



**Attari (Suing for himself, and on behalf of the Estate of Hatim Mohamedali Jevanjee - Deceased) v Oduori & another; Atlas Towers Ltd (Interested Party) (Environment & Land Case E077 of 2022) [2024] KEELC 7124 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7124 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE E077 OF 2022**  
**NA MATHEKA, J**  
**OCTOBER 30, 2024**

**BETWEEN**

**ZAHIDHUSSEIN E ATTARI (SUING FOR HIMSELF, AND ON BEHALF OF THE ESTATE OF HATIM MOHAMEDALI JEVANJEE - DECEASED) PLAINTIFF**

**AND**

**JABES ODUORI ..... 1<sup>ST</sup> DEFENDANT**

**MOMBASA COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ATLAS TOWERS LTD ..... INTERESTED PARTY**

**JUDGMENT**

- 1 The claim is that the Plaintiff, Mr. Hatim Mohamedali Jeevanjee and Mr. Mohsin Mohamedali Jevanjee remained the registered owners of the parcel of land situate at Nyali Mombasa Mainland North known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I). The Plaintiff, Mr. Hatim Mohamedali Jevanjee (Deceased) and Mr. Mohsin Mohamedali Jeevanjee (Deceased) by themselves or through their authorised agents have remained in exclusive possession of the suit property from the time the suit property was registered in their names and at all material times to this suit. The Plaintiffs claim against the 1<sup>st</sup> Defendant is for a permanent injunction to restrain the 1<sup>st</sup> Defendant from entering into, occupying, building on or in any other way interfering with the quiet possession of the Plaintiff on the suit property. Further, the Plaintiff claims damages for the loss occasioned by the Defendant's unlawful entry into the suit property, occupation of the suit property and building on the suit
- 2 In addition, an order compelling the 2<sup>nd</sup> Defendant, his representative, servants and/or agents to rectify the Land Register Nyali Mombasa Mainland North known as Subdivision No. 22E Section I (Original



Plot No. 4 Section I), by cancelling all registrations, if any. transferring title to the suit property to any other person other than the Plaintiff and re-register the Plaintiff, Mr. Hatim Mohamedali Jeevanjee (Deceased) and Mr. Mohsin Mohamedali Jeevanjee the sole proprietors of the suit property from the time they were registered. That at all material times to this suit, up to and including 19<sup>th</sup> January 2022 the Plaintiff has been servicing the suit property by paying Annual Land Rates to the County Government of Mombasa in respect to the suit property and he has produced receipts to prove the same.

- 3 The Plaintiff avers that on or about the year 2019, on a date not known to the plaintiff, the Defendant entered into the suit property without any lawful permission, licence or lease from the Plaintiff. The Plaintiff avers that on 6<sup>th</sup> October 2021 the National Construction Authority (NCA) on their own volition carried out inspection on the Defendant's illegal construction on the suit property and issued the Defendant with a Suspension of Works Order. Upon failing to comply with their requirements, the NCA ordered the Defendant to suspend the unlawful construction immediately. The Defendant was further informed that he would be required to ensure compliance with all the requirements and to obtain a lifting of the suspension of works Order before proceeding with the unlawful construction works.
- 4 The Plaintiff avers that upon discovering the 1<sup>st</sup> Defendant's unlawful entry, occupation and construction on the suit property, the Plaintiff wrote a letter dated 2<sup>nd</sup> June 2022 to the Lands, Planning, Housing and Urban Renewal Department at Mombasa County notifying them. Subsequently, on 2<sup>nd</sup> June 2022, the County Government of Mombasa issued the Defendant with a Stay Order Ref. No. Cph/stay Order/VOL 1/005 ordering the Defendant to immediately stay the development on the suit property as the Defendant had not yet complied with the requirements of the relevant County authorities. On 6<sup>th</sup> June 2022, the Plaintiff filed a Report at the Nyali Police Station and was issued with O.B No. 25<sup>th</sup> June 2022.
- 5 The Plaintiff prays for Judgment against the Defendants jointly and severally for,
  1. An order compelling the 2<sup>nd</sup> Defendant, his representative, servants and/or agents to rectify the Land Register Nyali Mombasa Mainland North known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I), by cancelling all registrations if any transferring title to the suit property to any other person other than the Plaintiff and reregister the Plaintiff, Mr. Hatim Mohamedali Jeevanjee (Deceased) and Mr. Mohsin Mohamedali Jeevanjee the sole proprietors of the suit property from the time they were registered.
  2. An order for a permanent injunction restraining the 1<sup>st</sup> Defendant by himself, his agents, servants, or whomsoever else acting on his behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating, charging, selling, disposing of and/or in any other manner whatsoever interfering with the Plaintiffs' rights of ownership, possession, occupation or use of the parcel of Land known as Subdivision No. 22E Section I (Original Plot No. 4 Section I).
  3. An order that the 1<sup>st</sup> Defendant vacates the parcel of Land known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I) within 30 days from the date of Judgment. In default, the plaintiff to forcefully evict the 1<sup>st</sup> Defendant and the 1<sup>st</sup> defendant to bear the costs of eviction.
  4. An order compelling the 1<sup>st</sup> Defendant to demolish all the structures, constructions, buildings, erections on the parcel of Land known as Subdivision No. 22E Section I (Original Plot No. 4 Section I) and grant the Plaintiff vacant possession of the suit property within 30 days after



the date of the Judgement. In default, the plaintiff to forcefully demolish the structures of 1<sup>st</sup> Defendant and the 1<sup>st</sup> defendant to bear the costs of demolition. OCS Nyali to supervise the eviction and demolition.

5. Cost of restoring the parcel of Land known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I) to its original status.
6. Costs.
- 6 The 1<sup>st</sup> Defendant states that the piece of land situate at Nyali Mombasa Mainland North known as Subdivision No. 22E Section I (Original Plot No. 4 Section I) did not at any given point belong to the Plaintiff but other individuals appearing in the search dated 23<sup>rd</sup> June, 2022. That he has openly, exclusively and with no secrecy occupied the suit property continuously and with no interruption for the last seventeen (17) years. The 1<sup>st</sup> Defendant prays that the Plaintiffs suit be dismissed with costs.
- 7 By a consent dated 13<sup>th</sup> October 2023 parties allowed The Intended Interested Parties notice of motion dated 20<sup>th</sup> July 2023 allowing the Interested Party to be enjoined in the proceedings and to participate in the trial and that the Interested Party was to deposit the rent from the lease agreement dated 27<sup>th</sup> September 2022 into an escrow account of the advocates of the parties. I have perused the said application attached is a lease agreement between the 1<sup>st</sup> Defendant and the Interested Party dated 22<sup>nd</sup> September 2022 leasing the suit property for the installation and operation of a communication facility and equipment.
- 8 This court has considered the evidence and submissions therein. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”
- 9 Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
- 10 The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- 11 This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra vs Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally



or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

- 12 PW1, the plaintiff testified that he is the owner of parcel of land known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I) as the registered owner and the administrator of the estates of the late Hatim Mohamedali Jeevanjee (Deceased). That . . . . . on 26<sup>th</sup> November 1959 vide Certificate of Title No. 2965, the Public Trustee, being the administrator of the Estate of one Mr. Jaffer Dewji, the then registered owner of the suit property, transferred the suit property to one Mr. Fazal Din S/O Ahmed Din for a valuable consideration of Kshs. 3,100/= . On 26<sup>th</sup> May 1960 vide Certificate of Title dated 26<sup>th</sup> May 1960, Mr. Hatim Mohamedali Jeevanjee (Deceased) purchased the suit property from the said Fazal Din S/O Ahmed Din for a valuable consideration of Ksh.4000/= jointly with one Mr. Zaidhussein Ibrahim and one Mr. Mohsin Mohamedali. On 18<sup>th</sup> May 1981, Mr. Hatim Mohamedali Jeevanjee bequeathed all his shares in real and personal property to the Plaintiff. This included his share in the suit property. On 15<sup>th</sup> November 1986, Mr. Hatim Mohamedali Jeevanjee passed away. On 24<sup>th</sup> June 1988, Mr. Mohsin Mohamedali Jeevanjee in the Last Will and Testament of Mohsin Mohamedali Jeevanjee bequeathed to the Plaintiff all the residue of his estate both real and personal whatsoever and wheresoever absolutely. The residue of Mr. Mohsin Mohamedali's estate included the suit property. On 24<sup>th</sup> September 2002, vide a Grant of Probate of Written Will issued by the High Court in Succession Cause No. H.C/R.M 43 of 2001 in the matter of the Estate of Hatim Mohamedali Jeevanjee (Deceased) the Plaintiff became the administrator of the Estate of Mr. Hatim Mohamedali Jeevanjee (Deceased). On 10<sup>th</sup> December 2003, the High Court issued a Confirmation of the aforementioned Grant of Probate of Written Will and directed that the assets of Mr. Hatim Mohamedali Jeevanjee (deceased) be distributed as per the written Will of the deceased. As per the Written Will of the deceased dated 18<sup>th</sup> May 2021, the Plaintiff became the registered owner of the suit property. On 17<sup>th</sup> July 2003, Mr. Mohsin Mohamedali Jeevanjee passed away. The Plaintiff produced a copy of the grant, copy of the title dated 10<sup>th</sup> December 2003 and copy of the official search.
- 13 The 1<sup>st</sup> defendant states that the Plaintiff is not the person named in the title. The Plaintiff swore a detailed affidavit dated 12<sup>th</sup> October 2022 and stated that his full name is Zahidhussein Ebrahim Mohamedali Jeevanjee Attari. That in his ID card number 4877067 his name appears as Zaihid Hussein Ebrahim M.J Attari. That Zahid Hussein was misspelt in his ID Card. However, his name is properly spelt in his other official documents. That he is one and the same person. I am satisfied that the person named on the title is one and the same person and that the Plaintiff is one of the registered proprietors of the suit land.
- 14 The 1<sup>st</sup> Defendant testified that he moved onto the suit land in 2003 after establishing that all the owners had died and the same was vacant and was being used as a dumpsite. He was given permission to build by the county government and proceeded to do so. He filed CMCC ELC suit No. 93 of 2022 for adverse possession. He was the only witness for the defence PW2 stated that in 2002 he visited the suit land and constructed a chain link fence as instructed by the Plaintiff. When he visited again in 2018 he found a boundary wall with a gate and a container inside. PW2 produced photos of the suit land taken in 2018 showing this. Indeed, the Plaintiff has produced google earth historical satellite photos to show there was no structure in 2005. I find that the 1<sup>st</sup> Defendant is not being truthful and only came



to occupy the site in 2018. The building approval by the Municipal Council of Mombasa produced by the 1<sup>st</sup> Defendant is dated February 2011! In 2022 the Plaintiff made efforts to report the matter to the police, the Lands, Planning, Housing and Urban Renewal Department at Mombasa County and also trace the parcel file in the land registry all in vain. I find that the sanctity of title must be protected. The 1<sup>st</sup> Defendant cannot just invade land because the owners are purportedly dead. I find that the 1<sup>st</sup> Defendants occupation has been from 2018 and this case was filed in 2022. This cannot entitle him to claim the suit land under adverse possession. I also find that it is only on the 22<sup>nd</sup> September 2022 after this suit had been filed that the 1<sup>st</sup> Defendant leased the suit property to the Interested Party. I find that the 1<sup>st</sup> Defendant's trespass and/or occupation of the suit property has interfered with the Plaintiff's quiet enjoyment of the property. I find that the Plaintiff is the joint owner of the suit property and is protected by Sections 24 and 26 of the Land Registration Act. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An order compelling the 2<sup>nd</sup> Defendant, his representative, servants and/or agents to rectify the Land Register Nyali Mombasa Mainland North known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I), by cancelling all registrations if any transferring title to the suit property to any other person other than the Plaintiff and reregister the Plaintiff, Mr. Hatim Mohamedali Jeevanjee (Deceased) and Mr. Mohsin Mohamedali Jeevanjee the sole proprietors of the suit property from the time they were registered.
2. An order for a permanent injunction restraining the 1<sup>st</sup> Defendant by himself, his agents, servants, or whomsoever else acting on his behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating, charging, selling, disposing of and/or in any other manner whatsoever interfering with the Plaintiffs' rights of ownership, possession, occupation or use of the parcel of Land known as Subdivision No. 22E Section I (Original Plot No. 4 Section I).
3. An order that the 1<sup>st</sup> Defendant vacates the parcel of Land known as Subdivision No. 22E Section 1 (Original Plot No. 4 Section I) within 90 (ninety) days from the date of Judgement. In default, eviction orders to issue.
4. An order compelling the 1<sup>st</sup> Defendant to demolish all the structures, constructions, buildings, erections on the parcel of Land known as Subdivision No. 22E Section I (Original Plot No. 4 Section I) and grant the Plaintiff vacant possession of the suit property within 90 (ninety) days after the date of service of this order. In default eviction orders to issue
5. Costs of this suit to be borne by the 1<sup>st</sup> Defendant.

15 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> DAY OF OCTOBER 2024.**

**N.A. MATHEKA**

**JUDGE**

