



Badri v Mbarak (Land Case 242 of 2020) [2025] KEELC 1491 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1491 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 242 OF 2020
LL NAIKUNI, J
MARCH 21, 2025
IN THE MATTER OF: AN APPLICATION BY WAY OF ORIGINATING
SUMMONS BY ABDILAH SALIM BADRI (AS HEIR/CESTIN QUE TRUST)
AND
IN THE MATTER OF: ORDER 37 OF THE CIVIL PROCEDURE RULES 2010
BETWEEN
ABDILAH SALIM BADRI PLAINTIFF
AND
HEMED MOHMAED MBARAK DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the Civil Suit instituted through by way of Originating Summons dated 23rd December, 2020 filed on the same day. It was by Abdilahi Salim Badri the Plaintiff herein instituted this suit against Hemed Mohamed Mbarak, the Defendant herein. The suit was premised under the dint of the provision of Order 37 of the Civil Procedure Rules 2010.
2. Upon being served with the Originating Summons and other related pleadings the Defendant entered appearance through a Memorandum of Appearance dated 8th January, 2021 and responses through a Replying Affidavit. The Honourable Court shall be dealing with it indepth at a later stage of this Judgement herein.
3. It is instructive to note that due to the nature of the matter, on 14th February, 2024 the Honourable Court referred the parties to the Court Annexed Mediation in accordance with the provision of Article 159 (2) of *the Constitution* of Kenya, 2010 and Sections 20 (1) & (2) of the Environment & Land Court *Act, No. 19 of 2011*. However, despite of all efforts made, the Court Annexed Mediator had to return



it to this Court with a Certificate of Non - Compliance and Settlement to enable this Court hear and finally determine the dispute

II. Court directions before the hearing

4. On 17th February, 2022, after confirming that all parties had complied with Order 11 of the Civil Procedure Rules 2010, directions were taken as per the provision of Order 37 Rules 13, 16 and 18 of the Civil Procedure Rules, 2010 on how to dispose off the matter altogether whereby the Originating Summons was converted to a Plaint; the Applicants to the Plaintiffs and the Respondents to the Defendants and the attached annexures to the List of documents to be relied on by parties herein. Further, the Honourable Court set the hearing date by adducing of “a Viva Voce” evidence on 13th April, 2022 although the said date was deferred to 18th October, 2022. The Plaintiff/Applicant called PW - 1, on the same day and closed his case thereafter. The Defendant/Respondent called their witnesses DW - 1 on 14th February, 2024 after which he closed his case.

III. The Plaintiff’s case

5. The Plaintiff claimed to be heir/cestui que trust in respect of trust created by the Probate Will of the deceased herein, the late Saleem Bader Abdul Baqui Al-Amry (aka Salim Badir Said Al-Amry). It was executed on the 11th day of March, 1979 over his estate which comprises of, among others, Plot No. 661/II/MN, which property had been trespassed upon by the Defendant herein, Mr. Hemed Mohamed Mbarak. The suit was for determination of the following five (5) questions namely:-
 - a. Whether the action by Mr. Hemed Mohamed Mbarak, the Defendant herein, in moving into Plot No. 661/II/MN and commencing the construction of a permanent house thereon is unlawful, illegal and amount to intermeddling/interference with the estate of a deceased person.
 - b. Whether the interest of Mr. Hemed Mohamed Mbarak, the Defendant herein, over Plot No. 661/II/MN ceased immediately he demolished the Swahili house without land he bought thereon.
 - c. Whether permanent injunction should be issued by this Honourable court stopping and/or restraining the Defendant by himself his servants, agents contractors, may be, of any beneficiary (ies) of the estate, ceased.
 - d. That by putting up a permanent structure on the suit property, the Defendant is only cleverly attempting to acquire the land which he had no interest in, and it is unlawful and illegal.
 - e. That the said construction is being done in such a hurried manner so as to defeat any proceedings which may be brought it
6. The Original Summons was based on the following grounds on the face of it and those of the 21 paragraphed supporting affidavit sworn by Abdilahi Salim Badri, the Plaintiff/ Applicant, the heir/cestui que trust to the Will of Saleem Bader Abdul Baqui Al-Amry (aka Salim Badir Said Al-Amry) executed on 11th March, 1979 sworn on the same day with the Originating summons where she averred:-
 - a. The said Will created a trust, and Mr. Abdullah Bin Omar Ba Sharaheel, Mr. Ahmed Bin Saleem Bin Badr and Mr. Abdul Karim Bin Abdallah Bin Kartem were appointed the executors.



- b. The said Probate Will was admitted to Probate and Letters of Administration was issued with the same attached, annexed in the affidavit and marked as “B” was a copy of the aforementioned Letters of Administration.
- c. The two administrators who were given the said Letters of Administration, namely; Abdallah Bin Omar Bashareel and Ahmed Bin Saleem had since died. Annexed and collectively Marked as “C” copies of their Certificates of Death.
- d. The deceased owned, during his lifetime, among others, parcel of land No.661/II/MN. Annexed and Marked “D” was a copy of the Certificate of Ownership.
- e. This property was owned by the deceased together with one Mjakazi Binti Masud (aka Sudi) who owned 1/16 share in it.
- f. The deponent was one of the sons of the deceased herein.
- g. This being an estate of a deceased Muslim, the issue of distribution was referred to the Kadhi’s court vide Succession Cause No. 243 of 1997 (O.S), where a consent was reached and the entire estate was distributed in accordance with Islamic law. Annexed in the affidavit and Marked “E” was a copy of the decree issued by the said Khadhi’s Court.
- h. In terms of the said decree, Plot No. 661/II/MN was distributed as follows:-0.546.Acres remained with Mjakazi Binti Masud (aka Sudi)5 Acres (10.5%) given to Ahmed Salim Bader and his two sons Abdulmuin Ahmed Salim and Abdulhalim Ahmed Salim0.454 Acres (1%) given to Lashad Mohamed Mubarak2.18 Acres given to Abdilahi Salim Badri (myself) holding it in trust for Asal Noor Madrasa and mosque
- i. This was the onlyproperty which had not been administered for reasons that the file at the Land Registry went missing, while the rest had been vested with the concerned beneficiaries.
- j. Before his death, The deceased allowed some people to build temporary Swahili houses, being “houses without land’, on the subject property. One such person was Said Abdalla Said (now deceased) the father of Halima Anderson Gylden.
- k. The deponent came to learn that the said Halima Anderson Gylden sold that Swahili house without land to Mr. Hemed Mohamed Mbarak, who is the Defendant herein.
- l. The Defendant, for whatever reasons only known to him, demolished the said house without land and started constructing a permanent house.
- m. It came as a surprise when the Defendant sometimes on or about the 14th day of December, 2020, moved into the portion where he demolished the said Swahili house. Annexed in the affidavit and collectively Marked “F” were copies of set of the photographs taken from the site.
- n. It was his position and he believed it was the correct position, that the interest the Defendant had on the subject land was only limited to that of Swahili house without land he bought, and not on the land itself. The moment he demolished the said structure his interest ceased. But even if a contrary reasoning was adopted, it was still his position that the Defendant had no right to build a permanent building on the subject land. The concept of house without land as had been a tradition in the Coast region was only limited to temporary Swahili houses, and not permanent ones.
- o. Besides the foregoing, this property had been distributed in the manner stated in paragraphs 10 hereof, and the same had been surveyed, and in terms of the sub - division scheme which was



now pending approval before the County Government of Mombasa, this subject portion fell within the 2.18 Acres given to the Deponent to hold in trust for the said Madrasa and mosque. Annexed and Marked "G" was a copy of the said sub - division scheme.

- p. The deponent had tried all he could to stop the construction, but the Defendant seemed to be determined to continue with it to its completion, which construction appeared illegal and amounted to intermeddling with the estate of the deceased herein.
 - q. While holding their conversations, the Defendant had maintained, without proof that his construction had the blessings of Asya Omar Badri (the widow of the Deponent's deceased brother Ahmed) and her son Abdulmuin, and even if it was true that they had a secret understanding between themselves, it was his case that the Defendant should wait until they finalized the issue of distribution of this property then he could move and build on the portion which would be taken by the said family. The Defendant should not be allowed to steal a match.
 - r. It was apparent from the foregoing that the Defendant's action complained of herein was illegal, unlawful and amounted to intermeddling with the estate of the deceased herein, and it was his prayer that this Honourable court do declare it so.
7. The Plaintiff/ Applicant also filed a 9 paragraphed further affidavit sworn by Abdilahi Salim Badri, who averred that:-
- a. The suit property was still undergoing succession by the time this suit was instituted, and the sub - division process was at an advance stage. Therefore it was prudent that anybody who was interested in purchasing, or selling, any portion of it should wait until such a time when the beneficiaries were given their respective portions. According to the Deponent, the Defendant was not ready to heed to that call.
 - b. Even after obtaining Deed Plans which were clearly showing that the area where the Defendant was constructing a permanent building fell right within the portion given to him to hold in trust for Asal Noor Madrasa and Mosque, which position was supported by the Survey Report by Ms. Pimatech Land Surveyors and Consultants. The same was brought to the attention of the Defendant but still the Defendant chose to ignore the same and moved on with the offending construction.
 - c. Now the sub - division of the suit property was over. The resultant Deed Plans had since been registered with the Lands Office, Mombasa and new Certificates of Title given, and it was apparent that this offending construction fell in the portion given to the Asal Noor Madrasa and Mosque, which was now the Sub - division No. 16335 (Org. No.661/3) Sec. II Mainland North - CR. 78976 which included the portion which was given to his mother Lashad Mohamed Mubarak.
 - d. The portion taken by his late brother, Ahmed Salim Bader and his two sons, Abdul Muin Ahmed Salim and Abdulhalim Ahmed Salim, who purportedly sold to the Defendant the portion he was putting up the impugned construction, was now Sub - division No. 16337 (Org. No. 661/5) Sec. II Mainland North CR.78978.
 - e. Annexed in the further affidavit and collectively Marked as "A" were those Certificates of Titles in respect of the said two Sub - divisions, together with the aforesaid Survey Report by Ms. Pimatech Land Surveyors and Consultants.
 - f. It was his conviction that this suit had merit and as was unequivocally put by the court in its ruling delivered on 24th June, 2021 in its closing holding that ".....Further, the court finds that



the harm to be suffered by the applicant, if any, can be compensated by an award in damages and the impugned construction demolished in the event this case succeeds at trial ...”, it was his prayer that the said impugned construction be demolished even as the court assessed his award in damages.

8. The Plaintiff/Applicant called PW - 1 on 18th October, 2022 at 2.45 pm and he testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Odongo Advocate.

9. PW - 1 was sworn and testified in Swahili language. He identified himself as ABDILAH SALIM BADRI, a citizen of Kenya with all the particulars as indicated in his national identity card as shown to Court. He lived in Tononoka and had a shop there. He knew Salim Badir Abdulbaqu Al Amry – his father who had passed on in the year 1984. He knew Hemed Mohamed Mbarak, the Defendant herein. He told the court that he had sworn an affidavit on 23rd December, 2020 and a further affidavit dated 14th December, 2022. He attached his documents. He asked the court to adopt the same as his evidence in chief. He produced 9 documents as Plaintiff Exhibit numbers 1 to 9.
10. PW - 1 told the court that he had sued the Defendant for having entered into the suit land as a tenant and hence started construction of a permanent house. It was through a previous tenant – Halima Handerson who attracted the Defendant. According to the Plaintiff by then his father used to allow tenants to build Swahili house structures on the suit land. All the transactions would be going on without their knowledge. The Defendant then demolished the structure and started the construction of a permanent structure. They came to court to be granted injunctive orders. The Plot No. 6611/II/MN. There was a will.
11. According to the witness people decided to enter into the land for the purposes of collecting rent. They occupied all the places; with the intention to improve their livelihood. They all have their title deed for their portions. By the time they were filing the case, the property had not been distributed. Its later on that that happened in accordance to Muslim law. Mr. Hemed Mohamed Mbarak got into an agreement for him to build a permanent house with the child of Ahmed Salim. Hemed was building in his land. They had held no legal capacity to enter into the agreement. They were challenging the agreement. PW - 1 prayed to be compensated or for the demolition of the house.
12. PW - 1 stated that he sent a surveyor and he confirmed that the structure was on his land. He had been taking care of them as they had mental disabilities.

B. Cross Examination of PW - 1 by Mr. Bosire Advocate.

13. The suit land according to PW - 1 was LR. NO. 661/II/MN. It was the original one before the sub - division. The sub - division was done as per the Probate Will. There was a Consent dated 24th November, 2011 which was adopted as a court order. There was a decree – marked as “E” to facilitate the distribution – issued on 29th May, 2018. From the decree the Plot 661/II/MN – he got 2.18 acre as trustees and others got certain shares. Before he died – Salim Badri – his father allowed people to build houses without land. One such person was Said Abdalla Said though he died. His house was taken over by his heirs one of them being Halima Anderson.
14. PW - 1 acknowledged that the people paid ground rent to his brother Salim Hamid. He acknowledged that the agreements were entered into by Salim Hamid. There were other people. There had been no cases of trespass on the land. There had been sub – division of the main land. From 25th July, 2018, when the sub division started up to the year 2019 when the director completed it. The surveying exercise was undertaken and the costs was met by himself as the legal administrator of the Estate.



15. PW - 1 reiterated that the shareholders were involved fully as the exercise was supervised by the KADHI. In the affidavit of 2nd March, 2021 there was an annexure – a medical report – from the year 2011 for the two young men. It was 12 years ago. The sub - division was before the court. It was not done wrongly all intended to remove a structure by the Defendant. According to the witness, there ere two errors inherent – that the Defendant constructed on the wrong place and the agreement having been entered with wrong parties. There was a ruling dated 24th June, 2021 by Justice Yano where the injunctive order was not allowed.

C. Re - examination of PW - 1 by Mr. Odongo Advocate.

16. PW - 1 confirmed that they went to the Kadhi and by consent they agreed on how the property belonging to the deceased was to be distributed. They were with their father. He took 5 acres; the two (2) young men and got 5 acres and the title deed was there, they had not been derived any of their rights. A Decree was extracted and taken to the lands office. The land was being distributed as per the interests of the beneficiaries and not the tenants. They got their shares. PW - 1 stated that he was given temporary injunction. But later on the injunction was lifted and he continued to build.
17. On 18th October, 2022 the Plaintiffs through their Legal Counsel Mr. Odongo marked his case closed.

IV. The Defendant's case

18. The Defendant responded through a 17 Paragraphed Replying Affidavit of Hemed Mohamed Mbarak, authorized by the Respondent to represent him in this matter herein, sworn on 8th January, 2021. He averred that:-
- a. He purchased a house without land from Halima Anderson Gyldensometimes in the year 2019 for a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) only. Annexed in the affidavit and marked as “HMM - 1” was a copy of the Sale Agreement.
 - b. The said house without land was erected on a portion of land known as Plot Number 661/ Section II/MN in Mtopanga.
 - c. The former owner of the house without land was Halima Anderson Gyldenwho used to pay monthly ground rent for the said portion of land to Ahmed Salim Baderand later upon the demise of the Late Ahmed Salim Bader to the Estate of the late Ahmed Salim Bader. Annexed in the affidavit and Marked as “HMM - 2” were copies of receipts and acknowledgment depicting the payment of land rent to Ahmed Salim Baderand later to the Estate of the late Ahmed Salim Bader.
 - d. The previous owner of the house without land i.e. Halima Anderson Gylden was the lawful owner of the said house without land for about 20 years prior to him purchasing the said house. The Plaintiff had never raised any issues regarding the ownership of the suit house nor ownership of the land in which the said house was erected.
 - e. When he was purchasing the House without land he obtained consent from the beneficiaries of the Estate of the late Ahmed Salim Bader who were the lawful owners of the portion of land in which the house without land was erected. The said beneficiaries consented to the sale of the house without land to the Deponent without any objection whatsoever. Annexed in the affidavit and Marked as “HMM - 3” was a copy of consent by the beneficiaries of the Estate of the late Ahmed Salim Bader sanctioning the sale of the house without land.



- f. Upon purchasing the house without land he further obtained consent from the beneficiaries of the late Ahmed Salim Bader who unequivocally gave their consent for the construction of a one storey permanent building. Annexed in the affidavit and marked as “HMM - 4” was a copy consent by the beneficiaries of the late Ahmed Salim Bader consenting to the construction of the permanent building.
- g. The consent for the construction of the permanent two storey building was conditional upon the Deponent paying a sum of Kenya Shillings Two Fifteen Thousand (Kshs. 215,000/-)to the beneficiaries of the late Salim Ahmed Bader which sum he had paid in part. Annexed in the affidavit and marked as “HMM - 5” were copies of receipt dated 11th February, 2019 and acknowledgment of receipt of cash.
- h. The Deponent averred that before obtaining the consent to transfer and build he conducted his due diligence and ascertained that indeed the beneficiaries of the late Ahmed Salim Bader were indeed the lawful owners of the suit property vide judgment of the Honourable Kadhi in Succession Cause Number 243 of 1997 O.S. Annexed in the affidavit and Marked as “HMM - 6” was a copy of the Judgment/Decree.
- i. The deponent reiterated that the portion of the suit property in which the Swahili house without land was constructed indeed belonged to the Late Ahmed Salim Bader and later by dint of judgment of the Kadhi’s court in Succession Cause No. 243 of 1997. The Plaintiff/Applicant had also admitted to the same in Paragraphs 13 and 15 of the supporting affidavit sworn by the applicant on 23rd December, 2020.
- j. The deponent further averred that the Plaintiff/Applicant had also no interest whatsoever in the house without land that formed a part of the subject matter in the instant suit. The applicant had miserably failed to adduce any evidence to prove his interest in the house without land.
- k. The Applicant herein never had Letters of administration of the estate of Salim Bader who was the owner of the suit property before it devolved to the Plaintiff and Ahmed Salim Bader and as such the Plaintiff never had Locus Standi to institute any proceedings on behalf of the beneficiaries of the late Salim Ahmed Bader.
- l. The deponent had been promptly paying the land rent to the Estate of the late Ahmed Salim Bader on a monthly basis since he purchased the said house in 2019. Annexed in the affidavit and marked as “HMM - 7” were bundles of receipts.

19. The Defendant/Respondent called DW - 1 on 14th February, 2024 at 1.30 pm who testified that:-

A. Examination in Chief of DW - 1 by Mr. Bosire Advocate:-

20. DW - 1 was sworn and he testified in Swahili language. He identified himself as being Hemed Mohamed Mbarak. He was a citizen of Kenya with all the particulars indicated in the national identity card shown to the Court. That on 29th March, 2022 he recorded a witness statement which he adopted as his evidence in chief. The witness produced ten (10) documents as Defendant’s exhibit 1 to 10. He was aware of the reason he was in court. He knew the land; Plot 661; It was the land – house without land. It had been occupied by her brothers for many years.
21. DW - 1 told the court that he would be going to visit them for a long time. They agreed with the owner Halima and she was willing to sell the land. They approached a lawyer Mr. Yunis Ali; the lawyer called the owner of the land who happened to be their lawyer as well. They entered into the agreement and



executed a sale agreement. He bought it and informed them that he would have liked to demolish the house in order to build a modern house. He had been informed that the land was not theirs and they were paying land rent. They produced receipts for over 50 years for the period they were paying ground rent. He produced the receipts as Defendant Exhibit - 5. He was informed by the advocate – the land was 10 acres belonged to 2 brothers and one of them died. On the issues of him being evicted from the land. He urged the court to protect him he did due diligence; he had taken up for 5 years and he had constructed.

22. DW - 1 stated that he was aware of the sub – division; but not aware that it was done. He was not involved. He had been informed that there were title deeds issued. The witness did not know that he had encroached into any other land. The land was 5.2 acres; he was occupying the portion owned by the one who sold him. They were not part of the suit – on that portion where he bought there were many other people and who had caused development. They were not in Court neither as Defendants nor Interested Parties.

B. Cross examination of DW - 1 by Mr. Odongo Advocate.

23. DW - 1 confirmed that he bought the house and not the land. He bought it from Halima Anderson. He did not know the concept of the house without land. He demolished the house which was on the land. His interest was to build a modern structure. The house without land were semi and permanent houses where they would be protected from the snakes and the sun. The land Plot 661 was for Salim Bader, Ahmed Bader and others who he may not remember. He paid for the plot to Halima. By this time, the sub – division had not been undertaken. He was told there was a Kadhi’s Court decree (Defendant Exhibit Number 8).
24. DW - 1 reiterated that they were to get shares/ portion of the land; the persons who sold him the house they were to get 5 acres. He was not aware whether they got title deed; he had not been told they got title. By the time the suit was filed he had already started construction. He started building in year 2020. On being referred to to the contents of Paragraph 19 of the supporting affidavit – he stated that by that time he had already commenced the building of the structure. He was aware that occupying a portion of other people; he believed they would agree. He bought the house on 11th February, 2019. He was referred to the receipt (Defendant Exhibit Number 9).
25. DW - 1 confirmed that the receipts were dated 7th February, 2019. It was before he bought the house. It was an error. They were written by Abdulmin – he saw that the handwriting on the receipts had different persons. He was aware that some of the people had mental disorders. He was referred to the receipts and the stamps. It read the executors of the estate of the late Salim Al Amry. At paragraph 4 of the witness statement, the witness stated that he sought consent from the land owners.
26. According to the witness at paragraph 10 of the Replying Affidavit he said the land belonged to Salim Bader. At paragraph 11 he stated that his land was on the portion where the land was. He told the court that he did not know the sub - division was ongoing.

B. Re - examination of DW - 1 by Mr. Bosire Advocate.

27. DW - 1 reiterated that when he demolished the house he sought for approval – See Defendant Exhibit Number 6. He was referred to the sale agreement between Halima and himself. They were cousins. They got the title of the 5 acres after he had bought the land; when he bought the property there was no title apart from the mother title. By the time of the court order was being issued, he was allowed to build as he had already started building. The seller of the house was not a Legal Administrator of the estate. With reference to the contents made out under Paragraph 5 of the supporting affidavit, the



witness told the court that all the Legal Administrators were deceased. He was not aware whether there were others appointed. The property was for trustees.

28. On 6th November, 2024 the Defendant closed his case through his Learned Counsel M/s. Abdalla.

V. Submissions

29. On 24th July, 2024, immediately after the closure of the Plaintiff's and the Defendant's case, the Honorable Court directed the parties to canvass the originating summons dated 23rd December, 2020 through written submissions. Thereafter, on the 20th November, 2024 the parties having fully complied and the Honorable Court reserved a date for delivery of Judgement on 28th January, 2025 accordingly. Unfortunately, due to unavoidable circumstances the Judgement was eventually delivered on 14th March, 2025.

A. The Written Submissions by the Plaintiff

30. The Plaintiff through the Law firm of Messrs. Odongo B. O. & CO Advocates filed their written submissions dated 13th November, 2024. Mr. Odongo Advocate provided a brief background of the matter. He stated that it was the Plaintiff's suit which commenced by Originating Summons dated 23rd December, 2020. This suit revolved around all that parcel of land known as Plot No.661/II/MN. This land was, at the time of the institution of these proceedings, part of the estate of the late Saleem Bader Abdul Baqui Al-Amry (aka Salim Badir Said Al-Amry). The deceased herein had allowed some tenants to build temporary Swahili type houses (commonly referred to as 'house without land') on portions of this land. One such tenant was Said Abdalla Said, who died and his daughters, Halima Anderson Gylden, inherited the said house without land.

31. It was this house without land which the Defendant bought and after sometimes demolished the temporary structure on it, and on its place built a permanent one. It was this building whose construction forced the Plaintiff to come to court. Though an interlocutory application dated 23rd December, 2020, the Plaintiff sought orders stopping its construction, but by a ruling delivered on 24th June, 2021 by Justice Yano, the same was allowed to continue, with a holding among, others, that ".....the harm to be suffered by the applicant, if any, can be compensated by an award of damages and the impugned construction demolished in the event this case succeeds at trial".

32. The Learned Counsel informed the court that the said house was eventually fully constructed, and what was therefore here for deliberation was whether the same should be demolished or the suit should be dismissed.

33. On the concept of house without land. The Learned Counsel submitted that they had said it before, that this concept of house without land was only unique to Coast Province, especially within the 10-mile coastal strip which was surrendered to Kenya by Sultanate of Zanzibar without compensation pursuant to an agreement of 1963 between United Kingdom, Kenya and Zanzibar, and which was brought under the Land Title Act, Cap. 282 of the Law of Kenya.

34. The Learned Counsel referred the Court to the commentary by Justice Joyce Khaminwa, sitting in Mombasa in the case of:- "HCC NO.64 of 2004 Christopher Baya & 2 Other v Philip Kiluko", where she held that:-

"This arrangement is known as "house without land" meaning the right to build on another's land under agreement which does not pass title to the land"



35. Similarly, Justice O.A. Angote, sitting in Malindi in the case of:- “Alwi Mohamed Alwi v Swaleh Omar Awadh ELC No. 44 of 2015”, held that the interest of the owner of a house without land is only limited to the house he bought.
36. Additionally, Justice Ouko, sitting in Malindi in the case of:- “HCC No. 34 of 2005 - Famau Mwenye & 19 Others v Mariam Binti Said”, described the concept as follows:-

“The dispute arises from land tenure unique to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as "house without land". That is, the owner of the house is different from the owner of the land on which it stands, it therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus ad coelum* [meaning, whose is the soil, his is also that which is above it”]
37. Furthermore, this description was captured by the court of Appeal in “Civil Appeal No. 18 of 2017- Abdulrazak Khalifa Salim v Harun Khator & Others” where the court upheld the Judgment of Murithi J, sitting in Mombasa, ordering the demolition of a house without land belonging to the Abdulrazak Khalifi Salim. Copies of those decisions were herewith attached. It was apparent from these descriptions that a house without land has nothing to do with the land where it stands. In fact, it would be safer to describe it as a chattel within the meaning of the Chattels Transfer Act, Cap.28.
38. On the Plaintiff’s originating summons, the Learned Counsel submitted that this Originating Summons raises the above stated Six (6) questions for its determination. The Learned Counsel submitted that it was premised on the grounds shown on its face, and the supporting affidavit sworn by the Plaintiff, which in fact was self-explanatory. The Plaintiff also filed a further affidavit sworn by himself on 14th February, 2022 where he explained all that had happened since the institution of this suit. The Plaintiff had also consolidated all the documents he relied on these two supporting affidavits into one list of documents dated 11th February, 2022.
39. It was the Learned Counsel’s contention that taking into consideration the sum total of the Plaintiff’s averments in the two affidavits herein, together with his story at the hearing, and evidence contained in his documents herein, the Plaintiff’s case was merited. The Defendant’s action in constructing a permanent house on the suit property, before the succession process was over, having demolished what he bought, amounted to intermeddling with the property of the estate. It was illegal and unlawful.
40. The Learned Counsel submitted that much had since changed and they would address the same under question 4 hereof. However they wished to submit that at the time of the institution of these proceedings, Plot No.661/II/MN, which had since been sub - divided and distributed amongst the beneficiaries, was still registered wholly in the name of the deceased herein, thus, being part of his estate. See the last entry in the document of title at pages 9 & 10 of the Plaintiff’s list of documents. This property was still undergoing sub - division process.
41. The Plaintiff did show through his affidavits herein, and documents he relied on, especially the decree issued by the Kadhis Court in Succession Cause No 243 of 1997 (OS), See the same at pages 11 & 12 of the Plaintiff’s list of documents, that this property was supposed to be distributed between Ahmed Salim Bader and his two sons, namely: Abdulmuin Ahmed Salim and Abdulhalim Ahmed Salim owning 5 Acres, Lashad Mohamed Mubarak (widow)1 Acre, and Abdullahi Salim Badri (Plaintiff) 2.18 Acres in trust for Asal Noor Mudrasa and Mosque.
42. Therefore, this property did not belong to one person, and it was possible that the Defendant’s action could affect any beneficiary who perhaps did not have any dealings with him. Which was why the Plaintiff did request that anything being done on this property was supposed to be halted until the



succession process was finalized to allow any beneficiary of the same to deal with his portion the way he/she wished.

43. According to the Learned Counsel, what the deceased allowed his tenants on the suit property to do was to build temporary Swahili “house without land” thereon, and not permanent ones. By stubbornly constructing a permanent structure thereon, thus, permanently affixing the same to the ground, before the succession process was over, amounted to intermeddling with the estate of the deceased person contrary to the provision of Section 45 of the Laws of Succession Act, Cap. 160 which provided as follows:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of. Or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

44. Plot No 661/11/MN was a free property of the estate of the deceased herein within the meaning of Section 3 of the Succession Act herein, which defines the same as follows:-

“free property”, in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

45. It was the submission of the Learned Counsel that the Honourable Court does agree with them that the Defendant’s action herein amounted to intermeddling with the property of the deceased person, illegal and unlawful.

46. On the second question, the Learned Counsel submitted that as had been said hereinbefore, the Defendant did not buy land, but a house standing on a portion thereon. This house was bought from one Halima Anderson Gylden, who also only owned that house as a licensee, but not the land where it stood. The interest of the Defendant was therefore only limited to what he bought. Once the same was demolished by his own hand voluntarily, his interest ceased. Purporting to build a permanent house on its spot only amounted to attempting to acquire interest in the land where the demolished one once stood without due process.

47. To buttress on this point, the Learned Counsel relied on the holding of Angote J. in the case of:- “Alwi Mohamed Alwi v Swale Omar Awadh” (Supra) herein, that the interest of the owner of a ‘house without land’ is only limited to the house he bought, “it was their submission that the interest and the right of the Defendant over anything pertaining to the suit property ceased immediately he demolished the house he bought. They urged the Honourable Court to find that the Defendant’s interest ceased with the said demolition.



48. The Learned Counsel submitted that the 3rd question had technically been overtaken by events, since the Defendant had proceeded with the construction to its finality. On the 4th question, it was the Learned Counsel submitted that the only remedy left in this case, for justice to be done, was to have this impugned permanent structure demolished. This was basically what Justice Yano J. said in his closing holding in his ruling herein.
49. According to the Learned Counsel, Justice Yano innocently confused the estate of the deceased herein, i.e. Saleem Bader Abdul Baqui Al-Amry (aka Salim Badri Said Al-Amry), and that of his son Ahmed Salim Bader, who was one of the beneficiaries of the suit property together with his two sons, which was why the Learned Judge went ahead and dismissed the said application on the ground that the Plaintiff was not the administrator of the said estate of Ahmed Salim Bader, which in fact was not the case.
50. It was in evidence as could be seen in the further affidavit by the Plaintiff hereinbefore referred to, that the suit property was eventually sub - divided and distributed among the aforesaid beneficiaries in accordance with their respective ratio/share as shown in the decree herein. Upon the said sub - division, the late Ahmed Salim Bader and his Sons aforementioned were given subdivisions Nos 16334 and 16337 (Original No.661) II MN, which summed up, in acreage, to 5 Acres, while the Plaintiff acquired No. 16335 (Original No.661/3) II MN which included a portion belonging to the widow, Lashad Mohamed Mubarak. Upon the said subdivision, this impugned structure fell in Plot No. 16335 (Original No. 661/3) II MN, which includes portion given to the widow Lashad Mohamed Mubarak, now owned by the plaintiff.
51. It was the Defendant's case that he was allowed to build there by one of the sons of Ahmed Salim Bader, Mr. Abdulmuin Ahmed Salim and his Mother Asiya Omar Badru, and this is exactly why the Plaintiff was of the view, which of course was the right thing to do, that this construction was supposed to be halted to await the succession process to be concluded so that the family of Ahmed knew their absolute portion on the ground to have a dealing over with the Plaintiff. The structure was now encumbering the portion held by the Plaintiff, and by extension his mother(the widow) while those who purportedly allowed the Defendant to build have their portions intact.
52. The Learned Counsel argued that the existence of this structure on what was now the Plaintiff's plot only amounted to what could only be described as trespass. It violated the Plaintiff's statutory and constitutional rights to this property. The Defendant had no justification at all in having this building remaining standing forever on what was now the Plaintiff's parcel of land. It was obvious and it was said in all of the affidavits filed in these proceedings, more so, those in support of his Notice of Motion application which was dismissed, that where the Defendant was putting up the impugned structure was earmarked for the said mosque and madrasa, but the Defendant could not hear of it. There was no way this property could be sub - divided to suit all the tenants on it, some had to be affected, since access roads had to be created, and those who were affected were compensated. No survey skill could place this impugned structure in the portions which were given to the late Ahmed Salim Bader and his two sons herein. The manner in which the suit property was sub - divided went down well with all the beneficiaries. None of them complained. It was their prayer that this Honourable Court order the Defendant to demolish this offending structure. It was not on his land, and it would never be, unless he bought the same under personal arrangement with the Plaintiff.
53. The Learned Counsel submitted that this was discretionary, and they left it to court. It was their submission that the Plaintiff was entitled to cost in the event the suit allowed, and they prayed that in that eventuality the same be given.
54. On the Defendant's case, the Learned Counsel contention was that the Defendant's position was contained in his statement dated 29th March, 2022, and filed on 30th March, 2022, and his list of



documents of the same date. This statement was somewhat long, however, they wished to confine their submission only to the contents of Paragraphs 3, 7, 10 & 11 respectively. The Learned Counsel singled out these paragraphs for they were the ones which showed the fact that according to the Defendant he was dealing with the estate of Ahmed Bader Salim. At paragraph 3, he said that he facilitated the transfer cost and cleared the rent arrears to the beneficiaries of the Plaintiff's brother, the late Ahmed Bader Salim. According to the Learned Counsel, this property belonged to the estate of the deceased herein and not to Ahmed Salim Bader. Ahmed was a beneficiary just like any other beneficiary. He and his two sons were given five (5) Acres of the suit property, which was still undivided by the time of the alleged transaction.

55. The late Ahmed Salim Bader was one of the executors of the estate herein. He used to collect rent on behalf of the estate. The rent which he received from these tenants were not his, but rather for the estate. This is what the plaintiff told the court. If he presented himself as the owner to the tenants, which was highly doubtful, it was unfortunate. What the Defendant was claiming, if at all that was what he did, was what belonged to the estate herein, and that of Ahmed Salim Bader.
56. In terms of the decree herein, there was nothing like the beneficiaries of the estate of Ahmed Salim Bader. The late Ahmed Salim Bader together with his two sons inherited in equal share what was apportioned to them in this decree. The two sons had rights in that portion, not as beneficiaries of their deceased father, but as proprietors who inherited the land from their grandfather. At paragraph 7, the Defendant was talking of obtaining consent from the estate of Ahmed Salim Bader to demolish the structure which was theirs and to build a permanent one.
57. The Learned Counsel told the court that the estate of Ahmed Salim Bader did not own the suit property and therefore could not purport to give consent. In fact, there was no Legal Representative of the estate of the said Ahmed Salim Bader. No administrator had been appointed. That alleged consent only amounted to intermeddling with the estate of the deceased. At paragraph 10 the Defendant still contended that the Plaintiff had no interest in the suit property as he was not a beneficiary of the estate of Ahmed Salim Bader who was the owner of the same.
58. The Learned Counsel further proceeded to submitted that the Defendant was deliberately feigning ignorance of the fact that the suit property belonged to the deceased herein, and not Ahmed Salim Bader. The late Ahmed Salim Bader and his sons only had beneficial interest in a portion of it measuring 5 Acres. In response to the contents of Paragraph 14, the Learned Counsel reiterated that on their submissions hereinbefore made, no survey skill could remove this structure from the portion which was earmarked for the mosque and madrasa herein, to the portions which were given to the late Ahmed Salim Bader and his two sons aforesaid.
59. As pertaining the documents contained in the 2nd, 3rd and 4th Defendant's list of documents, being the acknowledgements and consent to transfer, which were alleged executed by one Asiya Omar Badru and Abdulmuin Ahmed Salim, were executed by people who had no authority to deal with Plot No. 661/II/MN as they were not the executors of the estate of Saleem Badar Abdul Banqui Al-Amry (aka Salim Bader Said Al-Amry) which owned the same.
60. The Learned Counsel submitted that they did not understand and it had not been explained why they were receiving money from Yunis Ali & Co. Advocates on behalf of the Defendant. With respect to the many payment receipts contained therein, they submitted that it appeared that they bore the stamp of the executor of the estate of Salim Bader Al-Amry. What was apparent here was that the Defendant and M/s. Yunis Ali & Co. Advocates were taking advantage of the unfortunate mental state of these two sons of Ahmed and causing them to use this stamp even after the death of all the executors of the estate herein including their father Ahmed Salim Bader.



61. The Learned Counsel averred that the Law firm of M/s. Yunis Ali & Co. Advocates was the Advocates for these two sons at the Kadhis Court. It was also this Law firm which transacted this said transaction of sale which led to the building of the offending permanent house by the Defendant. The said Law firm of Advocates participated in the sub - division. Before it was approved by the Kadhis Court he demanded for sub - division schemes, together with the Deed Plans, which were given. This Law firm, which was also representing the Defendant herein, knew that the structure complained of was right inside the portion which was meant for the said Asal Mosque and Madrasa.
62. It was unfortunate that it was this Law firm which was now recording all these kind of statements from the Defendant. On the issue of the mental status hereinabove mentioned, they submitted that the Plaintiff did aver and demonstrated in his supplementary affidavit to his Notice of Motion which was dismissed, that these sons had mental problems, and annexed a report to that effect for Dr. Ernest H.O. Mahero dated 21st May, 2019, which the Defendant dismissed as too old. This issue had been there with these two sons, and was getting worse day by day. The Plaintiff was forced to apply to be the Manager/Guardian Ad Litem of their estate. See the Judgment by Justice Gregory Mutai in Petition No. E019/2023 appointing him as such.
63. The Learned Counsel submitted that this mental illness of those two sons was *res ipsa*. The Defendant, and even M/s. Yunis Ali, who had represented them before the Kadhis Court, were aware of this unfortunate situation. It was their prayer that the Honourable Court do ignore the Defendant position and allowed Plaintiff's case as prayed. The Plaintiff brought this suit in his capacity as the heir to this estate, and *cestue que trust* (person who had legal and equitable interest in the trust) within the meaning of Order 37(1) of the Civil Procedure Rules, 2010, since the deceased left a Probate Will which created a trust. See the deceased Will and a translation thereof (Plaintiff's documents 1) and the Letters of Administration with that will attached-document no.2.
64. The Learned Counsel concluded that as this suit progressed, the Plaintiff eventually became the proprietor as trustee of the portion of land where this offending structure stands. Therefore, the Learned Counsel asserted that contrary to the ruling by Justice Yano, the Plaintiff had both capacity and locus to bring this action.

B. The Written Submissions by the Defendant

65. The Defendant through the Law firm of Messrs. Yunis Ali & Company Advocate field his written submissions dated 4th December, 2024. Mr. Bosire Advocate proceeded to submit that the Plaintiff instituted this suit vide Originating summons dated the 23rd December 2020, supporting affidavit which was subsequently converted to the Plaint and witness statements as ordered by the court on the 17th January 2022. The Defendant filed a Replying Affidavit to the Originating Summons which were converted to Defence as per orders of the court. The matter was heard by way of viva voce evidence
66. According to the Learned Counsel, the Plaintiff's case was that he was an heir to the trust created by the Probate Will of Saleem Bader Abdul Al - Amry (deceased). The deceased had several properties but the one in contention and the subject in this case was Plot No.661/II/MN.They stated that the deceased prior to his death allowed individuals to construction houses on this land on condition that they paid ground rent. In this particular case, the deceased allowed Halima Anderson Gylden to construct a Swahili house which was subsequently sold to the Defendant herein.
67. After purchasing the property, the Defendant demolished it and constructed another house. The Plaintiff argued that that his interest in the house ceased to exist when the house was demolished. He proceeded to state that the property had been surveyed and new titles had been issued. That the matter



was done while it was still in court. No reasons were given why sub-division was done yet the matter was in court.

68. With regard to the Defendants case. The Learned Counsel argued that the Defendant purchased the house without land from one Halima Anderson Glyden for the purchase price of a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) in cash. He produced a sale agreement and an acknowledgment of the receipt of the cash to that effect. (Defendant Exhibit Numbers 1, 2 and 3). He stated that prior to purchasing the suit property he sought the consent of the beneficiaries of the estate of the deceased which was given. He attached the said consent to purchase the property. (Defendant Exhibit Number 4 as a copy of the consent).
69. The Defendant confirmed that Halima Anderson Glyden (the vendor) was paying rent substantiating her interest in the suit property. He produced the rent receipts and sale agreement between the said Halima Anderson and Said Abdalla. (Defendant Exhibit Numbers 5 and 7 respectively). The Learned Counsel proceeded to state that the house without land the Defendant had purchased was depilated, old and in state of disrepair. With the blessings and consent of the beneficiaries of the estate of the deceased, he demolished the building in the exact position that the initial property was laid (Defendant Exhibit Number 6) He did not encroach on the other people's property. He produced the survey report marked as Defendant Number Exhibit 10.
70. The Defendant stated that where the land was housed (Plot No. 661/MNnow sub - division No.16335, 16336 and 16337)belonged to the estate of Ahmed Salim Bader. He had been paying land rent to the beneficiaries of the estate of the deceased every month without fail and produced the receipts. (Defendant Exhibit Number 9).
71. The Learned Counsel relied on the following issues for determination:-
 - a). Whether the defendant has interest on the house without land?
 - a. Whether the Defendant's Actions Amounted to a Violation of the Defendant's Legal Rights as a House without Land Owner
 - b. Whether the Defendant was intermeddling with the estate of the deceased?
 - c. Whether the court has jurisdiction to hear this matter?
 - d. Whether the Plaintiff had locus standi to institute this case
72. On whether the Defendant had interest on the house without land. The Learned Counsel submitted that the Defendant lawfully purchased the house without land from one Halima Anderson Glyden for a consideration of a sum of Kenya Shillings Four Million (Kshs. 4,000,000/=). The Defendant had produced a Sale Agreement dated 11th February 2019 (marked as Defendant Exhibit Number 1) and an Acknowledgment of Receipt of the purchase price (marked as Defendant Exhibit Numbers 2). This fact remained uncontested by the Plaintiff.
73. The land upon which the house stood belonged to the Estate of Saleem Bin Saleem Bin Badr Al Amry. The deceased established a trust, which was admitted to probate vide Kadhi Succession Cause No. 243 of 1997 (OS). The appointed executors were Abdulahi Bui Omar Saleem Bui Badu and Abdul Karim Bui Abdallah, who were both now deceased. The distribution of the deceased's properties had been completed, save for Plot No.661 Section II MN measuring 8.18 acres, which was sub - divided in year 2022 after this suit was instituted. The said plot was to be distributed as follows:-5 acres to Ahmed Salim Bader and his sons,0.456 acres to Sudi,0.45 acres to Lashed Mohamed Mobarak,2.18 acres to Abdullahi Salim Badri, to hold in trust for Asal Noor Madrasa, the Mosque, and Safaricom Towers



74. It was not disputed that, at the time of distribution, the property had tenants, including the Plaintiff, who occupied houses without land and paid ground rent to the Estate of Ahmed Salim. The Defendant averred that the land upon which his house stood was owned by Ahmed Salim Bader who was a brother of the Plaintiff, who duly paid ground rent to the Estate of Ahmed Salim and, subsequently, to Ahmed Salim's heirs. The Defendant had produced ground rent receipts (marked as Defendant Exhibit Number 9) evidencing payments made by both himself and Halima Anderson to the Estate.
75. At no time has the Plaintiff received ground rent from the Defendant, signifying that the Plaintiff had no proprietary interest in the land. It would therefore be inequitable for the Plaintiff to now assert that he held the property in trust for the mosque, madrasa, and Safaricom Towers.
76. The Learned Counsel submitted that the Plaintiff's unilateral decision to sub - divide the property, without consulting the Defendant or other beneficiaries of the Estate, was undertaken with the intent of legitimizing illegal dealings with the property. This sub - division occurred during the pendency of this suit, a clear indication of bad faith on the part of the Plaintiff. While the beneficiaries of the Estate were entitled to utilize their respective shares of the property, the Plaintiff ought to have engaged the Defendant, who resided on the property, before effecting the sub - division.
77. On whether the Defendant's actions amounted to a Violation of the Defendant's Legal Rights as a House without Land Owner. The Learned Counsel posited that the Plaintiff, in his statement, acknowledged that the Defendant was the rightful owner of the Swahili house purchased from Halima Anderson. The Plaintiff's contention was that the Defendant demolished the original Swahili house, thereby allegedly terminating his interest. The Plaintiff further argued that the Defendant, if permitted to demolish the house, should have constructed a temporary Swahili structure instead of a permanent one. This argument was unfounded and without legal basis,
78. According to the Learned Counsel the Plaintiff did not dispute that the Estate of Ahmed Salim:Consented to the Defendant's construction of the house.Received the purchase price for the house without land, andAccepted ground rent payments from the Defendant.
79. Despite this, the Plaintiff now claimed that the property had been allocated to him in trust for the mosque and madrasa. He relied on a sub - division scheme but had failed to produce any meeting minutes or records evidencing an agreement among the beneficiaries that the Defendant's house would fall within the Plaintiff's share. This suggested that the Plaintiff was acting out of personal vendetta and with the sole purpose of settling scores with the Defendant.
80. The Learned Counsel asserted that the purchase, demolition and rebuilding of the house with the consent of the Estate of Ahmed Salim created a valid tenancy agreement between the Defendant and the Estate, entitling the Defendant to occupy the land upon which his house stood. The legal doctrine of 'house without land' had been judicially recognized as unique to the Kenyan coastal region. The Court of Appeal, in the case of:- "Abdulkrazak Khalifa Salimu vHarun Rashid Khator & 2 Others [2018] eKLR", held that the concept was analogous to a lease, where the house owner held distinct rights from the landowner and was entitled to the peaceful enjoyment of the land on which the house was constructed.
81. Historically, disputes concerning 'houses without land' were resolved under the now-repealed Transfer of Property Act. The applicable provisions under the current law are Sections 54 and 57 of the [Land Act](#), which outline the rights and obligations of tenants. In this case, the Plaintiff was not a party to the tenancy agreement between the Defendant and the Estate of Ahmed Salim and could not purport to label the Defendant a trespasser.



82. On whether the Defendant was intermeddling with the estate of the deceased. The Learned Counsel submitted that the parties herein subjected themselves to the jurisdiction of the Kadhi's Court in Succession Cause No. 243 of 1997 (OS). Being Muslims, they were governed by Islamic law, not the Law of Succession Act (Cap. 160 of the Laws of Kenya), as erroneously alleged by the Plaintiff.
83. The Learned Counsel contended that the issue of intermeddling was not provided for under the Kadhi's Court Rules. The appropriate forum for addressing any allegations of intermeddling was the Kadhi's Court or a family court with jurisdiction over succession matters under Islamic law. Without prejudice to the above, the Defendant argued that he was not intermeddling with the Estate of the deceased. The Defendant had consistently paid ground rent to the Estate of Ahmed Salim, thereby establishing a lawful tenancy and confirming his rightful ownership of the house without land. Consequently, the Defendant was a legitimate occupant of the house and had a valid tenancy arrangement, rendering any claims of intermeddling by the Plaintiff baseless and without merit.
84. On whether the Court had jurisdiction to hear this matter. The Learned Counsel submitted that the Environment and Land Court (ELC) derives its jurisdiction under Article 162(2) (b) of the Constitution of Kenya and Section 13(2) of the Environment and Land Court Act, 2011, which dealt with occupation, use, and title to land. However, the dispute primarily concerns the distribution of the deceased's estate, which fell under the jurisdiction of the Kadhi's Court or High Court handling succession matters.
85. The core issue in this case was the disposal, possession, or demolition of a house without land. The Defendant, with the consent of the beneficiaries, purchased the house, while the Plaintiff sought to dispossess the Defendant. This issue primarily concerned succession and distribution of the deceased's estate, which lied outside the ELC's purview.
86. To support on this point, the Learned Counsel relied on the case of "Susan Katinda Lewa & Andrew Nzioka Ndambuki v Christine Ndinda Maingi, James Maundu Makole, Joseph Nzonga Mulandi, Rose Katinda Muoki & Peter Makau Mulwa (Environment & Land Case 97 of 2014) [2015]KEHC 6185(KLR) (27 February 2015)", the court held:-

"The core issue in the instant suit is Rose Kendi Muoki's sale to the 3rd Defendant of 2 of suit land before distribution. It is not denied that she is a beneficiary just like the Plaintiffs. The Plaintiffs have not denied also that they sold part of the suit land to a third party before distribution. The sale by both sides amounts to intermeddling which the court finds falls in the jurisdiction zone of the family court and not ELC. The family court, in distributing the estate, will decide whether Rose Katinda will get the same sold land reduced from her shares, and so will the other beneficiaries who have disposed of part of the estate properties."

87. The Learned Counsel averred that the Plaintiff's sub - division of the estate during this suit violated "the doctrine of lis pendens", which prevented altering the status of property during ongoing litigation. In the case of:- "Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited [2017] eKLR", Onguto J. stated:-

"The doctrine of lis pendens, often expressed in the maxim pendente lite nihil innovetur (during litigation, nothing should be changed): see Black's Law Dictionary 9th Ed, was until May, 2012 part of our statute law. With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or



dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made, except with the authority of the court ad on terms.”

88. Similarly, in the case of:- “Bernadette Wangare Muriu v National Social Security Fund Board of Trustees & 2 Others [2012]eKLR”, the court held:-

“Under the doctrine of lis pendens, a party cannot be allowed to benefit from an act whose import is to frustrate and render useless the Judgment of the Court in the proceedings, of which he or she is a party.”

89. It was the Learned Counsel’s submission that the Plaintiff’s sub - division of the estate was a strategic move to prejudice his legitimate interest in the property and should be addressed by the succession court.

90. On whether the Plaintiff had locus standi to institute this case. The Learned Counsel informed Court that it was not contested that the Plaintiff only acquired an interest in the property after the sub - division of the property, which was undertaken after the matter was filed in court. As earlier submitted, the sub - division was only undertaken to prejudice the Defendant’s legitimate interest in the said suit property and was contrary to the principle of lis pendens.

91. It was not lost on them that the Defendants originally obtained an audience before this court via Order 37 Rule 1 of the Civil Procedure Rules, 2010 but the court’s suo moto conversion of the originating summons into a Plaint substantially changed the Plaintiff’s approach to the case, hence the need to obtain Letters of Administration. It was contested that the Defendants and the previous owner had been paying ground rent to the estate of Ahmed Salem Bader and his beneficiaries and continued to pay rent. Thus, there was no nexus between the suit properties and the Plaintiff. At this instance, the Plaintiff never had an audience before the court. The Learned Counsel referred the Honourable Court to the authority of:- “Alfred Njau vCity Council of Nairobi (1983) KLR 625”, where the Court of Appeal held that:-

“.....locus standi literally means a place of standing and refers to the right to appear or herd in court or proceedings and to say that a person has no locus standi means that he/she has no right to appear or be heard in such and such proceedings”

92. The mere fact that the Plaintiff was a beneficiary of the estate of Saleem Bader Abdul Baqui Al Amry (aka Salim Badir Said Al-Almry) never negated the fact that they should have first been issued with a Grant specific to filing this suit or obtained the consent of other beneficiaries. The court had, in many instances, frowned upon parties that attempt to institute cases without the grant, especially where there were many beneficiaries or interested parties. A case in point was “Julian Adoyo Ongonga vFrancis Kiberenge Abano, Migori Civil Appeal No. 119 of 2015”, where Mrima J held:-

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case simply put, a party without locus in a civil suit lacks the right to institute and or maintain suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in suit without locus can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person, since in most cases the estate involves several other beneficiaries or interested parties.”



93. Similarly, the ELC court in “Daniel Njuguna Mbugua v Peter Kiarie Njuguna, District Land Registrar, Thika & Attorney General (Environment & Land Case 7 of 2020)[2021]KEELC 4105 (KLR) (4 March 2021) (Ruling)” struck out the case with costs, despite the fact that the Plaintiff was a beneficiary to the estate, as this did not preclude him from obtaining the relevant grant. Further, the court in the case of:- “Isaya Masira Momanyi (Suing on behalf of the Late Masira Onsase)y Daniel Omwoyo & Kebungo Orina [2017]KEHC 2083 (KLR)” while striking out a suit for failure to obtain the relevant grant stated that:-

“With respect I do not agree that failure to obtain a grant of letters of administration to a deceased estate to enable one to acquire capacity to file a suit on behalf of the deceased estate would be a mere procedural technicality. The law is express that a deceased estate can only be represented by a person who is duly authorized to do so”.

94. The obtaining of Grant Letters of Administration, in this case, was very crucial, as it was mandated by the law, and it would assist the court in determining who is indeed the owner of the contested property, bearing in mind that some of the beneficiaries had consented to the sale of the suit property, thereby avoiding multiple suits by different beneficiaries. The Plaintiff, in his submission, raised the issue of the mental status of the deceased’s sons and proceeded to produce the Judgment of the High Court No. E019 of 2023, granting guardianship to the Plaintiff. The Learned Counsel submitted that this issuedid not arise during the trial and was an entirely new issue before the court. The said decision was not produced as an authority in this case.

95. It is trite law that submissions cannot introduce new issues. The Learned Counsel was guided by the case of “Republic vChairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting and Training Limited & another [2014]eKLR” in which the court held that:-

“The Applicant, the Respondents, and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.” (Emphasis added)

96. Likewise, in the case of:- “Clips Limited v Brands Imports (Africa) Limited formerly named Brand Imports Limited [2015] eKLR” the court observed that:-

“In paragraph (iii) of its supplementary submissions, the Defendant submits that it highly regrets it did not produce any evidence of usage of the disputed marks and submits the court cannot ignore this fact. However, it is trite law that new issues cannot be raised in submissions.” (Emphasis added)

97. Also, in the case of:- “Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014]eKLR” the court held that:-

“Submissions cannot take the place of evidence...What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”



98. The Learned Counsel prayed that the submissions were based on the mental status of the beneficiaries being ignored as rightly guided by the aforementioned authorities. Finally, the Learned Counsel submitted that it would have been improper to conclude the submission without addressing the Plaintiff's allegations against the Law firm of Yunis Ali & Co. Advocates, claiming that they were taking advantage of the mental status of the sons/beneficiaries of the deceased's estate. These statements were defamatory. However, they chose not to engage in settling scores through submissions and instead take the high road.

VI. Analysis and Determination

99. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the myriad of cited authorities made by both the Plaintiffs and the Defendant, the relevant provisions of *the Constitution* of Kenya, 2010 and the law.

100. In this regard, in order for the Honourable Court to arrive at an informed, fair, Equitable and reasonable decision herein, it has framed three (3) key issues for its determination. These are namely:-

- a. Whether the Plaintiff has made out his claim?
- b. Whether the Plaintiff is entitled to the prayers sought?
- c. Who meets costs of the suit

Issue No. a): Whether the Plaintiff has made out his claim

101. Under this sub – heading, the Honourable Court has deciphered that the main issue is whether the Plaintiff is entitled to ownership of all that parcel of land known as Plot No. 661/II/MN by virtue of being an heir/cestui que trust in respect of trust created by the Probate Will of the deceased herein. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as “the Burden of Proof” and is encapsulated for by the provision of Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya which provides as follows:-

“107. Burden of Proof (1) 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.(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

102. The provision of Sections 3 and 3A of the *Civil Procedure Act*, Cap. 21 provide that: -

3: “In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed by or under any other law for the time being in force.”

3A “Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

103. The provision of Order 37 Rule 1 of the Civil Procedure Rules, 2010 on the other hand states that: -

“The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or



otherwise, under any such creditor or other person as aforesaid, may take out as of course, an Originating Summons, returnable before a Judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust of any of the following questions –

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
- (b) the ascertainment of any class of creditors, devisees, legatees, heirs or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into any Court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

104. Therefore, heirs are permitted by the provisions of Order 37 Rule 1 to seek, by Originating Summons, any relief not amounting to administration of the Estate of a deceased person and raise any questions affecting their rights or interests as heirs, ascertain the class of heirs to be furnished by the executors or trustees with accounts and the determination of any question arising out of the administration of the Estate or trust – “Mikesh Manchand Shah & Another v Priyat Shah & Another C.A Civil Appeal No 39 of 2014 [2015 eKLR]”. It is settled law that the procedure for approaching the Court through Originating Summons is not intended for matters which involve serious and complex questions of law and fact. Rather, it is a procedure to enable the settlement of simple matters – “James Njiro Kibutiri v Elius Njau Kibutiri C.A Civil Appeal No 3 of 1982 [1983 1 KLR 38”].
105. In this case, the Applicant has contended that the deceased, before his death, allowed some people to build temporary Swahili houses, being houses without land, on the subject property. One such person was Said Abdalla Said (now deceased) the father of Halima Anderson Gylden. In the fullness of time, Halima Anderson Gylden sold that Swahili house without land to Mr. Hemed Mohamed Mbarak, the Defendant herein. The Defendant, for whatever reasons only known to him, submitted by his Counsel to build a more modern house, demolished the said house without land.
106. It came as a surprise when the Plaintiff sometimes on or about the 14th day of December, 2020, moved into the portion where he demolished the said Swahili house and started constructing a permanent house. Annexed in the affidavit and collectively Marked “F” were copies of a set of the photographs taken from the site. It was his position and he believed it was the correct position, that the interest the Defendant had on the subject land was only limited to that of Swahili house without land he bought, and not on the land itself. The moment he demolished the said structure his interest ceased. But even if a contrary reasoning was adopted, it was still his position that the Defendant has no right to build a permanent building on the subject land. The concept of house without land as has been a tradition in the Coast region was only limited to temporary Swahili houses, and not permanent ones.



107. Besides the foregoing, this property has been distributed in the manner stated in paragraphs 10 hereof, and the same had been surveyed, and in terms of the subdivision scheme which was now pending approval before the County Government of Mombasa, this subject portion falls within the 2.18 Acres given to the Plaintiff to hold in trust for the said Madrasa and mosque.
108. Does the Applicant's Originating Summons fall within the above stated provisions? On the applicability of Order 37 Rule 1, it is clear from the documents provided in evidence that the Applicant claimed to be heir/cestui que trust in respect of trust created by the will of the deceased herein, the late Saleem Bader Abdul Baqui Al-Amry (aka Salim Badir Said Al-Amry) executed on the 11th day of March, 1979 over his estate which comprises of, among others, Plot No. 661/II/MN, which property has been trespassed upon by the Defendant herein, Mr. Hemed Mohamed Mbarak. He had brought this suit seeking certain rights and orders in his capacity as cestui que trust and for the grant of a vesting order as the trustee trust created by the Probate Will. I therefore find that commencing the suit through an Originating summons herein concerns a trustee, and a cestui que trust under the deed and other instruments referred to in the foregoing was properly brought under the provision of Order 37 Rule 1 of the Civil Procedure Rules, 2010.
109. The second issue is whether the vesting order can be granted pursuant to the provision of Section 45 of the *Trustee Act*. The Defendant testified and fact not disputed at all, that he purchased a house without land from Halima Anderson Gyden sometime in the year 2019 for a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) only. The said house without land was erected on a portion of land known as Plot Number 661/Section II/MN in Mtopanga. The former owner of the house without land Halima Anderson Gyden paid monthly ground rent for the said portion of land to Ahmed Salim Bader and later upon the demise of the Late Ahmed Salim Bader to the Estate of the late Ahmed Salim Bader. Annexed herein and Marked as "HMM - 2" copies of receipts and acknowledgment depicting the payment of land rent to Ahmed Salim Bader and later to the Estate of the late Ahmed Salim Bader.
110. The purchase, demolition and rebuilding of the house with the consent of the Estate of Ahmed Salim created a valid tenancy agreement between the Defendant and the Estate, entitling the Defendant to occupy the land upon which his house stands. The legal doctrine of 'house without land' has been judicially recognized as unique to the Kenyan coastal region. The Court of Appeal, in "Abdulkrazak Khalifa Salimu v Harun Rashid Khator & 2 Others [2018] eKLR", held that the concept is analogous to a lease, where the house owner holds distinct rights from the landowner and is entitled to the peaceful enjoyment of the land on which the house was constructed.
111. On the question of house without land; in "Famau Mwenye & 19 others v Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005" (Ouko, J.) (as he then was) described the concept of house without land as follows:-

"The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as 'house without land'. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, 'whose is the soil, his is also that which is above it']."



112. In the case of “Murtahar Ahamed Dahman & Another v Athuman Sudi [2013] eKLR” Angote J, had the following to say regarding the concept of a house without land:-

“The land question within the coastal region is complex due to its peculiar historical and legal origins. The region is in a very unique position because of its geographical positioning and with it the peculiar historical ties unlike the other part of the country. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap. 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap. 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan law and the Land Titles Act, Cap. 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent.”

113. The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. The provision of Section 107 of the Transfer of Property Act 1882 of India provides that a lease of an immovable property from year to year, or for any term exceeding one year or in respect of which one yearly rent is reserved, can only be made by a registered instrument. The site acquired by the Plaintiffs for the erection of their houses under oral agreements are not under registered instruments. Where a party enters upon the land of another and erects a building with the permission of the land owner, such lease, tenancy or licence can be determined by giving 30 days’ notice, requiring the house owner to remove his house and restore the land to the state it was before entry. To me, the issuance of the notice extremely critical and fundamental in law.
114. It is an undisputed fact that the Defendant lawfully purchased the house without land from one Halima Anderson Glyden for a consideration of Kenya Shillings Four Million (Kshs. 4,000,000/=). The Defendant has produced a Sale Agreement dated 11th February 2019 (marked as Defendant Exhibit Number 1) and an Acknowledgment of Receipt of the purchase price (marked as Exhibit Number 2). In the course of time, the Defendant continued remitting the monthly ground rent thus sustaining the relationship as envisaged on the concept of ‘land without land’. Subsequently, the Defendant asserted that with his desire to construct a modern house on the same space, decided to demolish the old and dilapidated structure and constructed a permanent house. The Defendant has contended that this was all undertaken through obtaining the consent of the owners of the land..
115. The land upon which the house stands belongs to the Estate of Saleem Bin Saleem Bin Badri Al Amry. As parties, they opted to pursue the Mohammedan Law and thus submitted themselves before the Khadhi’ Court. The deceased established a trust, which was admitted to probate vide Kadhi Succession Cause No. 243 of 1997 (OS). The appointed executors were Abdulahi Bui Omar Saleem Bui Badu and Abdul Karim Bui Abdallah, from the testimony before this Court are both now deceased. None of the parties herein provided any empirical evidence to show their replacement in accordance with the provision of Law. The Court has been left to assume there exists a vacuum as far as Legal Representation to the Estate of Saleem Bin Saleem Bin Badri Al Amry was concerned to date.



116. Nonetheless, the distribution of the deceased's properties has been completed, save for Plot No.661 Section II MN measuring 8.18 acres, which was sub - divided in the year 2022 after this suit was instituted. The said plot was to be distributed as follows:-5 acres to Ahmed Salim Bader and his sons,0.456 acres to Sudi,0.45 acres to Lashed Mohamed Mobarak,2.18 acres to Abdullahi Salim Badri, to hold in trust for Asal Noor Madrasa, the Mosque, and Safaricom Towers.
117. Notwithstanding the above stated state of affairs, the management of the Estate of the deceased still provided on smoothly. It was not disputed that, at the time of distribution, the property had tenants, including the Plaintiff, who occupied houses without land and paid ground rent to the Estate of Ahmed Salim. The Defendant averred that the land upon which his house stands is owned by Ahmed Salim Bader who was a brother of the Plaintiff, who duly paid ground rent to the Estate of Ahmed Salim and, subsequently, to Ahmed Salim's heirs. Indeed, the Defendant produced ground rent receipts (marked as Defendant Exhibit Number 9) evidencing payments made by both himself and Halima Anderson Glyden to the Estate.
118. This has been a highly contested matter. The question to be decided by this Honourable Court is whether or not these transactions were valid or invalid. On the one hand, the Plaintiff vehemently avers that these transactions were invalid, illegal and wrongful on several grounds. Firstly, that the house without land belonged to his now deceased father and that Halima Anderson had no authority to transact in the said house. Secondly, by the Defendant causing the demolition of the temporary structure automatically cease to have any legal rights bestowed on him under the concept of 'house without land'. Finally, the Defendant unilaterally undertaking to construct a permanent house on the land allegedly away from the space allocated and when the matter was already in Court and whereby sub – division was undertaken and the portion allocated to the Plaintiff which according to the Deep Plan he offered for the construction of a Mosque and Madaras. House. To this effect, he urged the Court to cause a demolition of the said structure or in the alternative.....,
119. Juxtapose, on the other hand, the Defendant vigorously opposed the contentions by the Plaintiff. He affirmed that the transactions were above board and valid. To begin with, he purchased the property from M/s. Halima Anderson Glyden having fulfilled all the terms and conditions stipulated in the duly executed Sale Agreement. He affirmed that he paid the purchase price in full after recording the sale agreement. Secondly, he added that he took physical possession of the house-without-land. IN the course of tie he continued remitting the monthly ground rent to the representatives of the Estate of the deceased. Thirdly, seeing that the temporary structure was getting old and dilapidated he sought for the consent of the owners and on being allowed he undertook to construct a permanent house on the same spot where the temporary house had been situated. Finally, he was not involved in the proceedings that took place in Court and which allegedly made a determination for the sub – division of the land for the Estate of the Deceased. It is this contestation that the court is called upon to decide. In order to make a determination of the dispute, the court was guided by the established facts and the relevant law.
120. On substance, however, the success or failure of the Plaintiff's contentions rested on the proof or lack of proof of the ownership of the house-without-land by the Plaintiff's now deceased father. The Defendant entered into a sale agreement dated 11th February, 2019. There was acknowledgment of receipt of cash by Asiya Omar Badru and Abdulmuin Ahmed Salim. The Defendant produced a consent to sell and transfer signed by Asiya Omar Badru and Abdulmuin Ahmed Salim. The Defendant also produced a consent to construct a one story building on plot No. 661 SEC II/MN for a consideration of Kenya Shillings Two Fifteen Thousand (Kshs. 215,000/-) dated 14th March, 2019.
121. Further the court takes note that there was a sale agreement between Said Abdalla Said and Halima Anderson Glyden for a Swahili house comprising of 8 rooms on Plot No. 661 SEC II/MN dated July



2000. Therefore, by the first test, the court finds that the owners of the building were the sellers who were in possession and they had full authority to transact in the property.
122. Asiya Omar Badru and Abdulmuin Ahmed Salim then Halima Anderson Gildenhad full legal capacity to sell the house. To me, there was no illegality on their part when they sold it. This has the effect of distinguishing the cited case of “Root Capital Incorporated v Tekangu Farmers Co - operative Society Limited & Anor [2016] eKLR” because in the present scenario the transactions were lawful and validly conducted by persons who had capacity to contract. On the second aspect of the test, the recognition of the physical possession by the owner of the ground showed that prior to 11th February, 2019 it was Asiya Omar Badru and Abdulmuin Ahmed Salim who were collecting the rent who consented to the new purchaser to knock down the old bungalow building and construct a new storied building. This confirmed that not only had the owners of the ground recognized the previous owners but had also taken cognizance of the successor owner of] the house-without-land (the Defendant).
123. In all this course of events, the deceased father featured nowhere because in fact and in law he owned nothing. If the contrary position was true (which it was not), then under the provision of Section 108 of the Evidence Act Cap. 80 the evidential burden lay on the Plaintiff to produce the trustees of the deceased estate.
124. The provision of Section 108 of the Evidence Act provides:-
108. Incidence of burden
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence is given on either side.
125. By failing to discharge this specific evidential burden, the court finds that the Plaintiff could not prove that their now deceased father was the owner to this extent. In conclusion on this issue, the court finds no material or evidence to prove that the house in question was owned by the deceased estate. The court must not act in vain. The actual house that was sold to the Defendant no longer existed. It was demolished by the Defendant as an owner who then put up a storeyed and permanent building on the same space. This was done with the consent of the owner of the ground upon which the former house stood. If the court was to order a reversal, which included a demolition of the said building as urged, it would not only be totally absurd, in vain but also extremely draconian to say the very least.
126. The last nail in the coffin was the evidence from Kadhi’s Court in Misc. Application Succession Cause No. 243 of 1997 (O.S). The certified order was marked as Defendant’s exhibit Number 8 in the Defendant’s bundle of documents. As per the order of the Honourable Sheikh Mohamed dated 25th May, 201, the said property was divided amongst the family of the deceased and 2.18 acres to Abdilahi Salim Badri holding in trust for Asal Noor Madrasa, Mosque and Safaricom Towers proceed. 10.5% of the 5 acres of the 8.18 acres including the demolished house of the late Salim Bin Bader. From the foregoing reasons, therefore, I discern that the Plaintiff’s case has to be dismissed in its entirety. In saying so, I find that the Plaintiff lacks substance and has failed to prove his case on a balance of probabilities as required by the legal standards.

IssueNo. b). Whether the Plaintiff is entitled to the prayers sought

127. Having already made the final decision as stated above, there is really nothing valuable to add under this Sub – title. However, the only disclaimer, is for the Plaintiff to be declared as heir/cestui que trust to the Will of Saleem Bader Abdul Baqui Al-Amry (aka Salim Badir Said Al-Amry) executed on 11th March, 1979. But in as far as this instant case is concerned, the Plaintiff is not entitled to the



prayers sought. To this end, I reiterate and make a finding that the suit fails in its entirety and should be dismissed.

Issue No. c). Who bears the costs of the suit

128. It is now well established that the issue of costs is at the discretion of the Court, Costs mean the award that a party is awarded at the conclusion of any legal action or proceeding in any litigation. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

129. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. The Proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

130. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

131. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of:- “*Morgan Air Cargo Limited v Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

132. By the event it means the result or outcome of the legal action. In this case, as this Honourable Court taking that the Plaintiff has failed to establish its case, has opined above, the Defendant is entitled and thus shall have the costs.



VII. Conclusion and Disposition

133. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff has not established their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement entered in that the suit by the Plaintiff/ Applicant as per the originating summons dated 23rd December, 2020 fails in its entirety and is hereby dismissed as it lacks substance and the Plaintiff has failed to prove his case on a balance of probabilities.
- b. That the court vacates all interlocutory orders, injunctions and any restraining orders that had been issued against the Defendant in relation to the property in question. The Defendant has full liberty, possession and legal authority to proceed to deal with his property as he deems fit and just.
- c. That costs of the suit shall be awarded to the Defendant to be borne by the Plaintiffs jointly and severally.

It Is so Ordered Accordingly.

**JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS
SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.**

.....

HON. MR. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Mitsune Advocate holding brief for Mr. Odongo Advocate for the Plaintiff/Applicant.
- c. Mr. Mitei Advocate holding brief for Mr. Yunis Advocate for the Defendant/ Respondent

