



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO. 37 OF 2011**

**THE MOMBASA POLYTECHNIC**

**UNIVERSITY COLLEGE.....PLAINTIFF**

**-VERSUS-**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR MOMBASA DISTRICT.....2<sup>ND</sup> DEFENDANT**

**TIMELESS PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

**I. INTRODUCTION**

1. This Suit was initially instituted before the High Court at Mombasa being Civil case HCCC No. 37 of 2011 by the Plaintiff vide a Plaint dated 3rd March, 2011 and a Verifying affidavit dated 4th February, 2011 and filed on the 4th March, 2011. The 3rd Defendant filed a Statement of Defence and Counter Claim dated 12th July, 2011 and later on an Amended Defence and Counter Claim dated 24th March, 2015. It will be noted that the 1st and 2nd Defendants never entered appearance in this matter and the Plaintiff requested for Judgement to be entered in default. However, they came to participate during the presentation and hearing of the Land Surveyors report towards the tail end of this proceedings.

2. Subsequently, from records it appears in the year 2013 or thereabout, due to issues of Jurisdiction, the case was transferred to the Environment and Land Court at Mombasa for hearing and final determination. It retained the same case numbers. The matter commenced hearing on 5<sup>th</sup> November, 2018 with the Plaintiff's case. During the Judge's service week and for purposes of expediency in clearing case backlogs, a site visit ("Locus ni Quo") was held on 3<sup>rd</sup> December, 2018 and the matter was heard whereby the Plaintiff and the Defendants closed their case. Nonetheless, upon the closure of their cases by the parties, the Honorable Court strongly felt it needful to seek for more evidence particularly from a Land Surveyor in order to assist it court arrive at an informed, fair and just determination. Thus, on 11<sup>th</sup> November, 2021 upon the consultation and by the Consensus of all the parties, this Court invoked the provision of Section 173 (1) and (2) of the Evidence Act. Cap. 80 of the Laws of Kenya to that effect which reads *inter alia*:-

**Section 173 (1) Extended powers of Court for purpose of Obtaining proper evidence:- A Judge or Magistrate may, in order to discover or to obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to object to any such question or order, nor, without leave of the Court, to be entitled to object to any such question or order, nor without leave of the Court, to cross – examine the witness upon any answer given in reply to any such question. Provided that Judgement shall be based only upon facts which are otherwise admissible and which have been duly proved.**

3. Pursuant to that, and based on the above legal provision the Government Land Surveyor was directed to visit the suit land with clear terms of reference being to conduct a detailed historical background on all the parcel of land known as Land reference Numbers Plot/Mombasa/Block X/180 and Mombasa/Block X/430 respectively; an intensive and elaborate literature review from the land survey and Land registration offices at Nairobi and Mombasa; conduct a physical and detailed and physical surveying exercise on these parcels of land; establishing all the cadastral coordinates and beacons in relation to the existing land and survey maps from the Directorate of Survey, Kenya and elsewhere. Eventually, the Surveyor was to prepare and furnish all the parties herein with a comprehensive land Survey report. Indeed, in the course of time, a Coast Regional County Land Surveyor, Mombasa, one Mr. Sammy Wambua Juma conducted the said survey exercise

and prepared a report dated 7<sup>th</sup> December, 2021. On diverse dates of 31<sup>st</sup> January, 2022 and 18<sup>th</sup> February, 2022 the Surveyor led by Court produced his report in Court and was elaborately and intensively cross – examined by all the Advocates for the Plaintiff and the Defendants on its contents. The emerging issues from this exercise will be recounted herein below.

4. The Plaintiff and the Defendants also fully complied with the provisions of Order 11 of the Civil Procedure Rules on case management by filing a list of documents, a list of witnesses and their statements and a list of agreed issues. Subsequently, the Plaintiff's pleadings were served and on 12<sup>th</sup> July, 2011 the 3<sup>rd</sup> Defendant filed their Defence and a Counter Claim dated 7<sup>th</sup> July, 2011. They also filed a List of documents, a list of witnesses and their statements and a list of agreed issues.

5. On 16<sup>th</sup> September, 2013 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Memorandum of appearance and Defence. Thereafter, the 3<sup>rd</sup> Defendant filed an application dated 12<sup>th</sup> February, 2013 seeking to amend its Defence and a Counter Claim. It was not opposed by the Plaintiff. On 15<sup>th</sup> April, 2015 the orders were allowed as prayed. The Plaintiff was also granted liberty to file an Amended Plaintiff and Reply to the Amended Defence and Counter Claim. On 30<sup>th</sup> April, 2015 the 3<sup>rd</sup> Defendant filed an amended Defence and a Counter Claim to the Plaintiff.

On 1<sup>st</sup> October, 2018, the Plaintiff filed a reply to the amended Defence and Defence to a Counter Claim dated 1<sup>st</sup> October, 2018. It was served upon the 3<sup>rd</sup> Defendant on 12<sup>th</sup> October, 2018 and hence the pleadings were closed ready for a full trial.

## **II. THE PLAINTIFF'S CASE**

5. From the Plaintiff, the Plaintiff sought for the following orders:-

***a) A Declaration that the creation of Mombasa Block X/430 out of the portion of 1 ½ acres of the Plaintiff's Plot No. Mombasa Block X/180 inclusive of the reclaimed ocean due to the receded sea level and the consequent issuance of 99 years lease to the 3<sup>rd</sup> Defendant for the same is fraudulent and illegal and null and void ab initio and the same ought to be cancelled forthwith.***

***b) An order for rectification by Court of the register by directing the cancellation of Title Mombasa Block X/430 and the Register be accordingly amended to indicate Mombasa Block X/430 does not and/or has ceased to exist and consequently the proper boundaries for parcel No. Mombasa Block X/180 be restored.***

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

On 3<sup>rd</sup> December, 2018, PW – 1 Dr. Matata Kilungu, the Administrator to the Plaintiff testified in the English language and on oath. He stated that at all material times to this suit, the Plaintiff was the legal and absolute registered owner to all that parcel of land known as Land Reference numbers Mombasa Block X/180 with all indefeasible interest, title and rights vested on it in law and that is where the Plaintiff's main campus and offices were situated. He produced the Certificate of Lease to the suit land issued on 17<sup>th</sup> September, 2009 as the Plaintiff's Exhibit – 1 (a). His testimony was that sometimes during the year 1980, the Plaintiff reclaimed from the sea a portion of land next to its parcel as a result of the receding sea level. He further testified that the Plaintiff's land had a creek which fronted the sea line and the same was being used by the institution for Marine Engineering related academic activities from the early years of the 1950s. He further stated that a building called the Boat house had been constructed on the said parcel of land. The said Boat house was in use to date. He showed court where the boundaries of the University were from the five (5) maps. He produced the said Maps which were marked as the Plaintiff's Exhibit 1 (b) to (f).

6. His evidence was that sometimes in the year 2009, a discovery was done and it was supposedly discovered that a portion of the Plaintiff's parcel of land measuring 1 ½ acres had been curved off from the Plot Numbers Mombasa Block X/180 illegally and purportedly allocated to a company known as Timeless Properties Limited, the 3<sup>rd</sup> Defendant herein. This included the College's building called the Boat house. According to him, when a search was conducted at the Land Registry, it was discovered that a title deed had been irregularly and illegally and ostensibly issued to the said Timeless Properties Limited without the consent, knowledge or notice of the Plaintiff who was the registered owners. He stated that the purported title deed issued to Timeless Properties Limited, the 3<sup>rd</sup> Defendant, was bearing the Land Reference numbers Mombasa Block X/430. He further stated that the official search also indicated that the Certificate of Lease to the 3<sup>rd</sup> Defendant was issued on 20<sup>th</sup> July, 2006 for a term of 99 years from 1<sup>st</sup> July, 1997 for a sum of Kenya Shillings Seventy Thousand (KShs. 70, 000.00) per annum. He produced a copy of the Certificate of Lease issued to the 3<sup>rd</sup> Defendant as evidence which was marked as the Plaintiff's Exhibit – 2. He also produced the Certificate of official search which was marked as Plaintiff's Exhibit - 3.

7. His testimony in chief was that all this development had not been known to the Plaintiff's College Administration. He held that no notice had been issued to it before a portion of its Plot number Mombasa Block X/180 had been supposedly curved off and given away to a stranger. It is after this that they instructed their Advocates on record, Messrs. Opolu & Company Advocates to take up the matter on their behalf he testified. He informed court that the Advocates issued a demand notice to the Land Registrar, Mombasa District requesting him to rectify the register and have the purported registration of title in respect of Mombasa Block X/430 and the name of the 3<sup>rd</sup> Defendant be cancelled as they believed the same had been done illegally and fraudulently. He stated although the letter was received but it never elicited any responses. Arising from that state of affairs and there being no tangible action taken by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff decided to institute this suit before the court seeking for the orders as prayed in the Plaintiff.

### **Cross – examination of the PW – 1 by Tebino Advocate for the 3<sup>rd</sup> Defendant.**

8. PW – 1 was cross examined by the Counsels for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Upon cross examination, the PW – 1 affirmed that he was aware that the Survey of Kenya held all the maps of the Country. He further admitted that he had not presented before this court any map showing the limits of the Plaintiff's land. He also admitted not having any document before this Court showing the Boat house nor the

nautical block were gazette heritage buildings for United Nations educational, Scientific and Cultural Organisation (UNESCO). He stated that he had not looked at the documents which were filed in court by their Counsel in the year 2014 relating to the land known as Land Reference Mombasa Block/X/430. With regard to the exhibit marked as Plaintiff Exhibit – “1 a)” he admitted that it had not been approved by the Physical Planning department as the same was an internal layout of the University. As regards the exhibit marked as Plaintiff’s Exhibits marked as “1 d)” and “1 b)” he stated that they were for the institute of Muslim education which were for proposal purposes. He held that the map was the one that was remitted. He disagreed with the assertion that since the said Maps being exhibits marked as Plaintiff’s Exhibits – “1 b” to “d” bore no stamp for the Physical planning department then they were not approved. As for the Plaintiff’s Exhibits – “1 d” to “e” being Maps, he admitted that they were architectural drawings prepared by the Architect firm trading in the names and style of Waweru and Associates.

9. However, on further questioning, he responded by stating that some of the Maps were stamped by the Municipal Council of Mombasa and hence to him they were approved. He admitted being aware that the 3<sup>rd</sup> Defendant bought the suit land from a 3<sup>rd</sup> Party. He asserted that it was not fair to state that the 3<sup>rd</sup> Defendant was an innocent purchaser of any fraud. PW – 1 informed court that the 3<sup>rd</sup> Defendant had not carried out due diligence to know the history of the said parcel of land.

#### **Re – Examination of PW – 1 by Mr. Opolu Advocate**

10. On re-examination by his Counsel, PW – 1 informed court that all the documents relating to the development of the University were submitted to the County Council of Mombasa and previously the Municipal Council of Mombasa. He stated that all Maps presented bore the official stamp of the Municipal Council of Mombasa. He informed Court that that the trend extended in the years of 1950s and had continued to that date. He confirmed that what he had presented to court on that day were institutional documents and not maps he had created for purposes of this case. He informed court that the total acreage of land the University occupied was 27.5 hectares (approximately 67.96 acres) stretching from the main road to the ocean. He asserted that the Defendants had not presented any sale agreement showing whom they had bought the property from. That brought to a close of the Plaintiff’s case.

### **III. THE 3<sup>RD</sup> DEFENDANT’S CASE**

11. On 12<sup>th</sup> July, 2011 the 3<sup>rd</sup> Defendant filed a Statement of defence and a Counter Claim dated 7<sup>th</sup> July, 2011. It held that the Plaintiff’s suit against it was frivolous, vexatious and an abuse of the due process of court and hence it should be dismissed and/or struck out with costs. On 30<sup>th</sup> April, 2015, upon obtaining court’s leave filed an Amended Defence and Counter Claim dated 24<sup>th</sup> March, 2015. From these pleadings they sought for the following orders:-

***a) A Declaration do issue that the Plaintiff has trespassed onto the Defendants land known as Land reference no. Mombasa Block X/430***

***b) An order of vacant possession be and is hereby issued against the Plaintiff compelling it to give vacant possession of all that parcel of land known as Mombasa Block X/430 to the Defendant.***

***c) An order of vacant possession be and is hereby issued against the Plaintiff compelling it to pull down the buildings and/or constructions, structures it has put upon all that parcel of land known as Mombasa Block X/430 at its costs.***

***d) An order of injunction be and is hereby issued restraining the Plaintiff by itself, its servants, agents or otherwise howsoever from tress – passing onto or putting up buildings, constructions, structures or carrying out any activities on to all that parcel of land known as Mombasa Block X/430.***

***e) Alternatively, the Plaintiff be compelled to pay compensation to the Defendant as shall be properly determined.***

***f) The Plaintiff to pay costs of this suit.***

#### **Examination in Chief of DW – 1 by Tebino Advocate.**

12. On 3<sup>rd</sup> December, 2018 upon the closure of the Plaintiff’s case,

the 3<sup>rd</sup> Defendant commenced its case. DW – 1, Mr. Listony Muramba testified where he stated that he was the Director of the Timeless Properties Limited – the 3<sup>rd</sup> Defendant herein and he was duly authorized to testify on behalf of the Board of Directors of the Defendant. He indicated that in the year 2006 when the property – Land Reference No. Mombasa Block X/430 was placed on sale they engaged and instructed their Advocate, Messrs. Sachideva & Company Advocates to conduct due diligence on it and establish whether the title would be clear from existence of any encumbrances and worth to invest in. Eventually, upon being satisfied with the due diligence undertaken, all the prerequisite papers for sale were prepared and executed. In July, 2006 they purchased it for valuable consideration at a sum of Kenya Shillings Four Million (Kshs. 4, 000, 000.00). The property was transferred to them. He asserted that he had not been aware and could not believe that it was their land that was curved off from the land belonging to the University – the Plaintiff herein.

13. He testified that the 3<sup>rd</sup> Defendant was the legal and registered owner to all that property known as Land Reference Numbers Mombasa X/Block 430. He produced the Certificate of Lease issued on 20<sup>th</sup> July, 2006 as Defence Exhibit – 1. He stated that the 3<sup>rd</sup> Defendant were very surprised by the occurrence of two things, a). to see the Plaintiff constructing on their property and b). the institution of the civil suit against them by the Plaintiff. As a result, they took action by instructing their current Advocates to defend the case and to seek for orders for vacant possession, injunction and compelling the Plaintiff to pull down all the structures it had put up on their property. He denied that the 3<sup>rd</sup> Defendant had taken part of the Plaintiff’s property. He urged Court to adopt his written statement dated, 7<sup>th</sup> July, 2011 as being the

evidence in chief as part of the proceedings in this case together with his list of documents filed on the 12<sup>th</sup> July, 2011 as his Defence Exhibits “1 to 3”. There being no objection raised by the Plaintiff, the said statement and documents were adopted and admitted as evidence in chief for the DW – 1 herein.

#### **Cross – Examination of DW – 1 by Mr. Opolu Advocate**

14. On cross examination by the Plaintiff’s Advocate, DW – 1 stated that he had not indicated in his statement certain information to the effect that they had learnt about this property in the market for sale through an advertisement in the newspaper, the name of their Advocate and the actual due diligence they conducted. He also admitted to court that he had not presented before court a copy of the Sale agreement, transfer forms, proof of payments of stamp duty, registration and other related documents pertaining to the transfer and registration of the suit property. Further, he admitted not presenting any Part Development Plan (PDP), a Mutation Form or Survey Map showing the size and the extent of their parcel of land. He admitted despite having bought the parcel of land from the year 2006, they had not taken possession of the suit land to date. He also informed court that they had no access road to the suit land save for a way through another Plot No. 98. He confirmed that there was a structure called the Boat House and nautical house on their property, however he stated that these had been current development structures which had not been in existence when they purchased the plot. He affirmed that he was not in a position to show where exactly the beacons were planted or situated on the ground.

#### **Re – Examination of DW – 1 by Tebino Advocate.**

15. On re – examination by his Advocate, DW – 1 stated that it was after seeing the advertisement in the newspaper, that they instructed their Advocate to undertake up due diligence of the said parcel of land. Later on they proceeded to purchase it as advised by their Advocate as the said parcel of land was free from any encumbrances. They paid the purchase price. He stated that they did not see the need to file in court a survey map of the land and the Part Development Plan (the PDP) for the suit property as the Plaintiff had already filed them which supported their case. He confirmed that to access their Plot they normally used the neighbor’s parcel of land. He held that when they bought the property there had been no physical structures neither the Boat House, the nautical nor the horse houses on it. He stated that they filed the Counter Claim because the University started building on their land after they had purchased it. That was the closure of the 3<sup>rd</sup> Defendant’s case.

16. **The Site Visit (“Locus in Quo”)** - Upon hearing all the parties and the closure of both the Plaintiff’s and Defendants case, Court felt it imperative to conduct a site visit (“*Locus in Quo*”) pursuant to the provisions of Order 18 Rule 11 of the Civil Procedure Rules to inspect the suit property and the issues arising. On 3<sup>rd</sup> December, 2018 at 4.00pm the same took place in the presence of the Learned Counsels for the Plaintiff and Defendants, PW -1, DW – 1 and the Caretaker of the 3<sup>rd</sup> Defendant.

On arrival, the Caretaker informed court that the land did not begin from where the 3<sup>rd</sup> Defendant had stated. Indeed, it was found out that the Boat, horse houses, the nautical block and the new Engineering block were not part of the land in dispute. He stated that the boundary began outside the perimeter wall fence put up by the University (measuring 2 ½ acres). He stated that their land was strictly where the mangroves grew and it stretched to the sea.

17. From the entry of the University there was no visible access road, though the 3<sup>rd</sup> Defendant insisted that there was an access road. As a result, the team had to change the location and went through either Plots numbers 128, 129 or 130 in order to access the parcels of land number Mombasa/Block X/430 belonging to the 3<sup>rd</sup> Defendant. The court’s observation was that the parcel of land for the 3<sup>rd</sup> Defendant is completely sandwiched between the other parcels of land. Additionally, the land was also marshy, full of mangrove trees and high tides reaches the suit property.

#### **IV. THE SUBMISSIONS.**

18. On 3<sup>rd</sup> December, 2018, upon close of the hearing, the honorable Court provided direction with clear timeframes that each party prepares, files and exchanges their Written Submissions. Pursuant to that they all obliged and a Judgement date was reserved.

#### **A. THE PLAINTIFF’S SUBMISSIONS**

19. On 21<sup>st</sup> March, 2021, the Plaintiff’s Advocates the law firm of Messrs. Opolu & Company Advocates prepared and filed their written Submissions dated 20<sup>th</sup> March, 2019. From the very onset, Mr. Opolu Advocate observed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having failed to enter appearance despite having been served. They indicated that, upon request, Judgement in default was entered against them in this matter. In their submissions, the Learned Counsels posed three (3) issues to be considered by this Honorable Court which were:-

- a) Whether due process had been followed in the creation of the Title no. LR. No. Mombasa/Block/X430 out of the 1 ½ acres of Mombasa/Block X/180 and the Plaintiff’s reclaimed land from the receding sea water.
- b) Whether the Plaintiff’s right of easement enjoyed for the past 76 years as a littoral or riparian owner of Mombasa/Block/X/180 to access and use the Indian Ocean waters was absolute and indefeasible.
- c) Whether the court should grant the orders as prayed for by the Plaintiff.

20. The Advocate argued that the Plaintiff were the legal and absolute registered owners to all that parcel of land known as Land reference numbers Mombasa X/Block 180 and that they had been in possession of the said parcel of land from the year 1943. He held that held for the 76 years, the Plaintiff’s boundary abutted the sea with direct unhindered access and use of the Indian Ocean’s high waters for Marine Engineering academic activities. The Advocate submitted that the land had a contiguous and conterminous boundary with the Indian ocean.

The Advocate opined that it had only been on 20<sup>th</sup> July, 2006 that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purportedly issued a Certificate of Lease to the 3<sup>rd</sup> Defendant to the property known as Land Reference numbers Mombasa X/Block/430, measuring approximately 2 ½ acres.

21. To support his arguments, the Learned Counsel relied on the provisions of Section 7 of the Land Act, of 2012 where he held that the 3<sup>rd</sup> Defendant failed to establish it acquired the said land by following any of these laid down procedures known in the law hereof. Indeed, his contention was that the 3<sup>rd</sup> Defendant failed to produce the relevant documents such as sale agreements, Survey Maps, Part Development Plan (PDP), the transfer form, Mutation Form and proof of statutory payments such as Stamp duty. They also did not have access road to their land and instead they were using their neighbors parcel of land to access to their land. Further, he wondered why they had never taken possession of the land from the time they allegedly bought it on 20<sup>th</sup> July, 2006. By and large, the Advocates submitted that the title deed acquired by the 3<sup>rd</sup> Defendant was obtained through illegal and fraudulent means. The Learned Counsels argued that the dispute involved the hiving off a portion of the Plaintiff's land. This was towards its sea front boundary upon the receding of the high tidal water mark on the fore shore. The said hived off parcel of land allegedly granted to the 3<sup>rd</sup> Defendant completely blocked the Plaintiff's access and the use of the Indian ocean that they enjoyed since the year 1943, close to 76 years by the time of filing their case in court. To buttress on this point, the Advocate relied on the decision of *HCCC No. 1062 of 2000 – Rhoda Chelagat - Versus – Commissioner of Lands & 4 Others* and the Doctrine of Accretion and Discretion as founded in the cases of *“Gefford – Versus Lord Yarboroughai 5. BWG 163”*

22. From the above stated legal proposition, he held that it was the Plaintiff who was in occupation of the entire suit land was conterminous with the Indian Ocean. The Learned Counsel reiterated and stressed on the Certificate of Lease issued to the 3<sup>rd</sup> Defendant having been acquired through fraudulent and illegal means. In their pleadings and submission, they provided all the particulars of fraud and illegalities ostensibly committed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. These included the curving off about 1 ½ acres of their land; combining it with a portion reclined sea level without their consent; failure to follow the due process in creating this portion; refusal to rectify the register and issuance of the said Certificate of Lease to the 3<sup>rd</sup> Defendant.

23. Additionally, they invoked several the provisions of the law which included Sections 19, 20, 30 of the Registered Land Act, Cap 300 (Repealed) on the principles of Overriding Interest and Section 143 of the said repealed Act; Section 32 (1) of The Limitation of Action Act, Cap. 22; Article 40 (1) and 2 (a),(b) and (3) of the Constitution of Kenya which they felt the 3<sup>rd</sup> Defendant was an affront to them. He also submitted on the Easement rights of access to and user of the waters of the Indian Ocean by the Plaintiff which they had enjoyed for the many years as already indicated. He reiterated that the 3<sup>rd</sup> Defendant had never been in possession of the suit land at all from time they alleged to have bought. On the contrary, it was the Plaintiff who had been and still were in occupation of the suit land which was conterminous with the Indian Ocean. He argued that none of the prayers in the Counter Claim had been proved as the claim of trespass was unfounded, the title being fraudulently and illegally acquired.

The upshot of all these, he urged court to firstly, grant the prayers as sought in the Plaint and secondly to dismiss the Statement of Defence and the Counter Claim herein by the 3<sup>rd</sup> Defendant as unmerited with Costs to the Plaintiff.

## **B. THE 3<sup>RD</sup> DEFENDANT'S SUBMISSIONS**

24. On 20<sup>th</sup> May, 2019, the 3<sup>rd</sup> Defendant's Advocates the law firm of Messrs. Ahmednasir, Abdikadir & Company Advocates filed their Written Submissions dated 16<sup>th</sup> May, 2019. Mrs. Asli, the Learned Counsel for the 3<sup>rd</sup> Defendant, fully concurred with the Plaintiff's Advocates despite being served, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants never entered appearance in this matter. She framed three issues (3) which they wished Court would consider in its determination and which she relied on in their submissions. These were:-

- i. Whether the land by the 3<sup>rd</sup> Defendant at any time formed part of the Plaintiff's land.
- ii. Whether the land for the 3<sup>rd</sup> Defendant had been hived off from the Plaintiff's land
- iii. Which party bears the burden of proof with regard to the allegation that the 3<sup>rd</sup> Defendant's property was acquired through fraud and illegal means.

25. Based on the above framed three (3) issues, they submitted and strongly refuted that the 3<sup>rd</sup> Defendant's land had ever at any one time, been part of the Plaintiff's land. She argued that the Plaintiff failed to adduce any evidence especially on the original survey map of the title property prior to the subsequent alleged alienation. It was her contention that the Part Development Plan (The PDP) produced by the Plaintiff never indicated the boundaries of the 3<sup>rd</sup> Defendant's land. According to her, they held that the Survey Map clearly demonstrated not only the boundaries of the 3<sup>rd</sup> Defendant but also its coordinates and beacons including the access road from the right top hand side. Further, she submitted that, the survey map and the approved Part Development Plan (PDP) for the 3<sup>rd</sup> Defendant's property also showed the boundaries of the Plaintiff's and the 3<sup>rd</sup> Defendant's land.

26. Further, the Learned Counsel refuted the fact that that the 3<sup>rd</sup> Defendant's Plot was ever hived off from the Plaintiff's land. On this, she held that there was neither the original map for the Plaintiff's plot nor an amended Map having ever been produced to demonstrate that the 3<sup>rd</sup> Defendant's plot was part of the Plaintiff's property. Additionally, she argued that the Plaintiff merely produced maps and architectural drawings that had not been approved by the Physical Planning department putting their authority at stake.

27. The Advocate emphasized that the 3<sup>rd</sup> Defendant was the legal and absolute registered owner to that parcel of land known as Mombasa X/Block430 with all the indefeasible title, right, and interest. She relied on the provisions of Section 26 (1) of The Land Registration Act, of 2012. On this front, she submitted that the Plaintiff who alleged that the 3<sup>rd</sup> Defendant had acquired the title deed illegally and fraudulently who had the burden of proof the said allegations had failed to do so as demonstrated under the provisions of Sections 107, 109 and 112 of the

Evidence Act, Cap. 80. Nonetheless, she concurred that with regard to the allegation on trespass supposedly committed by the Plaintiff, the burden of proof was the 3<sup>rd</sup> Defendant to prove it.

28. Finally, she was of the view that the several provisions of law cited by the Plaintiff's Advocates being Article 40 of the Constitution of Kenya, Sections 30 of the Registered Land Act, Cap 300 (Repealed); and 32 of the Limitation Act, Cap.22 though were relevant but had no direct application to the facts of this case as the same had never been adduced at all in the pleadings nor during the hearing of the case. She never disputed that the Plaintiff had been on the land for over 43 years as the only issue of dispute was the Plaintiff having any rights with regard to the 3<sup>rd</sup> Defendant's property – Land Reference Numbers Mombasa/Block X/430, that bordered the sea shore and the alleged easement rights.

In the long run, the Learned Counsel urged court to dismiss the suit and allow the prayers sought in the Counter Claim with costs.

#### **V. The Regional Surveyor's Report and the emerging issues.**

29. As indicated above, upon the closure of the Plaintiff and the Defendant's case, the Government Land Surveyor was directed to visit the suit land. He was armed with clear terms of reference for the task which included conducting a detailed historical background on all the parcel of land known as Land reference Numbers Plot/Mombasa/Block X/180 and Mombasa/Block X/430 respectively; undertaking an intensive and elaborate literature review from the land survey and Land registration offices at Nairobi and Mombasa; conducting a physical and detailed and physical surveying exercise on these parcels of land; establishing all the cadastral coordinates and beacons in relation to the existing land and survey maps from the Directorate of Survey, Kenya and elsewhere. Eventually, the Surveyor was to prepare and furnish all the parties herein with a comprehensive land Survey report. After the exercise, he prepared a report dated 7<sup>th</sup> December, 2021. The following were some of its summarized findings:-

- a) The parcel number Mombasa/Block X/180 was originally surveyed in the year 1929. The Survey of parcel was contained in survey Plan. (F/R) 29/27.
- b) Plot No. 180 was a combination of two Plots – Plot No. 27 measuring 0.669 acres and Plot No. 26 measuring 26.8 acres approximately.
- c) In the year 1954 a portion of land was excised from Parcel No. 180 through survey Plan No. (F/R) 70/64. The excised portion was given Parcel No. 180/1 and later on renumbered as Parcel No. 2896 measuring 0.2650 acres approximately.
- d) The remaining parcel No. 180/R was re – numbered parcel No. 318
- e) Parcel Number Mombasa/Block/X/439 was surveyed in the year 1997. The Survey is contained in Survey Plan (F/R) 330/116. It measures 1.05 HA. The Survey Plan also indicated parcel No. 428 and 429 being part of Parcel No. 318 implying Parcel No. 318 which had been derived from Parcel Numbers 180 was further sub – divided.
- f) There is no access road to Parcel Number 430 but seems to be on Parcel No. 428 which was part of and hence curved out of Plot No. 180.
- g) Most of the boundary beacons for parcel No. 180 were falling on the perimeter wall and therefore could not be replaced.
- h) Beacons RD5, RD4, RD1 and 12 were placed. All these beacons also define the boundaries of Parcel No. 428.
- i) Parcel No. 430 was not accessible due to the perimeter wall established by the University.
- j) Parcels Numbers 180 and 430 were two separate parcels.

In its conclusion, the report stated that although Plot No. 430 was land locked and had no access road but it could be created from Parcel No. 428 over an already registered property – Plot No. 180 by invoking the provisions of Section 98 of the Land Registration Act, 2012 and Section 140 of the Land Act, No. 6 of 2012. Upon its presentation led by Court, the Surveyor was subjected to intensive cross – examination on its contents by all the Learned Counsels for both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. All these issues will be enumerated herein below.

#### **VI. ANALYSIS AND DETERMINATION**

30. I have carefully considered the Plaintiff's claim as contained in its pleadings against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the 3<sup>rd</sup> Defendant's statement of Defence and Counter Claim, The Amended Defence and Counter Claim, the Amended Reply to the Amended Defence and Counter Claim by the Plaintiff, both the oral and documentary evidence adduced and testified in court, the well articulate written Submissions tendered by the parties as well as the law applicable and the authorities referred to and cited herein. From the very onset, I must confess this was such a herculean task to determine. But be that as it may, in order to arrive at an informed, just and fair decision, I have managed to frame the following five (5) salient issues to be considered for determination of the Suit before this Honorable Court. These are:-

- a) Whether due process of law, method and procedure for the acquisition and creation of the Certificate of Leases to all suit properties known as Land Reference numbers Mombasa X/Block/180 and 430 by both the Plaintiff and the 3<sup>rd</sup> Defendant were followed accordingly.*

- b) Whether the Plaintiff had committed any acts of trespass onto the 3<sup>rd</sup> Defendant's land as alleged.**
- c) Whether the Parties are entitled to be granted the Permanent Injunction orders sought hereof.**
- d) Whether the findings by the Regional Coast Surveyor through its report dated 7<sup>th</sup> December, 2021 was valuable to Court.**
- e) Who will bear the costs of this Suit?**

**ISSUE No. 1. - Whether due process of law, method and procedure for the acquisition and creation of the Certificate of Leases to all suit properties Land Reference numbers Mombasa X/Block/180 and 430 by both the Plaintiff and the 3<sup>rd</sup> Defendant were followed accordingly.**

31. Before embarking onto the indepth and elaborate analysis of the above framed five (5) issues, it is imperative that this Honourable Court, first and foremost recounts on the brief facts of this case. From the pleadings, the Plaintiff was then a constituent of the Jomo Kenyatta University of Agriculture and Technology (JKUAT). However, later on it became fully fledged Public institution and was allocated the land in the County of Mombasa. From the facts available, the Plaintiff has been occupying and has had structures on all that parcel of land known as Land Reference numbers Mombasa X/Block/180 measuring approximately 27.5 acres. It acquired the land over 76 years ago and constructed several structures being its main campus and which included a Boat house for its boat repairs and another building called the Nautical house on it. It is stated that these structures were built in the years of 1950s. A new building called the Engineering Block was constructed on the land about five (5) years from the time of the filing of the suit. According to the parties herein, all along they held that these structures had been on the disputed parcel though this fact was corrected upon court paying a visit to the site as indeed they were found not to be on the Plaintiff's parcel of land. Clearly, that makes the assertion and claim by the 3<sup>rd</sup> Defendant in their Counter Claim on the alleged trespass meted out by the Plaintiff upon ostensible causing these building structures on the disputed part of their land is then untenable. As alleged, in the year 1999, the Plaintiffs discovered that a portion of its land measuring 1½ acres had been curved off and allocated to the 3<sup>rd</sup> Defendant herein. The alleged extent of the encroachment had been such that it included one of the oldest structures of the land declared by UNESCO heritage site called the Boat house and nautical buildings. As stated, upon conducting a official search on the parcel of land, it revealed that the land had been registered in the names of the 3<sup>rd</sup> Defendant. It was at this point that the Plaintiff instituted the suit seeking for the rectification of the register and cancellation of the title deed registered in the names of the 3<sup>rd</sup> Defendant on grounds of having been curved off from their land and issued illegally and fraudulently without their consent nor knowledge and other reliefs thereof. The Plaintiff pressed that despite the claim of having bought the land, the 3<sup>rd</sup> Defendant had never taken possession nor did they have any access onto their land.

32. On the other hand, according to the 3<sup>rd</sup> Defendant, in the year 2006 they saw an advertisement of the property to be sold in the newspapers. They instructed their Advocates who upon conducting due diligence and found non existence of any encumbrances on it proceeded to embark on the usual sale transaction upto the point of the registration in their names and them being legally issued with Certificate of Lease. They admitted not having any access to the land and were compelled to be using a neighbor's land to do so. They insisted that all the Survey Maps and PDP showed clear boundaries. They had not yet taken possession and eventually got engaged in defending themselves in this suit. They filed a Defence and a Counter Claim claiming that the Plaintiff had trespassed onto their land by causing construction of structures on their land and vacant possession to the suit land by the Plaintiff. That should be sufficient facts on the case.

33. Now turning to the framed issues. All said and done, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely. Thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods as follows:

***S. 7 Title to land may be acquired through:-***

- i. Allocations;***
- ii. Land Adjudication process;***
- iii. Compulsory acquisition;***
- iv. Prescription;***
- v. Settlement programs;***
- vi. Transmissions;***
- vii. Transfers;***
- viii. Long term leases exceeding Twenty one years created out private land; or***

**ix. Any other manner prescribed in the Act of Parliament.**

In the instant case, the 3<sup>rd</sup> Defendant has held it acquired its land from an innocent bona fide purchaser for value on notice and consideration from a third party – The Crescent Properties Company Limited which I shall be assessing in more depth herein below.

34. In Kenya, by dint of Section 107 of **“The Land Registration Act” of 2012**, the law applicable to this matter here for title deeds that were issued in the years 1997 and 2009 respectively way before the promulgation of the new Constitution of Kenya, 2010, would be Registered Land Act, Cap. 300 (Now Repealed) and the relevant Sections being 27, 28 and 143 of the RLA.

*Section 27(a) “Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”*

Section 28 of the Act provides that:-

*“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”*

Section 143 (1) of the Act provides thus:

*“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake*

*(2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”*

Nonetheless, in the current dispensation the effect of the Registration of Lands is founded in the provisions of Section 24 of **“The Land Registration Act”** which provides as follows:-

***“Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;***

35. To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the conclusive *“prima facie”* evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of **“The Land Registration Act” No. 3 of 2012** provides as follows:-

***“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.....”***

This fact is strengthened by the following decisions - **“ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka.** And in **Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua’** where courts has held that:-

*‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’*

36. It is not disputed that each of the parties herein claim to hold a legal instrument to their respective parcels of land where the Plaintiff is the registered owner to all that parcel of land known as Land Reference numbers Mombasa X/Block/180 measuring 27.5 Ha and having acquired it sometimes in the year 1950s, over 76 years ago by the time of filing this suit while the 3<sup>rd</sup> Defendant legally owns parcel bearing Land reference numbers Mombasa X/Block/430 measuring 2 ½ acres though having bought it in the year 2009 but the Certificate of the Lease had been acquired by the third party, Crescent Properties Limited in the year 1997.

Suffice to say, the main bone of contestation in this suit are three (3) fold, namely:- a). the allegations meted by the Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants that it illegally and through fraudulent means curved off 1 ½ acres of land from their land; b). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants effecting registration of the 3<sup>rd</sup> Defendant, obtaining and issuance of its documents by fraudulent means, irregularly and illegally; and c). The 3<sup>rd</sup> Defendant being the legally registered owners to all that parcel of land known as Land reference Numbers Mombasa/Block X/430 and the allegation that the Plaintiff has been trespassing on its land by causing construction of some structure on it.

37. In order for this Honorable Court to effectively deal with the afore stated three (3) issues, I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

***“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute***

*and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”*

In the case of **“Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR** - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery unprocedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of Land Registration Act, the Provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play – **“Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others” ELC (Kjd) No. 204 of 2017.”**

The concept of bona fide innocent purchaser for value has been well captured in the now famous Uganda case of **“Katende Haridar & Company Limited (2008) 2 EA 173**, where the Court of Appeal of Uganda held that:-

**a) “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the properly offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki Vs. William Nyanzi, High Court Civil suit number 434 of 1996, must prove that:-**

**b) He holds a Certificate of title;**

**c) He purchased the property in good faith;**

**d) He had no knowledge of the fraud;**

**e) He purchased for valuable considerations;**

**f) The vendors had apparent valid title;**

**g) He purchased without notice of any fraud; and**

**h) He was not party to the fraud.**

38. Be that as it may, the above legal position seem to be changing particularly in the Kenyan context and jurisprudence. In the case of **“Mwangi James Njehia & Another – Versus – Simon Kamanu’, Civil appeal no. 177 of 2019**, the Court of appeal on this matter held:-

**“We nonetheless wish to state that the law, including case law, is not static and the above requirement which were entered over twenty (2) years ago cannot be said to have cast in stone. We hold the vie that ( e ) above will need to be revisited and the word “apparent” be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have ‘Purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi.....”**

39. On the other hand, with regard to the substratum of this case, the 3<sup>rd</sup> Defendant stated that they acquired the land from a sale carried out in an advertisement of the said land placed in a some newspapers and they caused their Advocates to conduct due diligence and non-existence of any encumbrances. Though not adduced orally, but I have seen from the list of the documents filed by the 3<sup>rd</sup> Defendant the Vendor was trading in the names and style of Crescent Properties Limited. Being satisfied they bought by paying the required consideration. In other words it was a case of a bona fide innocent purchaser for value. The Plaintiff has strongly held that the title was acquired fraudulently and illegally. Under Paragraphs 19 of the Plaintiff It has alluded to the same being done out the machinations or collusion by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by:- a).curving out about 1 ½ acres of the Plaintiff’s land inclusive of combining it with a portion of reclined sea level and giving it to the 3<sup>rd</sup> Defendant without consent or knowledge of the Plaintiff b). Issuance of an illegal title and lease for 99 years c). declining to rectify the register in perpetuation of the said fraud and illegalities and d). failure to follow the due process in creating the 3<sup>rd</sup> Defendant’s plot. Your guess is as good as mine as to the reasons neither the Plaintiff nor the 3<sup>rd</sup> Defendant never deemed it necessary to have brought the Vendor - Crescent Properties Limited at least as Interested parties in this proceedings in order to have shade more light on the disputed issues and quickly settled the matter.

40. It is trite law and as founded under Sections 107 and 108 of **“The Evidence Act” Cap 80** that he who alleges fraud or any such a claim has to proof it. None of the parties herein have been able to proof the allegation of fraud by filing a report by a Land Surveyor or an investigation agency or forensic document examiner, or a report from the Division of Criminal Investigation Office being the established expert on demonstrating the allegation fraud were produced nor summoned. For that reason the Honorable Court is left to invoke the provisions of Section 173 (1) of the Evidence Act, Cap. 80 at least on the Surveying and root of title aspects of the two parcels of land in dispute in order to establish that the Certificate of Leases held by the Plaintiff and 3<sup>rd</sup> Defendant are genuine and the conclusive **“Prima Facie”** evidence that they are the legal and registered proprietor to the two suit parcels of land.

41. Further, the provision of Section 112 of the Evidence Act provides that:-

***“In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.***

To buttress this point, the Plaintiff relied on the decision of ***“Michael JGK Kapsot –Vs- Kotat Arap Too (2020) eKLR and “Koinange & 13 others –Vs- Koinange (1986) eKLR.***

The Learned Counsels submitted that the dispute involved the hiving off a portion of the Plaintiff’s land towards its sea front boundary upon rescinding from the high tidal water mark on the fore shore completely blocking the Plaintiff’s access and use of the Indian ocean that was enjoyed by them since the year 1943 which had been 76 years by the time of filing their case in court. On this point they relied on the decision of HCCC No. 1062 of 2000 – ***“Rhoda Chelagat - Versus – Commissioner of Lands & 4 Others”*** and the Doctrine of Accretion and Decretion as founded in the cases of ***“Gefford – Versus Lord Yarborougai 5. BWG 163”***

42. From these legal proposition they held that it is the Plaintiff who was had been in occupation of the entire suit land was conterminous with the Indian Ocean. They invoked the provisions of Section 30 of the Registered Land Act, Cap 300 (Repealed) on the principles of Overring Interest and Section 32 (1) of The Limitation of Action Act, Cap. 22; Article 40 (1) and 2 (a),(b) and (3) of the Constitution of Kenya which they felt the 3<sup>rd</sup> Defendant was an affront to them. The acquisition of land by sale is a long and activity infested involving process and not an event. This court did not have the benefit of being shown the empirical documentary evidence to support the said process. For instance, the 3<sup>rd</sup> Defendant failed to produce a copy of the said newspaper advertisement, sale agreement with terms and conditions stipulated thereof entered between it and the then vendor, copies of the transfer forms, application and Letter of Clearance by the Commissioner of Lands, copies of Mutation Forms, Maps, receipts of statutory payments being stamp duty and registration of the Certificate of Lease. For whatever its worth, at least they would have summoned the Vendors as their witness to the case but this never happened and it leaves the assertion of having acquired it from sale in great questionable pedestal.

#### **ISSUE No. 4 Whether the Plaintiff had trespassed onto the 3<sup>rd</sup> Defendant’s land**

43. Further, upon conducting the site visit, court found out some overwhelming real and interesting revelations. These were that the two structures – the boat house and the nautical block were constructed out of the 3<sup>rd</sup> Defendant’s land, that it had no direct and proper access road to its land. Additionally, it was rather disturbing that despite having bought the land for over twelve (12) years as claimed, the 3<sup>rd</sup> Defendant had never taken possession onto the land. In this Judgement it has been demonstrated that firstly, the Vendor did not have a good title to pass on to the 3<sup>rd</sup> Defendant. Secondly, I have no hesitation to conclude that the 3<sup>rd</sup> Defendant did not fall under the category of innocent bona fide purchaser for value without notice.

44. On this point I have relied on the case of the Court of Appeal ***“Munyu Maina – Versus – Gathiha Maina” (2013) eKLR*** (Vishra, Koome and Otieno – Odek JJA) emphasized the above point when it said:-

***“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register....”***

And additionally in ***Hubert L. Martin & 2 Others - Versus – Margaret J Kamar & 5 Others (2016) eKLR, Justice Munyao Sila held:***

***“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedure that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain, The parties to such litigation must always bear that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of the case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld”***

45. The matter of overriding interest under Section 28 (1) of the Land Registration Act, 2012, the registration of titles and as part of the due diligence conducting of official searches to ascertain the genuine position of land in Kenya was elaborately deliberated on In ***the ELC (Nbi) – ELC Reference No. 1 of 2018 – In the Matter of Drive In – Primary School & Ruaraka School – Vs – the National Land Commission & 11 others”*** court held:-

***“An official search on any title at the land registry is very important before one can act on it. The search indicates the owner (s) of a particular property and the encumbrances or other relevant entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, a search may not always be a true reflection of the position. ....On Torrens System of registration. It is necessary for one to take further steps to ascertain the authenticity of the search and ownership of land. If the Applicant had bothered to delve into history of the title. It would have discovered that the title had two mortgage besides the entries in the register.....or any other overriding interest affecting the land they wish to transact on. In light of the foregoing our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search”***

46. Clearly, they were swindled of their hard earned moneys by the vendor and they cannot rely on the provisions of Section 26 (1) of the Land Registration Act to aid them. In this Judgement it has been demonstrated that the Vendor did not have a good title to pass on to the 3<sup>rd</sup> Defendant. Eventually, it will be inevitable to institute a sit for relief of specific performance and refund of their finances from the Vendor. They should never be left to escape or go scot free from this breach of contract and disposing off a bad title to the 3<sup>rd</sup> Defendant.

**ISSUE No. 5 - Whether the parties are entitled to the relief sought**

47. From the evidence adduced and the authorities relied on, I find that the Plaintiff is the “*Prima facie*” registered owner of the suit land known as Land Reference No. MOMOBASA X/BLOCK 180 measuring 27.5 Ha.

Secondly as per the Plaintiff’s pleadings, it will be prudent that the 3<sup>rd</sup> Defendant legally vacates the suit land under the laid down Provision of Section 152 E of the Land (Amended) Act, 2016. I am reminded of Madan, JA (as he then was) in the case of “*Chase International Investment Corporation and Ano. – Versus – Laxman Keshra & Others (1978) eKLR 143; 143 (1976 – 80) 1 KLR 891*” to the effect that:-

***“If the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred”***

48. Therefore, in the given circumstances, the most appropriate and available legal relief entitled to the Plaintiff is to invoke the provisions of Section 80 (1) and (2) of the Land Registration Act which holds:-

***“Subject to sub -section (2), the court may order the rectification of the register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake...”***

**ISSUE No. 6. Whether the findings by the Regional Coast Surveyor through its report dated 7<sup>th</sup> December, 2021 was valuable to Court.**

49. As stated above, the report by the Coast Regional Surveyor dated 7<sup>th</sup> December, 2021 and presented in Court on 31<sup>st</sup> January, 2022 and 18<sup>th</sup> February, 2022 respectively which during the cross examination by all the Learned Counsels for the Plaintiff and 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants generated a lot of heated issue. These in summary included the fact that the Government Land Surveyor admitting that he never physically participated nor visited the field himself. Instead, he informed Court that he send his field assistants to the ground and are the ones who brought him data. He used this data to cause the analysis and prepare a report. This is a very serious issue on the credibility of the whole exercise. Further, he also admitted that he was not able to fully embark on the detailed literature and historical background of the two Parcels of land bearing Numbers 180 and 430 which was rather critical to the instant case and which formed part of the clear terms of reference by the Court. Further, from some of its summarized findings these issues emerged:-

a) His reporting that the parcel number Mombasa/Bock X/180 was originally surveyed in the year 1929. The Survey of parcel was contained in survey Plan. (F/R) 29/27. His observation that Plot No. 180 was a combination of two Plots – Plot No. 27 measuring 0.669 acres and Plot No. 26 measuring 26.8 acres approximately. This aspect was found to be rather theoretical and not backed by any scientific reasoning. For such to happen there would be required to have been a public participation process. But in this case there was none. Further, it was questioned whether this sub – division if all it occurred was with the approval of the owners of Plot No. 180. On this aspect, the Surveyor himself affirmed and informed court that no such exercise would be take place without the Consent nor knowledge of the legal owner. Further, assuming that the initial sub – division of Plot No. 180 was initiated by the owners, the Legal Counsels questioned why the land owners never surrendered their original Certificate of Title Deed to be issued with the intended two Others as a result of the alleged sub – division as was required by law.

b) His observation that in the year 1954 a portion of land was excised from Parcel No. 180 through survey Plan No. (F/R) 70/64. The excised portion was given Parcel No. 180/1 and later on renumbered as Parcel No. 2896 measuring 0.2650 acres approximately.

c) The remaining parcel No. 180/R was re – numbered parcel No. 318

d) Parcel Number Mombasa/Block/X/439 was surveyed in the year 1997. The Survey is contained in Survey Plan (F/R) 330/116. It measures 1.05 HA. The Survey Plan also indicated parcel No. 428 and 429 being part of Parcel No. 318 implying Parcel No. 318 was sub – divided. He admitted that the acreage for plot No. 429 was not stated at all.

e) The Surveyor’s observation on Plot No. 430 was rather disturbing to the Learned Counsels. Firstly, they questioned him on the aspects of him stating that he never came across any documentations at all with regard to the said Plot No. 430. In other words, he admitted there was no Part Development Plan which is normally circulated to other relevant departments for instance Public health, Physical planning and even published in the local newspapers, on it which would justify for it to be allocated a Letter of Allotment nor Minutes from the Municipal Council Committee and subsequently received by the Director of Survey for the preparation of the Registered Index Map (RIM) and a Certificate of Lease issued by the then Commissioner of land (Currently the national land Commission). So one wonders this being Public Land what was the basis to justify the legality of the parcel at all. Secondly, he indicated that there is no access road to Parcel Number 430 but seems to be on Parcel No. 428 which was part of and hence curved out of Plot No. 180. Thirdly, he was able to identify Plot No. 430 from Port Tudor on the Map of the year 1997 which means it had not been there before. It created after the year 1997 from Beacon no 10 as it was never there before.

f) As regards to Parcel Numbers 428 two issues emerged here. Firstly, he informed court that this Parcel No. 428 also had no records at the land registry Office to ascertain its ownership or measurement. Secondly, assuming the records were available, how do you create an access road over another parcel of land and which ideally belonged to another person?

g) His observation that most of the boundary beacons for parcel No. 180 were falling on the perimeter wall and therefore could not be replaced.

h) Beacons RD5, RD4, RD1 and 12 were placed. All these beacons also define the boundaries of Parcel No. 428.

i) Parcel No. 430 was six metres away from the ocean. It was not accessible due to the perimeter wall established by the University. He also confirmed there were several mangroves trees on this parcel land which he casually and lightly indicated there was nothing unusual about it so long as they were approved. The presence of Mangrove on land was an indication it was a riparian land which is preserve of the Government.

50. The conclusion of the Land Surveyor's report stated verbatim that:-

***“although Plot No. 430 which is land locked and has no access road but it can be created from Parcel No. 428 over an already registered property – Plot No. 180 by invoking the provisions of Section 98 of the Land Registration Act, 2012 and Section 140 of the Land Act, No. 6 of 2012.***

Is that really fathomable? From the provisions of Sections 98 of the Land Registration Act, No. 3 of 2012 and 140 of the Land Act, No. 6 of 2012, the owner of the Land Locked land has to apply to create for easement and obtain an access order. For one to attain an access order calls for such an elaborate process. The applicant who is the owner of the landlocked land has to apply to court to be allowed an access order. In such situation, for the Court to grant the order, it would consider the nature and quality of the access and circumstances under which the land became landlocked, the nature and conduct of the negotiations, if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land; the hardship that may be caused to the applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making of the order; the purpose for which access is or may be required and the period for which the access maybe required. This Court has taken judicial notice that so far none of these proposal have taken place to date despite the period that the Defendants have been in possession of the suit land – Parcel No. 430 for over ten (10) years.

Thirdly, he stated that he was able to identify Plot No. 430 from Port Tudor on the Map of the year 1997 which means it had not been there before. It created after the year 1997 from Beacon no 10 as it was never there before.

52. The conclusion that the Parcels Numbers 180 and 430 were two separate parcels. From the critical analysis done by this Court herein, I find that this assertion is bereft of any sound nor scientific basis at all in law nor in surveying terms. Therefore, the findings of the report comes to support the claim advanced by the Plaintiff to the effect that the creation of Mombasa Block X/430 was out of the portion of 1 ½ acres of the Plaintiff's Plot No. Mombasa Block X/180 inclusive of the reclaimed ocean due to the receded sea level and the consequent issuance of 99 years lease to the 3rd Defendant for the same was fraudulent and illegal and null and void ab initio and the same ought to be cancelled forthwith. We can not agree with them more.

#### **ISSUE No. 5 - Who will bear the costs of this suit?**

53. The Black Law Dictionary defines “Cost” to means, ***“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”***.

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of ***“Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180***, the House of the Lords noted:-

***“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....”***

From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case.

The events in the instant case is the Plaintiff in the Counter Claim has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

#### **IV. CONCLUSION AND DISPOSITION**

54. From the very onset, I must admit that this has been a very technical case. It was not an easy one to make a determination but luckily leaning on the divine intervention from the Scriptural verse of 1Kings 3 Verses 16 to 20, came in very handy to my rescue. This from story of the two harlots who came to King Solomon each claiming the biological parentage of the one living child. The King ordered to be brought for the sword and have the living child to be divided into two so that each lady would have one half of it. However, in the course of doing that, one the ladies declined to have the child divided as she offered it be taken by the other lady. It is from that point that the King declared this was the real and genuine mother of the living child,

55. As a parting shot, and from the very onset, I must sincerely applaud and strongly commend all the Learned Counsels in this matter in the professional manner in which they conducted these proceedings. They were full of resilience, decorum, diligence, dignity and respect for one another and to the Court. Their pleadings were well researched while their arguments were articulate and orderly. This is a prime moment to be emulated by all Counsels appearing before any Court of law where the adversarial system is the order of the day.

56. All said and done, and for avoidance of doubt I find that the Plaintiff has proved its case on the balance of probabilities. I accordingly enter judgment in favour of the Plaintiff as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and proceed to dismiss the 3<sup>rd</sup> Defendant's Defence and the Counter Claim as there was no trespass on to the land and the said structures were not constructed onto the 3<sup>rd</sup> Defendant's land. Specifically, I award the Plaintiff the following reliefs:-

a) **THAT** a declaration that the Plaintiff is the lawful registered proprietor of the parcel of land No. MOMBASA X/BLOCK 180 measuring 27.5 Ha.

b) **THAT** a permanent injunction be and is hereby issued restraining the 3<sup>rd</sup> Defendant, their agents, servants, employees or anybody purporting to act under him from entering, remaining, constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the Plaintiff's quiet occupation and utilization of the parcel of land known as Land Reference No. MOMBASA X/BLOCK 180 measuring 27.5 Ha.

c) **THAT** an order of legal eviction from the suit land by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be and is hereby granted within the next Ninety (90) days from this date hereof in accordance with the legal provisions of Section 151E of the Land Act, No. 6 of 2012. In default of forceful eviction to ensue at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's expenses.

d) **THAT** an order for the cancellation of all that Certificate of Title deed to that parcel of Land Known as Land Reference Numbers MOMBASA X/BLOCK 430 measuring 2 1/2 acres and rectification of the land registries to revert back to the Plaintiff's original land being Land Reference numbers MOMBASA X/BLOCK/180 under Section 80 (1) and (2) of the Land Registration Act of 2012.

e) **THAT** the Counter Claim dated 24<sup>th</sup> April, 2015 and filed in Court on 30<sup>th</sup> April, 2015 be and is hereby dismissed with Costs.

f) **THAT** the County Commander of Police, County of Mombasa and the Officer in Charge of Police Station (OCS), Central Police Station, Mombasa to ensure that these orders are fully complied with without failure.

g) **THAT** the Plaintiff is awarded the Costs of this suit to be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein.

**IT IS ORDERED ACCORDINGLY.**

**JUDGEMENT DELIVERED AT MOMBASA ON THIS 25<sup>TH</sup> DAY OF APRIL 2022.**

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

**ENVIRONMENT & LAND COURT,**

**MOMBASA**

**In the Presence of:-**

Yumna Court Assistant

*Mr. Opolu Advocate for the Plaintiff.*

*Mr. Makuto Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

*Mrs. Asli Advocate for the 3<sup>rd</sup> Defendant.*