



**Registered Trustees of Bochasanwasi Shree Akshar Perushottam  
(Swaminarayan) Sanstha v Kaab Investments Limited (Environment & Land  
Case E054 of 2023) [2025] KEELC 820 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 820 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E054 OF 2023  
SM KIBUNJA, J  
FEBRUARY 26, 2025**

**BETWEEN**

**THE REGISTERED TRUSTEES OF BOCHASANWASI SHREE AKSHAR  
PERUSHOTTAM (SWAMINARAYAN) SANSTHA ..... PLAINTIFF**

**AND**

**KAAB INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced their claim against the defendant through the plaint dated 30th May 2023, seeking for the following prayers:
  - a. A declaration that the plaintiff is the absolute owner of Land Reference Number 1348/I/MN.
  - b. A permanent injunction restraining the Defendant either by itself, its agents, workers, servants and/or any person acting on their directions/instructions from; entering, remaining upon, occupying, trespassing or in any other way interfering with the plaintiff's use and occupation of Land Reference Number 1348/I/MN.
  - c. Mesne profits.
  - d. General damages.
  - e. Aggravated damages for illegal use and occupation of Land Reference Number 1348/I/MN.
  - f. Costs of this suit together with interest thereon at court rates."



The plaintiff among others averred that it is the registered owner of plot 1348/I/MN, the suit property, after buying it from Middle East Bank Limited in 2021, who had exercised the statutory power of sale. It alleged that the defendant had sought a loan facility from the above mentioned banking institution, and failed to pay its debt. That after the suit property had been transferred to the plaintiff, the defendant refused to leave the suit property and instead commenced construction of a permanent building at the time this suit was filed. Despite service of summons to enter appearance as evidenced by the affidavit of service sworn by Samuel Muskoka, an authorized court process server on 13th July 2023, the Defendant failed to enter appearance.

2. During the hearing of the plaintiff's case, Mr Harikrishna Somabhai Patel, a trustee of the plaintiff, was called and testified as PW1. He relied on his statement dated 18th November 2024, whose contents he adopted as his evidence in chief and produced the documents in list of documents dated 30th May 2023, as exhibits. It was his evidence that through an advertisement on Standard Newspaper dated 17th November 2021, Valley Auctioneers slated a public auction of the suit property on 5th January 2022, during which the plaintiff successfully bid the highest amount of Kshs.47,600,000. He further stated that a certificate of memorandum of sale was issued to them on the same day and there being no objection, the said bank proceeded to transfer the suit property to the plaintiff. In cross-examination, PW1 stated that there were people in the suit property at the time the time of the statutory sale. That the plaintiff was not pursuing the prayers for mesne profits, general damages and aggravated damages.
3. After the close of the plaintiff's case, the learned counsel for the plaintiff filed their submissions dated 20th January 2025, which the court has considered.
4. The issues arising for the court's determinations are as follows.
  - a. Whether the plaintiff is the legal owner of the suit property.
  - b. Whether or not the plaintiff is entitled to a permanent injunction.
  - c. Whether the plaintiff is entitled to costs.
5. After careful consideration of the pleadings, oral and documentary evidence presented, submissions by the learned counsel, the court has come to the following determinations:
  - a. Section 26 of the *Land Registration Act* chapter 300 of Laws of Kenya provides inter alia that a certificate of title is prima facie proof of ownership of land, but can be challenged where there is fraud, mistake, undue procedure or illegality. In this suit, the plaintiff's title has not been challenged by the defendant, despite being properly served with the summons. The absence of a challenge notwithstanding, the court still has to consider the plaintiff's case on its own merits. In the case of *Nganga & 12 others versus Kabiu* [2024] KEELC 7067 (KLR) the court held that:

“It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. It would be recalled that even in uncontested suits, the burden of proof on a claimant is not lessened in any way. See the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR.”

The court further held:

“The Court of Appeal in the case of *Mbutia Macharia v Annab Mutua Ndwiga & Another* [2017] eKLR explained that the legal burden is discharged by way



of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. That constitutes evidential burden. The learned Judges cited with approval the same principle of law as amplified by the learned authors of the leading Text Book; - The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14:“

The legal burden is the burden of proof, which remains constant throughout a trial; it is the burden of establishing the facts and contentions, which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

There being no challenge to the plaintiff's title to the suit property and all the documents presented in the list of documents produced as evidence that due process being followed, the court finds that the plaintiff is the lawfully registered owner of the suit property.

b. The requirements to be established for a permanent injunction to issue were discussed in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 Others*, Ca No. 77 Of 2012 as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars upon which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case, that alone is not sufficient basis to grant of an interlocutory injunction. The court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy, and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly, without crossing the other hurdles in between.

c. The plaintiff having established that it is the legal and registered owner of the suit property itself suffices to show it has a prima facie case. It has also demonstrated through the demand letter dated 7<sup>th</sup> March 2023 and photographs of the illegal constructions on the suit property produced as exhibits 12 and 13 that the Defendant has not only refused to vacate from the



premises, but had ongoing construction. The plaintiff has shown therefore that unless the defendant is stopped from the unlawful interference with the suit property, it will be difficult for it to make use of the suit property and will continue to suffer irreparable loss. Indeed the balance of convenience tilts towards issuing the order. I need say no more. The permanent injunction is granted.

- d. Under section 27 of the *Civil Procedure Act*, Chapter 21 of Laws of Kenya, costs follow the event unless where the court for good cause orders otherwise. In this instance, the plaintiff is awarded costs as the suit was prompted by the defendant's action, despite not defending this suit.
6. From the foregoing conclusions, I find the plaintiff has proved its case against the defendant on a balance of probabilities, and enters judgement in its favour in the following terms:
- a. A declaration is hereby issued that the plaintiff is the absolute owner of Land Reference Number 1348/I/MN.
  - b. A permanent injunction is issued restraining the Defendant either by itself, its agents, workers, servants and/or any person acting on their directions/instructions from; entering, remaining upon, occupying, trespassing or in any other way interfering with the plaintiff's use and occupation of Land Reference Number 1348/I/MN.
  - c. The defendant to meet the plaintiff's costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26<sup>TH</sup> DAY OF FEBRUARY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr. Bryant

Defendant : No Appearance

Shitemi – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

