



**Owino v BIRTHIA & another (Environment and Land Case
225 of 2012) [2023] KEELC 19314 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 225 OF 2012**

**LL NAIKUNI, J
JULY 19, 2023**

BETWEEN

MILLICENT ODERO OWINO PLAINTIFF

AND

STANELY THINE BIRITHIA 1ST DEFENDANT

JUMA OMAR MUSA ALIAS MUJUMA 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Court relates to the Civil Suit that was instituted by the Plaintiff, Millicent Odero Owino, (in her capacity as the duly appointed Legal Representative of the Estate of her late husband, John Owino Opiyo) (Hereinafter referred to as “The Deceased”) through a Plaint on 16th October, 2012. Subsequently, on 17th June, 2014, the Plaintiff filed an Amended Plaint dated 16th June, 2014, accompanied with the witness statements and documents in support of her case. It was against the 1st and 2nd Defendants herein.
2. Upon being served with the Summons to Enter Appearance upon the 1st and 2nd Defendants enter appearance on 18th October, 2012. On 29th October, 2012, they filed a Defence and Counter Claim dated 25th October, 2012. Later on, on 21st July, 2014, the Defendants herein filed an Amended Defence and Counter Claim dated 4th July, 2014 and fully complied with the provision of Order 11 of the *Civil Procedure Rules, 2010*.
3. In earnest, on 30th November, 2021 the suit commenced hearing whereby the Plaintiff and the Defendants summoned their witnesses who testified accordingly. On 26th October, 2022 both the parties closed their case and the Court reserved a date to deliver this Judgement herein.



II. The Plaintiff's case

4. From the filed pleadings, the Plaintiff herein being the widow and the duly appointed Legal Administrator to the estate of the late John Owino Opiyo – the deceased. While the 1st Defendant was a male adult of sound mind and understanding, the 2nd Defendant also a male adult was sued being a representative of the Estate of Omar Musa (deceased) who at material times was the owner of a Parcel of land known as Plot No. 1665 Section/VI/MN. – the suit land herein.
5. On or about 9th of August 1985, the deceased, John Owino Opiyo purchased an existing building on the suit property from one James Otieno with the full consent of the landowner Omar Musa. Subsequently, the deceased demolished the existing house and erected his own premises. Thereafter, he continued paying ground rent to Omar Musa and his representative, the 2nd Defendant Juma Omar Musa alias Mujuma.
6. Upon the demise of the deceased, the building became part of the deceased's estate, and the Plaintiff continued paying ground rent to the 2nd Defendant and occupying it as a tenant. However, it was until May 2012, the 1st Defendant claimed to have purchased the same building from the 2nd Defendant as the landowner, obtained orders to evict the tenants, and proceeded to occupy the building. The Plaintiff asserted that she had no outstanding ground rent, was neither sued nor served with any notice to pay ground rent.
7. The Plaintiff alleged instances of fraud meted by the 1st & 2nd Defendants which included:-
 - a. Failure to involve the estate of the deceased in CMCC No2250 of2010.
 - b. Instituting a lawsuit against the tenants of the estate of the deceased while fully aware that they were such tenants.
 - c. Conspiracy between the 1st and 2nd Defendants to falsely and unlawfully deprive the Plaintiff or the estate of the deceased of the suit property.
 - d. Unlawfully transferring the suit property, Plot no. 1665 Section VI/MN, belonging to the deceased to the 1st Defendant without involving his estate.
 - e. Failure to declare or misrepresentation of the existence of the Plaintiff's building on the plot in *CMCC no2250 of2010*.
8. Based on these grounds, the Plaintiff sought for the following reliefs and for Judgment to be entered in her favour and against the 1st and 2nd Defendants jointly and Severally: -
 - a. An order revoking the transfer of the suit property, plot No. 1665/sec VI.M.N, to the 1st Defendant and directing its restoration to the estate of John Owino Opiyo.
 - b. A mandatory injunction requiring the 1st Defendant to vacate the premises belonging to the estate of John Owino Opiyo.
 - c. An order requiring the 1st Defendant to deposit all income from the suit property in the court until the matter is resolved.
 - d. General damages for interfering with the use and peaceful occupation of the suit property by the Plaintiff.
 - e. Costs of and incidental to this suit.



III. The testimony of the Plaintiff and the witnesses.

Examination in Chief of PW – 1 by Mr. Adika Advocate

9. PW – 1 was sworn and testified in the Kiswahili language. She identified herself as Millicent Odera Owino. She was a holder of the Kenyan national identity card bearing numbers 9942957. She was a duly appointed Legal Representative /Administrator to the estate of the deceased. The husband died on 20th February, 1994. She filed the succession cause in High Court of Mombasa No. 200 of 2010 and on 20th September, 2010 she was issued with a Grant Letters of Administration.
10. She stated being the owner of the house on the suit property. She was the Plaintiff. She recorded a witness statement dated 8th March, 2014. It was admitted. She informed Court that her husband bought the house on 9th August, 1982. It was a Makuti roofed thatched Swahili structure comprising of two shops, 2 stores and 2 rooms for residential purposes. He then demolished it. She would be collecting rent. But in the year 2010 it was taken over by another person. He never gave her money. Someone called her and said her things were thrown out. On arrival, she found that Mr. Stanley Thine Birithia, the 1st Defendant had taken over the suit property and even gotten a title deed to the land. He removed all the tenants from the said house. She had been away at home and it's the tenants who called to inform her of what had occurred. Mr. Birichia was then occupying the house.
11. PW – 1 stated that the deceased and the seller had an agreement for the purchase of the house. She had the receipt for the land rates. They were given forms by the National Land Commission. She needed the land back. There was an agreement between her husband and the seller of the house. She prayed to be granted the reliefs in the Amended Plaint.

Cross examination of PW - by Mr. Anangwe Advocate

12. She remembered this case. She confirmed that the suit land belonged to another person. She had an agreement letter dated 9th August, 1982. Apart from the agreement she had nothing else to show that the land was legally hers. Though, she also had receipts of the land rent. She knew the land was sold on 28th May, 2012. Before the sale the owner had not offered it to them. She was referred to a letter from the previous owner. She denied having seen it.
13. According to her, the house was for her husband. She would be collecting rent up to the year 2012. But todate, she had stopped collecting. She knew the National Land Commission (NLC) got involved in this matter in the year when they engaged them for purposes of compulsory acquisition. This was in the year 2018. They wanted to pay. She heard there was a case in Court by the 1st Defendant where he sued Julius Maweu and Somo Bwana Musa Yusufu. The person who claimed to have bought the land evicted the people. She also sued him. She refuted there being any Court order.

Re - examination of PW – 1 by Mr. Andika Advocate

14. She confirmed seeing some documents to show that she was paying for the land rent. In the case for eviction, she was not sued, but they were tenants along with Mr. Musa and Jane. She was not involved in that Court case.
15. They filed a suit in Court before filing this one. She was aware of the suit to evict tenants filed by Stanley Thine Birithia. The case was withdrawn. That was all.



Examination in Chief of PW – 2 by Mr. Adika Advocate.

16. PW – 2 testified and sworn in Kiswahili language. He identified himself as being Mr. Jeremiah Ochieng Afande. He was a holder of the Kenyan national card bearing numbers 21096927. His date of Birth was 1/1/1979. He recorded a witness statement dated 22nd February, 2014. He lived at Mgongo Estate since the year 1979. He knew Madam Millicent Odero Awino well. He knew her husband. The house belonged to Millicent Odero Awino. They lived there. After the death of the deceased they went to live up-country. There were tenants in the house.
17. The dispute over the house started in the year 2010. The police came to demolish the house. There were tenants. They were removed from the house and it was fenced. They painted the house. There was one person called Stanley Thine Birichia who had been collecting rent. PW – 2 reported the matter to the police. He called Mama Millicent.

Cross examination of PW – 2 by Mr. Anangwe Advocate

18. PW – 2 called Mr. Omar Bin Musa who was the owner of the land while Mama Millicent was the owner of the house. From year 2010 to date its Mr. Stanley Thine Birichia who had been collecting rent. That is all.

Examination in Chief of PW – 3 by Mr. Andika Advocate.

19. PW – 3 testified and sworn in Kiswahili language. She was called Jane Wahu Wanyaga. She was a holder of the Kenya national identity card bearing numbers 21980862. Her date of birth was 24th October, 1980. She lived at Jomvu and in the suit property. The property consisted of 2 bungalows, store and 4 separate rooms. They occupied the shop.
20. There was a Caretaker called Yusuf. She used to pay a sum of Kenya Shillings Four Thousand Five Hundred (Kshs 4,500/=) as rent. They were never given any notice. One day they saw the police and the eviction followed. They were evicted. PW – 4 lost a lot of things. She left behind things worth a lot of money.

Cross Examination of {{abbr{title Prosecution Witness} PW}} – 3 by Mr. Anangwe Advocate

21. PW – 3 reported the matter of their eviction to the police. It was in the year 2012. She never instituted any separate case. Mr. Stanley Thine Birithia came with a Court Order. She never went to Court to authenticate the Court.

Re - Examination By Mr. Adika Advocate

22. The Court Order obtained by Mr. Stanley Thine Birithia was only shown to them. It was not served upon them. That is all.

IV. The Defendant's case.

23. Based on the facts raised from the Amended Defence dated 4th July, 2014, the 1st Defendant stated that the 2nd Defendant and two others sold Plot No. 4744 (Original No. 1665 Section VI/MN) CR No. 47925 to him as representative of Omar Musa and the same was registered in his name. As the legal owner to the suit land he had followed all the due process of the law. He admitted that there stood an earth structure on the land and some tenants. He denied that the structure nor the land belonged to the Plaintiff. He held that he was in the process of demolishing it to pave way for a modern building



which had been approved by the Municipal Council of Mombasa. Nonetheless, he never demolished it but instead refurbished it so as to earn return on his investment.

24. He also informed Court that his intention was to remove the tenants from the structure as argued that there as no law which prohibited a Landlord of a Plot where there were tenants of houses without Land from transferring wholly their interest in that land provided that the owners of the houses without land had been given first option to purchase it as it was done in this case. The 1st Defendant stated that it was after they failed to take the option to purchase the land, that the 1st Defendant bought it. Further, he averred that the order of eviction were lawful, complete and no appeal was preferred even though the Plaintiff was represented by an Advocate.
25. He averred that the Plaintiff's claim was not only an after through but untenable in Law and the claim of an injunction could not stand. In the Counter Claim, the 1st Defendant prayed for the Plaintiff's suit against the Defendants to be dismissed with Costs. He further sought for an order for demolition of the earth structure which was standing on the suit property.

V. The testimony by the 1st Defendant

26. Stanley Thiine Birithia DW - 1 testifies and sworn in Kiswahili language. I/D NO 22----45. Date of Birth 1/1/1979. I recorded witness statement dated 25/10/2012. The statement admitted. The list of documents dated 25/10/2012 and filed the same dated and 7 documents Defendant-Exhibit-Marked 1-7.

Examination in Chief of DW -1 by Mr. Anangwe Advocate

27. DW – 1 was sworn and testified in Kiswahili language. His name is Stanley Thiine Birithia. He held the Kenyan national identity card bearing numbers 22----45. His date of birth was 1/1/1979. He hailed from Meru North. He a shop keeper. He swore a witness statement on 14th June, 2012. He was filed a List of documents dated 26th May, 2022. They were eight (8) documents as follows:-
 - a. A copy of a sale agreement contract dated 18th June, 2009.
 - b. A copy of Certificate of Title bearing CR No.47925.
 - c. A copy of letter dated 29th May, 2009.
 - d. A copy of letter to the Plaintiff dated 12th July, 2009.
 - e. A copy of letter of response to the one of 12th July, 2009 dated 16th July, 2009.
 - f. A copy of warrant of eviction dated 19th April, 2012.
 - g. A copy of the Plaintiff's Complaint of a suit No. CMCC No.2534/2010 dated 30th September, 2010.
 - h. A copy of a Defence by the 1st Defendant dated 6th September, 2010.

The Defendant documents were produced and admitted. They were marked as Defendant Exhibit numbers 1 to 8.

28. The testimony by DW – 1 was that the suit property was his. He was the registered owner. He bought it from Juma Omari Musa; Abdalla Said Hemed and Miriam Mohammed Musa vide a Sale agreement of 18th June, 2009, produced and marked as Defendant Exhibit - 1. The seller gave him a title deed. He changed it to his names. He was approached by a friend and told the owners were selling it. He met them. They showed him the title. He went to the Municipal Council and confirmed the property was



there. Then the Plot was sub - divided into two portions - 4744 and 4745. He bought Plot No. 4744. He went to the Land Registry, Mombasa and got it transferred to his names. The plot had a building with two stalls. The sellers told him they had offered the building to the occupiers of the building but they were unable to do so. Hence, they decided to sell it to him. There were two tenants - Julius Maweu and Solomon Musa. Hence, he gave them notice to vacate but they refused. he sued them and he obtained a Court Order. The Court Order was produced as Defendant Exhibit No.6. They were evicted using the police and he took vacant possession.

29. He did not know Millicent Odero Owino – the Plaintiff herein. I He saw her in the year 2018. During the construction of the Chagamwe Road by KURA/NLC her saw her claiming that the Plot was hers. He was sued by the Plaintiff. The house was not for the Plaintiff as he had never seen her from the year 2012. He had been in occupation in suit property all along. He was occupying one part of it and renting out the other part.

Cross Examination of DW – 1, Mr. Adika Advocate

30. DW – 1 found the building there. He added six (6) other rooms. It had no tenants. He had leased it to two (2) people. He got a sum of Kenya Shillings Thirteen Thousand (Kshs 13,000/=) per month. He conducted official search on the suit property. He also undertook investigation but she was not in occupation. He wrote a letter to Mr. John Owino. The letter was served on him through the tenants. The letter was one dated 12th July, 2010 and produced as Defendant Exhibit - 4. He was the one who had leased the premises to the tenant. He was referred to the Defendant Exhibit – 3. It made reference to a Mama Ochieng.
31. He confirmed that this suit was filed in the year 2012. They would be sending some documents to her through his Advocates. The land was his. He acknowledged that if one was to build a house or construct, one had to obtain a consent from relevant authorities. He never obtained any approvals as required by law. He refuted building a storey building. He was referred to the sale agreement. It was not signed by Mariam Mohamed Musa. He never served the Plaintiff with any Court Order as she was not in the suit property. He had bought the iron sheet for the development of the land. The KPLC bills were in his names.

Re - Examination of DW – 1 by Mr. Anangwe Advocate

32. He served the tenants with the Court Order as they were the ones in the house. He was only building Swahili houses. Hence, there was no need for any approval from the relevant authorities. That was all.

VI. The 2nd Defendant's case.

33. He was acting in person. He was sworn and testified in Kiswahili. He identified himself as Juma Omari Musa. He held the Kenya national identity card bearing numbers 260---88. His date of birth was 12th July, 1984.
34. The plot known as 1665/VI/MN was theirs. They had some financial problems and decided to sell it. They had been approached by the tenants but they were unable to sell. They managed to get Mr. Stanley BIRTHIA. He showed interest in buying it. But 2nd Defendant warned Mr. BIRTHIA while he would buy the land but the land had a house which had an owner. Therefore, the 2nd Defendant testified that they sold the land to Mr. BIRTHIA which had a house. The house belonged to Mr. John Owino Opiyo, the deceased. Mr. Opiyo was their tenant. He used to pay them rent and they had receipts. He decided to construct a house on the land. The land was theirs but the house was for John Opiyo. Mr. BIRTHIA paid up all the dues for transfer of the land.



Cross Examination of DW - 2 by Mr. Adika Advocate

35. According to DW – 2, the land belonged to the elders. When they died the beneficiaries became the Legal Administrators. Mr. John Owino Opiyo bought the house from someone. He used to pay them a sum of Kenya Shillings Five Hundred (Kshs 500/=) per month. The building had two rooms. The building had tenants. The building was for Mama Millicent but the land was for Mr. Birithia.

Cross Examination of DW-2 by Mr. Anangwe

36. The Plot was for the 2nd Defendant. They the plot to Mr. Birithia. The house was for John Owino Opiyo. There is nowhere from the sale agreement that indicates that they sold the house. He was referred to the witness statement showing what happened after they sold the land. Additionally, he was referred to his Defence under Paragraph 7. He denied the contents of the Defence.

VII. Submissions

37. Upon the closure of the Plaintiff and the Defendant’s case, they were directed to file their written submissions accordingly. Thereafter, the Honorable Court undertook to deliver its Judgement accordingly.
38. Unfortunately, from the records, there does not seem to be any prove of any submissions filed by either of the parties herein. Thus, the Honorable Court has decided to proceed and reach a decision purely on merit and the empirical evidence available hereof.

VIII. Analysis & Determination

39. I have keenly considered all the subject matter as raised from the filed pleadings herein, the evidence adduced by the witnesses summoned, the relevant provision of the Constitution of Kenya, 2010 and statutes.
40. For the Honorable Court to be in a position to deliver an informed, fair, just and reasonable Judgement, it has framed the following salient three (3) issues for its determination. These are:-
- a. Whether the suit instituted by the Plaintiff herein through an Amended Plaintiff and the Counter Claim by the 1st Defendant herein have any merit.
 - b. Whether the parties herein are entitled to the reliefs sought from the filed Amended Plaintiff and the Amended Defence and Counter Claim?
 - c. Who will bear the costs of the suit

Issue No. a). Whether the suit instituted by the Plaintiff herein through an Amended Plaintiff and the Counter Claim by the 1st Defendant herein have any merit.

Brief facts

41. Before embarking the issues of analysis under this Sub heading, the Honorable Court feels it imperative to extrapolate on brief facts of the case. From the filed pleadings, the Plaintiff herein being the widow and the duly appointed Legal Administrator to the estate of the late John Owino Opiyo – the deceased. While the 1st Defendant was a male adult of sound mind and understanding, the 2nd Defendant also a male adult was sued being a representative of the Estate of Omar Musa (deceased) who at material times was the owner of a Parcel of land known as Plot No. 1665 Section/VI/MN. – the suit land herein.



42. On or about 9th of August 1985, the deceased, John Owino Opiyo purchased an existing building on the suit property within Magongo Santana area, Changamwe, in the County of Mombasa from one James Otieno with the full consent of the landowner Omar Musa. Subsequently, the deceased demolished the existing house and erected his own premises. Thereafter, he continued paying ground rent to Omar Musa and his representative, the 2nd Defendant Juma Omar Musa alias Mujuma.
43. Upon the demise of the deceased, the building became part of the deceased's estate, and the Plaintiff continued paying ground rent to the 2nd Defendant and occupying it as a tenant. However, it was until May 2012, the 1st Defendant claimed to have purchased the same building from the 2nd Defendant as the landowner, obtained orders to evict the tenants, and proceeded to occupy the building. The Plaintiff asserted that she had no outstanding ground rent, was neither sued nor served with any notice to pay ground rent.
44. The Plaintiff alleged instances of fraud meted by the 1st & 2nd Defendants. On the other hand, from the facts raised from the Amended Defence dated 4th July, 2014, the 1st Defendant stated that the 2nd Defendant and two others sold Plot No. 4744 (Original No. 1665 Section VI/MN) CR No. 47925 to him as representative of Omar Musa and the same was registered in his name. As the legal owner to the suit land he had followed all the due process of the law. He admitted that there stood an earth structure on the land and some tenants. He denied that the structure nor the land belonged to the Plaintiff. He held that he was in the process of demolishing it to pave way for a modern building which had been approved by the Municipal Council of Mombasa.
45. Nonetheless, he never demolished it but instead refurbished it so as to earn return on his investment. He also informed Court that his intention was to remove the tenants from the structure as argued that there as no law which prohibited a Landlord of a Plot where there were tenants of houses without Land from transferring wholly their interest in that land provided that the owners of the houses without land had been given first option to purchase it as it was done in this case. The 1st Defendant stated that it was after they failed to take the option to purchase the land, that the 1st Defendant bought it. Further, he averred that the order of eviction were lawful, complete and no appeal was preferred even though the Plaintiff was represented by an Advocate.
46. He averred that the Plaintiff's claim was not only an after through but untenable in Law and the claim of an injunction could not stand. In the Counter Claim, the 1st Defendant prayed for the Plaintiff's suit against the Defendants to be dismissed with Costs. He further sought for an order for demolition of the earth structure which was standing on the suit property. He sought to be granted the prayers made out in the Counter Claim. That is adequate on facts.
47. Now turning to the main substratum of this matter. From the surrounding facts and inferences of the case, to me it is two pronged in nature. These are on the legality and the legitimacy of the ownership of the suit land by the 1st Defendant on the one hand and on the other hand is with regard to the ownership of the earth structure on the suit property by the Plaintiff based on to a rather convoluted concept of what has now come to be known within the Coastal parlance as "House without land". Perhaps, this may be equated to Periodic Leases. For good order, I will tackle on these two issues separately and to some little bit of details for ease of appreciation.
48. Firstly, it is not in any doubt that on 18th June, 2009 Adbdalla Said Hemed, Mariam Mohammed Musa, Bin Musa, Mwanahawa Hamisi Tangai and Mohamed Musa as the Vendor and the 1st Defendant as the purchaser entered into a sale agreement for the sale of the suit land terms and conditions stipulated thereof. It was for the consideration of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400, 000.00). Subsequently, a transfer of the suit property was effected and on 21st May, 2010 the 1st



Defendant was issued with a Certificate of Title deed number CR. 47925 under the *Registration of Title Act*, Cap 281 (Now repealed).

49. Legally speaking, under the provision of Section 23 of the *Act* the title deed bestowed the 1st Defendant with the indefeasible title, interest and rights over the suit land. In its preamble it stated “An Act of Parliament to provide for the transfer of land by registration of titles. Subject: Land & soil.

The provisions of Section 23 (i) and 24 (i), (ii) and (iii) of the *Act* holds that.

“The Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named herein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, resolutions and conditions contained therein or endorsed thereon and the title or that proprietor shall not be subject to challenge except on the ground of fraud, or misrepresentation to which he is proved to be a party’

- i. except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;
- ii. in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;
- iii. no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee’s statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya.

Considering that the Act has now been repealed, the applicable law is the Lands Registration Act, No. 3 of 2012 the provisions of Sections 24, 25 and 26 (1) of the *Land Registration Act*, No. 3 of 2012 is applicable in this case and the *Land Act*, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

This position was upheld in the cases of “*Samwuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR and *Tukero Ole Kina & Another v Tahir Sheikh Said (also known as TSS) & 5 Others* (2015) eKLR” .

50. For these reasons, therefore, there is no doubt at all that the suit land is properly and legally registered in the names of the 1st Defendant. Luckily, this issue was not in contention in this suit and therefore



the Honorable Court will not indulge in it any further. Be that as it may, by all standards the suit filed by the Plaintiff has merit.

Issue No. b). Whether the parties herein are entitled to the reliefs sought from the Amended Plaintiff and the Amended Defence and Counter Claim

51. Under this sub heading, the Honorable Court wishes to critically re – look at the filed pleadings and the reliefs sought thereof to make a determination whether the parties are entitled to them. To begin with, the Court has already settled on the legal ownership of the land being the 1st Defendant who has a prima facie and conclusive evidence to that effect. However, of great interest is the existence of the overriding interest on the suit land. Under Clause 9 of the sale agreement states that:-

“The Purchaser having had an opportunity of examining the said property shall be deemed to have full notice and acknowledged of the condition and state of the same and will not require the Vendor to improve the same or any part thereof”

52. Clearly, when the time the 1st Defendant bought the suit land, it was not free from any encumbrances. This was in form of the existence of an overriding interest in form of the earth structure belonging to the Plaintiff. An now that brings me to the second issue in this matter and the most contentious one.

53. Secondly, with regard to the concept of “the house without land”. Based on the evidence presented, it can be concluded that the Plaintiff and the 2nd Defendant had a tenancy agreement arising from the concept of “house without land,” where ownership of the house is separate from the land. Accordingly, on 9th August, 1982, the husband to the Plaintiff bought the earth structure from one James Otieno for a sum of Kenya Shillings Thirty Five Thousand (Kshs. 35,000.00/=). It was then a makuti roofed house but he demolished it and constructed the existing house. He then got tenants in it. He was receiving rent from them. It is important to note that the initial arrangement was of under the house without land, the owner of the structure was paid ground rent to the land owner.

54. The concept of house without land (Nyumba Bila Shamba) is only unique in the Coastal region of Kenya. It is where a person is given permission to build a house on land, but the ownership of the land remains separated from the ownership of the house. It has picked great credence in the legal sphere which cannot be ignored. It is where a person can own a house without owning the land which the house stands. (See COA Civil No. 18 of 2017 - in “*Addalbrazak Khalifa Salimu v Harun Rashid Khator & Others* (2018), In HCCC (Malindi) No. 34 of 2005 – *Famau Mwenye & 19 others Versus - Mariam Binti Said*” W. Ouko J describes it as “The dispute arises from land tenure unique to Mombasa which has baffled scholars, practineers and even jurist. The 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 Salum ejus est Usque ad coelum (meaning “Whose is the soil, his is also that which is above it”).

55. This issue arose when one wanted to terminate of the tenancy and interpretation of the provision of Sections 3, 8, 51 and 106 of the *Transfer of property Act* – incidence of the absence of contract or local law or usage to the contrary of a Lease. Many have build traditional permanent or semi permanent (Swahili) structures , grown perennial crops and shared fruits of their labour with the owners creating a perennial relationship. .



56. As explained by the Court of Appeal in the case of “Abdukrazak Khalifa Salimu v Harun Rashid Khator & 2 Others (2018) eKLR,

“.....we are persuaded by dictum in *Famau Mwenye & 19 Others v Mariam Binti Said*, Malindi High Court Civil Case No. 34 of 2005, where the trial Judge likened the concept of house without land to a lease stating, No matter what that arrangement is called, in my view it is a lease within the meaning of Section 105 of the Transfer of Property Act”. A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid.”

57. Additionally, in the case of “*W.J Blakeman Ltd v Associated Hotel Management Services Ltd* [1986] eKLR 156 the Court of Appeal held that the outstanding features of a monthly tenancy are possession and payment of rent.

“If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

58. Under the *Land Act* 2012, tenancy terms are outlined in Section 54 and 57 as follows:

Section 54: If an individual becomes entitled to any land, lease, or charge under the provisions of any law or by virtue of any order or certificate of sale issued under any law, the Registrar, upon the application of any interested person supported by the necessary evidence, shall register the entitled person as the proprietor.

Section 57: In any lease:

- a). If the lease term is unspecified, and there is no provision for giving notice to terminate the tenancy, the lease shall be considered a periodic lease.
- b). If the term is defined on a weekly, monthly, yearly, or any other periodic basis, with rent payable in relation to agricultural land, the periodic lease shall be for a duration of six months.
- c). If the lessee remains in possession of the land with the consent of the lessor after the lease term has expired:
 - i). Unless the lessor and lessee have expressly or implicitly agreed that the continued possession will be for a different period, the lease shall be deemed to be periodic.
 - ii). All terms and conditions of the lease that are consistent with the provision mentioned in Sub - Paragraph (i) shall remain in effect until the lease is terminated in accordance with this section. If the owner of land permits exclusive occupation of the land or any portion thereof by any person for rent, but without a written agreement, that occupation shall be considered a periodic tenancy.



The duration of the periodic tenancy referred to in Sub - Section (1) (a) shall be the period according to which the rent is payable. Either party to a periodic tenancy may terminate the tenancy by providing notice to the other party, the length of which shall not be shorter than the duration of the tenancy and shall expire on one of the rent payment dates.

59. As indicated above, in the instant case, the Plaintiff had tenants and who would be paying her directly the ground rent. This was her only source of income. But the 1st Defendant moved in and evicted these tenants and commenced collecting rent himself. The Plaintiff has raised allegations of fraud against the 1st and 2nd Defendants, specifying the following acts of fraud: -

- a. Failure to involve the estate of the deceased in CMCC No2250 of 2010. Instituting a lawsuit against the tenants of the estate of John Owino Opiyo while fully aware that they were such tenants.
- b. Conspiracy between the 1st and 2nd Defendants to falsely and unlawfully deprive the Plaintiff or the estate of the deceased of the suit property.
- c. Unlawfully transferring the suit property, plot no. 1665 Sec. VI/MN, belonging to the deceased John Owino Opiyo to the 1st Defendant without involving his estate.
- d. Failure to declare or misrepresentation of the existence of the Plaintiff's building on the plot in *CMCC No2250 of 2010*.

60. To understand the concept of fraud, reference is made to the case of "[*Gitbinga Kibutha v Caroline Nduku*](#) ELCA No 16 of 2007, where the court defined fraud as follows:

"The [*Land Registration Act*](#) does not define fraud. Recourse must therefore be had to other sources of law. The Black's Law Dictionary defines fraud as a deceitful practice or willful device, resorted to with the intent to deprive another of their right or cause them injury. Fraud, as distinguished from negligence, is always positive and intentional. In the context of contracts, fraud is the cause of an error bearing on a material part of the contract, created or continued by artifice, with the design to obtain an unjust advantage for one party or cause inconvenience or loss to the other. Fraud, in the sense of a court of equity, includes all acts, omissions, and concealments that involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another or result in an undue and unconscientious advantage being taken of another."

61. It is instructive to note that fraud must be specifically pleaded and proved to a standard above a balance of probabilities, but not beyond reasonable doubt. The burden of proving fraud rests on the party making the allegation as buttressed in the cases of [*Vijay Morjaria v Nansingh Madhusingh Darbar & Another*](#) [2000] eKLR and [*Kinyanjui Kamau v George Kamau*](#) [2015] eKLR.

62. In the present case, the Plaintiff has produced a transfer agreement dated 1982, indicating that a house without land on the suit land had been transferred to John Owino Opiyo and James Otieno for the consideration of Kenya Shillings Thirty Five Thousand (Kshs 35,000.00) The Plaintiff testified that she continued to pay ground rent on the property after her husband's demise in the year 1994 until the year 2012, despite not residing in Mombasa. The 2nd Defendant testified in court that they sold the suit property to the 1st Defendant but clarified that the ownership of the houses on the land belonged to the late Mr. Opiyo, and they only sold the land to the 1st Defendant.

63. Although the Plaintiff did not provide receipts to prove rent payment, DW - 2 testified that John Opiyo, the Plaintiff's husband, used to pay a sum of Kenya Shillings Five Hundred (Kshs. 500.00/) to



him. PW - 2 and PW - 4 confirmed being neighbors to the Plaintiff on the suit property. The Plaintiff also stated that she was never given notice to vacate the premises by the Defendants or offered to purchase the property. DW - 1 and DW - 2 maintained that the tenants were offered the opportunity to buy the property but were unable to do so. However, PW - 2 and PW - 4 maintained that they were never offered the premises for purchase and were evicted by court orders. DW - 1 as well confirmed that the court orders did not include the Plaintiff as she did not reside in the premises. DW - 1 produced correspondence of notice to Mr. John Opiyo, but the letter lacks any indication of it being received by the Plaintiff. The Plaintiff consistently maintained that she was informed of the eviction by her neighbors.

64. Significantly, the key question that the court must address is whether the Plaintiff was given notice to vacate the premises. The 1st Defendant produced a notice to vacate or purchase part of 1665/MN VI, addressed to a Mama Ochieng, dated 26th May 2009. However, there is no evidence to indicate that the letter was received by the Plaintiff. The 1st Defendant also testified that he never served court orders to the Plaintiff as she never used to in the premises. PW - 4 added that she was also not given proper notice and was evicted from the premise by a Court order.
65. Upon careful examination of the circumstances outlined above, it becomes evident that the 2nd Defendant explicitly communicated to the 1st Defendant that Mrs. Millicent was the rightful owner of the house without land situated on the property in question. Despite this knowledge, the 1st Defendant failed to fulfill their legal obligation of serving a notice of termination of the lease unto Mrs. Millicent Ochieng. Furthermore, it is apparent that the eviction notice issued by the court did not include Mrs. Millicent's name, despite the 1st and 2nd Defendants being fully aware that the property in question was owned by the deceased husband of the Plaintiff. Consequently, based on these facts, the Court has determined that the 1st and 2nd Defendants bear liability for the following:
- a. Failure of to involve the estate of the deceased in *CMCC No2250 of2010*
 - b. Conspiring between the 1st and 2nd Defendants to falsely and unlawfully deprive the Plaintiff or the estate of the deceased of the suit property.
 - c. Failure to declare or misrepresentation of the existence of the Plaintiff's building on the plot in *CMCC No2250 of 2010*.
66. For the above reasons, therefore, I am fully satisfied that the Plaintiff have been able to demonstrate her case on all the required standards as pleaded from the Amended Plaintiff. On the other hand, the Amended Defence and Counter Claim by the 1st Defendant fails on many aspects already sated out herein but particularly so for his failure to issue proper notice to have the Plaintiff vacate the premise. Thus, he cannot demolish the house without land before following the proper legal due process.

ISSUE No. c). Who will bear the costs of the suit.

67. 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 granted at the conclusion of a legal action and proceeding in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, cap 21 hold that costs follow the event. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of Supreme Court - "*Jasbir Rai Singh v Trachalan*" eKLR 2014; "*Hussein Muhumed Sirat v Attorney General & Another* [2017] eKLR, "*Harun Mutwiri v Nairobi City County Government* [2018] eKLR, where the court emphasized that costs should generally follow the event, unless there are specific reasons to deviate from this principle. In the case of "*Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another*



[2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.

68. In the present case, the Plaintiff has been able to establish her case as pleaded from the filed pleadings. Therefore, she is entitled to be awarded costs of the suit and the Counter Claim to be borne by the 1st Defendant accordingly.

VI. Conclusion & findings

69. The upshot of the matter is that, the case of Plaintiff has been in a position on preponderance of probabilities to establish her case against the 1st and 2nd Defendants herein. For avoidance of doubt, therefore, the Honorable Court proceeds to make the following specific orders:-
- a. That judgement be and is hereby entered in favour of the Plaintiffs and against the 1st and 2nd Defendants herein jointly and severally.
 - b. That there be an order for mandatory injunction issued in favour of the Plaintiff requiring the 1st Defendant to vacate the suit premises (the structure) as it belongs to the estate of John Owino Opiyo within the next Ninety (90) days pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012.
 - c. That there be an order requiring the 1st Defendant to deposit all income raised from house without land property dating back from 1st May 2012 till date.
 - d. That there be General damages of a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) for interfering with the use and peaceful occupation of the suit property by the Plaintiff.
 - e. That there be an order that the Defence and the Counter Claim herein by the 1st Defendant be and is hereby dismissed for lack of merit whatsoever.
 - f. That the Costs of and incidental to this suit to be borne by the 1st Defendant herein for the suit and the Counter Claim.

It is so ordered accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF JULY, 2023

.....

HON. JUSTICE MR. L. L. NAIKUNI

JUDGE

ENVIRONMENT & LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Adika Advocate for the Plaintiff.
- c. Mr. Anangwe Advocate for the Defendant.

