



**Sajun Limited v Kinyale & 6 others (Environment & Land Case 195 of 2021) [2024] KEELC 13863 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13863 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 195 OF 2021  
NA MATHEKA, J  
DECEMBER 19, 2024**

**BETWEEN**

**SAJUN LIMITED ..... PLAINTIFF**

**AND**

**ROY ROD KINYALE ..... 1<sup>ST</sup> DEFENDANT**

**PAPELLO INVESTMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES, MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS ..... 4<sup>TH</sup> DEFENDANT**

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

**THE COUNTY GOVERNMENT OF KILIFI ..... 6<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that they are the registered owners of the leasehold interest from the Republic of Kenya of the property known as L.R. No. MN/111/3348 for a term of 99 years with effect from 1<sup>st</sup> December 1996. The Plaintiff was issued with Grant No. C.R 29660 dated 21<sup>st</sup> February 1997 by the Commissioner of Lands on behalf of the President of the Republic of Kenya which grant was registered on 4<sup>th</sup> March 1997. On or about 9<sup>th</sup> June 2009, the Plaintiff learnt that on or about 28<sup>th</sup> July 2006, the Commissioner of Lands (the 7<sup>th</sup> Defendant's predecessor in title) purported to issue another Grant No. C.R. 44357 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the suit property which was registered on 17<sup>th</sup> October 2008.
2. The issuance of the said second grant prompted the Plaintiff to file suit against the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Defendants herein being Mombasa HCCC NO. 289 OF 2009: Sajun Limited vs The Attorney General



& 2 Others. Vide a Judgment delivered by Justice Edward M. Muriithi on 29<sup>th</sup> June 2012, the court in HCCC No. 289 of 2009 issued an order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from, inter alias trespassing on, entering upon, interfering with and/or in any other manner dealing with the suit property Justice Muriithi further declared that the Plaintiff herein is the lawful owner of the suit property and that the Grant No. 44357 issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein is null and void. The Judge also directed the Commissioner of Lands (the 7<sup>th</sup> Defendant's predecessor in title) and the 3<sup>rd</sup> Defendant to cancel Grant No. 44357. That despite the above judgment which was never challenged on appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded to subdivide the suit property into three (3) portions, to wit, L.R. No. MN/III/12214, MN/III/12215 and MN/III/12216.

3. The subdivision of the suit property into the said three portions was approved by the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants without regard to the fact that the suit property does not belong to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whose illegal Grant had been cancelled and nullified by the court. On 15<sup>th</sup> January 2020, the Chief Land Administration Officer in the Ministry of Land and Physical Planning, Mombasa who works under the supervision and superintendence of the 3<sup>rd</sup> Defendant approved the subdivision of the suit property into the said portions. The subdivision of the suit property into the said portions was done fraudulently and illegally and is therefore null and void.
4. On 15<sup>th</sup> January 2020, the 6<sup>th</sup> Defendant's Chief Officer in charge of Lands, Energy, Physical Planning & Urban Development purported to approve the subdivision of the suit property following an application by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff avers that the approval granted by the 6<sup>th</sup> Defendant's said Chief Officer was irregular, null and void and was done through fraud and in collusion with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
5. The Plaintiff prays for judgment against the Defendants jointly for:
  1. A declaration be and is hereby made and issued that the subdivision of the property known as L.R. No. MN/111/3348 by the Defendants into subdivisions numbers L.R. No. MN/III/12214, L.R. No. 12215 and L.R. No. MN/III/12216 and/or into any other subdivisions is null and void and of no legal consequence.
  2. An order of mandatory injunction be and is hereby issued directing the Registrar of Titles, Mombasa to cancel the titles numbers L.R. No. MN/III/12214, L.R. No. 12215 and L.R. No. MN/III/12216 and to remove the same from the Register within fourteen (14) days of this order.
  3. An order of mandatory injunction be and is hereby issued directing the Director of Surveys to cancel the Deed Plan Numbers 441054, 441055 and 441056 registered under Survey Plan No. 646/176 and to restore the property known L.R. No. MN/111/3348 into the official map and back to its original status within fourteen (14) days of this order.
  4. An order of permanent injunction be and is hereby issued restraining the Defendants, either by themselves or through their agents, assigns, attorneys, representatives, employees, officers, or any other person authorized by and/or acting for the Defendants from subdividing, selling, transferring, leasing, charging, accessing, occupying, trespassing on, using or in any other manner interfering with the property known as L.R. No, MN/111/3348.
  5. A declaration be and is hereby made that any action taken or acts done by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the property known as L.R. No. MN/111/3348 including any development, construction, lease, charge and transfer thereof is null and void and of no legal consequence.



6. Costs of this suit to be paid by the Defendants jointly and severally.
7. Any other and further relief this court may deem just to grant.
6. By an application dated 18<sup>th</sup> January 2022 the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed an application to have inter alia that this suit be consolidated with HCCC No. 289 of 2009 and the judgement therein to be set aside. The application was dismissed on 25<sup>th</sup> October 2022 and the matter proceeded to full trial. The 1<sup>st</sup> and 2<sup>nd</sup> defendants despite being served failed to attend court or adduce any evidence.
7. The 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants stated that they were not aware of the judgment and decree made in HCCC No. 289 of 2009 and are not privy to the particulars of fraud. The 6<sup>th</sup> Defendant avers that on 6<sup>th</sup> October 2021 the Directorate of Criminal Investigation in the Coast Region wrote to the Lands, Energy, Physical Planning and Urban Development Department stating that their office was investigating suspected forged stamps. A copy of the letter and specimen of the forged stamp is annexed and marked as "PW-1" The 6<sup>th</sup> Defendant denies the particulars of fraud and collusion and further avers that the purported approvals are fake. On 6<sup>th</sup> October 2021 they wrote a reply to the letter from the Directorate of Criminal Investigation demonstrating that the letter dated 15<sup>th</sup> January 2020 was fake, fraudulent and ingenuine. A copy of the letter and specimen of their original stamp and signature of the County Development Officer is annexed and marked as "PW-2".
8. 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.”
9. PW1 testified that they are the registered owners of the property known as L.R. No. MN/111/3348 for a term of 99 years with effect from 1<sup>st</sup> December 1996. that they were issued with Grant No. C.R 29660 dated 21<sup>st</sup> February 1997 by the Commissioner of Lands on behalf of the President of the Republic of Kenya which grant was registered on 4<sup>th</sup> March 1997. On or about 28<sup>th</sup> July 2006, the Commissioner of Lands purported to issue another Grant No. C.R. 44357 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the suit property which was registered on 17<sup>th</sup> October 2008. The Plaintiff filed suit against the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Defendants herein being Mombasa HCCC NO. 289 OF 2009: Sajun Limited vs The Attorney General & 2 Others. The Judgment was delivered by Justice Edward M. Muriithi on 29<sup>th</sup> June 2012, where he issued an order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from, inter alia trespassing on, entering upon, interfering with and/or in any other manner dealing with the suit property Justice Muriithi further declared that the Plaintiff herein is the lawful owner of the suit property and that the Grant No. 44357 issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein is null and void. The judge also directed the Commissioner of Lands (the 7<sup>th</sup> Defendant's predecessor in title) and the 3<sup>rd</sup> Defendant to cancel Grant No. 44357. Despite the above judgment which was never challenged on appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded to subdivide the suit property into three (3) portions,



to wit, L.R. No. MN/III/12214, MN/III/12215 and MN/III/12216. The plaintiff produced their certificate of title and the said judgement.

10. 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."

11. 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."

12. 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.

13. 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.

14. By the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeding to subdivide the suit property into three (3) portions, to wit, L.R. No. MN/III/12214, MN/III/12215 and MN/III/12216 they created a new cause of action hence the filing of this suit. I find that the subdivision of the suit property was undertaken fraudulently without notification, approval and consent of the Plaintiff who is the legal owner thereof. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Grant No. 44357 was nullified by the court in HCCC No. 289 of 2009 and therefore the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no rights whatsoever to initiate and undertake the subdivision. The purported subdivision of the suit property was done by the Defendants in violation of the judgment and decree made in HCCC No. 289 of 2009 which had restrained the 1<sup>st</sup> and 5<sup>th</sup> Defendants from



interfering and dealing with the suit property. The 6<sup>th</sup> Defendant stated that the alleged approval was a forgery. The said 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file a defence hence the plaintiff's evidence stands uncontroverted.

15. With respect to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, they filed an application stating that they were unaware of Mombasa HCCC NO. 289 OF 2009: Sajun Limited vs The Attorney General & 2 Others where vide a Judgment delivered by Justice Edward M. Muriithi on 29<sup>th</sup> June 2012, the court in HCCC No. 289 of 2009 issued an order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from, inter alias trespassing on, entering upon, interfering with and/or in any other manner dealing with the suit property. That Justice Muriithi further declared that the Plaintiff herein is the lawful owner of the suit property and that the Grant No. 44357 issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein is null and void. PW2, the 6<sup>th</sup> Defendant testified that the letter on page 34 of the Plaintiff's bundle of documents purporting to be an approval of the subdivision of the property known as L.R. No. MN/111/3348 is a forgery as the signature and stamp do not belong to the County Government of Kilifi. No witness or evidence was produced to the contrary which the court finds did not help the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' 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.”

16. 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.”

17. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's allegations 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)”

18. The court therefore finds the plaintiff is the legitimate registered owner of the suit property and the subdivisions are illegal null and void.

19. 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...”

20. 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, if 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 march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

21. Similarly, in *Lucy Wangui Gachara vs 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.”

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

23. Section 80 of the [Land Registration Act](#) provides as follows;

“ 80.

- (1) Subject to subsection (2), the court may order the rectification of the 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.
- (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.”

24. 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 their property was fraudulently subdivided by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants despite a court order. I find the Plaintiff has proved their case on a balance of probabilities and I grant the following orders;
1. A declaration be and is hereby made and issued that the subdivision of the property known as L.R. No. MN/111/3348 by the Defendants into subdivisions numbers L.R. No. MN/III/12214, L.R. No. 12215 and L.R. No. MN/III/12216 and/or into any other subdivisions is null and void and of no legal consequence.
  2. An order of mandatory injunction be and is hereby issued directing the Registrar of Titles, Mombasa to cancel the titles numbers L.R. No. MN/III/12214, L.R. No. 12215 and L.R. No. MN/III/12216 and to remove the same from the Register within fourteen (14) days of this order.
  3. An order of mandatory injunction be and is hereby issued directing the Director of Surveys to cancel the Deed Plan Numbers 441054, 441055 and 441056 registered under Survey Plan No. 646/176 and to restore the property known L.R. No. MN/111/3348 into the official map and back to its original status within fourteen (14) days of this order.
  4. An order of permanent injunction be and is hereby issued restraining the Defendants, either by themselves or through their agents, assigns, attorneys, representatives, employees, officers, or any other person authorized by and/or acting for the Defendants from subdividing, selling, transferring, leasing, charging, accessing, occupying, trespassing on, using or in any other manner interfering with the property known as L.R. No. MN/111/3348.
  5. A declaration be and is hereby made that any action taken or acts done by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect of the property known as L.R. No. MN/111/3348 including any development, construction, lease, charge and transfer thereof is null and void and of no legal consequence.
  6. Costs of this suit to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**N.A. MATHEKA**

**JUDGE**

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