



REPUBLIC OF KENYA



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**Mungumba v Mwangandi (Environment and Land Case 165 of 2016)  
[2023] KEELC 21996 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 21996 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 165 OF 2016  
LL NAIKUNI, J  
DECEMBER 5, 2023**

**BETWEEN**

**CHANZERA KOMBO MUNGUMBA ..... PLAINTIFF**

**AND**

**SILAS BONMBO MWAGANDI ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the suit that was commenced by way of Plaintiff dated 10<sup>th</sup> June 2016 and filed in Court on 16<sup>th</sup> June, 2016 by the Plaintiff herein. It was against the Defendant – Silas Bombo Mwangandi.
2. According to the Affidavit of Service by one Mr. Albert Baya Thoya, a Court Clerk attached at the Law firm of Messrs. Omollo Onyango & Company Advocates sworn on 8<sup>th</sup> July, 2016 and filed in Court on 15<sup>th</sup> August, 2016 he effected service onto the Defendant. In particular the contents of Paragraph 3, he asserted having effected service of the Summons to Enter Appearance dated 20<sup>th</sup> June, 2016 and all the pleadings upon the Defendant at his residence at Majaoni. He held he met the wife of the Defendant and upon introducing the purpose of his visitation she accepted the documents by signing at the back of his copy and which he returned to Court. Ideally, the Honourable Court deemed the service to have been proper in accordance with the provision of Order 5 Rules, 1, 2 and 3 of the *Civil Procedure Rules*, 2010.
3. Despite of the afore stated service having been effected upon the Defendant, he failed to comply by entering appearance nor filing a Defence as required by law under the provision of Orders 6, 7 and 11 of the *Civil Procedure Rules*, 2010. Resultantly, on 15<sup>th</sup> August, 2016, the Plaintiff requested for Judgement in default against the Defendant under the provision of order 10 Rule 6 of the *Civil Procedure Rules*, 2010. Nonetheless, being a land matter, it was fixed for formal proof. It is instructive



to note that, on 27<sup>th</sup> January, 2021, the Plaintiff's suit was dismissed for non – attendance under Order 12 Rule 1 of the *Civil Procedure Rules*, 2010. However, on being moved formally by the Plaintiff, the Honourable Court on 19<sup>th</sup> July, 2021 was persuaded to set aside its orders and thus the suit was reinstated.

4. On 12<sup>th</sup> May, 2022 the Plaintiff's case proceeded on for hearing in earnest to its logical conclusion.

## II. The Plaintiff's Case

5. Based on the filed pleadings, the Plaintiff is an adult male person of sound mind residing at Mombasa. While the Defendant is also adult male person of sound mind residing in Kenya. The Plaintiff averred that in the year 1978, his late father – Mr. Kombo Mungumba (Hereinafter referred to as “The Deceased”) leased out all that parcel of land known as Majaoni Settlement Scheme Plot No. MN/II/384 (Hereinafter referred to as “The Suit Land”) to one Mr. Charo Iha (Hereinafter referred to as “Mr. Iha”) for a sum of Kenya Shillings Two Thousand Eight Hundred (Kshs. 2,800/=) based on an agreement that he was to refund the money after 30 days.
6. The Plaintiff further averred that in the year 1988, Mr. Iha asked for the refund of the money so he could hand over the parcel of land back to the Plaintiff. The Deceased made all efforts to raise the said monies with intention comply with the demand of Mr. Iha. When he came back to demand for his refund, he was misinformed that the deceased had fallen and was on his death bed. Hence, from this assertion, Mr. Iha made a decision and opted sell off the said parcel of land to the Defendant Mr. Silas Bombo at a sum of Kenya Shillings Five Thousand Five Hundred (Kshs.5,500/=).
7. The Plaintiff informed Court that in the year 1989 Mr. Iha died. As a result, in the year 1998, he was left with no option but to approach the Defendant to transfer the said parcel of land back him. The Defendant agreed but gave a condition for that to happen by demanding that the Plaintiff pays him a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs. 7,500/=). The Plaintiff agreed. However, when the Plaintiff delivered the sum of Kenya Shillings Seven Thousand Five Hundred (Kshs. 7, 500.00/=) to the Defendant, the Defendant refused to take the amount and instead further demanded an additional sum of Kenya Shillings Eleven Thousand (Kshs. 11,000/=). The Plaintiff never gave up and worked tirelessly to raise the amount. Again he approached the Defendant with the said sum of Kenya Shillings Eleven Thousand (Kshs. 11,000/=) but the Defendant again refused to take it and instead demanded for a sum of Kenya Shillings Fifteen Thousand (Kshs.15,000/=).
8. The Plaintiff agreed to raise the money, where the Defendant orally agreed in the presence of the Area Chief that the Plaintiff should double the final refunded monies to be raised to a sum of Kenya Shillings Thirty Thousand (Kshs.30,000/=). Luckily, the Plaintiff had the money at that particular moment but when it was handed over, the Defendant once more changed his mind by declining to receive it. After the refusal, the Plaintiff told the Defendant that since both were using the same piece of land for farming purposes during harvesting and farming of coconuts they should continue to do so. Indeed, this happened for a period of six and a half months without any complain being raised from the Defendant.
9. However, the Plaintiff averred that on or about the year 1999, while he was seated with a friend Mr. Ravasco Mramba at his uncle's place (home) suddenly the Defendant accompanied with a group of people carrying weapons e.g. clubs, stones and dogs while the Defendant and one Corporal Manyesu (Bamburi Police Station) who was acting as his bodyguard were drinking the local brew (mnazi) confronted the Plaintiff. The Plaintiff asked the Defendant what was in his mind and why carry a lot of people. That the Defendant answered the Plaintiff that the people were there to beat him up with the clubs and stones whereas the dogs were to chase him if he had decided to run away.



10. The Plaintiff stated that when he insisted on getting a direct answer from the Defendant he was told that he was out of his mind to play around with a parcel of land belonging to a police officer and that he was going to Bamburi Police station, to be jailed for the rest of his life. The Defendant continued by saying that the Plaintiff and played around with the government property and that was lucky for not running otherwise he would be dead. The Plaintiff told the Defendant that it was okay and had no problem to go to the said police station for it would be known the rightful owner of the said parcel.
11. The Plaintiff averred that in the year 1999, the Defendant arranged to have the Plaintiff arrested and charged with the offence of stealing 200 pieces of coconuts but was released on cash bail of a sum of Kenya Shillings Two Thousand (Kshs.2, 000/=), the case was heard and justice delivered on 12<sup>th</sup> August 1999 when the Honorable Magistrate stated that the court was not in a possession to determine the conflicting claims of ownership in the absence of a Title Deed in the Defendants favour. The Plaintiff was then acquitted under the provision of Section 215 of the *Criminal Procedure Rules*, Cap. 75.
12. The Plaintiff held that when he got back he found that the Defendant had sub - divided and sold several plots despite being warned against the illegal sale, and yet the graves of the Plaintiff's relatives and one parent being inside the said parcel of land.

The Plaintiff prayed for Judgment against the Defendant for:-

- (a) A permanent injunction restraining the Defendant by himself, agents, employees, servants, and/or other persons acting on their behalf from developing, alienating, subdividing, selling and/or dealing with suit parcel being Majaoni Settlement Scheme Plot No. MN/II/384 in any manner whatsoever.
- (b) A declaration that the Plaintiff is the lawful owner of all that parcel of land in Majaoni Settlement Scheme Plot No. MN/II/384.
- (c) Costs of this suit and interest at Court rates.

### **III. The Testimonial Evidence by the Plaintiff**

13. On 12<sup>th</sup> May, 2022, the Plaintiff testified in earnest as PW – 1 and as follows.

#### **A. Examination in Chief of PW – 1 by Mr. Kahindi Advocate**

14. PW - 1 was sworn and testified in Kiswahili language. He identified himself as being Mr. - Chanzera Kombo Mungumba. He was a holder of the national identity card bearing numbers 11497721. He was born in the year 1974. He was the Plaintiff herein. He was a Casual worker. He recorded his witness statement dated 10<sup>th</sup> June, 2016 and filed in Court on 16<sup>th</sup> June, 2016. He had the statement adopted as part of his evidence. He also filed a list of documents dated 1h0<sup>th</sup> June, 2016 and which he produced and they were marked as Plaintiff Exhibit 1 to 4.
15. PW - 1 testified that his late father – deceased, who had partial eye disability - leased out their suit parcel of land to Mr. Iha for a sum of Kenya Shillings Two Thousand Eight Hundred (Kshs. 2, 800.00/=) in the year 1978 with an agreement that he was to refund the money in thirty (30) days. On 17<sup>th</sup> October, 1984, his father passed away. In 1988, Mr. Iha demanded for his refund but was misinformed that the Plaintiff's was gravely ill prompting him to sell the land parcel to the Defendant for a sum of Kenya Shillings Five Thousand Five Hundred (Kshs. 5,500.00/=). Mr. Iha also died in the year 1989. The Plaintiff approached the Defendant with a refund of the monies. He kept on moving the goal posts from an offers of a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs. 7,500.00/=) to Kenya Shillings Eleven Thousand (Kshs. 11,000.00/=) to Kenya Shillings Fifteen Thousand



(Kshs. 15,000.00/=) and Kenya Shillings Thirty Thousand (Kshs. 30,000.00/=) to buy the land back but despite the Defendant initially accepting the offer he rejected all monies offered. However, they continued cultivating and farming alongside each other for six and half months. The Defendant was a police officer.

16. In the year 1999, while he was seated with a friend called Mr. Ravasco Mramba at his uncle's place suddenly the Defendant approached him in a group of people carrying weapons eg rungu, stones and dogs and his body guard. They harassed and threatened him. Later on, the Plaintiff was arrested and arraigned in court for theft of 200 pieces of coconut from the suit parcel. Luckily, he was acquitted under the provision of Section 215 of the *Criminal Procedure Code*. He was born on the suit land. All his parents and relatives were buried on the suit land. When he got back he found that the Defendant had subdivided and sold several plots to other third party and despite being warned of the illegality of the sale. This situation necessitated the institution of this suit.
17. To support his case he relied on the following documents. These were:-
  - a. A copy of the national identity card for the Plaintiff – Plaintiff Exhibit - 1
  - b. A copy of a demand letter dated 19<sup>th</sup> October, 2015 – Plaintiff Exhibit - 2.
  - c. A copy of the Court proceedings of the criminal proceedings in criminal case number 1028 of 1999 – Plaintiff Exhibit - 3.
  - d. A copy of a letter to the Attorney General date 2<sup>nd</sup> May, 2003 – Plaintiff Exhibit - 4.
  - e. A Copy of receipt dated 30<sup>th</sup> March, 1999 – Plaintiff Exhibit - 5.

#### **IV. Submissions**

18. On 12<sup>th</sup> May, 2022 upon the closure of the Plaintiff's case, the Honourable Court directed the parties to file their written submissions within a stipulated timeframe. Pursuant to that by 16<sup>th</sup> June, 2022 the Plaintiff had complied the Honourable Court reserved a date for delivery of Judgement on notice accordingly.

#### **V. The Written Submission by the Plaintiff.**

19. On 23<sup>rd</sup> May, 2022 the Learned Counsel for the Plaintiff, the Law firm of Messrs. Onyango Onung'a Advocates filed their written Submissions dated 19<sup>th</sup> May, 2022. M/s. Onyango Advocate commenced her submissions by providing the Court with a brief introduction and facts of the case. She informed Court that the Plaintiff instituted this suit against the Defendant by way of Plaint dated 10<sup>th</sup> June 2016 and filed on 16<sup>th</sup> June 2016 together with all requisite documents to complement the Plaint on grounds of infringement of property rights by trespass by the Defendant.
20. The Learned Counsel stated that the Defendant never entered appearance himself nor instruct any law firm to do the same by filing a Memorandum of Appearance. Following the hearing of this suit on the 12<sup>th</sup> day of May 2022, this Honourable court issued directives that the suit be dispensed off by way of written submissions. The Plaintiff's late father one Mr. Kombo (now deceased)/Lessor leased out the family's ancestral land being – the suit land in a lease agreement to one Mr. Iha (now deceased)/ lessee at a fee payable for rent at Kenya Shillings Two Thousand and Eight Hundred (Kshs. 2,800/=) in the year 1978. In addition, he two further agreed that the said monies would be refunded after 30 days had elapsed. That after the thirty days had elapsed, the duties and/or obligations of each party to the lease agreement were to be executed in totality. Mr. Iha approached the deceased for realization of



- the same but unfortunately, he was given misleading information that the said lessor had fallen ill to a point that he was contemplating death.
21. The Counsel stated that the lessee negligently and/or recklessly relied on the said information and sold the said parcel of land to the Defendant herein at a purchase price of Kenya Shillings Fifty Five Thousand (Kshs. 5,500/=). This was an act of breach of contract being that at no particular point in their verbal lease agreement, did they consent on selling the said parcel of land in an instance of non-performance and/or breach of contractual terms.
  22. That after the demise of the lessee, the Plaintiff herein sought audience with the Defendant for an alternative resolution to be arrived at to which the Defendant agreed to the same. However, the Defendant's consent was rather conditional being that he demanded that the Plaintiff pay him a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs. 7,500/=). The Defendant with the sole intention to defraud the Plaintiff, resulted to malicious acts of increasing the said price every now and then. The said acts subjected the Plaintiff to emotional distress and mental torture.
  23. After a strenuous back and forth chase between the Plaintiff and Defendant, both parties agreed and in the presence of the Area Chief that the Plaintiff should pay the Defendant a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) to which the Plaintiff had in his possession the said amount of money. Just as the Plaintiff was handing over the said sum of money to the Defendant, surprisingly and/or out of disbelief, the Defendant declined to accept the said sum of money but opted to enter into a new agreement with the Plaintiff.
  24. The Learned Counsel held that the terms of the new agreement were that both parties would continue carrying out agricultural activities on the said parcel of land to which the Plaintiff agreed to the same. They did this for six and a half months. That in the year 1999. the Defendant ambushed the Plaintiff by infringing on his right to quiet possession and peaceful enjoyment in the company of a group of armed men with the sole intent to intimidate, frustrate, ridicule and/or humiliate the Plaintiff further to a point that he would vacate from the said parcel of land. In the year 1999, the Defendant lodged a complaint against the Plaintiff at Bamburi Police Station on alleged allegations of Theft. He accused the Plaintiff of stealing 200pieces of Coconuts. After determination of the said criminal suit, the Plaintiff was acquitted under Section 215 of the *Criminal Procedure Code*. As if that was not enough, upon the culmination of the above mentioned criminal suit, the Plaintiff found out that the Defendant had sub-divided the said parcel of land into numerous portions of land. These acts prompted the Plaintiff to institute the suit herein.
  25. The Learned Counsel in her submissions raised two (2) issues for the consideration by this Honourable Court, These were namely:- Firstly, whether the Plaintiff is the absolute owner of the suit land. The Learned Counsel started by defining what a Lease was. According to her, the provision of Section 2 of the *Land Act* No. 6 of 2012 which defines what a lease is in Law. With regard to the instant case herein, the Plaintiff's late father, the deceased, leased out his ancestral land being the suit land to Mr. Iha (now also deceased) for a sum of Kenya Shillings Two Thousand Eight Hundred (Kshs. 2,800.00/=) in the year 1978 with an agreement that the said monies would be refunded to the lessee after 30 days. That the lease agreement between the lessor and lessee indeed existed due to the existence of the three features and/or elements in the said lease being Rent, Certainty of time and Exclusive Possession.
  26. According to the Counsel, the element of Rent, illustrated and/or signified the regular payments that the lessee made to the lessor for the lease for a specific period of time. Secondly, Certainty of Time provided for the period created for the lease to be in existence and thirdly, Exclusive Possession occurred when a tenant and/or lessee had occupation of all or part of commercial premises and had complete control over the said premises. With that being said, she submitted that a contractual agreement in the



form of a Lease did exist. On this proposition, she referred to the principle brought out in the case of *Street v Mountford* (1985) AC 809 which held that: “If the three essential characteristics for a lease are present, then the tenant more than likely has a lease as opposed to a license.’

27. The Learned Counsel averred that the malicious acts portrayed by the Defendant as envisaged within herein, were a clear indication of a vindictive person who would stop at nothing to intimidate, ridicule and take possession of that which was not rightfully and legally his just to oppress others. Moreover, due to desperation and/or frustration on the Plaintiff’s part, both parties mutually consented to the Plaintiff paying the Defendant the sum of Kenya Shillings (Kshs.30.000/=) just for him to reclaim what was truly and rightfully his.
28. Furthermore, the Learned Counsel contended that the Defendant was in illegal possession of the said parcel of land which amounted to trespass reason being, Mr. Iha (now deceased) who sold the suit property herein to him never had the mandate and/or authority to do so from the lessor – the deceased. On this proposition, the Learned Counsel made reference to the provision of Section 57 1 (c) (i) of the *Land Act* No. 6 of 2012.
29. The Learned Counsel submitted that what was considered as Ancestral property was any undivided property which had been present through four generations. To her, the suit property was ancestral property being that some of the Plaintiff’s dead family members had been buried in the parcel of land and further, the Plaintiff had known the said parcel of land as home being that it was owned by his late father who also acquired ownership through inheritance as kin of the said lineage.
30. In addition to that, one could not sell ancestral property without obtaining consent from the heirs of the said property. The agreement for sale between the Defendant and Mr. Iha (now deceased) was null and void being that the lessee and lessor did not have a meeting of the minds to mutually consent to selling the said parcel of land incase the lease period elapsed. Henceforth, the Learned Counsel argued that the lease between the deceased and Mr. Iha (now deceased) was the only agreement that governed the contractual duties and/or obligations in the suit herein as was seen in the case of *Prudential Assurance Co. of Kenya Limited v Sukhwender Singh Jutney* Civil Appeal N0.23 of 2005.
31. Secondly, whether the Plaintiff merits to the reliefs sought. The Learned Counsel asserted that the Defendant was fully conversant with the fact that the suit property belonged to the Plaintiff’s family and further that the Plaintiff was the rightful owner and one of the heirs to the said parcel of land under Customary Law. She relied on the provision of Section 5 (1) (d) of the *Land Act* which stipulates for the forms of land tenure in Kenya which confirms and recognizes Customary Land Rights to be a form of land tenure where it is consistent with the *Constitution* of Kenya, 2010.
32. Further, the provision of Section 5 (2) of the *Land Act* states that:-

“there shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.”

It was the submission by the Learned Counsel that the Plaintiff was the lawful and beneficial owner of the suit property to which his property rights were envisaged within the provision of Article 40 of the *Constitution* of Kenya, 2010 to acquire and own property of any description and in any part of the country.

33. In conclusion, therefore, the Plaintiff prayed that this Honourable Court grants the reliefs sought in form of a declaration that he was the rightful and lawful owner of the suit property. Further, it should



grant a permanent injunction to the Defendant restraining himself, agents, employees, servants and/or any other persons from having access to the suit property.

## VI. Analysis and Determination

34. I have assessed the filed pleadings being the Plaintiff dated 10<sup>th</sup> June 2016 accompanying documents, the evidence adduced in Court by the Plaintiff's witness, written submissions by the Plaintiff dated 19<sup>th</sup> May 2016, the appropriate and relevant provisions of the Constitution and the statutes.
35. To arrive at an informed, fair and reasonable decision on this matter, the Honourable Court has condensed the subject matter into the following three (3) issues for its determination. These are:-
  - a. Whether the suit through the filed Plaintiff dated 10<sup>th</sup> June, 2016 by the Plaintiff has any merit.
  - b. Whether the Plaintiff is entitled to any relief from the filed suit
  - c. Who will bear the costs of the suit.

### ISSUE No. a). Whether the suit through the filed Plaintiff dated 10<sup>th</sup> June, 2016 by the Plaintiff has any merit.

36. Under this Sub heading, the Honourable Court needs not belabor on the facts of the case as they have been elaborately spelt out from the proceedings. Nonetheless, the main substratum of the instant case revolves around three (3) fundamental aspects:-
  - a). The legal status on the ownership to the suit land;
  - b). The justification of the claim made by the Plaintiff over the suit land; and
  - c). Who bears the costs of the suit.
37. Firstly, the issue is whether the Plaintiff or the Defendant were the absolute owners of the suit land. Despite of the surrounding facts and the inferences of this case, the Honourable Court has observed that the matter is marred with a lot of abstract theories and assumptions with no proper back up in form of documentary evidence. Indeed, there are numerous grey areas as pertaining to the legal regime and the status of the suit land within this area. It will be noted that the Honourable Court has had by compulsion to keep on digging deeper and deeper in the dry terrain to access certain vital and relevant information and hence make the ends meet. Ordinarily, when confronted with such glaring legal lacuna that the evidence of certain witnesses and particularly land experts such as the Land Registrars or Land Adjudication and Settlement Officers normally would come in handy to shade some useful light. Honestly, it is a situation which is likely to tempt the Court to give up and hang its boots by simply dismissing the matter outrightly – a case of dead on arrival. Be that as it may, from the scanty facts of the case, the Honourable Court has decided to soldier on and attempted to groom and navigated in the dark tunnels to fully appreciate the issues at hand on the subject matter. A really herculean task.
38. To begin with, the Court perceives the suit land to have been under the communal land ownership and which had just undergone the land Adjudication process under the land Settlement Scheme. It is not yet very clear whether upon the completion of the adjudication process the Letters of Allotments and the Certificate of title deeds were issued if at all or not. Additionally, the Court has been on umpteenth times informed the suit land was ancestral belonging to the Plaintiff's family and though with out any empirical evidence that the Plaintiffs grand parents and parents and other relatives were buried on it. In the course of time, the deceased entered into a short term Lease agreement with one Mr. Iha for a sum of Kenya Shillings Two Thousand Five Hundred (Kshs. 2, 500.00/=) to utilise it for a period of thirty (30). On realizing the deceased was ailing Mr. Iha demanded for a refund of his monies so that



he would hand over the land to the deceased. But upon the demise of the deceased, Mr. Iha cleverly and wriggle out of this situation decided to disposed off the leased land to the Defendant for a sum of Kenya Shillings Five Thousand Five Hundred (Kshs. 5, 500.00/=) As fate would have it, Mr. Iha also passes on prior to having this land dispute resolved. As a result it now leaves the tussle to be between the Plaintiffs and the Defendant.

39. As indicated above, from my basic understanding and the facts presented the suit land was under a settlement scheme. It has been stated the adjudication process commenced in earnest and was still going on. The Plaintiff claims to have been involved in the adjudication process whereby he kept on raising objections but which were never heeded to and again no such evidence was placed before the Court during the trial or proceedings. All said and done, the Settlement programs were created in an effort to settle displaced individuals or to cater for landless families and squatters as well as ease the burden of population growth in the native reserves. Moreover these schemes sought to increase agricultural production and the furtherance of rural development. There was no codified law regarding the creation of settlement schemes prior to the enactment of the *Land Act* No. 6 of 2012. According to the case of “*Chengo Katana Koi v Protus Evans Masinde*” (2013) eKLR *Malindi and Raphael Kariuki Gichuki v Peter Maya Gichuki* (2019) eKLR (Kerugoya (ELC) there was and should be established Settlement Scheme Trustee Fund under the provision of Section 168 of the Agriculture Act used for the purchase of land for resale to settle land less persons. The provision of Section 134 (1), (2), (4), (5), (6) and (7) of the *Land Act*, No. 6 of 2012, the Government of Kenya, the National Land Commission and the County Government are mandated to create a settlement programs for settlement of the landless persons, squatters, displaced by natural causes, development projects, conservation, internal conflicts or other causes that may led to the movement or displacement.
40. The procedure for the acquisition of land within the land Settlement scheme is as follows:-
- a. Upon declaration of the settlement scheme by the Minister of Lands, the Government dispatches its officers to the area as Fund Trustees to manage the scheme;
  - b. The Officers are then tasked with the identification of the people on the area with the help of the local administration;
  - c. Depending on the size of the land they determine the size of land each settler is to get;
  - d. The Officers then undertake demarcation, allocation of the parcels of land, planning of the scheme and the issuance of the offer letter to the settlers offering them the land at a small fee;
  - e. Upon acceptance, an allotment letter is issued to the person and a charge drawn against the allotment letter whereof the allottee commits himself that he shall pay the loan amount as indicated in the charge;
  - f. The loan amount is payable within several years and it is upon final payment that a Discharge of Charge is then prepared whereof one is discharged from any liabilities to the settlement fund trustees; and
  - g. The Applicant then forwards all the documents which include the allotment letter, the receipt for payment of the charge amount, the discharge of charge among other documents to the Ministry of Lands and a title deed is produced in favour of the person/allottee.
41. Resultantly, the Discharge of Charge is released by the Director of the Land Adjudication & Settlement Officer (DLASO) to the Land Registrar to enable the officer to register the allottee and then d then issues the Title deeds accordingly. Certainly, although the adjudication process commenced and PW – 1 indicate on several occasions they as a family raised objections but no one listened to them. Indeed,



he imputed that the Land Adjudication Committee had been biased and discriminatory to them. In the given circumstance, the Plaintiff nor their family never obtained a Certificate of Title deed. The same applied to the Defendant who for a fact never possessed any documentations on ownership to the suit land.

42. Clearly, the Plaintiff has failed to demonstrate whether the above elaborate procedure ever took place by summoning the DLASO to testify as an expert witness. Worse still, this situation leaves the Court in a very precarious and awkward situation on two parties having a dispute over the suit land but without any tangible nor empirical documentary evidence to back them up as envisaged under the provisions of the law for instance Sections 24, 25 and 26 of the *Land Registration Act*, 2012. Be that as it may, the Court then has to revert back to the two (2) broad ingenious and innovative arguments advanced by the Learned Counsel. These were:- Firstly, that the suit land was ancestral property being undivided property which had been preserved through four generations. Furthermore, the Plaintiff's dead family members had been buried in the parcel of land. Further, the Plaintiff had known the said parcel of land as home being that it was owned by his late father who also acquired ownership through inheritance as kin of the said lineage. In addition to that, one could not sell ancestral property without obtaining consent from the heirs of the said property. Hence, the ostensible the agreement for sale between the Defendant and Mr. Iha (now deceased) was null and void being that the lessee and lessor did not have a meeting of the minds to mutually consent to selling the said parcel of land incase the lease period elapsed. Henceforth, the Learned Counsel argued that the lease between the deceased and Mr. Iha (now deceased) was the only agreement that governed the contractual duties and/or obligations in the suit herein.
43. Secondly, she upheld the testimony by the Plaintiff to the effect that there existed a short term Lease Agreement duly executed the Plaintiff's late father – the deceased, who leased out his ancestral land being the suit land to Mr. Iha (now deceased) for a sum of Kenya Shillings Two Thousand Eight Hundred (Kshs. 2,800.00/=) in the year 1978 with an agreement that the said monies would be refunded to the lessee after 30 days. According to the Learned Counsel the lease agreement between the lessor and lessee indeed existed due to the existence of the three features and/or elements in the said lease being Rent, Certainty of time and Exclusive Possession. The Learned Counsel proceeded to defining what a Lease was. According to her, the provision of Section 2 of the *Land Act*, defines a Lease as:-
- 'the grant with or without consideration, by the proprietor of land of the right to the exclusive possession of his or her land, and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement of lease.'
44. Further, according to the Counsel, the element of Rent, illustrated and/or signified the regular payments that the lessee made to the lessor for the lease for a specific period of time. Secondly, Certainty of Time provided for the period created for the lease to be in existence and thirdly, Exclusive Possession occurred when a tenant and/or lessee had occupation of all or part of commercial premises and had complete control over the said premises. With that being said, she submitted that a contractual agreement in the form of a Lease did exist.
45. In as much as this may be very sound legal arguments, so to speak, but as has already indicated, the Honourable Court still finds it difficult to fathom the same without any corroborative evidence of the land being ancestral land – for instances, photographs on the burial sites; testimonies by the neighbours or other beneficiaries of the said ancestral land; the nature of the objections ostensibly raised by the Plaintiff at the Land Adjudication committee; the Certificate of beacon or Letters of Allotment; Discharge of Charge issued to the Plaintiff; evidence by the experts such the Divisional Land Adjudication and Settlement Officer (DLASO), Land Adjudication Committee members, the



area local provincial administration such as the Chief and/or the Land Registrar or even the copy of the lease agreement and evidence from the estate of Mr. Iha.

46. To make matters even worse, and perhaps the straw that broke the camel's back, the Honourable Court has through the evidence on record noted that the land transaction and the events that led to the filing of the suit began in the year 1978. They culminated in the arrest of the Plaintiff in the year 1999 after which he lay off the matter to pursue the ownership of the suit parcel till the filing of the case on 10<sup>th</sup> June 2016. Further his attempts to buy back the suit parcel from the Defendant were in the year 1988. As it stands by the time of filing the suit in court it had been 28 years since the Defendant in question rejected his attempts to buy back the suit parcel. Critically speaking, this case is statutorily barred under the provisions of Section 7 of the Limitation of Action Act, Cap. 22. The provision of Section 7 provides:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

I wish to rely on the case of:- “Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows:-

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

47. Ideally, this matter would have ended right here. Died as a doodle!! However, I dare say, luckily, this suit was never defended as perhaps it would have been a slightly different tale to tell to the birds of the blue skies thereof. In any case doesn't Legal Maxim proceed thus “Equity aids the Vigilant not the Indolent”? I will say no more.
48. Nonetheless, this being a land matter and in the interest of Justice, Conscience and Equity, the Honorable has proceeded to invoke the inherent powers and the Overriding Objectives vested in Court under the provisions of Article 159 (1) and (2) of the Constitution of Kenya, 2010, Sections 3 and 13 of the ELC Act, 101 of the Land Registration Act, No. 3 of 2012 and Section 150 (1) of the Land Act, No. 6 of 2012 to allow the suit in favour of the Plaintiff.

#### **ISSUE No. b). Whether the Plaintiff is entitled to any relief from the filed suit**

49. Under this Sub – heading, having stated as much herein above, the Honourable Court will proceed to assess whether the Plaintiff merits to the reliefs sought. The Learned Counsel asserted that the Defendant was fully conversant with the fact that the suit property belonged to the Plaintiff's family and further that the Plaintiff was the rightful owner and one of the heirs to the said parcel of land under Customary Law. She relied on the provision of Section 5 (1) (d) of the Land Act which stipulates for the forms of land tenure in Kenya which confirms and recognizes Customary Land Rights to be a form of land tenure where it is consistent with the Constitution of Kenya, 2010. Further, she referred Court to the provision of Section 5 (2) of the Land Act states that:-

“there shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.”



50. It was the submission by the Learned Counsel that the Plaintiff was the lawful and beneficial owner of the suit property to which his property rights were envisaged within the provision of Article 40 of the Constitution of Kenya, 2010 to acquire and own property of any description and in any part of the country.

The provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

51. Trespass is described under the Trespass Act Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)

A continuing trespass is defined in:- Jowitt's Dictionary of English Law 2<sup>nd</sup> Edition as follows:-

“A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.

Finally, in the Clerk & Lindsell on Torts 16<sup>th</sup> Edition, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

52. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The Honourable Court can never imagine where Mr. Ita obtained that wisdom to have decided to dispose off a leased out land to a third party – the Defendant and subsequently the Defendant abrogating the so called rights and interest over the suit land by sub – division of it into small portions and transferring them to other third parties. This is incredible! Everything was turned upside down here. It was really jungle law prevailing. The chaotic situation compels the Honourable Court to seek refuge from the words of Arch Bishop Fulton Sheen when he stated:-

“Moral principles do not depend on a majority vote. Wrong is wrong, even if everybody is wrong. Right is right, even if nobody is right”

53. Undoubtedly, the Court is persuaded by the above arguments that the fairest conclusion is to hold that indeed the Defendant have trespassed onto the Plaintiff's land. Having found that the Defendants trespassed into the Plaintiff's land, the next issue is whether as a result of the same; the Defendants should be permanently restrained.

54. On the prayer sought by the Plaintiff for being granted permanent injunction orders restraining the Defendants from dealing with suit property. I wish to make reference to Korir, J who aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of “Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib (2018) eKLR” when he stated thus:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually



restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

55. Indeed, I fully satisfied that the character by the Defendant is one full malicious acts, arrogance, vindictiveness and unreliability. It is portrayed by the fact that he would stop at nothing to intimidate, ridicule and take possession of that which was not rightfully and legally his just to oppress others. Moreover, due to desperation and/or frustration on the Plaintiff's part, both parties mutually consented to the Plaintiff paying the Defendant the sum of Kenya Shillings (Kshs.30.000/=) which kept on moving from a sum of Kenya Shillings Seven Thousand Five Hundred (Kshs. 7, 500.0/=) to Kenya Shillings Even Thousand (Kshs. 11, 000.00/=) to Kenya Shillings Fifteen Thousand (Kshs. 15, 000.00/=), the use of goons armed with weapons to harass and intimidate the Plaintiff arising from the fact that he was a trained and serving as a Police officer just for him to reclaim what was truly and rightfully his. The Honorable Court is not shy to note perhaps that is the reason the Defendant despite of service being effected never bothered to enter appearance nor file a Defence to the suit.
56. Furthermore, the Learned Counsel contended that the Defendant was in illegal possession of the said parcel of land which amounted to trespass reason being, Mr. Iha (now deceased) who sold the suit property herein to him never had the mandate and/or authority to do so from the lessor (Mr. Kombo). On this proposition, the Learned Counsel made reference to the provision of Section 57 1 (c) (i) of the Land Act which states:-
- "the lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other illegally in occupation of land whose ownership vests with the Plaintiff by virtue of customary law and rights being that the said of parcel of land is Ancestral land."
57. For all these reasons, and nothing else, I hold that the Plaintiff is entitled to the vacant possession of the suit land and the orders to permanently preserve it accordingly.

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

58. It is now well established that issues of Costs are at the discretion of the Cost. Costs mean the award that a party is granted at the conclusion of the legal action or proceedings of any litigation. The provision of Section 27 (1 ) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By events it means the outcome of result of any legal action as stated herein. See the cases of "Jasbir Rai Singh v Tarchalans Singh Rai, (2014) eKLR, Kenya Sugar Board v Ndungu Gathini (2013) eKLR and Cecilia Karuru Ngayu v Barclays Bank of Kenya (2016) eKLR where the Courts held:-
- “The basic rule on attribution of costs is that Costs follow the events .....it is well recognized that the principles that costs follow the events is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”
59. The instant case is that the Plaintiff has established his case. Thus, he is entitled to costs accordingly.

#### **VI. Conclusion & findings**

60. Ultimately, upon conducting an indepth of the issues framed herein, the Honorable Court herein based on the Preponderance of Probabilities and the balance of convenience, it arrives at the conclusion



that the Plaintiff has successfully established its case based on Law and facts. For avoidance of any doubts, the Court proceeds to specifically make the following orders. These are:-

- a. That Judgement be and is hereby entered in favour of the Plaintiffs in accordance with the reliefs sought from the filed Plaintiff dated 10<sup>th</sup> June, 2016 accordingly with costs.
- b. That a declaration that the Plaintiff is the legal and absolute registered owner to the suit land – Majaoni Settlement Scheme Plot No. MN/II/384.
- c. That an order that the Defendant be and is hereby found to be trespasser and encroached onto the suit land - Majaoni Settlement Scheme Plot No. MN/II/384 and hence to be lawfully evicted within the next ninety (90) days from the date of the delivery of this Judgement pursuant to the provision of Section 152E of the Land Act No. 6 of 2012.
- d. That this marks the final settlement of the matter.
- e. That Costs to be awarded to the Plaintiff.

It is ordered accordingly.

**JUDGEMENT DELIVERED VIA EMAIL AS PER THE NOTICES DISPTCHED TO ALL THE PARTIES HEREIN SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF DECEMBER, 2023**

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**HON. JUSTICE L. L. NAIKUNI (MR.),  
ENVIRONMENT & LAND COURT AT MOMBASA**

