



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC.NO.153 OF 2017(FORMERLY 495/2011)**

**KASARANI MALL LTD.....PLAINTIFF**

**-VERSUS-**

**DANIEL OTIENO MIGANGA.....1<sup>st</sup> DEFENDANT**

**DAVID J. KOLLAL.....2<sup>nd</sup> DEFENDANT**

**GILBERT THUO MACHARIA.....3<sup>rd</sup> DEFENDANT**

**ROYSA COMMUNITY SELF HELP GROUP.....4<sup>th</sup> DEFENDANT**

**JUDGEMENT**

By a *Plaint* dated **20<sup>th</sup> September 2011**, the Plaintiff herein, **Kasarani Mall Limited**, brought a claim against the Defendants herein and sought for these orders:-

***a) A permanent injunction against the Defendants whether by themselves, their employees, servants or agents or any of them or whomsoever purporting to be a member of the 4<sup>th</sup> Defendant and any of them from trespassing on the Plaintiff's land known as LR.5875/2, Thika Road, entering thereon and committing any acts of waste or damage or in any other way purporting to alienate the property of the Plaintiff in any manner whatsoever.***

***b) General damages for trespass.***

***c) Costs.***

The Plaintiff alleged that it is the registered proprietor of all that piece of land known as **LR.No.5875/2**, located in the **Kasarani Area, Thika Road Nairobi**, measuring about **6.944 Hectares** and that it got **registered** as the proprietor of the land on **20<sup>th</sup> March 2001**.

The Plaintiff further alleged that the Defendants have threatened to invade the Plaintiff's land aforesaid and thereafter commit acts of waste, damage and alienation. It was also further alleged that the Plaintiff's threats and purported acts of trespass were detrimental to the Plaintiff's title. It was the Plaintiff's contention that those threats by the Defendants and their purported acts of invasion are illegal and

continues to be detrimental to the Plaintiff. Therefore unless protected by an order of the Court, the Plaintiff stands to suffer loss and damage in respect of the Defendants continued threats and acts of trespass. The Plaintiff urged the Court to allow its claim.

The Defendants herein **entered appearance** on **3<sup>rd</sup> November 2011**, through the **Law Firm of Odour Henry John Advocates** and filed their **joint statement of Defence** and denied all the allegations made in the Plaint. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants admitted that they are officials of the 4<sup>th</sup> Defendant. The Defendants further averred that they are the legal owners of **Plot No.5875/2**, located at the **Kasarani Area, Thika Road Nairobi**. They further alleged that the title documents in possession of the Plaintiff were forged documents and the Plaintiff was put to strict proof thereof. Therefore the Defendants alleged that they cannot threaten to invade what belongs to them. Further, the **Defendants alleged** that the **suit is bad in law** and they sought to have it **struck out**. The Defendants urged the Court to dismiss the suit with costs.

The matter **proceeded** for **viva voce evidence** on **3<sup>rd</sup> November 2015**, wherein the Plaintiff called only one witness.

### **Plaintiff's Case**

**PW1-Simon Sang**, told the Court that he works for **Uchumi Supermarkets Limited** as a **Chief Security Officer**. He relied on his **witness statement** dated **5<sup>th</sup> December 2014**. In his statement, PW1 stated that the Plaintiff is the lawful and registered owner of the property known as **LR.No.5875/2**, located along **Kasarani area, Thika Road**, measuring **6.944 Hectares**. It was his testimony that the suit property was initially granted by the Government of Kenya to an entity known as **Solio Construction Company** on **18<sup>th</sup> May 1992**. He further stated that the property was transferred to the Plaintiff by that Company on **20<sup>th</sup> March 2001** for valuable consideration and the Plaintiff was registered as the legal owner. Further that the Plaintiff's title to the property **LR.No.5875/2**, has been confirmed by the Commissioner of Lands in his letter dated **3<sup>rd</sup> November 2010**, to the Permanent Secretary, Ministry of Trade. It was his testimony that the Defendants have threatened to invade the Plaintiff's land. That the Plaintiff reported the matter to OCS Kasarani Police Station who showed them a **Court Order** issued by the Court on **15<sup>th</sup> October 2010**. However upon inquiry from the Court registry, the Plaintiff's advocate was informed that no such case exists in the Court records. The witness was therefore apprehensive that if the Defendants are not permanently restrained by an Order of this Court, they will continue to issue those threats of invading the Plaintiff's land with impunity. That the Plaintiff is in possession of the land and has fenced it all round with a stone wall. In cross examination, the witness confirmed that **Kasarani Mall Limited** is a subsidiary of **Uchumi Supermarket Limited**, although he did not possess documents to that effect.

He also stated that he safeguards the Company property and he is also involved in security of Uchumi property. He reiterated that **Kasarani Mall Limited** acquired the land in the **year 2001**, from a Company known as **Solio Company Limited**. He also confirmed that the payment of land rates dated **24<sup>th</sup> September 2010**, for **LR.No.5875/2** showed that the property was in the name of **M. J. Samuels**.

### **Defendants' Case**

**DW2 – David Jakenya Kollal**, told the Court that he is the 2<sup>nd</sup> Defendant herein and Secretary to the 4<sup>th</sup> Defendant. It was his testimony that the 4<sup>th</sup> Defendant was a **Community Self Help Group**. He also stated that the person who gave evidence for the Plaintiff is a **Security Guard** at **Uchumi Supermarket** and not representative of the Plaintiff. That **Pauline Kimotho** is the one who swore affidavits but did not testify in Court. It was his evidence that the suit land belongs to the Defendants herein. He denied that the land was ever sold to the Plaintiff. He stated so because there was **no Sale Agreement** produced in Court between the Plaintiff and the said **Solio Construction Limited**. He further clarified that the **land initially** belonged to **Major Jacob Samuel**, in **1964** who **died in 1974**. Then his **two young brothers took over the administration** of the land. That these two brothers are **Raphael** and **Meshmor Jacob Samuel**. It was his further testimony that the land was **conveyed** to them by **Meshmor Jacob Samuel**,

who left the land to the children of the parents who were working for the three families of **Meshmor**. He also stated that they had lived on that land for a long time. Further that **Uchumi Supermarket Limited** had **filed** a case against the Defendants being **ELC No.515/2010**, which was later **dismissed** by the Court. Then the Plaintiff filed the instant suit and there is no evidence that Plaintiff owns the land. It was his further evidence that the documents produced by the Plaintiff were not genuine documents. He urged the Court to dismiss the Plaintiff's case. He insisted that the Defendants were given the suit land by **Meshmor Jacob Samuel** to develop the same. In cross-examination, he insisted that the **documents** held by **Kasarani Mall Limited** are a **forgery**.

**DW2 - Arthur Wamiti Njoroge**, the Chairman of the 4<sup>th</sup> Defendant relied on this witness statement dated **3<sup>rd</sup> December 2015**. He also relied fully on the Defendants' bundle of documents. In cross-examination he stated that he had no evidence to show that **Meshmor** and **Raphael Jacob Samuel** were the administrators of the Estate of **Major Jacob Samuel**. He also did not have a title for **Major Jacob Samuel**. He reiterated that the land was conveyed to them but they did not have the conveyance documents. He further stated that the land is registered in favour of the Defendants. The witness further stated that the **original owner** of the suit land **conveyed** it to **Roysa Community Self Help Group**, the 4<sup>th</sup> Defendant. It was his further evidence that the title deed by the Plaintiff was a forgery.

**DW3 – Antipas Nyanjwa** who works for **National Land Commission, Head of Investigations** told the Court that he prepared a report in regard to **LR.No.5875/2 Nairobi**. He produced the report as **exhibit no.2** in Court. In cross-examination, he stated that he got the information from the valuation file. He also confirmed that there are titles to the suit land. It was his evidence that the **title deed** for **Solio Construction Limited** was gotten from the Court File as the Deed file was missing. He therefore used the valuation file and he did not know how the documents were produced in Court. He further testified that a parcel of land cannot have two titles. He however confirmed that there was a transfer of this land to **Kasarani Mall Limited** for **Kshs.85 million** on **20<sup>th</sup> March 2001**. There was also a **caveat** by the proprietor and according to **exhibit no.15**, the land belongs to **Kasarani Mall Limited**.

After the close of the **Viva Voce evidence**, parties were directed to file their **Written Submissions** which directives they complied with. The **Defendants** filed their submissions on **30<sup>th</sup> September 2016**, and **Plaintiff's** filed their submissions on **30<sup>th</sup> October 2016**.

The Court has now carefully considered the Pleadings in general and the exhibits produced therein. The Court has also considered the tendered evidence by the witnesses, the Written Submissions and the relevant provisions of the law and the Court makes the following findings;

The **suit** herein was filed on **20<sup>th</sup> September 2011**, and simultaneous to the Plaint, a **Notice of Motion** Application even dated was also filed. The said **Notice of Motion** sought for injunctive orders against the Defendants herein. The Court has also noted that **Summons to Enter Appearance** though drawn were **not extracted nor saved** as provided by Order 5 Rule 1 of the Civil Procedure Rules which provides that:-

**“where a suit has been filed, a summons shall issue to the Defendant ordering him to appear within the time specified therein”**

In the instant suit, the **Summons to Enter Appearance** are **not dated signed or extracted**. It is therefore not clear whether the Plaint served upon the Defendants was accompanied by Summons.

However, the Court has noted that on **3<sup>rd</sup> November 2011**, the **Law Firm of Odour Henry John Advocates** filed a **Memorandum of Appearance** for all the Defendants. The Defendants further filed their **Defence** on **3<sup>rd</sup> November 2011**, and denied the allegations made in the Plaint. The issue of failure to serve Summons was never raised by the Defendants all along. The suit went through Pre-trial Conference and none of the parties pointed out the failure to extract the Summons. The suit was therefore certified ready for hearing and was given a hearing date. **Order 5 Rule 1(6)** provides that:-

**“Every Summons except where the Court is to effect service shall be collected for service within**

***thirty days of issue or notification whichever is late failing which the suit shall abate”.***

Going by the above provision, the ***Plaintiff ought to have extracted and collected the Summons*** within a period of ***30 days*** of the issue of the same. The Plaintiff ***did not do so***. Therefore the ***suit ought to have abated***.

However, the Court have noted that the Defendants never raised any objection to the suit and they entered appearance and filed their Defence. The suit herein was filed in the ***year 2011*** after the promulgation of the new Constitution 2010, which brought in ***Article 159(2)(d)*** which binds the Court to administer justice without undue regard to procedural technicalities. The said Article provides as follows:-

***“in exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-***

***a) Justice shall be administered without due regard to procedural technicalities.”***

Therefore bearing in mind the above provisions, this Court will exercise its discretion in this matter to ensure that substantive justice is done and will therefore overlook the procedural technicalities. The Defendant never raised that issue of failure to extract and serve them with Summons. They have entered appearance and filed their Defence. The Defendants will therefore not suffer any prejudice or injustice and the Court leaves it at that.

On the substantive issues, the Court will first point out the undisputed facts before picking out the issues for determination. There is no doubt that ***LR.No.5875/2***, is registered in the name of ***Kasarani Mall Limited*** as from ***20<sup>th</sup> March 2001***, which is evident from the Certificate of Title attached to the Plaintiff’s bundle of documents. There is also no doubt that the said suit property was initially granted to ***Solio Construction Company Limited*** as from ***1<sup>st</sup> July 1999***. There is also no doubt that the Defendants are also claiming ownership of this parcel of land ***LR.No.5875/2***, having been conveyed the same by ***Meshumor Jacob Samuel*** vide a ***conveyance*** dated ***5<sup>th</sup> March 1990***.

There is also no doubt that ***Kasarani Mall Limited*** is a ***subsidiary of Uchumi Supermarket Limited***, as confirmed by the Registrar of Companies vide a letter dated ***21<sup>st</sup> April 2015***. There is also no doubt that this suit property was a subject of various correspondences among different Government offices. In particular is the letter dated ***30<sup>th</sup> April 2008***, from ***Director of Public Prosecutions (DPP)***, which made various conclusions. Among the conclusions made are that the land in question ***LR.No.5875/2***, was procedurally applied for and allocated to ***M/S Solio Construction Company Limited***. Further that ***Solio Construction Company Limited*** acquired a valid title to the said land which it later sold to ***Kasarani Mall Limited (A subsidiary of Uchumi Supermarket Ltd)*** in ***2001***, on a willing buyer willing seller basis.

There is also no doubt that the Defendants have threatened to take possession of the suit land and thus the filing of this suit.

Having now pointed out the undisputed facts, the Court finds that the issues for determination are:

***(i) Who is the legal owner of the suit property?***

***(ii) Is the Plaintiff’s title to the suit property valid?***

***(iii) Is the Plaintiff entitled to the prayers sought in the Plaint?***

***(iv) Who is to bear the costs of this suit?***

***i) Who is the legal owner of the suit property?***

It is evident that legality of ownership of any property can be deduced from the registered documents. In

our case herein the registration document herein is the Certificate of title. The Plaintiff herein has attached a Certificate of Title which shows that the **suit** land was **transferred** to **Kasarani Mall Limited** on **20<sup>th</sup> March 2001**. **Initially** the suit land was **owned** by **Solio Construction Limited**. Section 26(1) of the Land Registration Act provides that such Certificate of title is conclusive evidence of proprietorship except where the said title is acquired through fraud or misrepresentation. Though the Defendants alleged that the suit land belongs to them and that the Plaintiff acquired the same illegally, it is evident from the letter written by the Director of Public Prosecution on **30<sup>th</sup> April 2008**, that he exonerated the Plaintiff from any wrong doing. Particularly, the Director of Public Prosecution stated that:-

***“There is no evidence suggesting any collusion or conspiracy between the Company and the land officials during the allocation of the land to M/S Solio Construction Company Limited”.***

Further after investigations, the Director of Public Prosecution also came to the conclusion that **M/S Solio Construction** acquired a valid title to the said land which it **later sold** to **Kasarani Mall Limited** on a willing buyer willing seller basis.

The above investigations were done in the **year 2008**. DW3 who prepared a Report in the **year 2015** did not tell this Court why he decided to fault the finding of the Director of Public Prosecution. Since the suit land was registered in the name of the Plaintiff in the **year 2001**, under the Registration of Titles Act, (now repealed), Section 23(1) of the said Act provided that the said registration was conclusive evidence of ownership. The said Section states as follows:-

***“The Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all the Courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”***

The Court will rely on the authority quoted by the Plaintiff; **Nairobi Permanent Market Society & Others..Vs...Salima Enterprises (1995-1998) 1 EA 232**, where the Court held that:-

***“Section 23(1) of the Registration of Titles 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 the 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..... 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.”***

Having found that the Plaintiff herein is the registered owner of the suit property, then that is conclusive evidence that the **Plaintiff** is the **absolute and indefeasible owner** of the suit property as provided by Section 26(1) of the Land Registration Act.

#### **ii) Is the Plaintiff’s title to the suit property valid?**

The Court has found that the Plaintiff is the registered owner of the suit property. The Defendants have alleged that the Plaintiff’s title documents are a forgery and DW3 gave evidence to that effect. However, DW3’s evidence was a contradiction to the conclusion made by the Director of Public Prosecution vide his letter dated **30<sup>th</sup> April 2008**, where he concluded that there was no evidence of any collusion or conspiracy between the Company and the land officials during the allocation of the land to **M/S Solio Construction Company Limited**. The Director of Public Prosecution further concluded that **Kasarani Mall Limited** held a valid title and he further concluded that the caveat therein should be removed. The Certificate of title held by **Kasarani Mall Limited** **has not been expunged** or **revoked**. There is no evidence of fraud or wrong doing by **Kasarani Mall Limited**. The Plaintiff was a willing buyer who bought the suit land from a willing seller whom the Director of Public Prosecution has concluded was

validly issued with the Title Deed. Therefore this Court finds that the **Plaintiff's title** to the suit property is **valid**.

**iii) Is the Plaintiff entitled to the prayers sought in the Plaint?**

Having found that the Plaintiff is the legal owner of the suit property, then the Plaintiff is entitled to enjoy rights and privileges over the suit property as provided by **Section 24(a)** of the **Land Registration Act** which provides:-

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.***

Further, as an absolute and indefeasible owner of the suit property, the Plaintiff's rights to the suit property can only be curtailed through operation of the law as provided by **Section 25(1)** of the **Land Registration Act** which states:-

***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.***

As a proprietor of the suit property, the Plaintiff's rights are also protected by Article 40 of the Constitution. The Plaintiff cannot therefore be deprived of the said property unless as provided by **Article 40(3)** of the **Constitution** which provides:-

***"The state shall not deprive a person of property of any description, or in any interest in, or right over property of any description, unless the deprivation:-***

***a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***b) is for public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-***

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

The Defendants have not denied that they have trespassed and/or threatened to trespass on the Plaintiff's parcel of land. The Plaintiff is entitled to protection of its property as provided by the Constitution and other provisions of law. The Court has found and held that the Plaintiff is the absolute and indefeasible owner of the suit property. The Plaintiff is entitled to enjoy the right of ownership of the suit land without interference from the Defendants.

The Plaintiff has sought for damages for trespass. However, the Plaintiff has alleged that it fenced off the suit land by constructing a wall around the property. Further, the Court issued a temporary injunction against the Defendants on **18<sup>th</sup> June 2012**. There is no evidence that the Defendants have defied the said Court Order. The Court comes to a conclusion therefore that there is no sufficient evidence provided by the Plaintiff to prove that the Defendants have barred them from the use of the suit land and thus entitled to damages.

In conclusion, the Court finds that the Plaintiff **are entitled** to the **orders sought** in the Plaint only to the extent of permanent injunction against the Defendants **but not damages** from trespass.

**iv) Who is to bear costs of the suit?**

The Plaintiff herein is the successful litigants. The Defendants' actions prompted the filing of this suit by the Plaintiff. The Court therefore finds that costs normally follow the event and since the Plaintiff is successful in its claim, then the **costs** of the suit **to be borne** by the **Defendants** herein, **jointly** and **severally**.

Having now carefully considered the available evidence, and the submissions therein, the Court finds that the Plaintiff herein **Kasarani Mall Limited** has proved its case on a balance of probabilities and consequently, the Court **enters judgement for the Plaintiff** against the Defendants as prayed in the Plaint in terms of **prayers no.(a)** and **(c)**.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this 18<sup>th</sup> day of August 2017.

**L. GACHERU**

**JUDGE**

**18/8/2017**

In the presence of

Mr. Makori for Plaintiff

Mr. Odour for Defendants

Philis - Court clerk.

**L. GACHERU**

**JUDGE**

**18/8/2017**