



**Shah v Mbogua & 4 others (Environment and Land Case Civil Suit E391 of 2021) [2024] KEELC 3376 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3376 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E391 OF 2021  
LN MBUGUA, J  
APRIL 24, 2024**

**BETWEEN**

**NEESHA SHAH ..... PLAINTIFF**

**AND**

**CHRISTINE IMBOSA MBOGUA ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KULALI ONUNGA ..... 2<sup>ND</sup> DEFENDANT**

**QADER A HASSAN ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> defendant herein had filed a suit against HEMAKSHI SANJAY KANANI & SANJAY KANANI before the Milimani Chief Magistrates Court Nairobi MC ELC E297 OF 2021 vide a plaint dated 23.8.2021. She was claiming that she is the registered owner of the suit parcel LR. NO. 209/4593/8 whereby defendants were tenants of the previous owner of that land. She wanted orders inter alia, an eviction against the said defendants.
2. The said suit was contemporaneously filed with an application of even date where that plaintiff (current 1<sup>st</sup> defendant) was seeking injunctive orders against the then defendants of which the said orders were granted exparte on the same day of 23.8.2021.
3. The plaintiff in the current suit had then filed an application dated 8.9.2021 seeking orders inter alia, to be joined in that suit as a 3<sup>rd</sup> defendant on the basis that she was the legal owner of the suit property. That she was embroiled in a possession dispute with the then defendants (the tenants in the case Nairobi ELC 1192 of 2013), and that the suit property was worth over Ks. 150,000,000.



4. The current plaintiff then filed the instant suit before this court vide a plaint dated 13.11.2021 contemporaneously with an application of even date seeking orders inter-alia, a stay of the proceedings before the magistrates court, as well as injunctive orders against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein.
5. On 19.1.2022, the court was informed by plaintiff's counsel that the firm of Frank Karanja advocates had served them with a notice of appointment for 1<sup>st</sup> & 2<sup>nd</sup> defendant, but the document was not filed in the digital portal. The court gave directions for the application to be served upon that advocate who had filed a notice of appointment and also to effect service through substituted service.
6. Service was then duly effected and there being no responses, the application was eventually allowed on 8.2.2022. Subsequently, and pursuant to the provisions of Section 18 of the *Civil Procedure Act*, the court transferred the suit before the Magistrates Court to this court and the cases were consolidated.

### **Pleadings**

7. Vide the plaint dated 13.11.2021, the plaintiff has pleaded that the suit land was owned by her father, through a transfer of 10.6.1974, and upon his death, the property went to his wife Shanta Rameshchandra Meghji Rupa in 1989, and when she passed on, the property devolved to the children namely the plaintiff and her brother Pratik Ramesh Shah, where each was owning 50 0/0 share.
8. That her brother had entered into a tenancy agreement with Hemakshi Sanjay Kanani and Sanjay Kanani for occupation of the outhouse, of which the tenancy dispute gave rise to litigation in ELC 1192 OF 2013.
9. She avers that the suit property has never been sold. However, in year 2021, she embarked on paying rates and discovered that the records of the suit property had been tampered with where the land reference number had been changed from parcel 209/4593/5 to 209/4593/8. Further investigations revealed that the 1<sup>st</sup> defendant had a certificate of title issued on 20.11.2018. That thereafter, the 1<sup>st</sup> defendant moved to the Chief Magistrates court in the case MC ELC 297 OF 2021 where she obtained injunctive orders which she used to trespass unto and to interfere with plaintiff's possession of the suit property.
10. Plaintiff avers that the title of the 1<sup>st</sup> defendant was obtained through fraud and illegality, of which the 1<sup>st</sup> defendant purported to enter into a lease agreement with the 2<sup>nd</sup> defendant.
11. The plaintiff also discovered that the 3<sup>rd</sup> defendant too had a forged title over the suit property.
12. The plaintiff blames the 4<sup>th</sup> defendant for the fraudulent activities over the suit property since they are the custodians of land records throughout the Republic of Kenya.
13. The plaintiff has further pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and their agents/ servants invaded the suit property in November 2021.
14. The plaintiff seeks the following orders;
  - i. A Declaration that the Plaintiff is the registered owner of all that the parcel of land known as L.R. No. 209/4593/5 (I.R. No. 10974) and is entitled to the exclusive ownership.
  - ii. A declaration that the purported title over the property known as L.R. No. 209/4593/8 in the name of the 1<sup>st</sup> Defendant is null and void and of no effect.



- iii. A declaration that the purported title over the property known as L.R. No. 209/4593/5 in the name of the 3<sup>rd</sup> Defendant is null and void and of no effect.
  - iv. An order do issue directing the 4<sup>th</sup> defendant to revoke grant/lease number I.R. No. 218881 to the 1<sup>st</sup> defendant; to cancel the certificate of Title issued in favour of the 1<sup>st</sup> Defendant; to cancel any transactions consequently registered including change of user and change of reference number to L.R. No. 209/4593/8 and to expunge any records with relation to the said title including the deed plan number 402577 from the official records.
  - v. An order do issue directing the 4<sup>th</sup> defendant to revoke grant/lease number I.R. No. 216025/1 to the 3<sup>rd</sup> defendant; to cancel the certificate of title issued in favour of the 3<sup>rd</sup> defendant; and to expunge any records with relation to the said title including the deed plan number 402577 from the official records.
  - vi. A mandatory injunction do issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> defendants directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants and their agents, servants and /or employees to yield immediate vacant possession of the suit property, LR No. 209/4593/5 (I.R. No. 10974) to the Plaintiff, Plaintiff's agents, servants and or employees.
  - vii. A permanent Injunction do issue to stop and/or restrain the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/s whether by themselves, their agents, servants and /or any other person authorized by or claiming through them from trespassing into, dealing with, transferring, selling, delineating, letting out, building upon and/or disposing or in any other manner whatsoever dealing with and from interfering howsoever with the Plaintiff's rights of occupation and quiet possession and enjoyment of the parcel of land known as L.R. No. 209/4593/5 (I.R. No. 10974) situate at Nairobi County.
  - viii. An order do issue directing the Officer Commanding Police and Station (OCS) Parklands Police Station to assist the Plaintiff in ensuring the enforcement of the orders granted by this Honourable Court and of observance and maintenance of peace.
  - ix. General damages for trespass and exemplary damages.
  - x. Costs of this suit together with interest from the date of filing.
  - xi. Any other or further relief that this Honourable Court may deem fit and just to grant.
15. The defendants were served through substituted service. The firm of S.N. Otinga did file a notice of change of advocate to represent the 1<sup>st</sup> defendant taking over from Karanja advocates, but the said firm filed an application to cease acting which was allowed on 13.10.2023. The plaintiff contends that the 1<sup>st</sup> defendant did file a statement of defence and counter claim, but such pleadings cannot be found in the portal.
16. The 4<sup>th</sup> and 5<sup>th</sup> defendants (Attorney General) were represented in court throughout the lifespan of the suit. They however never filed any documents in this case.
17. In essence none of the defendants filed any pleadings, thus on 23.1.2024, the court gave directions that the matter would proceed as a formal proof.



18. That notwithstanding, the defendants were duly served with the mention date of 23.1.2024 and the hearing dates of 8.2.2024 as per the affidavits of services filed in the portal.

### **The evidence**

19. The Plaintiff is the lone witness in this case. She gave her testimony virtually from Australia. She adopted her witness statement dated 13.11. 2021 as her evidence, which mirrors the contents in her pleadings. I will therefore not belabour reproducing the said evidence. The plaintiff also produced the 32 documents in her trial bundle as her exhibits.

### **Submissions**

20. The submissions of the plaintiff are dated 14.2.2024 where she avers that her evidence remains uncontroverted, but nevertheless, the plaintiff has discharged the burden of proof. To this end, reference was made to the cases of Gichinga Kibutha vs. Caroline Nduku [2018] eKLR and Edward Mathu Kamau vs. Joyce Wambui Mbugua [2019] eKLR.
21. It was further submitted that the plaintiff has given cogent evidence that she has a valid title, of which her family has held the suit land since year 1974 when her father purchased the land from Jayantil Narbheram Tolia. That on the other hand, the 1<sup>st</sup> defendant only acquired title to the property on 20.11.2018, while that of the 3<sup>rd</sup> defendant was allegedly issued on 18.12.2020. That to this end, the maixim of equity which stipulates that “when two equities are equal, the first in time prevails “is applicable. To buttress this point, the case of Catherine Wanjeri Wamaitha (suing as the legal representative Ad Litem of the Estate of Esther Wamaitha) (Deceased) vs. Chutha & 2 Others; Family Bank Third party Environment and Land case 537 of 2008 (2022) KEELC12699 (KLR) (25 May 2022) (Judgment) was proffered.
22. The case of Gathenya Ngumi vs. Eric Kotut & 4 Others (2022) eKLR and Munyu Maina vs. Hiram Gathiha Maina Civil Appeal No. 239 of 2009 were relied upon to advance the claim that the plaintiff was able to demonstrate the indefeasibility and root of her title, hence the plaintiff is the bonafide owner of the suit property. The case of Daudi Kiptugen vs. Commissioner of lands Nairobi Lands & 4 others (2015) eKLR was also cited to buttress this point.
23. The court was urged to take note of the daring nature of the fraudsters who were blatantly taking over plaintiff’s property which is located just across parklands police station. To this end, the plaintiff invoked the words of Onyancha J in the case Alberta Mae Gacie vs. Attorney General & 4 Others [2006] eKLR, where it was stated that;
- “Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit, or any kind of fraud would acquire a legal and valid title deceitfully snatched from registered owner....”
24. It was further submitted that the dispute in the case ELC 1192 OF 2013 reported as Sanjay Kumar Kanani v Nisha Sha & Another (2022) EKLR, was finalized by this court vide a judgment dated 2.2.2022 where the current plaintiff was found to be the lawful owner of the suit property.
25. On damages, plaintiff claims an award of Ksh.500,000 for trespass averring that the invasion on the suit land occurred on 5.11.2021 and on 23.11.2021, where the plaintiff was ejected from the suit land whereby, the 1<sup>st</sup> & 2<sup>nd</sup> defendants and their agents proceeded to cut down trees and brought down



fixtures thereon. On this point, the case of Stephen Makau Kanyia vs. Wilson Njeru Wega & 4 Others [2021] eKLR was proffered.

## **DETERMINATION**

26. I have considered the pleadings, the evidence, the submissions as well as the litigation history relating to the suit property. The court also takes cognizance of the fact that this court duly delivered a judgment in ELC 1192 OF 2013 reported as Sanjay Kumar Kanani v Nisha Sha & Another [2022] eKLR, in which the plaintiff herein was found to be the lawful owner of the suit property. However, that dispute was pitting the current plaintiff vis a vis the tenants of which the latter were ordered to pay rent arrears to the current plaintiff to the tune of sh.3 900 000 and to vacate the suit premises.
27. In the dispute at hand, the plaintiff has a title to the suit premises, but so is the 1<sup>st</sup> defendant as well as the 3<sup>rd</sup> defendant. The issue now falling for determination is; which of the three titles is valid, what reliefs are available in the circumstances.
28. The evidence of the plaintiff is uncontroverted. However, as rightly submitted by the plaintiff, she still has to discharge the burden of prove in tandem with the provisions of Section 107-112 of the [evidence Act](#). To this end, I make reference to the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR, cited by the plaintiff where it was held that;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

29. The title of the plaintiff is at page 35 of plaintiffs bundle which contains entries of transfers of the suit property dating as far back as 10.9.1964, to 18.6.2018. Some entries are not clear but entry no.19 shows how the plaintiff and one Pratik got the land through grant of probate.
30. On the other the other hand, the certificate of title of the 1<sup>st</sup> defendant is at page 78 of plaintiff’s bundle. It was issued on 20.11.2018. It has no history of transactions. The certificate of title for the 3<sup>rd</sup> defendant is at page 169 of plaintiffs bundle and was issued on 18.12.2020. Just like the case of the 1<sup>st</sup> defendant, this title too has no roots.
31. In the case of Munyu Maina v Hiram Gathiha Maina, Civil Appeal number 239 of 2009, the Court of Appeal held as follows:

“We state that 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 from any encumbrances including any and all interests which would not be noted in the register”.
32. The plaintiff has given a detailed history of ownership of the suit property at paragraph 13 of the plaint and at paragraph 8 of her recorded statement that; The suit property was initially owned by Aura Rodrigues who transferred the same to Jayantilal Narbheram Tolia on 3.11.1967, who in turn transferred the land to plaintiffs father Rameschandra Meghji Rupa Shah on 10.6.1974. The land then went to plaintiff’s mother, one Shanta Rameschandra Meghji in 1989, then to herself and her brother Pratik Ramesh Shah in equal shares. Her brother died and she became the owner of the suit property.



33. The copy of the title of the plaintiff presented at page 35 of plaintiff's bundle captures the above mentioned historical account of the root of the title. In contrast, the titles issued to the 1<sup>st</sup> and 3<sup>rd</sup> defendants do not have any history at all.
34. The document at page 172 of plaintiff's bundle is a screenshot of the LIMS which indicates that the suit land is in the name of the 3<sup>rd</sup> defendant. The said screen shot is blurred, but the name of the 3<sup>rd</sup> defendant can be discerned. LIMS is the Land Information Management System where land records are hosted in the digital platform at Lands registries. The 4<sup>th</sup> defendant was represented throughout the trial but they "kept mum", yet they are custodians of the land records. What I discern is that the current registration records reflect the 3<sup>rd</sup> defendant to be the owner of the suit land, but there is no logical account as to how this came to be.
35. A perusal of the judgment in *Sanjay Kumar Kanani v Nisha Sha & Another* (2022) eKLR reveals how the plaintiff herein was battling for possession of the suit property with the tenants of her deceased brother which culminated in the decision of this court given on 22.2.2022, where the tenants (plaintiffs) were ordered to vacate the land and pay rent arrears to the defendant (current plaintiff). But as the said case was on going, the 1<sup>st</sup> defendant filed the case before the magistrates' court (297 of 2021) against the same tenants where she obtained an injunction apparently against the mentioned tenants in August 2021. This gives credence to plaintiff's claim that the invasion of her land occurred in November 2021 after the issuance of the aforementioned injunctive orders.
36. The plaintiff's title bears number L.R. 4593/5, while that of the 1<sup>st</sup> defendant is L.R. 4593/8, but it happens to be the same land on the ground. The title of the 3<sup>rd</sup> defendant is L.R 209/ 4593/5. No explanation has been proffered by the 4<sup>th</sup> defendant as to how the land number changed, then reverted back to the original one. As observed in the case of *Tushar Shah & Another v John Mariara Kingotho & Another; John Munge (Interested Party)* [2021] eKLR the change of numbers is not an inadvertent error, but a fraudulent process conducted by persons who are in business of making fake titles.
37. A perusal of file 1192 of 2013 *Sanjay Kumar Kanani v Nisha Sha & Another* (2022) ECLR in the digital platform reveals that after the judgment was delivered, the then plaintiffs (tenants) made an application to pay rent arrears by monthly instalments of Ksh.500,000, which application was allowed, but there was no compliance and a warrant of arrest was issued against them. The events happening in the aforementioned case when tied together with the case filed at the magistrates court 297 of 2021, reveals the crafty machinations of known and unknown entities geared towards divesting the land from the legal owner who is the plaintiff.
38. In the case of *Amos Kibata Githeko v Loise Gachiku Kinuthia* [2021] eKLR, I cited the case of *Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others* (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR where the Court of Appeal decried; "the startling decree of misuse of the judicial process in the pursuit of an insatiable greed and varice that stops at nothing to achieve its ends, including subverting the legal process". It is the finding of this court that the 1<sup>st</sup> defendant was abusing the judicial process in filing the case 297 of 2021.
39. The end result is that the title of the plaintiff is the one found to be valid. It follows that the invalid titles must be cancelled; See *Amos Kibata Githeko v Loise Gachiku Kinuthia* (Supra).
40. On damages for trespass, I find that the plaintiff has given a solid account of the events which led to invasion of her land in the month of November 2021. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on



Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In the case of *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession.

41. In the case of *Rhoda Kiilu vs. Jiangxi Water and Hydro Power Construction Limited* (2019), eKLR, I cited the case of *Willesden Investment Limited vs. Kenya Hotels Properties Limited* NBI H.C.C.C. No. 367 OF 2000 where the court had this to say on the issue of damages;

“There is no mathematical or scientific formula in

these type of cases and that the guiding factors are the circumstances in each case”.

42. In light of the foregoing findings, I hereby award the plaintiff general damages for trespass against the 1<sup>st</sup> and 2<sup>nd</sup>

**defendants to the tune of Ksh.500,000 jointly and severally.**

### **Final orders**

43. Judgment is hereby entered for the plaintiff against the defendants as follows;
- i. A Declaration is hereby issued that the Plaintiff is the lawful registered owner of all that the parcel of land known as L.R. No. 209/4593/5 (I.R. No. 10974); and is entitled to exclusive possession thereof.
  - ii. An order is hereby issued directing the 4<sup>th</sup> defendant to revoke all the fraudulent transactions registered for title L.R No. 209/4593/5, save the one reflecting plaintiff as the owner of the land.
  - iii. A mandatory injunction is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents, servants and /or employees to vacate the suit property, LR No. 209/4593/5 (I.R No. 10974) forthwith.
  - iv. An order is hereby issued directing the Officer Commanding Police and Station (OCS) Parklands Police Station to assist the Plaintiff in ensuring the enforcement of the orders granted by this Court and of observance and maintenance of peace.
  - v. Plaintiff is awarded general damages for trespass against the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the tune of Ksh.500 000, plus interests at courts’ rates from the date of delivery of this judgment.
  - vi. The plaintiff is awarded costs of the suit as against all the defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Kimani for Plaintiff

Court assistant: Eddel

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