

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ELC CASE NO. E016 OF 2023

1. MATANO JOHN MWANDAU

2. JOSEPH KIMOJU MWAZO

3. DOMINIC JOHN MWAZO.....

PLAINTIFFS

=VERSUS=

CHALLA

HOTEL

LIMITED.....

.....DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit by way of a Plaint dated 30th January 2023 seeking for the following reliefs against the Defendant: -

- (i) A declaration that the Plaintiffs are the lawful and registered owners of the parcel of land known as TAVETA TOWN BLOCK 1/123.**
- (ii) An order for vacant possession of the parcel of land known as TAVETA TOWN BLOCK 1/123.**
- (iii) An order for eviction of the Defendant, its servants and or agents from the suit property**

and demolition of any structures erected on the suit property.

(iv) A permanent injunction restraining the Defendant, its servants and or agents from remaining on or continuing in occupation of the suit property.

(v) Mesne profits.

(vi) Costs and interest.

2. The suit was contested by the Defendant. The Defendant filed a Statement of Defence dated 25th April 2023.

The Plaintiffs case

3. It was the Plaintiff's case that the Defendants have encroached on the suit property and have in fact been occupying and using the parcel as part of the Hotel premises.

4. It was averred that on or about 7th April 2022, the Plaintiffs issued a demand letter advising the Defendant to vacate the parcel of land and grant vacant possession. The same did not elicit any response and in another letter dated 18th August 2022 the Plaintiffs issued another demand letter to the Defendant but the Defendant neither acknowledged nor responded to the same.

5. It was stated that the Defendant continues in its unlawful occupation of the suit property thereby causing the Plaintiffs to be deprived of the use of the same thereby suffering loss and damage.
6. During trial, two witnesses testified on behalf of the Plaintiffs.
7. **Matano John Mwandau testified as PW1.** He adopted and relied on his witness statement and bundle of documents dated 30th January 2023 in his evidence in chief.
8. It was his testimony that they stayed on the suit land when young before moving. His father now deceased had leased out the same. It was also his testimony that the land is adjacent to the property occupied by the Defendant and the Defendant has encroached on the same using it as part of hotel land.
9. On cross-examination, he stated that the hotel was already operational when his father died. The land is adjacent to the hotel. He did not have any letters of administration.
10. When re-examined, he stated that the property is next to the hotel. The hotel had not been constructed

when they were growing up. He was not aware that there was another title of the said plot.

11. **Robert Nyambuga testified as PW2.** It was his testimony that he was engaged by the Plaintiffs to carry out a topographical survey. He did visit the site and prepared a report of the same. It was also his testimony that L.R 4118/281 is the same as Taveta Town Block 1/123. He also stated that he saw a Certificate of Lease, the survey plan, RIM which all tallied. He also stated that the Plaintiffs are the lawful owners of the suit parcel.
12. On cross-examination, he stated that the survey was done on 26th March 2025. When he went to the site he requested to see the owners of the hotel. He waited for about 2 hours. He also stated that his instructions were to identify the property and not to point out the beacons. He reiterated that Land Parcel 123 is the same as LR 4118/281.
13. On re-examination, he stated that the management of the hotel was given a notice of his visit and he was able to talk to them. They even allowed him to take pictures.

The Defendant's case

14. The Defendants filed a Statement of Defence dated 25th April 2023. They denied the averments made in the plaint. It was averred that it is the registered and beneficial owner of the suit premises having charged the same with a Bank to secure a loan facility. The bank has never issued a Discharge of Charge and or issued the Defendant with any statutory declaration on the part of the Defendant.

15. During trial, **Mary Kariuki** testified on their behalf as DW1. She relied and adopted her witness statement and bundle of documents dated 20th November 2023 in her evidence in chief. It was her testimony that the construction of the hotel was completed in 1992. They later needed space for parking and they approached their neighbours seeking for more space. They also approached Flavian Ngoto Mareko and they did an agreement for plot 4118/260. They also gave him Kshs. 20,000/= . That was sometimes in 1992. They later made an application to the Lands registry and had the property registered in their name. She also stated that the parking was later extended and was completed around 1996 and 1997.

16. It was also her testimony that they took possession of the land immediately in 1993. Nobody objected to the same. Flavian Ngoto Mareko did not have a title but had an offer letter. The plot numbers were changed when titles were issued. The property is fenced and secured. The land is not charged but the bank placed a caveat on all plots including the suit property. The same has not been removed to date.
17. On cross-examination she stated that the Defendant never bought the land but was acquired through an exchange for a plot to plot arrangement. She also stated that there were some documents which showed that Flavian had acquired land from his aunt. He did not have a title. He had not informed them whether he was paying any rates. No succession had been done.

Plaintiffs' submissions

18. The Plaintiff filed written submissions dated 25th August 2025.
19. It was submitted that the Plaintiffs have clearly established ownership of **TAVETA TOWN BLOCK 1/123** through a duly registered lease. Reliance was placed on

Section 26(1) of the Land Registration Act No. 3 of 2012 which stipulates as follow:

“The certificate of title is sued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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.”

20. The Plaintiffs also made reference to the Court of Appeal decision in the case of Frann Investment limited v Kenya Anti-Corruption Commission & 6 Others (2024) KECA 714 (KLR), where the Court held:

“The doctrine (of indefeasibility) is now recognized under Section 26(1) of the Land Registration Act, 2012 which affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition.”

21. It was argued that in the said case, the Court had emphasized that a certificate of title issued under the Act is conclusive evidence of ownership, and such ownership

can only be impeached by proof of fraud, misrepresentation, or illegality attributable to the registered proprietor and that in the present case, there is no allegation or alone proof of fraud or illegality in the Plaintiffs' acquisition of title.

22. It was contended that the Plaintiff has established lawful ownership over the suit property within the meaning of Section 26(1) and is entitled to the full rights and privileges of a registered proprietor, including the right to exclusive possession and protection from interference by third parties.

23. It was also submitted that from the testimony of the Plaintiffs and the exhibits produced in evidence, the Plaintiffs had demonstrated that the parcel of land known as **TAVETA TOWN BLOCK 1/123** is registered in their names and they are its lawful owners.

24. It was contended that the Certificate of Lease (Exhibit 1) dated 1st February 2022 showed the Lessor as the National Government and the Lessees as the Plaintiffs holding a leasehold interest of 99 years over the suit property. The aforesaid position is clearly confirmed by the Plaintiffs'

Further List of Documents dated 17th September 2024 with the Green card for the suit property.

25. The Survey Report by Gimsmap Surveyors dated 4th April 2024 confirms the suit property as **TAVETA TOWN/BLOCK 1/123**. At page 4 of the Survey Report, a bullet comment notes that “on parcel 123 sits a gazebo structure, non-storey accommodation units and Garden land scaping all done by Challa Hotel Limited.

26. It was also submitted that from the sketch plan at page 14 (last page) in the Survey Report it can be seen that the Defendant has its hotel on Plot No. 121 and 122. On the suit property Plot No. 123 the Defendant has put up a Garden and temporary structures.

27. The court was urged to grant the prayers sought.

The Defendant's submissions

28. The Defendant filed written submissions dated 29th August 2025. Counsel submitted on the following issues:-

(i) Whether the Plaintiffs certificate of lease constitutes indefeasible title;

(ii) Whether the Defendant's long-standing possession, developments and equitable rights

constitute overriding interests binding the Plaintiffs.

(iii) Whether the remedies sought by the Plaintiffs, namely eviction, mesne profits and injunction are available in the circumstances.

29. It was submitted that whereas Section 26(1) LRA provides that a certificate of title is prima facie evidence of ownership, it is worth noting that subsection (b) allows impeachment where the title was obtained illegally, unprocedurally, or through a corrupt scheme. The jurisprudence is clear that indefeasibility is not absolute. Reliance was made to the Court of Appeal case in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** where it was held that once a title is challenged, the registered proprietor must go beyond the instrument and demonstrate the legality of its root.

30. Citing the cases of **Arthi Highway Developers Ltd v West End Butchery Ltd [2015] eKLR** where the Court emphasized that indefeasibility is not a cloak for fraud or irregularity and further the Supreme Court in **Dina Management Ltd v County Government of Mombasa & Another (2023) eKLR** where it was confirmed that

Article 40(6) of the Constitution withdraws protection from titles unlawfully or irregularly acquired and that courts will not “sanction illegalities and irregularities” simply because a certificate has been issued. In **Hika v Kagwima (2025) eKLR**, the Environment and Land Court held that failure by the Registrar to inquire into visible occupation before issuing a title amounts to procedural irregularity and renders the title defeasible.

31. It was also submitted that in this matter, the Plaintiffs registration in 2022 disregarded the Defendant’s open and developed occupation and must therefore be deemed procedurally irregular and defeasible under Section 26(1) (b).

32. On whether the Defendant’s long standing possession, development and equitable rights constitute overriding interests binding the Plaintiffs, it was submitted that Section 28(b) LRA expressly provides that all registered land is subject to overriding interests, including the rights of persons in actual occupation and reliance was made to the cases of **Kikungu v Ndolo & Another (2024) eKLR** and In **Khaseke & Others v Maurice & Another (2024) KECA, Macharia Mwangi Maina & 87 Others v Kagiri**

(2014) eKLR and Willy Kimutai Kitilit v Michael Kibet (2018) eKLR, Mwirebua v Mutonga (2025) KECA and in **Shah & Others v Mombasa Bricks & Tiles Ltd (2023) KESC**, the Supreme Court elevated constructive trust as a shield against unjust enrichment by registered title holders.

33. On the remedies sought it was submitted that eviction is an extraordinary and discretionary remedy, only granted against wrongful occupiers. Reliance was placed on the cases of **Muasya v Nywoki & Others (2023) eKLR** and **Ensi Investments v Were (2024) KESC**.

34. In respect to the Plaintiffs claim for mesne profits, it was submitted that the same is equally untenable and should not be awarded since there is no evidence of any wrongful occupation by the Defendants. Reliance was made to the cases of **Attorney General v Halal Meat Products Ltd (2016) eKLR** and **Peter Mwangi Mbutia & Another v Samow Edin Osman (2014) eKLR**, where the Court reiterated that mesne profits cannot be awarded without evidence of wrongful possession and proof of computation.

35. The Defendant concluded its submissions by urging the court to find that the Plaintiffs had not discharged their burden and dismiss the suit with costs.

Analysis and Determination

36. Having considered the pleadings filed, written submissions and the oral and documentary submissions of the parties, this court is of the view that the following are the salient issues for determination herein:-

(i) Who is the bonafide owner of the suit parcel Taveta Town Block 1/123 and also known as LR No. 4118/281.

(ii) What are the appropriate reliefs to grant herein.

37. On the first issue, it is worth noting that the Plaintiffs and the Defendant are both laying claim to the suit property. They are also both claiming to have ownership documents in relation to the same. Where a court is faced with two or more interests over the same suit property, it must look into the root of ownership of the suit said. This approach was well appreciated in the case of **Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR.**

38. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as **Munyu Maina vs Hiram Gathiha Maina (Supra) And Funzi Development Ltd & Others vs Country Council of Kwale [2014] eKLR,** and by the Supreme Court in its authoritative and all-binding decision of **Dina Management Limited vs County Government of Mombasa & 5 Others (Supra)**
39. As earlier stated, both parties are laying claim to the suit property. It is trite law that he who alleges must prove. This is set out under **Section 107(1)(2)** of the **Evidence Act**, which provides as follows:

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Sections 109 and 112 of the same Act states;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

40. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi**

M'Nabea vs David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular

fact may be cast on the person who wishes the Court to believe in its existence.”

41. With respect to the burden of proof, the learned Judges of Appeal in the case of **Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR**, posited thus:

“Denning J, in Miller -vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party

bearing the burden of proof will lose because the requisite standard will not have been attained.”

42. The Court will be guided by the aforementioned provisions and cases. It was the Plaintiffs case that they are the rightful owners of the suit parcel which was initially owned by their father and that they used to stay there when they were young and that Flavian Ngoto Mareko who allegedly gave the plot to the Defendant was just a tenant.

43. The Defendant on the other hand stated that the plot was acquired sometimes in 1992 after exchanging the same with Flavian by giving him another plot since they needed some land for the hotel.

44. During trial, it emerged from cross-examination of DW1 that Flavian had just done an affidavit confirming ownership of the plot. He did not have any ownership documents to confirm the same before he gave them the plot. From the analysis of the evidence tendered Flavian Ngolo Mareko did not have good title to pass the same to the Defendant and in the circumstances the Defendant could not have lawfully acquired the same.

45. **Section 26 (1) of the Land Registration Act**, gives a registered owner of property absolute and indefeasible rights over the said property. However, it is not in doubt that the said title can be impeached if it is found to have been acquired unprocedurally or through fraud. In this instant case, the Plaintiffs have shown the root of their title and it is the Court's considered view that they have proved how they acquired the suit property and the same was acquired procedurally. However, despite the Defendant producing documents indicating that it acquired the same from Flavian Ngoto Mareko who allegedly got the same from his late aunt they failed to prove that the Plaintiffs title to the suit property was acquired illegally and the Court was not furnished with any evidence of the same.

46. Therefore, on the first issue, it is the finding of this court that the Plaintiffs are the bonafide owners of suit property known as Taveta Town Block 1/123.

47. In respect to the reliefs sought, the Plaintiffs have sought for several reliefs including permanent orders of injunction against the Defendant, a declaration that they are the

lawful and registered owners, vacant possession, eviction, mesne profits and costs.

48. In considering the grant of the said reliefs, It is instructive to adopt and restate the holding of the court in the case of **Waas Enterprises Limited v City Council of Nairobi & another [2014] eKLR**, where the Honourable court emphasized on the import and tenor of the certificate of ownership and confirms that the bearer of such certificate of ownerships deserves the protection until and unless the same is cancelled.

49. For coherence, the Honorable court stated thus;-

“As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in Sections 24 and 25 of the Land Registration Act which provide as follows :-

“24. Subject to this Act—

(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- 1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- 2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff.”

50. Furthermore, the sanctity of the certificate of title/ownership was also underscored by the Court

of Appeal in the case of **Joseph N.K. Arap Ng'ok Vs Moiwo Ole Keiwua [1997] eKLR**, where the court stated and held thus;-

“Section 23(1) of the Act 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.”

51. Invariably, the issuance of the certificate of ownership in favor of the Plaintiffs operates to vest and bestow upon the owner of the land lawful rights which must be protected by the court, unless the

certificate of title/ownership was procured by fraud, illegality or mis-representation.

52. Clearly, in this case, no evidence has been availed to allege that the Plaintiffs title was procured vide fraud or otherwise. In the premises, the Plaintiffs are entitled to the protection of the Court.

53. There is no gainsaying that the Plaintiffs have established and demonstrated they are entitled to the declaratory orders sought. To this end, I find and hold that the prayer for declaration sought is meritorious.

54. Regarding the prayer for eviction, there is no gainsaying that the right to absolute and exclusive possession of property by the title owner cannot be realized if there is a third party interfering with such rights. In this regard, it is imperative to observe that an eviction order would go a long way in ensuring that the title owner enjoys the exclusivity in possession and occupation of the designated property. In short, the Plaintiffs are entitled to an order of eviction.

55. In respect of the prayer for permanent injunction, there is no gainsaying that an order of order of permanent injunction also goes along way in vindicating and protecting the statutory rights of the property owner. Absent an order of permanent injunction, the rights of the owner shall be exposed to violation, breach and or infringement by third parties.

56. To this end, I find and hold that a credible basis has been established to warrant the issuance of an order of permanent injunction. See the decisions in the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] KEHC 5027 (KLR).**

57. The Plaintiffs also sought for mense profits, however they did not provide any computation for the same to guide the court and neither did they submit on the same and as such the Court is unable to grant the said relief.

58. The Plaintiff also sought for costs of the suit. **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. However, it is trite

that costs usually follow the event and the same are granted to the successful party, unless there are special circumstances. In this instant case, the Court finds that the Plaintiffs being the successful litigants are therefore entitled to the costs of this suit.

Final orders

59. In conclusion, it is the finding of this Court that the Plaintiffs have proved their case to the required standard and judgment is hereby entered in favour of the Plaintiffs as against the Defendant as follows:-

(a) A declaration be and is hereby issued that the Plaintiffs are the lawful and registered owners of the parcel of land known as Taveta Town Block 1/123.

(b) The Defendant is hereby directed to vacate the suit parcel known as Taveta Town Block 1/123 within 90 days from today. Failure of which eviction to issue.

(c) Pursuant to order (b) above, an order be and is hereby issued for a permanent injunction

restricting the Defendant from remaining and or continuing in occupation of the suit property.

(d) Costs of the suit are hereby awarded to the Plaintiffs.

Dated, Signed and Delivered Virtually/Open Court at Voi this 14th day of October 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Waweru for the Plaintiffs.

Mr. Otieno for Defendant.

Court Assistant: Mary Ngoira.