



**Bandari Savings & Credit Cooperative Society Ltd v Simiyu & another (Environment & Land Case 239 of 2021) [2023] KEELC 20808 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20808 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 239 OF 2021  
LL NAIKUNI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**BANDARI SAVINGS & CREDIT COOPERATIVE SOCIETY LTD .... PLAINTIFF**

**AND**

**ROBERT WEKESA SIMIYU ..... 1<sup>ST</sup> DEFENDANT**

**KENYA PORTS AUTHORITY PENSION SCHEME ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**i. Preliminaries**

1. This is a Judgment whereby the Plaintiff herein - “Bandari Savings & Credit Co - operative Society Limited” initially instituted this Suit through filing of an Originating Summon dated 24<sup>th</sup> November, 2021. Later on in the course of the proceedings, the Plaintiff filed an Amended Originating Summon dated 17<sup>th</sup> May, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.
2. Essentially, it is acclaim of all that property known as all that parcel of land known as MOMBASA/ BLOCK XXIII/216 (Hereinafter known as “The Suit Property”). From the filed pleadings and the evidence adduced thereafter, the Plaintiff decided to purchase the suit property so as to construct their offices and other income generating development on it with an aim of generating income for and save the money.
3. Upon effecting service, on 15<sup>th</sup> December, 2021 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein entered appearance and subsequently filed their statement of Defence and other documents in compliance with the Provision of Order 11 of the Civil Procedure Rules, 2010. Consequently, on 15<sup>th</sup> December, 2021 directions on the Originating Summons were taken pursuant to the provisions of Order 37 Rules 11, 13 & 16 of the Civil Procedure Rules, 2010. Hence the matter was fixed for hearing by all the Parties accordingly as stated herein and it proceeded on in earnest as scheduled.



## ii. The Plaintiff's Case

4. From the filed pleadings the Plaintiff claimed that they were legal and absolute registered owners to the suit property. They claimed to have acquired it by reasons of their purchase of it by Public Tender via Tender number KPAPS/PM/03/2019 disposal of scheme property from the Kenya Ports Authority Pension Scheme the 2<sup>nd</sup> Defendant herein. This was after the said tender was advertised for tendering through a tender advertisement No. KPAPS/PM/03/2019 by Vendor Carried out in the local dailies of "The Standard" Newspaper of 10<sup>th</sup> September, 2019 and "The Daily Nation" of 17<sup>th</sup> September, 2019.
5. Thereafter on 2<sup>nd</sup> October, 2019 the Plaintiff purchased the tender documents and paid a sum of Kenya Shillings Three Thousand (Kshs. 3,000.00) for the tender documents and eventually they emerged the highest bidders for a sum of Kenya Shillings Fifty Eight Million Four Hundred Thousand (Kshs.58,400,000.00) and the same was communicated by the Vendor via a letter dated 14<sup>th</sup> October, 2019.

On 2<sup>nd</sup> October, 2019 the Plaintiff paid a sum of Kenya Shillings Fifteen Million Six Hundred and Forty Thousand (Kshs. 15,640,000.00) being the deposit of the Purchase Price for the Suit Property and the balance was to be paid to the 2<sup>nd</sup> Defendant in installments on various dates up to 16<sup>th</sup> February, 2021 by way of RTGS. The 2<sup>nd</sup> Defendant executed a Transfer of Lease dated 15<sup>th</sup> September, 2021 in favour of the Plaintiff and was caused to be registered at the Lands Registry after paying the requisite Stamp Duty for the Transfer. On 21<sup>st</sup> September, 2021 the Plaintiff was issued with a Certificate of Lease.

6. At all material times, the 1<sup>st</sup> Defendant was also a member of the Plaintiff and 1<sup>st</sup> Defendant. Further, he was a tenant to the Suit Property. He had always been aware of this process and knew that he would be required to vacate the Suit Property at an appropriate time. Indeed the 1<sup>st</sup> Defendant was notified by the 2<sup>nd</sup> Defendant of the new acquisition of the Suit Property by the Plaintiff and requiring him to amicably vacate it.
7. Despite of all this and all efforts made to have the 1<sup>st</sup> Defendant vacate the premises he had become completely adamant. As a result it necessitated the Plaintiff to institute this suit. The Plaintiff has sought on having the 1<sup>st</sup> Defendant be declared a trespasser and upon being evicted from the Suit Property for him to compensate the Plaintiff for loss of user in terms of the rent at market rates with effect from 6<sup>th</sup> October, 2021 until he hands over vacant possession or he shall be evicted. In summary he sought for the following orders:-
  - a. That a Declaration that Robert Wekesa Simiyu, his agent, servants and/or representative and any other party whatsoever entitled to any right under the auspices of the 1<sup>st</sup> Defendant's continued occupations of Mombasa/Block XXIII/216 is unlawful and that the same constitutes illegal trespass.
  - b. That his agents, servants and/or representative and any other Party whatsoever entitled to any right under the auspices of the 1<sup>st</sup> Defendant be forcefully evicted from the said parcel of land being Mombasa/Block XXIII/216;
  - c. That Officer Commanding Police Station of Mbaraki Police Station observe law and order during the eviction process;
  - d. That an order be and is hereby issued directing the 1<sup>st</sup> Defendant to pay rent for the Suit Property at prevailing market rate from 6<sup>th</sup> October, 2021 until he gives vacant possession or he is evicted;



- e. That an order of Permanent Injunction do issue restraining the 1<sup>st</sup> Defendant whether by himself his agents, servants, employee, assigns from entering upon the Suit Property or dealing in any manner adverse to the Plaintiff's occupation, possession, enjoyment and derivative use of the Suit Property or the Plaintiff's interest in the entirety of the Said Property; and
- f. That the costs of these proceedings to be provided for;

### **iii. The testimonial evidence by the Plaintiff's Witnesses**

8. To prove its case the case by the Plaintiff commenced on 18<sup>th</sup> October, 2012 whereby the Plaintiff summoned one (1) Witness Plaintiff Witness-1. PW-1 testified as follows: -

#### **Examination in Chief of PW -1 by M/s. Kamau Advocate**

9. PW – 1 testified and sworn in English. He identified himself as Joseph Otieno Bee. He was a holder of the national Identity card bearing numbers 13326018. His date of birth was 22<sup>nd</sup> August, 1974. He lived in Nyali estate of the County of Mombasa. He was the Chief Executive Officer of Bandari Savings & Credit Co – operative Society Limited, the Plaintiff herein. He had authority to tender evidence on behalf of the Plaintiff. He recorded a witness statement on 13<sup>th</sup> July, 2022. He wished to adopt and rely on it as his evidence in support of this case. Further, he also filed a List of Documents dated 13<sup>th</sup> July, 2022. They are all produced and marked as “Plaintiff Exhibits Numbers 1 to 15”. Hence all the documents be and are hereby produced. That is all.

#### **Cross Examination of PW - 1 Mr. Mkanzi Advocate**

10. They purchased the property by open tender. There was tenancy agreement that was executed – - March 2020. The purchase of the property was done in the year 2019. It was advertised in the local dailies on 10<sup>th</sup> September, 2019 in “The Standard” and on 17<sup>th</sup> September, 2019 in “The Daily Nation” newspapers respectively.
11. On 2<sup>nd</sup> October, 2019 they paid for the tender document. On 14<sup>th</sup> October, 2019 they emerged as the highest bidders. It was mandatory for them to have gotten 100% for the purchase. They paid a sum of Kenya Shillings Fifteen Million Six Fourty thousand (Kshs. 15,640,000/=). The Plots were numbers 215, 214 and 216 all situated along the Mbariki location of the County of Mombasa. Having paid that, they did the transfer on 17<sup>th</sup> December, 2020 of the three (3) properties. From that time onwards they became the registered and legal owners to these properties. They had no issue at all. – we do not collect any rent. The plots were to be developed further.
12. He was not aware that the 1<sup>st</sup> Defendant was to acquire the property. They had an issue with the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Occupier to the suit property died. They were members of the Sacco – the Plaintiff. They were given some grace period. When PW – 1 called for the key of the premises, he was directed to the property manager. While there, he found out that there was a new tenant. The 1<sup>st</sup> Defendant applied for the property one year after they had purchased it in the year 2019.
13. They were seeking to recover the property as the Plaintiff was already incurring rent payable to the Kenya Ports Authority (Hereinafter referred to as “The KPA”). PW -1 was not aware of any other Civil case or cases over the same subject matter before the lower court. He wanted vacant possession from the 1<sup>st</sup> Defendant and costs of the suit. The 1<sup>st</sup> Defendant tried to resolve the matter amicably with the 2<sup>nd</sup> Defendant but in vain. The Plaintiff never signed any tenancy with the 1<sup>st</sup> Defendant herein.



### **Cross Examination of PW - 1 by Mr. Omondi Advocate**

14. PW – 1 confirmed they participated in the tender for the purchase of the three properties which included the suit property. The Plaintiff was successful as the highest bidder. This was shown from a letter dated 14<sup>th</sup> October, 2019. They paid the required deposit on 2<sup>nd</sup> October, 2019. By the time of the payment, the 1<sup>st</sup> Defendant was not in occupation. They notified the 2<sup>nd</sup> Defendant of all these developments. The 2<sup>nd</sup> Defendant, who was also a member of the Plaintiff assisted. They filed a notice to vacate their premises which is marked as Plaintiff Exhibit -12.
15. The 2<sup>nd</sup> Defendant was committed in assisting. The 2<sup>nd</sup> Defendant wanted to evict the 1<sup>st</sup> Defendant. The Plaintiff did not have any claim against the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant refuted any claim existed with the 2<sup>nd</sup> Defendant.

### **Re – Examination of the PW – 1 by M/s. Kamau Advocate**

16. They had not been collecting rent from the suit property. They wished to be compensated for the time the 1<sup>st</sup> Defendant had been in occupation of the premises. PW-1 produced the following documents to support his evidence. These were: -
  - a. Copy of Authority to Plead dated 24<sup>th</sup> November, 2021;
  - b. Tender advertisement and documents No. KPAPS PM/03/2019;
  - c. Receipts for Tender Documents;
  - d. Letter for notification of award for tender dated 14<sup>th</sup> October, 2019;
  - e. Copies of bank advices dated 7<sup>th</sup> October, 2019;
  - f. General of application for registration;
  - g. Valuation requisition for Stamp Duty;
  - h. Duly registered transfer of Lease;
  - i. Stamp Duty payment slips;
  - j. Copy of the certificate of Lease of Mombasa/Block XXIII/216;
  - k. Notice to vacate by the Vendor dated 4<sup>th</sup> August, 2021;
  - l. The eviction notice dated 11<sup>th</sup> October, 2021;
  - m. Valuation Report dated 11<sup>th</sup> May, 2022; and
  - n. The office monthly rent invoice.That was the close of the Plaintiff's case.

### **iv. The 1<sup>st</sup> Defendant's Case**

17. On 4<sup>th</sup> February, 2022 the 1<sup>st</sup> Defendant filed his pleadings while opposing the suit filed by the Plaintiff herein. He informed Court that he was a member of the 1<sup>st</sup> Defendant and currently employed by the Kenya Ports Authority. He provided a brief background on the relationship he held between the 2<sup>nd</sup> Defendant and himself as follows: -



- a. His colleague the late Mwangilo used to occupy the Suit Property upon his death on 1<sup>st</sup> October, 2020 the 1<sup>st</sup> Defendant applied and he was given the house. But since the deceased's wife was still occupying it he had to wait until 31<sup>st</sup> December, 2020 to start renovating and occupying it.
  - b. In order to secure his tenancy the 2<sup>nd</sup> Defendant through its agent NW Realite gave him a Tenancy Agreement for staff quarterly dated 1<sup>st</sup> October, 2020.
  - c. On 31<sup>st</sup> December, 2020, the Deceased's family vacated the premises pursuant to Clause (vi) of the Tenancy Agreement.
  - d. He carried out repairs from January, 2021 to end of February, 2021 and moved into the premises on 1<sup>st</sup> March, 2021. On 15<sup>th</sup> March, 2021 he executed a Tenancy Agreement for two (2) years.
  - e. Prior to occupation he had caused renovations and improvements on the property. These included fitting a new gate; major plumbing works, repaired the leaking roof; unblocked the sewage, painting, bush clearing within the compound, ground leveling, fitted new window glasses and reinforced the concrete wall by placing additional pillars.
  - f. Upon conclusion of the repairs and restoring the Suit Property to habitable condition he moved in with his family. Prior to this they lived in Mikindani Estate where his children Quincy Anne Wekesa (14) years, Quilent Nekesa Wekesa (10) years and Mark Wafula (7) years attended St. Irene Primary School in Mikindani but he later on moved them to join Star of the Sea Primary School.
18. On receiving the notice to vacate the Suit Property he filed a Civil Suit CMCC (Mombasa) No. 1449 of 2021 against the 2<sup>nd</sup> Defendant and he was able to be granted interim orders and hence he was not a trespasser as alleged by the Plaintiff. Indeed the 2<sup>nd</sup> Defendant was still collecting rent from him. He had never denied the Plaintiff access to the Suit Property. He held that the whole problem was caused by the 2<sup>nd</sup> Defendant who while allowing the 1<sup>st</sup> Defendant to execute Tenancy Agreement through its agents it was at the same time selling the Property to the Plaintiff.
19. His main concern was on financial resources he had been made to incur as a result of the extensive renovation and also having shifted his children from school at Mikindani to the mainland for all these he had been made to suffer loss and damages which he would wish to be catered for accordingly.

#### **v. The testimony and evidence by the 1<sup>st</sup> Defendant**

20. On 2<sup>nd</sup> November, 2021 Defendant's witness – DW-1 testified as follows: -

#### **Examination in Chief of DW - 1 by Mr. Mkanzi Advocate.**

21. DW – 1 testified and sworn in the Kiswahili language. He identified himself as Robert Wekesa Simiyu, He was a holder of the national Identity Card bearing numbers 22447036. His date of birth was 1981. He lived in Mbaraki Estate of the County of Mombasa. He was employed by the Kenya Ports Authority as an Operator of Crane. He had worked there for 20 years. He knew why he was in as the 1<sup>st</sup> Defendant. He had a cordial relationship with his employer. He lived in the house – the suit property for a long period. He leased it from the 2<sup>nd</sup> Defendant. He was a member of the 2<sup>nd</sup> Defendant. Hence the dispute here emanated from the lease. He executed the Replying Affidavit. He filed list of Documents – the 6 documents. These were namely:-



- a. A copy of the Tenancy Agreement dated 1<sup>st</sup> October, 2020 – Defendant Exhibit 1.
  - b. Copy of a Lease Agreement dated 1<sup>st</sup> March, 2021 – Defendant Exhibits -2
  - c. A Copy of Receipts and Invoices – Defendant Exhibit number 3 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n) and (p)
  - d. A Copy of the Valuation Report dated 14<sup>th</sup> December, 2021 – MFI – (4)
  - e. A Copy of Court Order issued on 16<sup>th</sup> September, 2021 – CMCC (Mbsa) No. 1449/2021 – Defendant Exhibit – 4.
  - f. A copy of a Notice to Vacate dated 4<sup>th</sup> August, 2021 – Defendant Exhibit – 5
22. In October, 2020 he applied to be given the house. That was before it was occupied by John Mwangolo – he was now deceased. Upon making the application, he was given the house by the agent “NW Realite” – The manager was called Christine. They were the estate agents for the 2<sup>nd</sup> Defendant. He did not enter the house immediately as the wife of the deceased was still in occupation. However, she vacated it in January, 2021. It was cleaned up in March, 2021. He had to renovate it. He placed the gate and fence for security purposes. He fixed the roof, plumbing and water system, window panes, tiling and so forth. By then, he was putting up at his brother’s place at Tudor estate of the County of Mombasa. He never got any objection not to do the renovation. The house was owned by the 2<sup>nd</sup> Defendant. After the renovation in March, 2021, DW – 1 took possession with his family. He had children who were attending school here in town. He would be paying monthly rent to the 2<sup>nd</sup> Defendant. It would be deducted on a Standing Order by the KPA. Upto that moment, he was still paying rent. When the suit was filed in court he was not aware. He was a member of both the Plaintiff and the 2<sup>nd</sup> Defendant. When he received the notice to vacate, he informed his Advocate. He got a Court Order (Defendant Exhibit 4). He wanted his right. He had just gotten into the house and here he was being asked to vacate. He wanted compensation. The Chief magistrate Court case was still on. It was the 1<sup>st</sup> case. This one here at ELC case was the 2<sup>nd</sup> Case.
23. DW – 1 never got any communication that the house was sold by 2<sup>nd</sup> Defendant. Christine, the agent Manager, gave him the documents and which he signed. The valuations was done by a valuer commissioned by himself. He had not known him before. He believed the Valuation Report did a good work. They had no issue.

His tenancy agreement was to expire in the month of March, 2023. For him to be removed from the house, he would need compensation and to be an alternative house. That was all.

**Cross Examination of DW-1 by M/s. Kamau Advocate.**

24. He was still living at Mbaraki. Before that he would be living with his brother at Tudor estate of the County of Mombasa. He an active member of 2<sup>nd</sup> Defendant. Hence he was fully aware of all the happenings on the suit property. There were Delegates appointed to attend meetings and they would brief them of all the development. He was never briefed that this property was being and/or to be sold. He was not aware that there was a tender to sell the house. He was referred to the tender “Plaintiff Exhibit 2”). It was dated 10<sup>th</sup> September, 2019.
- He was not aware of the tender to sell the house as he only got involved and occupied it in the year 2020. He went to the Agent in year 2020. It was when he was asked to vacate. His children would suffer a lot. He saw the notice to vacate the house to pave way for Bandari Sacco who bought it. He had not paid any rent to Bandari Sacco. He was still in the house as a matter of right. He was claiming all this from



the 2<sup>nd</sup> Defendant. He had no issue with the Plaintiff – Bandari Sacco. He was referred to Notice to Vacate Plaintiff Exhibit -12. He was holding on to the house as he had been given by the 2<sup>nd</sup> Defendant. He was not an illegal occupier as he was claiming it from the 2<sup>nd</sup> Defendant.

**Cross Examination of DW-2 by Mr. Omondi Advocate: -**

25. DW – 1 went to the agent – Real Light. He never went to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant was never involved at all. He never inquired from the agent the owner of the house. He never paid the Agent any monies. The 2<sup>nd</sup> Defendant gave all the houses to the Agent and hence it's the Agent that gave the houses. If the house had been sold in year 2019 yet he met the agent in year 2020 then it was not right as far as he was concerned.

26. He did not have prove of payment of the rent i.e. from the payslip – showing deduction here in Court. He did not bring them here in court. He had not sub - leased the house. He was still in the house. He wanted compensation and/or an alternative house. He was referred to the Defendant's Exhibit 3, (a) to (n) on the copy of receipts, none of them bore his names and hence no prove that he paid. The rest were by the fundis concerned. He was referred to the valuation Report marked as "DMFI - 4" . He was the one who led him. It showed he lived at Mikindani estate of the County of Mombasa.

He was referred to the tenancy agreement marked as Defendant Exhibit 2 – (vi) – on the obligation for the Lessee. He did not know about it. He was claiming compensation against it.

27. He was referred the Email dated 6<sup>th</sup> August, 2021 send by Christine Elsa to 1<sup>st</sup> Defendant through his email address rsimiyu75@gmail.com marked as "DMFI-5". It was on the willingness to offer DW – 1 an alternative residential address located in Tudor.

DW – 1 stated that he hardly read Emails. He only relied on Phone and read newspapers.

**Re – Examination of DW – 1 by Mr. Mkanzi Advocate**

28. DW - 1 was never involved on the ownership of the House. The house was given by the agent but the payment was deducted from the KPA monthly payslip.

He was referred to "DMFI -5" – of August, 2021. He had not been given any alternative premises. Had he been an alternative house, he would have left immediately.

**Court: -**

29. In view of the presentation by the Learned Counsels, by consent the Valuation Report dated 14<sup>th</sup> December, 2021 by M/s. Amazon Valuers Limited was produced and marked as Defendant Exhibit 4.

That was the close of the 1<sup>st</sup> Defendant's case.

To support his case, DW – 1 produced the following documents: -

- a. A copy of the Tenancy Agreement dated 1<sup>st</sup> October, 2020;
- b. A copy of the Lease Agreement dated 1<sup>st</sup> March, 2021;
- c. Copies of receipts and invoices;
- d. A copy of the Valuation Report dated 14<sup>th</sup> December, 2021;
- e. A copy of a Court Order issued on 16<sup>th</sup> September, 2021 in Civil Case CMCC (Mombasa) No. 1449 of 2021; and
- f. A copy of a Notice to vacate dated 4<sup>th</sup> August, 2021.



## vi. The 2<sup>nd</sup> Defendant's Case

30. On 9<sup>th</sup> February, 2022, the 2<sup>nd</sup> Defendant filed their Defence. It held that the 1<sup>st</sup> Defendant was a member of the 2<sup>nd</sup> Defendant by virtue of being an employee of the Kenya Ports Authority and hence was fully aware of the purposes and obligations of the scheme.

31. The 2<sup>nd</sup> Defendant was regulated by the retirement benefits Authority established under the Retirement Benefit Act. One of the regulated areas was the proportion of assets classes which the Pension Scheme was only allowed to invest in properties up to a maximum of 30% of entire portfolio. As a member of the scheme, the 1<sup>st</sup> Defendant had been fully aware of this regulation.

32. As it stood, the 2<sup>nd</sup> Defendant's investment in property stood at more than 50% which was more than the 30% required by law. Therefore, the scheme was under obligation to ensure that the investment was within the required limits.

Further, the 2<sup>nd</sup> Defendant was a "Closed Scheme" meaning that as a retirement benefits scheme it was never allowed new members to join. The effect of this was that the scheme had to find how to liquidate its assets and ensure timely payment of its monthly pension.

33. It was against this backdrop that the 2<sup>nd</sup> Defendant in its Annual General Meeting held in the year 2019 passed a resolution to dispose off some of its properties. The move was aimed at ensuring that the 2<sup>nd</sup> Defendant complied with the law and that it was liquid enough to cater for its members.

34. Through a newspaper of National circulation the 2<sup>nd</sup> Defendant advertised for sale some of its property including the Suit Property and hence it was within public knowledge that the Suit Property was sold off which included the 1<sup>st</sup> Defendant as a member of the scheme and it was only being done in order to comply with the law.

35. Through a Tenancy License Agreement made on 11<sup>th</sup> March, 2021 the 1<sup>st</sup> Defendant entered into a Tenancy Agreement with the 2<sup>nd</sup> Defendant and the rent payable on monthly basis and as such the tenancy was a short term lease within the meaning of Section 58 of the Land Act.

36. Through the letter dated 4<sup>th</sup> August, 2021 the 2<sup>nd</sup> Defendant informed the 1<sup>st</sup> Defendant of the following developments: -

- a. The property had been sold to the Plaintiff;
- b. The Plaintiff was intending on taking vacant possession of the premises as from 5<sup>th</sup> October, 2021;
- c. The 1<sup>st</sup> Defendant was required to vacate the premises on or before 4<sup>th</sup> October, 2021. That notice was more than the amount of notice provided for in law.

Further, the 2<sup>nd</sup> Defendant through their property managers engaged the 1<sup>st</sup> Defendant with a view of offering him an alternative housing but the efforts never bore any fruits.

37. The 2<sup>nd</sup> Defendant proceeded and sold the Suit Property to the Plaintiff. The Plaintiff had also issued a demand letter to the 1<sup>st</sup> Defendant to vacate the premises but the 1<sup>st</sup> Defendant had not heeded to all for clarity sake. The 2<sup>nd</sup> Defendant's position could be summarized as follows: -

- i. The property was sold and transferred to the Plaintiff;
- ii. The 2<sup>nd</sup> Defendant had terminated the Tenancy Lease Agreement with the 1<sup>st</sup> Defendant through a letter dated 4<sup>th</sup> August, 2021.



- iii. As it stood, the Suit property was registered in the name of the Plaintiff.
38. On 2<sup>nd</sup> November, 2021, the 2<sup>nd</sup> Defendant summoned their Witnesses who testified as follows: -

**Examination in Chief of DW - 2 by Mr. Omondi Advocate.**

39. DW -2 testified and sworn in English language. He was a holder of the national identity Card bearing numbers 11625688. His date of birth was 1<sup>st</sup> January, 1972. His name was Paul Muthini Mwaka. He lived at Shimanzi estate of the County of Mombasa. He worked as a Trustee of 2<sup>nd</sup> Defendant. He came to court as a witness in this case. It's about the house which was sold to Plaintiff sometimes back. It's about the eviction for the 1<sup>st</sup> Defendant from the House.
40. He sighted the witness statement dated on 18<sup>th</sup> October, 2022 which he intended to rely on and have it adopted as his evidence in support of the case for the 2<sup>nd</sup> Defendant. He also a List of documents in court dated 18<sup>th</sup> October, 2022. There were eight (8) documents namely:-
- a. Copy of Extract of Advertisement on newspaper and 2<sup>nd</sup> Tender – Defendant Exhibit 1 and 2
  - b. A letter of notification of Award dated 14<sup>th</sup> October, 2019 - 2<sup>nd</sup> Defendant Exhibit -3.
  - c. Certificate of Official Search Indicating Plaintiff was owner done 21<sup>st</sup> September, 2022 – 2<sup>nd</sup> Defendant Exhibit 4.
  - d. Notice to vacate dated 5<sup>th</sup> August, 2021– 2<sup>nd</sup> Defendant Exhibit 5
  - e. Email to the 2<sup>nd</sup> Defendant dated 20<sup>th</sup> August, 2021 – 2<sup>nd</sup> Defendant Exhibit – 6
  - f. Tenancy Agreement executed on 1<sup>st</sup> October, 2020 2<sup>nd</sup> Defendant Exhibit 7
  - g. Tenancy Agreement dated 1<sup>st</sup> March, 2021 – 2<sup>nd</sup> Defendant Exhibit 8.
41. He confirmed that in year 2019, the property was advertised through Tender. The information was public and open to all. The members were aware of the sale for the House. It was not the first time. The members ought to have known. The 2<sup>nd</sup> Defendant was not involved in the 1<sup>st</sup> Defendant taking the house. It was possible that the agent may have gone ahead with the transaction without involving the 2<sup>nd</sup> Defendant. After they discovered it was found out that the agent were not been authorized to give the house to the 1<sup>st</sup> Defendant.
42. However, taking that the 1<sup>st</sup> Defendant was their member they did not want to push him. They offered him alternative accommodation facilities. They had a contractual relationship with Agent. The agreement with the agent was for them to provide service. That is the management of the property and exercise the control, supervision and manage the property under the consent of the Board of the Trustee. The 1<sup>st</sup> Defendant never replied to the offer for an alternative premises which was send by Email. As a tenant the property belonged to the 2<sup>nd</sup> Defendant. It's illegal to change the structure. It's the 2<sup>nd</sup> Defendant which undertook all the renovations. They had no idea that the same was being done by the 1<sup>st</sup> Defendant herein. This was a management policy. He was referred to clause (vi) – which were consumables. They were allowed but anything else was not allowed.
43. DW – 2 was not aware that Mr. Robert Wekesa Simiyu was granted the suit house but he was not the owner using it. It's used by a 3<sup>rd</sup> Party doing illegal business. It's for selling of motor vehicle which was illegal. He had no objection on it being visited by Court at the opportune moment.



**Cross Examination of DW – 2 by M/s. Kamau Advocate: -**

44. He had the authority to represent the 2<sup>nd</sup> Defendant. He confirmed that the Plaintiff paid the deposit for the purchase of the suit property in October, 2019. The property had been paid in full and it had been transferred to the 2<sup>nd</sup> Defendant herein. He could not confirm whether vacant possession was provided. He confirmed that after receiving money and sold the property.
45. They never entered into the tenancy agreement with the 1<sup>st</sup> Defendant. The tenancy agreement was under unclear circumstances when they discovered it. They offered alternative accommodation, but he declined. But the illegal occupant – the 1<sup>st</sup> Defendant herein was not willing to vacate. They asked the agent to have the matter resolved amicably but the efforts were in vain. They had not been collecting rent from the 1<sup>st</sup> Defendant. He was aware the Plaintiff was incurring losses because the 1<sup>st</sup> Defendant had refused to either pay rent nor vacate the premises.

**Cross Examination of DW – 2 by Mr. Mkanzi Advocate: -**

46. DW – 1 stated that he did not have any documents to show that he was the Trustee of the 1<sup>st</sup> Defendant herein. He did not have any resolutions to be in Court. There was no communication to the members that they were selling property apart from the Tenancy Documents. The NW Realite agent were reprimanded for acting aside the laid - down policy. They were instructed to provide the 1<sup>st</sup> Defendant with an alternative accommodation and eviction. They did but he declined. He never replied their mails. They had not laid any claim against the Agent. No one was allowed to cause any renovations. If it was to happen it's the Estate Management to do that.
47. He was referred to the Witness Statement – there was no Scheme between the agent and the 1<sup>st</sup> Defendant. He wished to retract that they had agreed with the 2<sup>nd</sup> Defendant that they discuss with the 1<sup>st</sup> Defendant or any other to allow the family of the Deceased to stay in the house for two (2) months before occupation of the House.

**Re - Examination of DW – 2 by Mr. Omondi Advocate**

48. They had not been receiving any rent from the 1<sup>st</sup> Defendant. He never replied to their offer. Instead he went to court. They had no objection in him getting an alternative accommodation. The structural improvements were on his shoulders. They normally communicate to the public and every year. They had an Annual General Meeting (AGM) where they sought the approval of the members. That was the close of the 2<sup>nd</sup> Defendant's case.

To support its case the Defendant Witness -2 for the 2<sup>nd</sup> Defendant produced the following documents. These were: -

- a. Copy of the extract of the advertisement published in the local newspapers;
- b. A letter of notification of the award dated 14<sup>th</sup> October, 2019;
- c. Certificate of official search indicating the Plaintiff was the owner done on 21<sup>st</sup> September, 2022;
- d. Notice to vacate by the 1<sup>st</sup> Defendant dated 5<sup>th</sup> August, 2021;
- e. Email to the 1<sup>st</sup> Defendant dated 6<sup>th</sup> August, 2021; and
- f. A copy of the Tenancy Agreement executed on 1<sup>st</sup> October, 2020 and 1<sup>st</sup> March, 2021.



## vii. Submissions

49. Upon the closure of the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cases, the Honorable Court directed that all parties file and exchange their Written Submissions within the given and stipulated time frame. Thereafter, on 16<sup>th</sup> February, 2023 upon full compliance the Honorable Court reserved a date to deliver its Judgment on notice accordingly.

### a. The Written Submissions by the Plaintiff

50. On 3<sup>rd</sup> February, 2023 the Learned Counsel for the Plaintiff through the Law firm of Messrs. Nyambura, Kamau & Co. Advocates filed their Written Submissions dated 23<sup>rd</sup> December, 2022. M/s. Kamau Advocate commenced her submission by providing a detailed background and brief facts of the case.

In order to advance her submissions further and in support of the case by the Plaintiff, the Learned Counsel framed four (4) issues as follows: -

51. Firstly, whether the Plaintiff was a bonafide Purchaser and the registered owner of the Suit Property; whereby she averred that the Plaintiff acquired the property from the 2<sup>nd</sup> Defendant for valuable consideration. She reiterated that on 10<sup>th</sup> September, 2019 the 2<sup>nd</sup> Defendant placed a tender advertisement number KPAPS/PM/03/2019 in the local dailies being “The Standard” and “the Daily Nation” newspapers for the disposal of the 2<sup>nd</sup> Defendant’s properties among them was the Suit Property.

Resultantly, the Plaintiff purchased the tender and subsequently purchased the property on 15<sup>th</sup> September, 2021 where the 2<sup>nd</sup> Defendant executed a transfer of lease in favour of the Plaintiff upon full compliance by the Plaintiff they were issued with the Certificate of Lease. Accordingly as prima facie conclusive evidence, she cited the Provision of Section 26 of the Land Registration Act No. 3 of 2012. These are facts which were fully supported by the 2<sup>nd</sup> Defendant and hence the Plaintiff is entitled to legal proprietorship to the Suit Property under Article 40 of the Constitution of Kenya, 2010.

52. Secondly, the Learned Counsel submitted that the 1<sup>st</sup> Defendant was a trespasser on the Suit Property and hence must give vacant possession to the Plaintiff. She asserted that the fact that the Plaintiff was the legal and registered proprietor to the Property then the 1<sup>st</sup> Defendant was a trespasser. The 1<sup>st</sup> Defendant contended that he was in occupation of the Property by virtue of a Tenancy License Agreement entered between himself and the 2<sup>nd</sup> Defendant on 1<sup>st</sup> March, 2021 and dated 15<sup>th</sup> March, 2021.

The 1<sup>st</sup> Defendant is a member of both the Plaintiff and the 2<sup>nd</sup> Defendant. Although he denied having knowledge of the sale of the property to the Plaintiff such ignorance was defence since the sale was in public domain.

She submitted that the Tenancy License Agreement entered into by the Defendants over the property was invalid because by 16<sup>th</sup> February, 2021 as the 2<sup>nd</sup> Defendant had no authority or right to lease the property to the 1<sup>st</sup> Defendant or any other person and hence enter into the Tenancy Agreement. Nonetheless, still the Tenancy License Agreement can never override those of the registered owner.

Indeed, on 4<sup>th</sup> August, 2021 the 1<sup>st</sup> Defendant was informed of the sale of the property to the Plaintiff and given two (2) months notice to vacate it on or before 4<sup>th</sup> October, 2021 but he blatantly refused to oblige.



The Counsel cited the Provision of Sections 3(1) of the *Trespass Act* Cap. 294 cases of: “Joseph Kipchirchir Koech – Versus- Philip Cheruiyot Sang (2018) eKLR and Charles K. Maiyo & Anor – Versus- John Mburu (2015) eKLR where the Courts found in a similar situation as of the instant case where tenants refused to vacate premises to the registered proprietor who has already purchased the said properties were termed as being trespassers and hence were ordered to grant vacant possession to the Plaintiffs and hence there was no justification for the 1<sup>st</sup> Defendant continue occupying the property and therefore he was a trespasser and should be evicted.

53. Thirdly, the Learned Counsel held that the Plaintiff should be allowed to forcefully evict the 2<sup>nd</sup> Defendant from the Suit property. She held that this needed to happen as the Plaintiff was the legal owner to the property. The 1<sup>st</sup> Defendant had become a trespasser and had stubbornly refused to vacate the premises. Hence there was no alternative but to have him evicted forcefully.
54. Fourthly, the Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should compensate the Plaintiff for the loss of user of the Suit Property. She averred that the Plaintiff purchased the property as an income generating investment for the benefits of its members. However, since it spent millions of shillings on that investment had not received any returns due to the acts of omission and commission by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. She cited the case of: “Ramadhan Makal Lalangole –Versus- Lopusikou Kori Lokamar [2015] eKLR to back her argument.

She informed Court that by Consent of all the Parties the Plaintiff produced a valuation Report by Amazon Valuers Ltd which assessed the property fair market rental rate at Kenya Shillings Fifty Six Million Six Sixty Seven Thousand and Sixty Seven Cents (Kshs. 56, 667,000.67) per month. The 1<sup>st</sup> Defendant should be made to pay this rent to the Plaintiff.

In conclusion the Plaintiff had demonstrated was the absolute and legal proprietor to the Suit Property having bought it from the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant was a trespasser and who ought to be evicted forcefully and the Plaintiff to be compensated through payment of rental income and loss of user. The Plaintiff should be awarded relief sought from the Plaintiff.

#### **b. The Written Submissions by the 1<sup>st</sup> Defendant**

55. Despite of the Court’s direction for all the Parties to file and serve their Written Submissions the Honorable Court has taken judicial notice that by the time of penning down this Judgment the 1<sup>st</sup> Defendant was yet to have filed their Written Submissions. In the given circumstances, the Honorable Court will proceed to deliver Judgment by solely relying on the other filed pleadings and the evidence already adduced on record and merit accordingly.

#### **c. The Written Submissions by the 2<sup>nd</sup> Defendant**

56. On 23<sup>rd</sup> March, 2023 the Learned Counsel for the 2<sup>nd</sup> Defendant through the Law Firm of Messrs. J.P. Ngoya and Austine Advocates LLP filed their Written Submissions dated 13<sup>th</sup> March, 2023. Mr. Ngoya Advocate commenced the submission by providing a brief background to the matter as per the filed pleadings.

Ideally, the Counsel underscored that the 2<sup>nd</sup> Defendant sold the Suit Property to the Plaintiff having followed all the due process and which was conducted in the public domain, public auction in a move that was meant to balance the investment portfolio of the Scheme toward alignment with the prevailing retirement benefits law. The Learned Counsel held that the said law required that the property investment of the scheme should not exceed 30% of its entire investment portfolio and which investment portfolio was already out of alignment by standing at 52% on property.



In essence, the Counsel held that the 2<sup>nd</sup> Defendant never opposed the eviction of the 1<sup>st</sup> Defendant from the Suit property.

57. However, the Learned Counsel observed that the 1<sup>st</sup> Defendant opposed the Suit on ground he was a tenant of the 2<sup>nd</sup> Defendant by virtue of the Tenancy License Agreement dated 1<sup>st</sup> March, 2021 for a fixed term of two (2) years commencing from 1<sup>st</sup> March, 2021 and terminating on 29<sup>th</sup> February, 2023.
58. The Counsel observed that it was evident from the Court record that this issue of the term of the tenancy was brought up on 16<sup>th</sup> February, 2023 when the Parties were taking direction on the filing of the Written Submissions. Indeed, the 1<sup>st</sup> Defendant affirmed that upon the determination of the tenancy through effluxion of time, he would then vacate the Suit Property which was 1<sup>st</sup> March, 2023 and hence he would not resist eviction.

Besides, the 1<sup>st</sup> Defendant had been issued with several demand notices of eviction but continued to legally occupy it. The Counsel associated himself to the case of: “Charles K. Maiyo (supra) already cited by the Counsel for the Plaintiff.

59. The Learned Counsel on whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should compensate the Plaintiff for the loss of user of the property held that the Plaintiff had never pleaded it from the filed Amended Originating Summons dated 17<sup>th</sup> May, 2022 for it to be compensated by the Defendants and hence the prayer did not lie. To buttress on that relied on the cases of:- “Wambui Kimathi & 2 others –Versus- Mary Wangui Muhindi (2021)eKLR and David Sironga Ole Tukai –Versus- Francis Arap Muge & 2 Others (2014) eKLR where the Court of Appeal held: -

“It is well established in our jurisdiction that the Court will not grant a remedy, which had not been applied for, and that it will not determine issues which the parties have not pleaded. In an adversarial system such as ours, Parties to litigation are the ones who set the agenda and subject to rules of pleadings each party is left to formulate its own case in its own way. And it is for the purposes of certainty and finality that each party is bound by its own pleadings”.

Nonetheless, should there be any order of compensation to be made the Counsel submitted it should be to have it done by the 1<sup>st</sup> Defendant. In saying so he held that the 1<sup>st</sup> Defendant knew the property had been sold but still entered into a tenancy agreement from the New Realite Valuers and Property Consultant. Besides, despite of knowing this fact the 1<sup>st</sup> Defendant failed to join them as a party to this suit as Co-Defendants.

Further, the 2<sup>nd</sup> Defendant never featured nor did they sign the said Tenancy Lease Agreement if at all this agents were duly instructed by the 2<sup>nd</sup> Defendant as they said agent would have known that the property was not available for leasing having been sold to the Plaintiff by the 2<sup>nd</sup> Defendant. The said Agent never sought consent from the 2<sup>nd</sup> Defendants as was the usual tradition.

Indeed, the 2<sup>nd</sup> Defendant issued the 1<sup>st</sup> Defendant several notices to vacate the premises but all were in vain. Additionally, the 1<sup>st</sup> Defendant never used to remit any rent to neither the Plaintiff nor the 2<sup>nd</sup> Defendant.

In conclusion, the Counsel urged Court to find that the 2<sup>nd</sup> Defendant was not liable for the tortious actions of the 1<sup>st</sup> Defendant and hence they should not be punished and find that the Suit against the 2<sup>nd</sup> Defendant was devoid of any merit and hence should be dismissed with costs to the 2<sup>nd</sup> Defendant.



### viii. Analysis & Determination

60. I have keenly considered all the filed pleadings, the evidence adduced by all the summoned witnesses, the documentary evidence, the Written Submissions and the plethora of cited cases by all the Parties, the relevant Provisions of *the Constitution* of Kenya, 2010 and the Statutes.
61. For this Honorable Court to reach an informed, just, equitable and reasonable decision on the subject matter, it has considered all the issues into the following three (3) sub-headings. These are: -
- a. Whether the Suit instituted by the Plaintiff through the filed Amended Originating Summons dated 17<sup>th</sup> May, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has any merit whatsoever?
  - b. Whether the Parties herein are entitled to the reliefs sought.
  - c. Who will bear the costs of the suit.

#### **Issue No. (a) Whether the Suit instituted by the Plaintiff through the filed Amended Originating Summons dated 17<sup>th</sup> May, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has any merit whatsoever?**

62. The facts of this case have been enumerated enough times and it would be of less worthy resources to record them herein. However, for clarity sake the Honorable Court has noted the facts which are not in contention at all. These are that the Plaintiff is the legal and absolute registered owner to the Suit Property having bought it on 2<sup>nd</sup> October, 2019 from the 2<sup>nd</sup> Defendant at a public auction. Indeed, the said auction was elaborately advertised from two (2) local newspapers of wide national circulation. Hence all knew about it including the 1<sup>st</sup> Defendant and particularly having been a registered member of both the Plaintiff and 1<sup>st</sup> Defendant by virtue of his employment to the Kenya Ports Authority. The sole purpose for the sale of the property was elaborately explained being in conformity with the requirement of the *Retirement Benefits Act* and the resolution of the Annual General Meeting held by the 2<sup>nd</sup> Defendant which included 1<sup>st</sup> Defendant.

Based on the principles and legal ratio held in Sections 24, 25 and 76 (1) of *Land Registration Act* and Article 40 of Constitution of Kenya (Amendment) Act, 2021 the Plaintiff who held the certificate of Lease having fully complied to all the process attained the indefeasible right, title and interest by law to the Suit Property.

63. Furthermore, the Plaintiff despite having brought the property for its income generation investments and development, they were never able to take up possession as the 1<sup>st</sup> Defendant had prevented this from happening. The 1<sup>st</sup> Defendant claimed to have acquired tenancy and hence occupation onto the Suit Premises on the strength of a Tenancy Lease Agreement executed on 1<sup>st</sup> March, 2021 for a period of two (2) years to be terminated on 1<sup>st</sup> March, 2023 through an agent trading in the names and style of New Realite Properties Ltd. He alleged to have undertaken extensive renovation onto the property and also moved his family from a place called Mikindani estate of the County of Mombasa and changed the schools of his three (3) children. According to him, all these development made him to incurred colossal financial resources which if he was to vacate he ought to be compensated.
64. Additionally, it is not in contention that the 2<sup>nd</sup> Defendant was not involved in the development of the Tenancy Lease Agreement as their name does not feature any where nor their signatures as would have been expected. From the evidence adduced by Defendant Witness-2 when a property was already sold by the 2<sup>nd</sup> Defendant, for any leases to be entered by any agent their consent by the 2<sup>nd</sup> Defendant was required. Evidently, no such consent was sought nor obtained. In other words, it makes the Tenancy Lease Agreement illegal, wrongful invalid, null and void.



65. The Honorable Court has also noted and which is not in contention that from the time the 1<sup>st</sup> Defendant took possession to the Suit Property, he never remitted any rental income to neither the Plaintiff nor the 2<sup>nd</sup> Defendant. Clearly, this makes the occupation of the Suit Premises wrongful, illegal and irregular. The Court cannot agree more with the Learned Counsel for the Plaintiff that it tantamount to act of trespass by the 1<sup>st</sup> Defendant.
66. Besides, the Court has noted that on 4<sup>th</sup> October, 2021 the 1<sup>st</sup> Defendant was informed by the 2<sup>nd</sup> Defendant that the property had been sold off and it now belonged to the Plaintiff. He was urged to seek for accommodation elsewhere but he became adamant on the strength of the Tenancy Lease Agreement. Pursuant to this, he was issued with several notices to vacate from the Plaintiff, the Agents and 2<sup>nd</sup> Defendants but he refused to oblige.
67. Arising from the above reasoning and the fact that the 1<sup>st</sup> Defendant was offered an alternative premises by the New Realite Agents and worse of it all the lease terms had by effluxion of time terminated the said lease was already overtaken by events on 1<sup>st</sup> March, 2023, the Plaintiff has been able to demonstrate that its Suit has merit. For these reasons the Suit succeeds.

**Issue No. (b) Whether the Parties herein are entitled to the reliefs sought.**

68. Under this heading, it is a rather straight forward issue. From the above analysis, it's on a conclusive position that the Plaintiff is the absolute and legally registered proprietor to the Suit Property. I have taken cognizance of the fact that although the Plaintiff bought this property from the 2<sup>nd</sup> Defendant herein, the sellers of the property would be liable in that in the process of allowing it to be controlled, supervised and managed by an agent – New Realite ,the said agents abdicated their obligation by leasing it out to the 1<sup>st</sup> Defendant without seeking the consent of the 2<sup>nd</sup> Defendant. This was a major lapse on their part. Indeed, the 2<sup>nd</sup> Defendant informed Court that they reprimanded them for that management blunder. However, taking that the 1<sup>st</sup> Defendant never bothered to file any Counter Claim to that effect nor the 2<sup>nd</sup> Defendant seeking to join the agent into the suit as a third party proceedings the Honourable Court will want to wish and have the matter wither the matter away silently as dry leave or wet ashes as its founded in the English adage “let the sleeping dogs lie”.
69. Be that as it may, the Plaintiffs are entitled to all the mesne profits in form of the rental income which the 1<sup>st</sup> Defendant continued enjoying by occupying it and not remitting to neither the 2<sup>nd</sup> Defendant, the Agent nor the Plaintiff. From the Valuation Report produced by the Plaintiff from the Valuers firm trading in the names and style of Messrs. Amazon Valuers Limited the Plaintiff is entitled to a sum of Kenya Shillings Fifty Six Thousand Eight Hundred and Twenty two (Kshs. 56,822.00) per month to be met by the 1<sup>st</sup> Defendant.
70. In saying so I am compelled to rely on the authority cited by the Learned Counsel for the 2<sup>nd</sup> Defendant Winfred & Jolowicz on Tort (19<sup>th</sup> Ed Volume 2) by Sweet & Maxwell page 675 in the following passage where the Lordship cited: -

“The action for mesne profits enables the Claimant to a reasonable rent for the possession of the property by the Defendant up to the time when possession is surrendered and damages for any deterioration.....”

The text further continues “It remains a matter of debate whether the sum payable by way of reasonable rent represent a compensatory measure of damages or a restitutionary measure”.

The award of damages here will be issued against the 1<sup>st</sup> Defendant being the person who was in actual and physical possession and occupation of the Suit Property.



As indicated the 1<sup>st</sup> Defendant was in possession from 1<sup>st</sup> March, 2021 and was on 4<sup>th</sup> October, 2021 issued with a notice to vacate to allow the Plaintiff take occupation but he declined leading to trespass.

From the case cited by the Learned Counsel for the Plaintiff of “Ramadham Makal Lolangole (Supra)” held: -

“According to Halsbury Law of England, 4<sup>th</sup> Ed Vol. 45 at paragraph 26, 1503, the following must be taken into consideration as an action for damages for trespass provides thus: -

- a. If the Plaintiff proves trespass he is entitled to recover nominal damages even if he has not suffered any actual loss;
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss;
- c. Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use..... (emphasis is mine).

The (c) above is directly applicable to the instant case. The 1<sup>st</sup> Defendant has to meet this damages for the loss of user for a sum of Kenya Shillings Fifty Six Thousand Eight Hundred and Twenty Two (Kshs. 56,822.00) per month.

Ideally, in the given circumstances and the surrounding facts and inferences of this case, the 1<sup>st</sup> Defendant has to immediately vacate the premises and hand it over to the Plaintiff.

#### **Issue No. (c) Who will bear the costs of the Suit**

71. It’s now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of “Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR” where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

72. In the instant case, the Plaintiff has been successful in establishing its case. Being a successful party, they are entitled to costs against the 1<sup>st</sup> Defendant herein for good reason. Thus, I direct so for the costs of the suit to be borne by the 1<sup>st</sup> Defendant.

#### **ix. Conclusion and disposition**

73. Ultimately, upon conducting such an elaborate analysis to the framed issues herein the Honorable Court concludes on preponderances of probabilities that the Plaintiff has been able to establish the case against the 1<sup>st</sup> Defendant. For avoidance of doubt, I specifically make the following orders: -



- a. That Judgement be and is hereby made in favour of the Plaintiff and against the 1<sup>st</sup> Defendant only as the 2<sup>nd</sup> Defendant herein is exonerated from any claims;
- b. That an order made that the 1<sup>st</sup> Defendant is found to be a trespass onto the Suit Property from 1<sup>st</sup> March, 2021 to date and hence he is to pay the damages.
- c. That there be an order to have the 1<sup>st</sup> Defendant remit all the rental income garnered to the Plaintiff and/or accrued while in occupation of the Suit Property for a sum of Kenya Shillings Fifty Six Thousand Eight Hundred and Twenty Two (Kshs. 56,822.00) per month without fail.
- d. That there be an order to have the 1<sup>st</sup> Defendant legally vacate the Suit premises within the next Ninety (90) days pursuant to the Provision of Section 152 E of the Land Act No. 6 of 2012 subject to remittance of monthly rent to the Plaintiff.
- e. That failure to comply with this orders, the Plaintiff and the Officer in Charge of Mbaraki Police Station Mombasa to ensure the orders are adhered with at the expense of the 1<sup>st</sup> Defendant.
- f. That the costs of this suit to be borne by the 1<sup>st</sup> Defendant.

It is ordered accordingly.

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS AND SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

.....

**HON. JUSTICE L.L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

**Judgment delivered in the presence of:-**

- a. M/s. Yumnah, the Court Assistant;
- b. M/s. Nyambura Kamau Advocate for the Plaintiff;
- c. No appearance for the 1<sup>st</sup> Defendant; and
- d. Mr. Ngoya Advocate for the 2<sup>nd</sup> Defendant.

