



Githu & another v Kimotho & 2 others (Environment & Land Case 212 of 2017) [2022] KEELC 3027 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 212 OF 2017**

**LL NAIKUNI, J
JULY 27, 2022**

BETWEEN

NANCY WANJIRU GITHU 1ST PLAINTIFF

KELVIN GIKONYO GITHU 2ND PLAINTIFF

AND

MOSES KINYANJUI KIMOTHO 1ST DEFENDANT

ROSE NYAWIRA 2ND DEFENDANT

LAND REGISTRAR MOMBASA 3RD DEFENDANT

JUDGMENT

1. On June 14, 2017, the 1st and 2nd plaintiffs instituted this suit vide a plaint dated the same date, against the 1st, 2nd and 3rd defendants herein.

The plaintiffs prayed for judgment to be entered against the defendants jointly and severally for:-

- a. A declaration that the plaintiffs are the legitimate registered proprietors of all that parcel of Land Reference Sub-division No. 1230 (Original Number 53/222) Section II Mainland North situated in Mombasa District containing by measurement Nought Decimal Nought Three One One (0.0311) Hectares or thereabouts together with the buildings and other improvements being thereon
- b. A declaration that any registration of the suit property conducted prior and/or during the pendency of these proceedings infavour of the 2nd Defendant was perpetuated by fraud, and/or misrepresentation and is therefore illegal, null and void.
- c. An order directing the 1st Defendant to give up vacant possession of the suit property to the Plaintiff within three (3) days of the delivery of this Judgment herein, supervised by both the



Court Bailiff and the O.C.S. Kiembeni Police Station and in default of such vacant possession the Plaintiffs be at liberty to evict the 1st Defendant from the suit property with the aid of both the court bailiff and the O.C.S. Kiembeni Police Station.

- d. An order directing the 2nd defendant to surrender any and all documents of title in respect of the suit property to the 3rd defendant for cancellation and attendant procedures within Twenty-Four (24) hours of the delivery of judgment herein.
- e. An order of permanent injunction do issue restraining the 1st and 2nd defendant whether by themselves their agents/employees/servants and/or anyone whosoever laying claim to title through them jointly and severally from entering into, dwelling upon interfering with the plaintiff's occupation, possession, enjoyment and derivative use, and/or in any other manner whatsoever dealing with the suit property in any manner adverse to the plaintiffs interest therein without the plaintiff's express consent and/or authorization.
- f. An order directing the 1st defendant to pay the plaintiffs Mes Profits based on the market rent of the suit property with effect from May 15, 2017 until payment in full.
- g. Costs of this suit and interest thereon.
- h. Any other relief the Honorable Court may deem fit and just to grant in the circumstances

II. The Plaintiffs Case.

2. The hearing of the Plaintiffs' case commenced on June 2, 2021. They summoned two (2) witnesses who tendered their evidence in chief based on their written statements, cross examined and re – examined by the Advocates on record.

PW - 1 Nancy Wanjiru Githu Sworn States In

English Language

3. She lived in Nairobi. She was a contractor and the 1st Plaintiff herein in this case. The 2nd Plaintiff is her younger brother. She had no relation with the 1st Defendant. The 2nd Defendant was their step mother. She confirmed having recorded the witness statement dated 14th June, 2017. She sought for it to be adopted as her evidence in chief. The case was over all that property Sub - division 1230 (original No.53/222/Section II/MN. There was a two bedroomed house built on the property at the time of filing suit. They moved in into that house when she was aged four (4) years. Her sibling was born in the same house. They were living in that house with her biological parents. She informed Court that her brother had some sentimental value to the house. They felt they should buy it. She had the Provisional title issued on 14th June, 2016. She also had the Certificate of Title in which under Entry No. 10 stated the transfer of the land was to Nancy Wanjiku Githu and Kelvin Gikonyo Githu, the 1st and 2nd Plaintiffs herein on 5th August, 2016. The property was sold to them Clara Mkamboi Maina. Against the Entry No. 5 was a transfer to Clara Mkamboi Maina dated 7th September, 1990. She produced them and were Marked as Plaintiff Exhibit No. 1 & 2.
4. Further, she produced the agreement for sale dated 25th June, 2016 duly executed between Clara Mkamboi Maina as the Vendor and ourselves as the purchasers. It was Marked as Plaintiff Exhibit No. 3. The property sold was the suit property herein. It was for the consideration of Kenya Shillings Two Million (Kshs. 2, 000, 000.00) which they paid in cash at once. The agreement was witnessed by Tawas Karemi advocate for both the Vendor and Purchasers herein. The agreement was drawn by Sichangi & Advocates. They also executed the transfer instruments from the vendor to them. The date of the



transfer was 5th August, 2016. The consideration for the sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00) was stated on the form. It was witnessed by Jane Karimi Advocates. It was drawn by Sichangi & Co Advocates. She produced it and Marked as Plaintiff Exhibit No. – 4. The 5th document to be produced and Marked as Plaintiff Exhibit No. 5 was a Discharge of Charge by the financiers, Chargee – the Kenya Commercial Bank Limited (KCB) and the Vendor over the same property. The discharge of charge was drawn by J K Mwarandu & Co Advocates on 8th April, 2015. Entry No. 8 on the title deed was the discharge of charge. Against Entry No. 6 was the Charge dated 24th August, 1990 and Entry No. 7 was a Charge dated 29th June, 1995 by KCB. They were Marked as Plaintiff Exhibit No. 6 a) & b).

5. The next document was a notice of termination of tenancy dated 15th December, 2017 marked as Plaintiff Exhibit No. 7. After the transfer of the suit land into their names was accomplished, they could not take possession because the 1st Defendant was living there. When they discovered that, they gave him a termination notice.

He was not their tenant. The Plaintiffs moved out of the property in the year 2004. Their father and step mother were residing in the house. It was a rental house. When they served the 1st Defendant with the notice, he did not move out. Instead, on 1st March, 2017 they received a letter from Messers. Clarks & Company Advocates dated 28th March, 2017.

It was at this point that they decided to institute this suit. They did that in their capacity as the legitimate and the registered owners of the property. She informed Court that they were not in possession and they wanted the entire property. Before they obtained a Court order, they had not been able to access it. She was not aware of any suit challenging their ownership to the suit property.

Cross examination of PW – 1 by Mr. Mkok

6. PW – 1 stated that they followed all the procedures with regard to the registration of the title. There was no encumbrance on the property. She refuted there being any other suit in court over the suit property.

Re – examination of PW – 1 by Mr. Ngonze

Nil

7. This marked as the close of the Plaintiffs’ case. At the same time, there being no pleadings filed by the 1st and 2nd Defendants it also brought a closure to their case. Equally, the 3rd Defendant sought to close their case.

III. The Submissions

8. On June 3, 2021 upon the closure of both the Plaintiff’s and defendant’s case and further on diverse dated of December 9, 2021 and 15th March, 2022 in presence of the parties court directed them to file their written submissions accordingly. Pursuant to that the Plaintiff, 1st, 2nd and 3rd defendants fully complied and the court thereafter reserved a date for delivering of its Judgment accordingly.

A. The Written Submissions by the Plaintiff

9. On February 4, 2022, the Learned Counsel for the plaintiff the Law Firm of Messers. Ngonze & Ngonze Advocates filed their written submissions dated the same date.

Mr. Ngonze Advocate submitted that all material times to this suit the Plaintiffs were and still were the absolute legal and legitimate registered owners to all the suit land herein. That pursuant to the sale agreement entered into on 25th June, 2016 between the Plaintiffs as the purchasers and one Clarah



Mkamboi as the vendor being the then registered proprietor to the suit property terms and conditions stipulated thereof, they purchased the entire suit property at a purchase price of Kenya Shillings Two Million (Kshs. 2,000,000/=) which amount was paid in full upon execution of the said agreement and the receipt acknowledged.

He held that the requisite Transfer Forms were duly executed on 25th June, 2016 by the Plaintiffs. There was also the spousal Consent duly executed by the Vendor's husband. Mr. Maina Chege Kahora. The documents were submitted to Land Registrar Mombasa it was registered and a Provincial Certificate of title issued.

10. However, upon Inspections of the suit property it was revealed that one Mr. Moses Kinyanjui the 1st Defendant has been in occupation of the suit property. The Plaintiffs issued him with a 3 months notice to terminate tenancy with effect from 15th February, 2017 to 15th May, 2017 and give up the vacant possession of the property upon expiration of the said notice. But he never responded.

The Counsel contention was that any such registration of proprietorship in favour of the 2nd defendant could only be accompanied by way of fraud and/or misrepresentation to the 3rd Defendant, while stating so, he held that any such tenancy deriving therefrom in favour of the 1st Defendant could therefore be deemed as an act of illegality as itemized in the Plaintiff.

11. He held that the 2nd defendant were advised by their counsels to give vacant possession but despite this the 2nd Defendant continued occupation of the suit land without the express consent and/or authorization of the plaintiffs in direct violation of his right to private property. His contention was that any purported registration of the suit property in favour of the 2nd defendant without the consent and/or authorization of the Plaintiff was improper, unlawful and gross violation of the private property rights for the Plaintiff.

The Learned Counsel summarized the evidence of PW-1 through his written statement dated 14th June 2017 as follows:-

- a. They entered into a sale agreement dated 17.6.2016 between them and the vendor for the purchase of the suit land.
 - b. They got a spousal consent by the Vendor's husband.
 - c. Execution of the Transfer Forms – on 25th June, 2016.
 - d. Lodged the documents with the Land Registrar on 5th August, 2016 and the registration of documents and the issuance of the Provincial Certificate of title deed.
 - e. Demand to the Defendant to give up vacant possession within 3 months but without any response.
 - f. Filing of this suit on 14th June, 2017.
 - g. Delivery of this court's ruling and taking up vacant possession of the suit property.
12. The Learned Counsel has relied on several provisions of Law being sections 107, 109, 110 and 120 of the *Evidence Act* Cap 80 order 13 rule 2 of the *Civil Procedure Rules*, 2010 order 40 rules 1, 2 and 4 sections 24, 25 & 26 of *Land Registration Act* No. 3 of 2012, sections 38, 43 and 46 of the *Land Act*, No. 6 of 2012 and section 13 of the *ELC Act* No. 19 of 2011.

The import of section 26 of Land Registration was considered in the case of "*Elijah Makeri Nyangwara Njuguna & Another* (2013) eKLR."



In conclusion the counsel submitted that the plaintiffs had sufficiently made out a Prima facie Case on merits to warrant grant of all the prayers sought in the Plaintiff.

He therefore urged court to enter judgment for the Plaintiff's against the Defendants as prayer in the Plaintiff.

B.The Written Submissions by 1st and 2nd Defendants

13. On March 8, 2022 the Learned Counsel for the 1st and 2nd defendants herein, the Law firm of Messrs. Madzayo Mrima & Jadi Advocates Company filed their written submissions dated March 4, 2022. M/s. Jadi Advocate submitted that in light of the material on record, the 1st and 2nd Defendants wish to leave it to the court in respect of prayers (a) to (e) of the Plaintiff inclusive with the regard to prayer (f).

The Learned Counsel submitted that the 1st Defendant should not be condemned to bear any Mesne Profits in respect of the suit property as they had already vacated same immediately upon delivery of Ruling on 19th April. 2018.

With regard to prayer 9 of the Plaintiff, the Defendants submitted that this was a case where parties ought to bear their own costs considering the following aspects: -

- a. That the substance suit was undefended.
 - b. That the 1st Defendant vacated the suit property upon the delivery of the said ruling by Lady Justice Komingoi without necessitating the Plaintiff to invoke the acrimonious process of gaining vacant possession through eviction.
 - c. That the 1st Defendant was not a trespasser on the suit property.
 - d. That these are family members the relationship between the Plaintiff and the 2nd Defendant was one of Children and their step mother respectively. It ought to be given special consideration.
 - e. That having regard to all the circumstances surrounding this case, there was need to promote reconciliation among the said disputing parties in accordance with the provisions of article 159(2) (c) of the Constitution of Kenya.
14. The Learned Counsel further submitted that taking into consideration the evidence on record and all the surrounding circumstances of this case, it was not necessary to saddle the Defendants with a burden of costs as they had acted in a manner that had also spared the court judicial time while at the same time endured minimal confrontation and/or acrimony. All along the 1st Defendant was riding on the shoulder of the 2nd Defendant and had vacated the Premises upon the delivery of the ruling by this court which helped to deescalate any acrimony that may have developed between the parties if he close to contest the said orders for delivery of vacant possession of the disputed property.

The Learned Counsel relied on the decision of "Cecilia Ngaya – Versus - Barclays Bank of Kenya".

C.The Written Submissions by the 3rd Defendant

15. On March 20, 2022, the Learned Counsels for the 3rd Defendants Senior Litigation Counsel, State Law Office, filed their written statements dated March 30, 2022, Mr Mwandeje Mng'ong'o Advocate provided a chronology of transactions as such:

- a. That as per the filed documents at the Offices of the Land Registry on 14th June, 2016 a Provincial Certificate of title deed was issued pursuant to the Kenya Gazette Notice No 2332 of 8th April, 2016.



- b. On 5th June, a transfer instrument was presented for registration where Clara Mkamboi Maria was the vendor while Nancy Githu and Kelvin Gikonyo Githu were the purchasers.
 - c. The title deed was issued to the 1st and 2nd Plaintiffs.
 - d. The title being held by the 2nd Defendant was nullified pursuant to the provisions of section 33 of the [Land Registration Act](#) 2012.
16. Based on the above facts the Learned Counsel posed the question whether the plaintiffs were the bona fide lawful and registered proprietors of the suit property. To respond to that query he relied on the Provisions of sections 24, 25, 26 and 28 of the [Land Registration Act](#) No. 3 of 2012. He submitted that in the instant case the title deed produced by the Plaintiffs showed that the suit land was registered in her name. he contended that that position was never challenged by the 1st and 2nd Defendants as in fact they failed to file any pleadings such as Defence opposing such as Defence opposing the claim either in person or through their Advocates. On the contrary the Plaintiffs filed a suit and conducted evidence that showed that the 1st and 2nd Defendants had illegally taken possession of the suit land and were utilizing it for their own benefit – which action amounted to the violation of the Plaintiff’s right as guaranteed in the [Constitution](#) of Kenya. The 1st and 2nd Defendants never rebutted.
17. The Learned Counsel argued that the 1st and 2nd defendants ought to give vacant possession to the Plaintiff who was the rightful and legal registered owner to the suit property.

IV. Analysis & Determination

16. I have keenly assessed the filed pleadings by all the parties herein, the plaint, the Statement of Defence, the filed written submissions, the citations, relevant provisions of [the Constitution](#) and statutes. In order for the Honorable Court to arrive at an informed, reasonable, fair and just decision, it has framed the following (5) salient issues for its determination. These are:-
- a. Whether the 1st and 2nd Plaintiffs herein are the absolute and legal registered proprietors with all indefeasible rights, titles and interest of the suit land.
 - b. Whether the registration of the suit land in favour of the 2nd Defendant herein was perpetuated by fraud, and/or misrepresentation and is therefore illegal, null and void and hence were the 1st and 2nd Defendant trespassers onto the suit land.
 - c. Whether the 1st and 2nd Defendants once found to have illegally acquired and thence being trespassers over the suit land they should be evicted from it and the other consequences including the cancellation of the said illegal title deed.
 - d. Whether the parties are entitled to the relief sought.
 - e. Who will bear the costs of the suit.

Issue No. a). Whether the 1st and 2nd Plaintiffs herein are the absolute and legal registered proprietors with all indefeasible rights, titles and interest of the suit land.

Brief Facts

17. Before embarking onto the analysis of the framed issues herein, this Honorable Court feels it imperative to extrapolate on the brief facts of the case herein. The facts are based on the filed pleadings and testimonies attested herein by the both the witnesses by the 1st and 2nd Plaintiffs and 1st, 2nd and 3rd defendants herein.



The Plaintiffs claimed that at all material time they were and still were the legitimate registered proprietors of all that parcel of Land Reference Sub-division No. 1230(Original Number 53/222) Section II Mainland North situated in Mombasa District containing by measurement Nought Decimal Nought Three One One (0.0311) Hectares or thereabouts whose boundaries, abbutal and dimensions were more particularly set out in the Land Survey Plan Number 120892 annexed to the Certificate of Title registered in Land Titles Registry at Mombasa as Number CR 17308/1 together with the buildings and other improvements being thereon (Hereinafter referred to as “The Suit Land”).

18. The Plaintiff stated that pursuant to the Agreement for sale entered into on 25th June, 2016 between themselves as purchasers and one Clarah Mkamboi Maria as the Vendor/Registered proprietor they purchased the entire suit property from the Vendor at a consideration of Kenya Shillings Two Million (Kshs. 2,000,000/=) which among was paid in full at the execution of the said agreement and receipt acknowledged through the said execution.

The Plaintiffs further stated that the requisite instrument of Transfer was also duly executed on 25th June, 2016 by the Plaintiff as the purchasers and the said Clarah Mkamboi Maria as the Vendor/Registered proprietors accompanied by a spousal consent duly executed on even date by the vendor’s husband one Maina Chege Kahora evidencing the Transfer of the Vendor’s entire interest in the suit property to the Plaintiffs.

19. On 5th August, 2016 they lodged these documents at the Land Registry Mombasa upon fulfilment of their obligation and the transfer was registered in their names and in the relevant parcel file and an endorsement entered on that regard on even date on the Provisional Certificate of Title.
20. On the other hand, it is claimed that the 1st and 2nd Defendants had been tenants the suit property. Somehow in the cause of time they acquired a title to the property. When the Plaintiffs bought the property, they issued them with a demand notice to terminate the tenancy and give vacant possession, they became adamant and never responded. Instead they engaged an Advocate who wrote back to the Plaintiff claiming ownership to the property. As a result the Plaintiff decided to institute this suit. Through an application, on 19th April, 2018 this Court issued a mandatory injunction order against the 1st Defendant to give the Plaintiff vacant possession. He obliged. The 2nd Defendant continued being in occupation. Thus, the essence of this suit. That is adequate on facts.
21. To begin with, the provisions of Section 107 of “The Land Registration Act” of 2012, as a saving and transitional provisions with respect to rights, actions, dispositions and so forth, provides that the law applicable to this matter here and for the title deeds that were issued in the years 1974 and 2003 respectively would be the *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”

22. Nonetheless, the effect of the Registration of Lands is founded in the provisions of section 24 of “The Registration [Land Act](#) (Repealed) 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;

To advance on this legal preposition, 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 “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.....”

23. 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, un procedurally 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.”

24. In the cases of “[Joseph Komen Somek - Versus - Patrick Kennedy Suter](#); ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR and [Elijah Makeri Nyangwara – Versus - Stephen Mungai Njuguna & Anor](#), (2013) 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. It is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of the Section is to remove



protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

25. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the provision of section 143 of RLA and currently 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.”

Under the provisions of Sections 104, 107 and 112 of the Evidence Act, Cap. 80. It holds that he who claims have to proof. From the evidence adduced form the pleadings and the testimony of the witnesses, it clear that the Plaintiffs having legally acquired the suit property through purchase as innocent purchasers – based on the legal principles founded in the famous Uganda case of “Katende – Versus – Haridar & Company Limited (2008) 2 EA. 173” are the absolute and legal owners to it.

Issue No. b). Whether the registration of the suit land in favour of the 2nd Defendant herein was perpetuated by fraud, and/or misrepresentation and is therefore illegal, null and void and hence were the 1st and 2nd Defendant trespassers onto the suit land.

26. As already found out, the Plaintiffs are the legitimate registered proprietors of all the suit land. They acquired it through proper sale on 25th June, 2016 between themselves as purchasers and one Clarah Mkamboi as the vendor/Registered proprietor at a consideration of Kenya Shillings Two Million (Kshs. 2,000,000/=) which among was paid in full at the execution of the said agreement and receipt acknowledged through the said execution. On 5th August, 2016 they lodged these documents at the Land Registry Mombasa upon fulfilment of their obligation and the transfer was registered in their names and in the relevant parcel file and an endorsement entered on that regard on even date on the Provisional Certificate of Title.
27. The 1st and 2nd Defendants herein have not been able to demonstrate how they acquired their title deed to the suit land. Upon being asked to provide vacant possession they outrightly refused to do so. When the Plaintiff was compelled to institute this suit against them and on being served they failed to file any defences at all. They never entered appearance compelling the Plaintiff to request for Judgement in default. On 19th April, 2018, this Honorable Court delivered a ruling granting a mandatory injunction compelling the 1st Defendant to give vacant possession to the Plaintiff within sixty days of the suit property. He obliged accordingly.
28. Clearly, the Honorable Court holds the strong conclusion that the acquisition of the title deed by the 2nd Defendant was marred by illegality, fraud and unprocedural or corrupt scheme. In the given circumstance, therefore, the Court invokes the provision of Section 80 (1) of the Land Registration Act, No. 3 of 2012 and direct the Land Registrar to henceforth proceed to cancel and/or revoke the said title and rectify the Land Registry to reflect ownership of the suit property as one belonging to the Plaintiffs herein.

Issue No. c). Whether the 1st and 2nd Defendants once found to have illegally acquired and thence being trespassers over the suit land they should be evicted from it and the other consequences including the cancellation of the said illegal title deed.



29. In my view and in the given circumstances the plaintiffs are undoubtedly entitled to mandatory injunction orders, vacant possession and the orders of eviction of the 2nd Defendant from the suit property. The Plaintiffs have proved that the title deed is indeed legitimately theirs while that of the 2nd Defendant, has been impeached on grounds of having been obtained illegally, fraudulently, unprocedurally and/or through corrupt scheme.
30. Undoubtedly, this Honorable Court finds that the 2nd Defendant is a trespasser without consent or authority of the Plaintiff. According to the provision of Section 3 of the Trespass Act, it stipulates 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 (1). Where any person is charged with an offence under Sub – Section (1) of this Section the burden of proving that he had reasonable excuse or the excuse or consent of the occupier shall lie upon him”.

Thus, based on all the surrounding facts, inferences of this case and relying on the above cited legal provision, I find that the 2nd Defendant’s action were in contravention of the law as stipulated above. I hold that the illegal entry to the suit land legally registered in the names of the Plaintiffs amounts to acts of trespass. The 2nd Defendant has no basis on being in occupation on the suit land.

Issue No. d). Whether the parties are entitled to the relief sought.

31. The answer to the query posed under this sub heading should be in the affirmative. Relying on the facts of this case, it has been demonstrated clearly that the Plaintiffs bought the suit property as innocent purchasers for value. All the due process of a transaction of sale was address with strictly to a point of getting the property legally registered in their names. Based on all the provisions of the Constitution being Article 40 (1), (2) and (3) they are entitled to the right and protection of their private property. This Court should ensure that they assume and acquire vacant possession immediately. This position has been well supported and corroborated by the 3rd Defendant herein.
32. On the other hand and as stated above, while the 1st Defendant gave possession following a ruling by this Court, the 2nd Defendant has perpetuated an illegality of not only having acquired a title illegally, unprocedurally or through corrupt means but also sustained continuous trespass which is defined in the Black Law Dictionary, 8th Edition as “.....A trespass in the nature of a permanent invasion on another’s property”.

The Honorable Court has taken cognizance of the submissions by the Learned Counsel for the 1st and 2nd Defendants herein to the effect that this suit was never defended and that the Plaintiffs and the Defendants had blood relationship. Nonetheless, while the Plaintiffs who have proved their case are entitled to all the relief sought, the title deed held by the 2nd Defendant should be impeached by revocation and cancellation. He should be evicted pursuant to the provision of Section 152E of the Land Act, No. 3 of 2012. By invoking this provision of the law Court has taken cognizance that indeed these are blood relationship here and do not want to worsen the situation further.

Issue No. e). Who will bear the costs of the suit.

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

The proviso under the provisions of section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. It is trite law that 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.....”

34. 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, I have considered the entire chain of events from the filing of the suit up to the time the parties left the issue to the Court to determine, the numerous Court attendances and successfully prosecuting the suit by the Plaintiff. It would be very unfair not to award them Costs despite of the blood relationship between them and the Defendants. For that very fundamental reason, therefore, the costs of this suit will be borne by the 2nd Defendant herein.

VI. Conclusion & Determination

35. In the final spell and upon the indepth analysis this Honorable Court now proceed to enter Judgement in favour of the Plaintiffs herein having been able to establish their case on a balance of probability. For avoidance of doubt, the Court makes the following orders. These are:-
- a. That a declaration be and is hereby made that the 1st and 2nd Plaintiffs herein are the absolute and legal registered proprietors with all indefeasible rights, titles and interest of all that parcel of Land Reference Sub-division No. 1230 (Original Number 53/222) Section II Mainland North situated in Mombasa District containing by measurement Nought Decimal Nought Three One One (0.0311) Hectares or thereabouts together with the buildings and other improvements being thereon.
 - b. That a declaration be and is hereby made that any registration of the suit property conducted prior and/or during the pendency of these proceedings in favour of the 2nd Defendant was perpetuated by fraud, and/or misrepresentation and is therefore illegal, null and void.
 - c. That a Mandatory Injunction order based on the provisions of Section 152E of the *Land Act*, No. 6 of 2012 directing the 2nd Defendant to give up vacant possession of the suit property to the 1st & 2nd Plaintiffs within the next three (3) month of the delivery of this Judgment herein, supervised by both the Court Bailiff and the O.C.S. Kiambeni Police Station, the County of Mombasa.
 - d. That in default of providing the vacant possession the Plaintiffs be at liberty to evict the 2nd Defendant herein from the suit property with the aid of both the court bailiff and the O.C.S. Kiambeni Police Station.
 - e. That an order directing the 1st & 2nd Defendants herein to surrender any and all documents of title in respect of the suit property to the 3rd Defendant for cancellation and attendant procedures within Seven (7) days of the delivery of this Judgment herein.
 - f. That an order of Permanent injunction do issue restraining the 1st and 2nd Defendants herein whether by themselves their agents/employees/servants and/or anyone whosoever laying claim to title through them jointly and severally from entering into, dwelling upon interfering with the Plaintiff's occupation, possession, enjoyment and use, and/or in any other manner



whatsoever dealing with the suit property in any manner adverse to the Plaintiffs interest therein without the Plaintiff's express consent and/or authorization.

- g. That an order directing the 2nd defendant herein to pay the 1st and 2nd plaintiffs herein general damages for the continuous trespass and Mesne Profits based on the market rent of the suit property with effect from 15th May, 2017 until payment in full.
- h. That costs of this suit to be borne by the 2nd defendant herein and interest thereon.

JUDGEMENT DELIVERED, SIGNED & DATED THIS 27TH DAY OF.....JULY.....2022

HON. JUSTICE MR. L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s. Yumna, Court Assistant.
- b. M/s. Kegehi Advocate holding brief for Mr. Ngonze Advocate for the 1st & 2nd Plaintiffs.
- c. M/s Jadi Advocate holding brief for Mr. Kinyanjui Advocate for the 1st & 2nd Defendants.

