



**Tulip Developments Ltd v Baya & 4 others (Environment & Land Case  
222 of 2020) [2024] KEELC 4631 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4631 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 222 OF 2020**

**NA MATHEKA, J**

**JUNE 11, 2024**

**BETWEEN**

**TULIP DEVELOPMENTS LTD ..... PLAINTIFF**

**AND**

**REHEMA KAZUNGU BAYA ..... 1<sup>ST</sup> DEFENDANT**

**KHALID OMAR AHMED ..... 2<sup>ND</sup> DEFENDANT**

**SALIM SALIM MWABAHLE ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH A. NG'ETICH ..... 4<sup>TH</sup> DEFENDANT**

**ABRAHAM BIRUNDU NYANGOTO ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that it is the registered leasehold proprietor of all that parcel of land known as L.R. No. MN/ 1/3220 registered as grant number CR 27666 measuring 0.3092 Hectares. By virtue of being the lawfully registered owner of the Suit Property, the Plaintiff was at all material times entitled to its proprietary rights as conferred by law including but not limited to the right to occupy the same as it has not entered into any transaction for the sale or transfer of the Suit Property or any part or portion thereof to any person. The Plaintiff avers that it still has possession of the original title to the Suit Property free of any encumbrances.
2. On or about 8<sup>th</sup> January, 2016, pursuant to the Plaintiffs application for a search, which the Land Registrar declined to issue due to alleged conflicting claims of ownership, the Plaintiff discovered that without the Plaintiff's knowledge or consent, the 2<sup>nd</sup> Defendant fraudulently and irregularly registered an instrument purporting to transfer the Suit Property to the 2<sup>nd</sup> Defendant. The Plaintiff has never advertised or offered the Suit Property for sale to the 2<sup>nd</sup> Defendant or to any other person and it has never received any sum of money from the 2<sup>nd</sup> Defendant or from any other person relating to the



said property and the 2<sup>nd</sup> Defendant acquired title to the Suit Property fraudulently, irregularly and illegally and the said title is void ab initio. To prevent further fraudulent and illegal dealings by the 2<sup>nd</sup> Defendant or any other person, the Plaintiff caused to be registered a restriction against the title to the suit property on 7<sup>th</sup> June, 2016. When the investigations on the fraudulent transfer of the suit property to the 2<sup>nd</sup> Defendant were completed and the 2<sup>nd</sup> Defendant was being sought by the police for prosecution in respect thereof, in a calculated scheme by the Defendants to defraud and dispossess the Plaintiff of the suit property, the 1<sup>st</sup> Defendant unlawfully entered the suit property and quickly put up temporary structures and filed two suits against the Plaintiff, namely ELC No.82 of 2017(0. S) and ELC No. 120 of 2017(0. S.) claiming ownership through adverse possession.

3. The 1<sup>st</sup> Defendant filed another suit namely ELC No. 131 of 2020(0.S.) on 21<sup>st</sup> September, 2020 and while Plaintiff was preparing to respond to the said suit, it discovered that despite the registration of the restriction against the title as aforesaid, in further perpetuation of the fraud, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, without the Plaintiffs knowledge or consent, sometimes in November, 2019, obtained an order issued pursuant to a purported consent adopted in Mombasa Chief Magistrate ELC No. 155 of 2019 filed by the 3<sup>rd</sup> Defendant against the 4<sup>th</sup> and 5<sup>th</sup> Defendants and caused the same to be registered as entry number 9 on an undisclosed date, purporting to transfer ownership of the Suit Property to the 3<sup>rd</sup> Defendant and the removal of the restriction earlier registered and fraudulently procured title to the Plaintiffs property. The Plaintiff states that the registration of the transfer purporting to transfer ownership of the Suit Property to the 2<sup>nd</sup> Defendant and the subsequent registration of an order obtained in Mombasa Chief Magistrate ELC No. 155 of 2019 purporting to transfer ownership of the Suit Property to the 3<sup>rd</sup> Defendant and the removal of the restriction is fraudulent. The Plaintiff further avers that the registration of the 2<sup>nd</sup> Defendant as alleged owner of the suit property and the subsequent registration of the order issued in Mombasa Chief Magistrate ELC No. 155 of 2019 purporting to transfer ownership of the suit property in favour of the 3<sup>rd</sup> Defendant, in light of the above, was irregular and marred by fraud and is null and void and the same should be revoked. The Plaintiff prays for judgment against the Defendants jointly and severally for;
  - a. A declaration that the Defendants acquired no lawful or valid title or interest in all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 and any titles issued to them are illegal and fraudulently obtained therefore null and void.
  - b. A declaration that the Plaintiff is the true and lawful registered leasehold proprietor of all that parcel of land known as L.R. NO. MN/1/3220 registered as C.R NO. 27666 and is entitled to all proprietorship rights conferred on it by law, including the right to quiet and uninterrupted possession thereof.
  - c. A mandatory injunction compelling the Defendants by themselves, their employees, servants and/or agents and all and any persons claiming any title or interest through any of the Defendants in all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 to forthwith (or within such time as the Court shall deem fit to order) deliver up vacant possession of the said parcel of land to the Plaintiff and at their cost, to remove and/or otherwise demolish any developments, buildings and/or structures put up thereon and to carry away any debris resulting from such removal and/or demolition.
  - d. Failing the removal and/or demolition of such developments, buildings and/or structures within fourteen (14) days after delivery of vacant possession of all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 (or within such time as the Court shall deem fit to order), the Plaintiff be at liberty to remove and/or demolish any such developments, buildings and/or structures at the Defendants' cost.



- e. A permanent injunction restraining the Defendants jointly and severally by themselves, their agents, servants, family members, predecessors, successors in interest or otherwise howsoever from entering or further entering upon the parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 or any part thereof or from subdividing, surveying, fencing, building upon, selling, alienating, charging, making further entries in the land register of the suit property and or from dealing or interfering with the parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 in any manner howsoever.
  - f. An order that entry number 7 and all entries on the land register in relation to the registration of the 2<sup>nd</sup> Defendant, or any person claiming under him, as proprietor of the parcel of Land known as L.R. NO. MN/1/3220 registered as C.R. NO. 27666 be revoked and/or otherwise cancelled forthwith.
  - g. An order that entry number 9 and all entries on the land register in relation to the registration of the 3<sup>rd</sup> Defendant, or any person claiming under him, as proprietor of the parcel of Land known as L.R. NO. MN/ 1/3220 registered as C.R. NO. 27666 be revoked and/or otherwise cancelled forthwith,
  - h. An order that the Land Registrar, Mombasa do forthwith rectify the land register for the parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R. NO. 27666 so as to reflect the Plaintiff, Tulip Development Limited, as the legal and only registered leasehold proprietor thereof.
  - i. An order directing the 2<sup>nd</sup> to 5<sup>th</sup> Defendants to surrender any title in their possession related to all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R. No. 27666 to the Land Registrar, Mombasa for purposes of cancellation, failing which the said titles be deemed as cancelled.
  - j. General Damages for trespass and unlawful dispossession of the Plaintiff.
  - k. Costs of this suit together with the interest thereon and on any damages awarded at such rate and for such period of time as this Honourable Court may deem fit to grant.
4. Boniface Musyoka; a licensed court process server effected service on 23<sup>rd</sup> January 2021 upon the 1<sup>st</sup> defendant who accepted service on behalf of herself and the other defendants. The 1<sup>st</sup> defendant filed a Defence dated 25<sup>th</sup> February 2021 and averred that she obtained title through adverse possession having stayed on MN/I/3220 hereafter the suit property since 1994. She also denied the claims by the Plaintiff and stated that the suit is res-subjudice contrary to section 6 of the *Civil procedure act* as there is an existing case ELC 131 of 2021. Finally, she was of the opinion that the plaintiff lacks locus as the plaintiff relies on documents which it did not author/make as required under section 139 of the *Evidence act*.
  5. PW1, Zainul Iqbal Vali a director of the plaintiff reiterated her statement dated 18<sup>th</sup> October 2023 and testified that the plaintiff owned the suit property from 1998 and in 2016 when she went to do a search, she found out that the registered owner was the 2<sup>nd</sup> defendant and two title deeds had been issued. She stated that when she reported to the DCI, they found out that the transfer to the 2<sup>nd</sup> defendant was fraudulent. Further, she stated that the counsel who witnessed the transfer was deceased and that the 2<sup>nd</sup> defendant could not be traced.
  6. However, amidst all this the 1<sup>st</sup> defendant made entry into the suit property and put up a temporary structure followed by filing of several cases claiming adverse possession. PW 1 stated that all the cases filed by the 1<sup>st</sup> defendant have been dismissed. Consequently, the plaintiff put up a structure and in



2020 they found out that there was a suit in the lower court involving the 3,4 and 5<sup>th</sup> defendant where an inhibition the plaintiff had caused to be placed was removed.

7. Counsel for the plaintiff submitted that the plaintiff is the legitimate registered owner as evidenced by PEX 1 which shows as entry no. 6. a transfer to the plaintiff registered on 16/2/2007. They argued that the defendants have not challenged this evidence. Furthermore, counsel argued that the transfer to the 2<sup>nd</sup> defendant was fraudulent by producing PEX 9 the DCI report and that the title held by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant is a forgery and Mombasa CMCC 155 of 2019 was an attempt to sanitize the said title. Counsel also argued that the 1<sup>st</sup> defendant was not the beneficial owner by virtue of adverse possession as she did not produce any documents in support of this claim. They also mentioned that all the suits filed with respect to the suit property i.e. ELCC 82 of 2017, ELCC 120 of 2017 and ELCC 131 of 2020 were withdrawn and/or dismissed.
8. Counsel also argued that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendant had committed fraud by obtaining a forged title which they used to file Mombasa CMCC 155 of 2019 and hence the proceedings were a nullity and the plaintiff was not made a party to the suit despite being the legitimate registered owner. They relied on *Vijay Morjaria vs Nansingh Darbar & Another (2000) eKLR*.
9. I have read and considered the pleadings above together with the testimony, submissions and authority. The issues for determination are;
  - a. Whether this suit is res subjudice?
  - b. If the answer for a is in the negative, who is the legally registered owner of the suit property?
  - c. What prayers can the court grant?

**a. Whether this suit is res subjudice?**

10. The law for res subjudice has been set out in section 6 of the [civil procedure act](#) which states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

11. The matter in which the 1<sup>st</sup> defendant claims that this suit is in sub judice with is ELC 131 of 2020 *Rehema Kazungu Baya vs Tulip Developments Limited*. The plaintiff has produced PEX 15; an order dated 22<sup>nd</sup> February 2021 showing the suit had been dismissed for want of prosecution. The court also confirmed from the court file that the dismissal is still in effect. Hence, this suit is not sub judice.

**b. If the answer for a is in the negative, who is the legally registered owner of the suit property?**

12. Proof of title has been provided for by section 26 of the [land registration act](#) which states 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.”

13. The plaintiff produced his certificate of title PEx 1 and also produced PEx 3 which shows entry 7,8 and 9 as transfers to the 2<sup>nd</sup> defendant and consequently the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The plaintiff has claimed that the transfer to the 2<sup>nd</sup> defendant was fraudulent and that the title used to file CMCC 155 of 2009 which resulted into the transfer to 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants is a forgery.

14. Section 109 of the Evidence Act Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

15. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

16. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,



unless it is provided by any law that the proof of that fact shall lie on any particular person.”

17. To prove fraud by the 1<sup>st</sup> defendant the DCI report stated that Entry 9 in the PEx 3 which was the registration of transfer to the 2<sup>nd</sup> defendant was missing in the plaintiff’s original title PEx 1. The Transfer had had forged signatures together with impersonated photos. N.J. Chudasma counsel was already deceased on 5<sup>th</sup> August 2012 but mysteriously witnessed the attestation on 8<sup>th</sup> December 2012. The stamp duty declaration form, pay in slip and the national bank deposit slip were false. Vide Section 109 of the *evidence act* the burden of proof shifted to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to prove that its title is legitimate as provided. The said defendants did not file a defence hence the plaintiff’s evidence stands uncontroverted.

18. With respect to the 1<sup>st</sup> defendant, she filed a defence claiming adverse possession however, no witness or evidence was produced which the court finds did not help the 1<sup>st</sup> defendant’s case as was stated in North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited vs City Council of Nairobi (2019) eKLR thus;

“ 18. In Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff’s evidence is to be believed, as allegations by the defence is not evidence.”

19. Similarly in the case of Motex Knitwear Limited vs Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another vs Raju Govindji, Hccc No.548 of 1998 appreciated that;

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

20. The 1<sup>st</sup> defendant’s Defence remained unproved by evidence. This was discussed in the case CMC Aviation Ltd vs Crusair Ltd (No.1) (1987) KLR 103 as follows;

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents. (Emphasis mine)”

21. The Court therefore finds the plaintiff is the legitimate registered owner of the suit property.

### **c. What prayers can the court grant?**

22. The plaintiff seeks prayers for grant of permanent and mandatory injunction which was to be directed towards all the defendants. In Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib (2018) eKLR the court held inter alia as follows;

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence



in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

23. With regards to mandatory injunction I rely on the court of appeal case of *Malier Unissa Karim vs Edward Oluoch Odumbe* (2015) eKLR as follows;

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella –Versus - Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd-Vs- Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

24. Similarly, in *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR the court rendered itself thus;

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.”

25. I find that the plaintiff having established that they are the legitimate registered proprietors of the suit property and hence entitled to the said orders.

26. Be that as it may, the plaintiff has failed to give the extent of damage as was held in *Philip Ayaya Aluchio vs Crispinus Ngayo* (2014) eKLR where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).”

27. Section 80 of the *Land Registration Act* provides as follows;

“80. Subject to subsection (2), the court may order the rectification of the register  
(1) by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.



- (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

28. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the plaintiff has proved that his property was fraudulently transferred to the defendants, however the claim for general damages have not been proved and the same will not be awarded. I find the plaintiff has proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the Defendants acquired no lawful or valid title or interest in all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 and any titles issued to them are illegal and fraudulently obtained therefore null and void.
2. A declaration that the Plaintiff is the true and lawful registered leasehold proprietor of all that parcel of land known as L.R. NO. MN / 1/3220 registered as C.R NO. 27666 and is entitled to all proprietorship rights conferred on it by law, including the right to quiet and uninterrupted possession thereof.
3. A mandatory injunction compelling the Defendants by themselves, their employees, servants and/or agents and all and any persons claiming any title or interest through any of the Defendants in all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 to) deliver up vacant possession of the said parcel of land to the Plaintiff within 90 days from the date of this judgement and indefeasible orders to issue.
4. A permanent injunction restraining the Defendants jointly and severally by themselves, their agents, servants, family members, predecessors, successors in interest or otherwise howsoever from entering or further entering upon the parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 or any part thereof or from subdividing, surveying, fencing, building upon, selling, alienating, charging, making further entries in the land register of the suit property and or from dealing or interfering with the parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R NO. 27666 in any manner howsoever.
5. An order that the Land Registrar, Mombasa do forthwith rectify the land register for the {parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R. NO. 27666 so as to reflect the Plaintiff, Tulip Developments Limited, as the legal and only registered leasehold proprietor thereof.
6. An order directing the 2<sup>nd</sup> to 5<sup>th</sup> Defendants to surrender any title in their possession related to all that parcel of land known as L.R. NO. MN/ 1/3220 registered as C.R. NO. 27666 to the Land Registrar, Mombasa for purposes of cancellation, failing which the said titles be deemed as cancelled.
7. Costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF JUNE 2024.**



**N.A. MATHEKA**

JUDGE\*\*

