



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**ELC CASE NO. 59 OF 2015**

**1. MOHAMED RIAZ SHOUKAT.....1<sup>ST</sup> PLAINTIFF**

**2. SHOUKAT MOHAMED NOORANI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**1. YASIN ABUBAKAR ARGWINGS KODHEK.....1<sup>ST</sup> DEFENDANT**

**2. MASRAF ABUBAKAR LTD.....2<sup>ND</sup> DEFENDANT**

**3. BARAWA NYAWA NDORO.....3<sup>RD</sup> DEFENDANT**

**4. KENYATTA MWERI MANGI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs instituted this suit by way of a plaint dated 2<sup>nd</sup> April 2015 and filed on 7<sup>th</sup> April 2015. An amended plaint dated 27<sup>th</sup> April 2015 was filed on 30<sup>th</sup> April 2015. The plaintiffs are seeking for judgment against the defendants for:

**i. An injunction permanently restraining the defendants or their agents and/or servants from alienating, sub-dividing, cutting, disposing off, constructing on, trespassing or in any manner whatsoever interfering with the suit property known as plot NO.289/1/M.N. BAMBURI, MOMBASA worth Kshs.10,000,000.**

**ii. General damages occasioned by the unlawful and fraudulent acts.**

**iii. Cost of this suit and any other relief the Honourable Court may deem fit to grant.**

2. The plaintiffs' case is that at all material times, the plaintiffs were the registered owners of the property known as PLOT NO.289/1/M.N. situated at Bamburi, Mombasa. The plaintiffs aver that in or about March, 2015, the defendants trespassed onto the said property without the plaintiffs' knowledge, authority or consent and sub-divided and sold it. The plaintiffs further aver that in furtherance of their illegal and unlawful act, the 4<sup>th</sup> defendant without the plaintiffs' consent or authority trespassed onto the said property and fenced off a part of the land and began constructing on the said portion.

3. It is the plaintiffs' contention that the defendants continue to sub-divide, sell and construct on the suit

property, notwithstanding that the plaintiffs have made several reports to the relevant authorities and the police who have declined to act appropriately. The plaintiffs further contend that the 1<sup>st</sup> and 2<sup>nd</sup> defendants unlawfully and illegally and without the plaintiffs consent, authority or knowledge subdivided the suit property into more than 30 plots. The plaintiffs aver that they learnt of the illegal subdivisions when the plaintiff in CMCC No.211 of 2015, OMAR AHMED SALE – VS – MASRAF ABU BAKR LTD & 4 OTHERS was carrying out execution in the defendant's house and discovered several documents relating to the said sub-division allegedly in the name of the plaintiffs. The plaintiffs aver that the defendants have no legal claim over the suit property whatsoever but have threatened to continue with their unlawful acts.

4. It is the plaintiffs' case that unless the defendants are restrained by an order of the court, they will lose their property and will be exposed to irreparable loss and damage because they have invested heavily on the property. The plaintiffs have given particulars of fraud, loss and damage by the defendants.

5. The defendants were served with summons to enter appearance but failed to do so. Upon request by the plaintiffs, interlocutory judgment was entered against the defendants in default of appearance on 16<sup>th</sup> July 2015. On 23<sup>rd</sup> July 2015, the defendant's filed an application to set aside the judgment but their said application was dismissed on 8<sup>th</sup> October 2015 for want of prosecution. The matter proceeded for formal proof on 27<sup>th</sup> February 2017 wherein the 1<sup>st</sup> plaintiff gave evidence.

6. In his evidence, PW1 who is the 1<sup>st</sup> plaintiff stated that the 2<sup>nd</sup> plaintiff is his father and that they jointly own the suit property. He produced a certificate of ownership (exhibit 1) in which entry No.20 thereof shows the property was transferred and registered in the plaintiffs names on 11<sup>th</sup> June, 2010. He stated that the defendants have illegally entered into the suit land without their permission and/or consent and that they have fenced part of it, sub-divided it and destroyed the vegetation and crops and put up some constructions. The witness produced photographs showing the acts complained of. It is the evidence of PW1 that the defendants' actions are unlawful and have greatly prejudiced their rights as the registered owners. The 1<sup>st</sup> plaintiff further stated that although the defendants have stopped from their unlawful acts following their complain to the area District Officer as well as the temporary injunction obtained from the court, the defendants still visit the suit property once in a while. The 1<sup>st</sup> plaintiff stated that they spent the sum of Kshs.1,800,000 to put up a wall part of which was destroyed by the defendants. He further stated that they were forced to hire security guards to guard the property at a cost of Kshs.30,000 per month. The plaintiffs' did not call any other witness and therefore closed their case.

7. After the close of the plaintiffs' case, the plaintiff's counsel filed written submissions which mainly summarized the plaintiffs' case as pleaded and the evidence relied on. Counsel submitted that the plaintiffs have proved that they are the bona fide owners of the suit property and that the defendants have unlawfully invaded onto it. It was counsels' submission that the defendants' actions amount to trespass and therefore the plaintiffs are entitled to the reliefs sought in the amended plaint. While relying on the case of PAUL AUDI OCHUODHO –VS- JOSHIA OMBURA ORWA (2014) eKLR, counsel for the plaintiffs stated that the first requirement for one to establish an action for trespass is to prove ownership of the land which the plaintiffs have done by producing a certificate of ownership showing the property is registered in their names. Counsel further submitted that the second requirement is that the plaintiffs ought to prove that the defendants have illegally invaded onto the suit property. In support of this, counsel submitted that the plaintiffs have discharged this onus by producing photographic evidence which showed the defendants actions. Counsel further submitted that on the totality of the evidence produced, it is plainly clear that the defendants' actions amount to trespass and the plaintiffs are entitled to an order of permanent injunction and damages for trespass. Counsel did not submit on the amount of damages payable but left it to the discretion of the court.

8. I have carefully considered the plaintiffs' case as pleaded and the evidence tendered in support as well as the submissions made. The main issues for determination are whether the defendants trespassed on the suit land, whether they removed the crops and vegetation thereon and carried out sub-divisions and constructions and what amounts (if any) is payable as damages for trespass, and whether the order for a permanent injunction should issue as claimed.

9. From the material placed before me, there is no dispute that the plaintiffs are the registered owners of the suit property. The plaintiffs placed before the court the certificate of ownership in their names. Section 24 (a) of the Land Registration Act, 2012 provides that “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.” Section 26 (1) of the said Act provides as follows:

“The certificate of title issued 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party;  
or**

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

There was no evidence challenging the plaintiffs’ title to the suit land. As the absolute and indefeasible owners of the suit property, the plaintiffs are entitled to enjoy the rights and privileges associated with ownership which includes exclusive use and possession thereof without interference from any other person except with their consent.

10. The plaintiffs have accused the defendants of entering the suit land without their consent and carrying out sub-divisions and constructions thereon. The plaintiffs produced photographic evidence showing the cleared vegetation and structures that have been put up by the defendants. The defendants did not defend this suit and therefore the plaintiffs’ evidence on this actions have not been controverted. In the circumstances, I am satisfied that plaintiffs have proved that the defendants entered the suit property without the plaintiffs consent, took possession of it and undertook the acts complained of. I therefore find on a balance of probabilities that the defendants did enter into the plaintiffs land without their permission and their action amounted to trespass. Even though trespass is actionable per se, it is clear from the evidence adduced by the plaintiffs that they suffered damage and wastage on their land as a result of the defendant’s actions. The plaintiffs are therefore entitled to general damages for trespass. I will award a nominal sum of Kshs.300,000 as general damages for trespass.

11. In conclusion therefore, I enter judgment for the plaintiffs as against the defendants as follows:

**i) A permanent injunction restraining the defendants or their agents and/or servants from alienating, sub-dividing, cutting, disposing off, constructing on, trespassing or in any matter whatsoever interfering with plot NO.289/1/M.N. BAMBURI Mombasa.**

**ii) Kshs.300,000.00 as general damages for trespass.**

**iii) Costs of the suit to be borne by the defendants.**

**Judgment dated, signed and delivered at Mombasa this 15<sup>th</sup> day of June 2017**

**C. YANO**

**JUDGE**