

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. 389 OF 2009**

**ORBIT HOLDINGS LIMITED ..... PLAINTIFF**

**VERSUS**

**MARIAKANI HOLDINGS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MAYUR SHAH** (Legal Representative of the Estate of Amritlal  
Vira Shah) ..... **2<sup>ND</sup>**  
**DEFENDANT**

**JUDGMENT**

**Background**

1. By a Complaint dated 10<sup>th</sup> November, 2009, Orbit Holdings Limited (the Plaintiff) prays for Judgment against the two (2) Defendants jointly and severally for the following:
  - i. **A declaration that the Plaintiff is the lawful owner and entitled to immediate possession of all that parcel of land known as Land Reference Number 21623 South East of Mariakani, Kilifi District (hereinafter “the said land”) registered at the Land Titles Registry at Mombasa under Title Number C.R.312512;**

- ii. An injunction ordering the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves (or any one of them) and/or their servants or agents or otherwise howsoever from either, occupying or using the said land or preventing the Plaintiff or its servants or agents from either entering, occupying or using the said land;**
- iii. Damages and interest thereon at such rate and for such period as this Honourable Court deems just; and**
- iv. Costs.**
2. Those prayers arise from the Plaintiff's contention that at all times relevant to this suit, it was the registered proprietor and entitled to possession of the said parcel of land. The Plaintiff avers that on 16<sup>th</sup> September 2008 while it was in the process of building a chain link fence around the perimeter of the suit land, its contractor was stopped and forced to leave by persons claiming that the land belonged to the 1<sup>st</sup> Defendant.

3. The Plaintiff further avers that on 12<sup>th</sup> October 2009, it instructed a Licenced Surveyor to undertake a survey of the suit property but the said Surveyor was stopped from doing so by persons claiming to represent the 1<sup>st</sup> Defendant. It is the Plaintiff's case that each of the two Defendants herein claim to partially own the suit land and that their acts amount to continuing trespass.
4. Mariakani Holdings Limited (the 1<sup>st</sup> Defendant) and Amritlal Vira Shah (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) are opposed to the claim. In their joint Statement of Defence dated 30<sup>th</sup> November 2009 the two Defendants aver that they do not know that the Plaintiff is the registered owner of the suit land. The Defendants deny that they stopped the Plaintiffs' contractor from carrying work or its Surveyor from surveying the suit land.
5. The 1<sup>st</sup> Defendant asserts that it owns and is entitled to occupation and possession of the parcel of land situated at Kabendarani/Mkwajuni at Mariakani measuring 7.31047 Ha which it purchased in the year 1986. It is the 1<sup>st</sup> Defendant's case that its application to set apart the said parcel of land

was made to the Town Council of Mariakani and that the same was duly approved and surveyed by the Ministry of Lands and Settlement.

6. Similarly, the 2<sup>nd</sup> Defendant avers that he owns and is entitled to occupation and possession of a parcel of land situated at Kabenderani in Mariakani measuring 4.2313 Ha having purchased the same in the year 1987. It is the 2<sup>nd</sup> Defendant's case that his application to set apart the land to the Town Council of Mariakani was duly approved and surveyed by the Ministry of Lands and Settlement.
7. The Defendants further aver that in the year 2005, one Purshottam Govind Parmar and Somchand Mulji Shah unlawfully entered their land claiming ownership. As a result, the Defendants assert that they filed a claim before the Land Disputes Tribunal at Kaloleni and in a decision rendered on 12<sup>th</sup> March 2007, the Tribunal allowed the Defendant's case. The award of the Tribunal was adopted as a decree of the Court in Kaloleni SRM Land Case No. 7 of 2007.

8. The Defendants aver further that subsequent to the award, they did institute Mombasa HCCC No. 324 of 2007 against the two individuals seeking a declaration that the Defendants are the owners of the suit property and that a judgment was entered in their favour on 26<sup>th</sup> June 2008. The Defendants therefore deny that they have trespassed onto the Plaintiff's property as claimed.
9. At the trial which commenced on 1<sup>st</sup> October 2013 the Plaintiff called three (3) witnesses in support of its case while the Defendants called two (2) witnesses. Amritlal Vira Shah originally sued as the 2<sup>nd</sup> Defendant passed away on 18<sup>th</sup> October 2017 while the proceedings were still pending. He was substituted by his son and Legal Representative Mayur Kumar Shah.

### **Analysis and Determination**

10. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the Court by the Learned Advocates representing the parties.

11. By their suit as filed herein, the Plaintiff Company has urged the Court to declare that it is the lawful owner entitled to immediate possession of all that parcel of land known as LR. No. 21623 situated South East of Mariakani in Kilifi County and registered at the Land Titles Registry at Mombasa under Title No. CR. 312512. In addition, the Plaintiff prays for an order of injunction to restrain the two Defendants from occupying or using the said land and from preventing the Plaintiff, its servants and/or agents from either entering, occupying or using the said land. The Plaintiff further prays for an award of damages and the costs of the suit.
12. The basis for those prayers is the Plaintiff's contention that it is the registered proprietor of the said parcel of land. The Plaintiff avers that on 16<sup>th</sup> September 2008 while it was in the process of constructing a chain link fence around the perimeter of the suit land, its contractor, one Gorave Amarnath (PW2) was stopped and forced to leave the land by persons who claimed that the land belonged to the 1<sup>st</sup> Defendant.

13. It was further the Plaintiff's case that on 12<sup>th</sup> October 2009 it did instruct one Munuve Kasyi, a Licensed Surveyor to undertake a survey of the suit property but the said Surveyor was stopped from doing so by persons who again claimed that the land belonged to the Defendants.
14. While denying that they had stopped the Plaintiff's contractor and surveyor from entering the land described by the Plaintiff and carrying out any works thereon, the 1<sup>st</sup> Defendant asserts that it owns and is entitled to occupation and possession of a parcel of land situated at Kabenderani/Mkwajuni at Mariakani measuring 7.31047 Ha having purchased the same in the year 1986. It was the 1<sup>st</sup> Defendant's case that it did apply to the Town Council of Mariakani to set apart the said parcel of land and that the application was duly approved and surveyed by the Ministry of Lands and Settlement.
15. That was the same position taken by the 2<sup>nd</sup> Defendant who asserted that he owns and is entitled to occupation and possession of a parcel of land measuring 4.2313 Ha situated at Kabenderani in Mariakani having purchased the same in

the year 1987. It was equally the 2<sup>nd</sup> Defendant's case that he had applied to the Town Council of Mariakani to set apart the said parcel of land and that the application had been approved and the land had been surveyed by the Ministry of Lands and Settlement.

16. The two Defendants further asserted that their ownership of the said parcels of land had been recognized both by the Kaloleni SRM's Court and the High Court at Mombasa. It was therefore their case that they had not trespassed into the Plaintiff's land as claimed, or at all. According to the 2<sup>nd</sup> Defendant, the Plaintiff had erroneously surveyed the Defendants' parcels of land situated at Kabenderani village and had created the title while the Plaintiff's real parcel lay elsewhere.

17. As the Court of Appeal did state in the case of ***Munyu Maina -vs- Hiram Gathiha Maina (2013) eKLR:***

**“When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the**

**instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free of any encumbrances including any and all interests which need not be noted on the register.”**

18. According to the two Defendants, the parcel of land that the Plaintiffs had purchased is situated in a place they refer to as Kafaduni village which is situated in present day Kwale County. It is their case that the Plaintiff upon purchase of the land proceeded to survey a totally different parcel of land situated at Kabenderani Village in Mariakani within present day Kilifi County.
19. In support of its case, the Plaintiff told the Court that it had purchased the land from one Ramesh Samji Patel through a Sale Agreement produced in Court and dated 21<sup>st</sup> March 2007. From the material placed before the Court, it was apparent that the said parcel of land previously belonged to one Mzee Katana Ngoka together with his six (6) sons. It was further apparent that at some point in time, the original owners had sold the land to one Ali Ahmed and two other

individuals but later refused to transfer the land to the new owners.

20. As a result, Ali Ahmed and his two colleagues instituted Mombasa RMCC No. 1572 of 1989 against Mzee Katana Ngoka and his 6 sons. On 18<sup>th</sup> August 1993, the Court issued orders in the matter as follows:

**“1. The Plaintiffs and/or their agents and/or servants be provided with police security to enable them to fence off their parcel of land as awarded by the court in this matter, the land being a parcel measuring 15 acres or thereabouts situate at Kafudini village, Mariakani Location.**

**2. This order be served upon the OCS Mariakani Police Station to ensure its compliance.”**

21. While the letter made reference to the land being situated in Kafudini village, it was apparent to me that the place being referred to was situated in Kilifi County and not Kwale as purported by the Defendants. That was clear from the fact that the parcel was according to the court order said to be

situated in Mariakani Location and that the OCS Mariakani Police Station was the one required to enforce the same.

22. In further support of their case, the Plaintiff has produced a Sale Agreement dated 15<sup>th</sup> December 1995 indicating that when Ali Ahmed and his two counterparts had obtained possession of the land as per the Court order, they proceeded to dispose of the same at a consideration of Kshs. 1,000,000/- to an entity known as Swaleh Squared Limited.
23. To facilitate the registration of the new proprietors, the Town Clerk Urban Council of Mariakani did write to the Commissioner of Lands on 4<sup>th</sup> July 1996 as follows:

**“RE: DEED PLAN NO. 202295 - SWALEH SQUARED LTD.**

**M/s S. Squared Ltd of Mariakani purchased a parcel of land measuring about 15 acres locally (see sale agreement). They have now approached the Council to have this parcel of land registered in their name.**

**You will notice that the issue has undergone a number of steps already. It has been a subject**

**matter of Court and the Court has eventually ruled the matter in their favour.**

**This Council has carried out the necessary investigation as requested by the Kilifi County Council Clerk's letter No. KFI/LND/57/103 and we have established that they bought the piece of land from the rightful Claimants.**

**This Council therefore has no objection on the land being allocated to Swaleh Squared Ltd. Enclosed herein please find copies of all the relevant documents confirming this.”**

24. It was also clear that following this request, on 4<sup>th</sup> January 1996, a new grant was issued by the Survey of Kenya as LR. No. 21623 to the said Swaleh Squared Ltd and that on 15<sup>th</sup> January 1996, the Company applied to the Commissioner of Lands to be issued with a Letter of Allotment for the said property.
25. The Plaintiff also produced a letter dated 4<sup>th</sup> July 1996 in which the Commissioner of Lands confirmed that the Company had bought the land. The suit land was then

transferred from the Kilifi County Council to Swaleh Squared Ltd who were thereafter issued with a letter of allotment dated 6<sup>th</sup> June 1997. Swaleh Squared Ltd was subsequently issued with a title under Grant No. IR 31252 dated 11<sup>th</sup> May 1998.

26. It was further evident from a perusal of the Plaintiff's documents that the suit land was subsequently transferred to one Purshottam Govind Parmar and Somchand Mulji Shah on 13<sup>th</sup> March 2003. It is the two that on 8<sup>th</sup> December 2006 transferred the land to Ramesh Samji Patel who thereafter sold the land to the Plaintiff.
27. While both Defendants asserted that they had bought various parcels of land from various individuals in the place they referred to as Kabenderani area, it was clear that both the Kilifi County Council and the Commissioner of Lands had confirmed that the Plaintiff's predecessor in title had acquired the land from the rightful owners.
28. In his testimony before the Court, the 2<sup>nd</sup> Defendant told the Court that they had not been issued with a title to the land and that they were only issued with a Letter of Allotment on

12<sup>th</sup> May 2011. As we have seen herein above Swaleh Squared Ltd was issued with a Letter of Allotment on 6<sup>th</sup> June 1997 and had complied with the terms thereof. That being the case, the suit land was no longer available for allocation and the subsequent letter of allotment issued to the 2<sup>nd</sup> Defendant was therefore invalid.

29. While the Defendants further traced their ownership of the suit property on account of two orders issued to them by the Courts, I had no doubt in my mind that the two cases could not divest the Plaintiff of its title.
30. From a perusal of Kilifi District Land Dispute Tribunal at Kaloleni Land Case No. 29 of 2005, it was not in dispute that the two Defendants herein had sued Purshottam Govind Parmar and Somchand Mulji Shah over the ownership of the parcels of land the Defendants claim to own. There was also no doubt that the Tribunal rendered a decision which was later adopted as an order of Court in Kaloleni SRM Land Award Case No. 9 of 2007.
31. That award was however of no consequence as Section 3(1) of the Land Disputes Tribunal Act (now repealed) did not

confer any jurisdiction upon the Tribunal to deal with the issue of ownership to land. The award was therefore made in excess of jurisdiction and cannot therefore stand.

32. The Defendants must have known that the Tribunal's award was a nullity. That must be the reason that that same year they instituted Mombasa HCCC No. 324 of 2007 against the said Purshottam Govind Parmar and Somchand Mulji Shah seeking to be declared as the proprietors of the parcels of land they described as LR. No. KAL/29/2005 comprising 7.31047 Ha. and LR. No. KAL/30/2005 comprising some 4.2313 Ha.
33. It was not clear if those Land Reference Numbers were those of the suit property herein. If they were, then the Plaintiff or his predecessor in title Ramesh Samji Patel ought to have been made a party to the suit which proceeded ex-parte. As we have noted herein above, the said Purshottam Govind Parmar and Somchand Mulji Shah had on 8<sup>th</sup> December 2006 transferred their interest in the land to Ramesh Samji Patel and any suit filed in the year 2007 in regard to the suit property had arrived too late in the day. The issue of the

substantive ownership of the suit property cannot therefore be said to have been determined in Mombasa HCCC No. 324 of 2007.

34. In the premises I am persuaded that the Plaintiff has proved its case on a balance of probabilities and that the Defendants had jointly and severally interfered with its possession and occupation on the purport that the suit land belonged to the Defendants.
35. Accordingly, I hereby allow the Plaintiff's suit and make orders as follows:

**a) A declaration is hereby issued that the Plaintiff is the lawful owner entitled to immediate possession of all that piece or parcel of land known as LR No. 21623 situated South East of Mariakani in Kilifi County and registered at the Land Titles Registry at Mombasa under Title No. CR. 312512;**

**b) An order of injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their servants and/or agents from either occupying or using the suit property or preventing the Plaintiff or its servants and/or**

**agents from either entering, occupying or using the said parcel of land.**

**c) The Costs of this suit are awarded to the Plaintiff.**

36. It is so ordered.

**Judgement dated, signed and delivered in open court and virtually at Mombasa this 19<sup>th</sup> day of February, 2026**

.....  
**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Munyao holding brief for Inamdar Advocate for the Plaintiff
- c) Mr. Asige Advocate for the 1<sup>st</sup> Defendant
- d) Mr. Asige holding brief for Masese Advocate for the 2<sup>nd</sup> Defendant