasehold interests was to say the least, illegal and unlawful. The evidence available confirms that the suit property was surveyed and processed through Computations No. 13759, examined on 3rd December 1969, authenticated and assigned plot No. 133 on 22nd July 1974, as evinced by Survey Map, FR No. 116/192. The plot was demarcated and delineated by the four beacons identified as B1, B2, B3 and B4. The evidence adduced specifically by PW3, and confirmed by the court during the visit to the suit property on 25th July 2023, is that the fourth beacon could not be reached due to the developments thereon and the gate to the walk through path being closed. The access road passing through the property had also been blocked at the point it meets with the coffee/sisal factory on plot Mombasa/block 1X/212. The court was also shown a church building that is on plot Mombasa/block 1X/209, whose structures had encroached onto plots Mombasa/block 1X/ 210 & 211. That as there is no dispute that the 1st defendant's impugned re-planning and subdivisions affecting the suit property resulted to creations of plots Mombasa/block 1X/210 to 214, it follows therefore, that any allocation and or transfer of any of the said plots, was equally illegal, unlawful and incapable of passing good title.

- h. The 2nd, 3rd, 5th & 6th defendants were purportedly registered as proprietors of plots Mombasa/block 1X/210, 211, 212 & 213 respectively. The 2nd defendant transferred Mombasa/block 1X/210 to 7th defendant who in turn reportedly transferred it to 8th defendant who has denied it. The 3rd, & 5th defendants transferred plots Mombasa/block 1X/211 and 212 to the 4th defendant during the pendency of this suit, but the 6th defendant retained Mombasa/block 1X/213 in her name. The 2nd and 7th defendants did not defend the claim against them, but it is noted that the suit against the 7th defendant was marked abated.
- i. The 3rd, 4th, 5th and 6th defendants filed their statements of defence averring inter alia that they lawfully obtained title to their respective plots for value and without notice. However, none of the said defendants testified or called any witness during the hearing in support of their



pleadings in the statements of defence. Without evidence in support thereof, their averments in the statements of defence remains mere statements of allegations that cannot be relied on, to rebut the evidence adduced by the plaintiff in support of its claim. See *Ndindiri versus Irimu & 3 Others* [2023] KEELC 18438 (KLR).

- j. In the Supreme Court of Kenya case of *Dina Management Limited versus County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) the court held as follows about the defence of bona fide purchaser for value:

“93. As held by the Court of Appeal in *Munyu Maina versus Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

That as the plaintiff has shown that the 1st defendant’s purported re-planning and subdivision of the suit property was without its consent, and the court has found it was illegally and unlawfully done, and therefore null and void, no good title passed to the 3rd, 4th, 5th and 6th defendants or to any of the other third parties thereof to whom they were transferred to.

- k. The 8th defendant filed a defence and testified as DW2, denying being allocated, or registered or in possession of Mombasa/block IX/210 or any of the subdivisions. It was the plaintiff’s duty to adduce evidence to connect the defendants including the 8th defendant, with first,



the registration and or possession any of the subdivisions from the suit property, and proof of fraud thereof. The plaintiff has not discharged that duty in respect of the 8th defendant and its claim against him fails.

- l. The 9th Defendant did not file any defence or participate in the hearing. From the available evidence, the plaintiff has failed to show any fault attributed to the 9th defendant that it could be held liable for, and the claim against it fails.
- m. Though the 10th and 11th defendants filed a statement of defence seeking to among others strike out the plaintiff's suit, it acknowledged the plaintiff ownership of the suit property. Further, through the testimony of its witness, DW3, she confirmed that from their records, Mombasa/block 1X/133, measuring 1.55 acres, has not been subdivided and is still in the name of the plaintiff. The net effect of the 10th and 11th defendants' pleadings and evidence is not only to denounce the 1st defendant's re-planning and subdivision but also to support the plaintiff's title to the suit property, and the plaintiff's case against them fails.
- n. The actions of purported re-planning and subdivision of the suit property undertaken by the 1st defendant amounted to arbitrary and oppressive deprivation of the plaintiff's proprietary rights over the suit property. Such unlawful acts by public bodies should not be encouraged as it adversely affected the plaintiff's access and use of the developments it had erected on the suit property. In the case of *Godfrey Julius Ndumba Mbogori & Another versus Nairobi City County* [2018] KECA 702 (KLR) the Court of Appeal held as follows:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the



plaintiff, and iii) where exemplary damages are expressly authorized by statute.”

Though the motivation that led the 1st defendant to engage in the impugned re-planning and subdivision is not obvious from the evidence tendered, it is clear that however well meaning it could have been, it resulted in unlawfully and illegally denying the plaintiff of its proprietary rights over the suit property. The 1st defendant should therefore pay the plaintiff exemplary and aggravated damages. No amount was proposed by the plaintiff in their submissions and noting that whatever amount that the court arrives at will come from the public coffers, the court finds an award of Kshs.1,000,000 to be fair and just.

o. On the claim of special damages, the plaintiff pleaded for the following amounts:

- i. Surveyors fees of Kshs.250,000 plus court attendance costs of Kshs.25,000.
- ii. Physical Planners fees of Kshs.266,800 plus attendance fees/expenses of Kshs.50,000.
- iii. Land valuers fees of Kshs.300,000 plus court attendance charges of Kshs.20,000.

During the hearing PW2, confirmed invoicing the plaintiff for Kshs.192,800 and Kshs.234,440 as per the documents at pages 251 and 252 of the plaintiff's bundle of documents. He also stated that he expected to be paid for the two days he attended court. PW3 stated his fees was Kshs.250,000 as shown by the document at page 253 of the plaintiff's bundle. He added that he would be seeking for payment for the two days he attended court. PW5 testified that he invoiced for Kshs.300,000 and Kshs.20,000 for court attendance. The total sum from the evidence tendered is higher than the amount pleaded, and as there was no amendments made to the pleadings to accommodate the enhanced sum, the court will grant special damages limited to the amounts pleaded and proved.

p. That as the plaintiff is successful in its claim against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants, then in accordance



with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya that costs follow the event unless where for good cause the court orders differently, in this instance, I do not find any basis for directing otherwise.

- q. The plaintiff will have interests on the sums awarded as damages and costs.

25. Flowing from the foregoing determinations, the court finds the plaintiff has failed to prove its claim against the 8th to 11th defendants, but has proved its case against the 1st, 2nd, 3rd, 4th, 5th and 6th defendants to the standard required of balance of probabilities. The court therefore enters judgement for the plaintiff and against the 1st to 6th defendants and orders as follows:

- 1(a) The plaintiff's case against the 8th to 11th defendants is dismissed.
- 1(b) The plaintiff to pay the costs for 8th Defendant.
- 2a) A declaration is hereby issued that the certificate of title/lease in respect of the plaintiff's suit property known as Mombasa/block 1X/133 is valid and still in force.
- 2b. A declaration is hereby issued that the purported re-planning and subdivision by the 1st defendant over the plaintiff's suit property known as Mombasa/block 1X/133 to form Mombasa/block 1X/210 to 214 is illegal, null and void an initio.
- 2c. The 4th defendant, to whom the 3rd, & 5th defendants transferred plots Mombasa/block 1X/211 and 212, and the 6th defendant, in whose name Mombasa/block 1X/213 is registered, are hereby ordered to vacate and give the plaintiff vacant possession of Mombasa/block 1X/133, suit property, and/or any portion thereof under whatever description, including title numbers Mombasa/block 1X/210, Mombasa/block 1X/211, Mombasa/block 1X/212, Mombasa/block 1X/213 and Mombasa/block 1X/214, in ninety (90) days from today, and in default eviction order to issue to be executed at their costs.
- 2d. An order of permanent injunction is hereby issued against the 1st to 6th defendants restraining them by themselves, servants or agents from developing, transacting, intermeddling and/or in any way to deal with the Mombasa/block 1X/133, suit property, or any part thereof, other than by giving the plaintiff vacant possession.
- 2e. The 1st defendant to pay the plaintiff exemplary and aggravated damages assessed at Kshs.1,000,000 [one million].
- 2f. The plaintiff is awarded Kshs.911,800 [nine hundred and eleven, eight hundred] being the total sum of special damages pleaded and proved.
- 2g. Plaintiff's costs to be paid by the 1st to 6th defendants.
- 2h. The plaintiff is awarded interest on sums in (e) and (f) above, and costs.

Orders accordingly.

DATED, SIGNED, AND VIRTUALLY DELIVERED ON THIS 1ST DAY OF OCTOBER 2025.

S. M. KIBUNJA, J.

ELC Mombasa.

In The Presence Of:



Plaintiff : M/s Ngonde for Njoroge Regeru.

Defendants :Mr Kiti and M/s Jadi for 1st Defendant, M/s Okumu for 4th Defendant, Mr Wafula for 5th Defendant, MR Oyas for 6th Defendant, Mr Omwenga for the 8th Defendant and Mr Kemei for 10th and 11th Defendant.

Shitemi-court Assistant.

