



**Juma (Suing in her Capacity as Attorney of Patrick Maelo) v Mohamed (Environment & Land Case 19 of 2015) [2022] KEELC 13317 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13317 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 19 OF 2015  
LL NAIKUNI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**MARY NAMEAMBA JUMA ..... PLAINTIFF**

**SUING IN HER CAPACITY AS ATTORNEY OF PATRICK MAELO**

**AND**

**ASHA MOHAMED ..... DEFENDANT**

**JUDGMENT**

**i. Preliminaries.**

1. This suit was instituted on February 12, 2015 by the Plaintiff against the Defendant. Ideally, the case has now taken close to seven (7) years ago from its inception to date. It was filed through a Plaint dated February 10, 2015. While doing so, the Plaintiff herein acted on the strength as the Attorney Agent for the late Mr Patrick Maelo donated to her by the Powers of Attorney dated August 26, 2014 and registered at the offices of the District Land Registry, Mombasa on the September 10, 2014. She sought several reliefs to be stated later on.
2. Upon being served with the pleadings to this case, on May 26, 2015 the Defendant filed a Statement of Defence, List of documents dated May 26, 2015 and list of witnesses thereof. While the Plaintiff claimed to be the owner of Plot number Mombasa/Mikanjuni/ Scheme/60 measuring 0.019 HA, the Defendant claimed to be the owner to the Plot number Mombasa/Mikanjuni/ Scheme/63 measuring 0.008 HA thereof. Hence, the main bone of contention was on the physical location of these two plots and who had permeated into the others plot. The Court has been called upon to determine whether it's a case of legal trespass and by who.
3. Subsequently, the hearing of the Plaintiff's case commenced on May 7, 2018 whereby two (2) witnesses testified. Thereafter, the Defendant conducted its case by calling up three (3) witnesses. In the course of the proceedings, it was noted that there were produced two Land Surveyor summoned by each



party and who produced their Surveying reports. Apparently, the said reports were distinct and had conflicting conclusions. Immediately after the closure of both the Plaintiff and the Defendant's case and based on the evidence adduced particularly with regard to the two conflicting surveying reports by the Land Surveyors and their adamant refusal to provide a joint report, in order to arrive at a fair, just and equitable decision, to ameliorate the dire situation, on September 29, 2021, this court held an intense deliberation with the advocates for the parties. Based on their mutual consent and consensus, the Honorable Court invoked the provision of Section 173 (1) of the *Evidence Act*, Cap 80 and Order 10 Rule 11 of the *Civil Procedure Rules, 2010*. The provision of Section 173 (1) provides 'inter alia:-

'The extended powers of Court of obtaining proper evidence – A Judge or Magistrate may, in order to discover or 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 ; any 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 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'

4. Pursuant to this provisions of the law, a special Site Visit ('Locus in Quo') was agreed upon to be undertaken in company of the Coast Regional Surveyor and two independent surveyors to be conducted. Indeed, on May 13, 2022 the said site visit was effectively held. The Site Visit report has been re – produced herein below. From the said site visit, a Joint report was prepared before the Court retired to render this Judgement.

## **ii. The Plaintiff's Case.**

5. The Plaintiff sought for the following orders:
  - a. That a declaration that all that property known as Plot Number Mombasa/Mikanjuni Scheme/60 is wholly and solely owned by the Plaintiff's principal and husband Mr Patrick Maelo and the Defendant's action in trespassing on it by constructing a building thereon is unlawful, illegal and an affront to sanctity of ownership.
  - b. That a mandatory injunction compelling the Defendant to demolish the structure so far constructed on the Plot No Mombasa/Mikanjuni Scheme/60. Alternatively, the Plaintiff be granted leave to demolish the said building by herself, at a costs to be recovered from the Defendant.
  - c. That a Permanent Injunction restraining the Defendant by herself, her family, agents, servants, employees and/or personal representatives from going into or in any way whatsoever entering and/or interfering with or any part of all that parcel of land known as Plot Number Mombasa/ Mikanjuni Scheme/60.
  - d. Damages.
  - e. Costs of the suit.
  - f. Interests on ( d ) & ( e ) above at the Court rates from the date of the Judgement until payment in full.
  - g. Such other or further orders as Court may deem fit and just to grant.



On May 7, 2018 the Plaintiff commenced its hearing and on March 25, 2019 it closed its case as stated here below.

**Examination - in - Chief of Pw - 1 Mary Nameamba Juma By Mr Odongo Advocate For The Plaintiff:-**

6. As PW – 1 her testimony was that she used to live in Mikanjuni Scheme, Mombasa, but later on moved to Bungoma. She was a farmer. Her husband used to work in Mombasa. His name is Patrick Maelo. They bought a parcel of land known as land Reference numbers title No Mombasa/Mikanjuni Scheme/60 which was registered in his name. She had a Power of Attorney of Attorney donated to her by her husband. They sued the Defendant for entering into their plot.
7. She testified that in their plot, they had built a Swahili house. One day, one of the tenants in their house called and informed her that someone was constructing on their plot. She went to the chief, assistant chief and also Lands Office who informed her that the Defendant was the one constructing on their plot. They gave her a letter to take to the locational Chief and later gave her a copy of the said letter to take to the District officer's office.
8. She later on learnt that the Defendant was a wife to the Chief. She went to the District Officer I who had called them. A Land surveyor was called to carry out a surveying of the land exercise. From the survey, it turned out that the construction by the Defendant was on plot belonging to PW - 1. She later looked for an advocate who filed this case. She stated that she had a list of documents and the documents attached filed before the Honorable Court on February 12, 2015 and which she wished and indeed produced as the Plaintiff's exhibits. These were:-
  - a. Letter of Offer – Plaintiff Exhibit – 1.
  - b. Title Deed – Plaintiff Exhibit - 2.
  - c. Special Power of Attorney – Plaintiff Exhibit – 3.
  - d. Letter form Land Registrar – Plaintiff Exhibit - 4.
  - e. Letter from County Commissioner – Plaintiff Exhibit – 5.
  - f. Letter form District Commissioner to Chief – Plaintiff Exhibit – 6
  - g. Letter from Lands to District Commissioner – Plaintiff - Exhibit 7.She testified that her advocates on record also requested for a surveying of the suit land and the surveyor filed a report.
  - h. Surveyor's Report – Marked Plaintiff Marked For Identification-8
9. Finally, she stated that she was asking the court to order the Defendant to demolish her house standing on her plot no 60. She prayed for costs and permanent injunction. That was all.

**Cross Examination of Pw – 1 By Mr Musili Advocate for the Defendant:-**

10. She stated being the holder of the a national identity card bearing numbers xxxx. She was married to Patrick Maelo. She had no evidence of marriage with her then but it was at home. She stated that Patrick was unwell. She had medical documents at home showing he was sick. Her husband had heart problems. PW – 1 stated that the Defendant had constructed on their Plot No 60 and not on her Plot, No 63. The Defendant constructed the house in the year 2012. If the house was in the Defendant's plot, she could not have reason to sue her.



At the time she filed the suit, the construction was about one metre high. She did not know anything about constructions. She took some days looking for money to travel. Upon arrival she met the Chief who directed her to the land's offices.

11. She did not know if the Defendant was allocated Plot No 63. She did not have a caretaker on her plot but her neighbors looked after it and are the one who used to inform her all what was happening on it. She confirmed that the house was constructed in their Plot No 60. That was all.

There was no re – examination by the Advocate for the Plaintiff.

#### **Examination - in - Chief of Pw - 2: Edward Marenye Kiguru By Mr Odongo for the Plaintiff.**

12. PW – 2 stated that he was a licensed land surveyor by profession. He practiced as Messrs Edward Kiguru Land Surveyors based in Mombasa. He was given instructions by one Mary Namaemba Juma – PW - 1 on behalf of Patrick Maelo who was the registered owner of parcel No 60 Mikanjuni Settlement Scheme situated at the County of Mombasa. He was instructed to carry out a survey for Purposes of identifying the plot boundaries and finding out if there were any encroachments or structures thereon. He testified that pursuant to that he carried out the survey on the Plot on April 1, 2017 and prepared the Land Survey report which he shared with the client. It included his detailed survey report and a drawing he had made. It showed that there was indeed a house and construction being built by another party. That meant that there was an encroachment. He had the report duly signed by him on April 1, 2018. He produced the survey report which was marked as an exhibit - Plaintiff Exhibit - 8. That was all.

#### **Cross Examination of Pw – 2 By Kayatta Advocate for the Defendant.**

13. PW – 2 stated that on arriving at the conclusion of his Land Survey report, he relied on a survey map which had been prepared and approved by the Mombasa Provincial Survey Office, known as Registered Index Map (RIM) and registered by survey of Kenya in March 2017.

It was based on that, they were able to identify the boundary beacons along the main road which were then used to traverse the site and the suit land - Plot No 60. He confirmed being aware of the existence of a dispute between Plot No 60 and 63.

14. He testified that he only concentrated on Plot No 60. He never went onto Plot No 63. He did not identify any structure on Plot No 63 as he only concentrated on Plot No 60.

He had not seen another Land Survey report and therefore could not confirm its credibility. It was not normal to use the same RIM and arrive at different results. He confirmed that the measurement in the report was the same as in title for Plot No 60. The map covers the northern part of the settlement scheme. That was all.

#### **Re - Examination of Pw – 2 By Mr Odongo Advocate for the Plaintiff.**

15. He responded by stating that if a Land Survey report was over two different plots, the reports could not be the same. That was all.

#### **iii. The Defendant's Case.**

16. On September 25, 2019, the defence hearing commenced. It closed its case on September 24, 2020. The Defendant's case proceeded as sated herein below.



**Examination - in - Chief of Dw – 1 Esha Mohamed Said By M/s Kayatta Advocate for the Defendant.**

17. She informed court she lived in Magongo. She was a housewife. She only knew the Plaintiff by face. She knew about the case before court was over the Plot No 63 and Plot No 60. They were in Mikanjuni area. She was the owner of Plot No 63 Mikanjuni Settlement Scheme. When she heard that there were plots being allocated, she applied to the area chief, Jomvu Location. Later, her application was successful and she was issued with a Letter of Allotment. Initially it was Plot No 465 which was later changed to Plot No 63. The Letter of Allotment was dated March 25, 2008. She paid a sum of Kenya Shillings Eight Thousand (Kshs 8000/=) to the government and she had the official receipt.
18. Upon making the payment, she went to the lands office. She was shown the plot by a land Surveyor. Some fracas ensued as people claimed that plot was not hers. The Plaintiff claimed it was her plot. She planted beacons and developed it by putting up a house there. Before completing the construction, she received a letter from the police in Changamwe. She reported and recorded a statement. She continued with her construction. Later they went to the District Commissioner who brought surveyors who confirmed the plot was hers.
19. Later on, the Plaintiff instituted this suit against her. She had a letter from the surveyor stating he was coming to show her the boundaries and the planted beacons. She wished to produce the documents and list of documents dated May 26, 2015 as marked Defendants Exhibits 1 - 6. The surveyor also prepared a report filed on March 22, 2019 was marked for identification – DMFI -7. She stated that she carried out the construction based on what the surveyor had confirmed. Finally she stated that she would have liked to continue developing her plot. She produced the following documents as evidence in support of her case. These were:-
  - a. Letter of offer dated March 25, 2008;
  - b. Beacon identification – Plot No 63 Mikanjuni dated August 29, 2012;
  - c. Letter of Changamwe District Commissioner confirming survey of Plot No 63 Mikanjuni ownership to Esha Mohamed Said dated August 22, 2012;
  - d. KCB banking slip for payment to Provincial Survey – Mombasa dated August 22, 2012;
  - e. Official payment receipt No xxxx dated August 10, 2011 for Kenya Shillings Eight Thousand Two Hundred and Fifty (Kshs 8, 250.00) to District Land Adjudication and Settlement Office, Mombasa.

A copy of the Title Deed No Mombasa/Mikanjuni Scheme/63 in the names of Esha Mohammed Said. That was all.

**Cross Examination of Dw – 1 By Mr Odongo Advocate for the Plaintiff.**

20. According to her, the Plaintiff claimed someone had trespassed on her known as land Reference numbers Plot No 60. The parcel of land known as land Reference Number Plot No 63 was hers. She was allocated the plot and paid for it. A surveyor came and showed her the Plot. She did not know the location she was allocated. The Land Surveyor showed her the plot in the year 2012. Lands officials came and confirmed the Plot No 63 was hers. She could see Plaintiff Exhibit No 4. It was a letter dated November 9, 2012. The letter was by the Land Registrar to the District Officer Changamwe stating ongoing construction was on Plot No 60 instead of 63. She took the surveyor to Plot No 63.



**Re - Examination of Dw – 1 By Ms Kayatta Advocate for the Defendant.**

21. She reiterated her plot was No 63 and that is where she had constructed. She was not served with Plaintiff Exhibit 4. The government officials are the ones who showed individuals their respective plots. That was all.

**Examination - in - Chief of Dw - 2 Walid Abbas By M/s Kayatta.**

22. He stated that he was the Lands Surveyor working with the National Government, Regional Survey Office, Coast. He held a degree in Geo - matrix Engineering. He prepared a report pursuant to instructions of one Esha Mohamed – the Defendant herein. The report was dated March 21, 2019. The report was over Plot Mikanjuni/SS/63. The exercise was done on March 18, 2019 to identify the boundary of Plot No Mikanjuni 63. The Plot is in Mikanjuni, Changamwe.

He stated that the datum for the survey was RIM which was sold in their offices, Mombasa. The Methodology used was the neighboring plots. They produced an aerial image, the RIM and they overlaid on the ground which showed them where Plot 63 was and what was on the ground.

23. There was an existing building foundation on the ground. According to the sketch Map, there was a portion showing the RIM boundary and the foundation. The shaded part was showing the building foundation. He produced the report he made and marked as – D Exhibit - 7. That was all.

**Cross Examination of Dw – 2 By Mr Odongo Advocate for the Plaintiff.**

24. He indicated having signed the report on behalf of the Regional Surveyor, Coast who was under the Director of Survey, while he was under the Regional Surveyor. They worked as an office.

The report was signed for Regional Surveyor. The Instruction he received were in respect of Plot No 63. Whatever he had drawn was to scale. What is attached was a sketch map. The building foundation appeared on the ground as shown on the sketch map. That was all.

**Re - Examination of Dw – 2 By Ms Kayatta Advocate for the Defendant**

25. He affirmed that he was the one who prepared the report. He informed court that they were all under the Regional Surveyor and we wrote and prepared reports for Regional Surveyor. That was all.

**iv. The Submissions.**

26. On October 25, 2021 while all parties were in court, the Honorable Court directed them to file their written submissions. Pursuant to that, on November 29, 2021 court having confirmed that all parties had fully complied with the courts directions and as indicated a Site Visit was held on May 13, 2022 for the Site visit. Thereafter, a date for delivery of the Judgment was reserved accordingly.

**A. Written submissions by the Plaintiff.**

**Issue No 1**

27. On November 8, 2021, the Counsel for the Plaintiff, the Law firm of Messrs. Odongo BO and Company Advocates filed written submissions dated November 4, 2021. Mr Odongo Advocate submitted that it was not in doubt that the suit land – Plot No 60 belonged to the Plaintiff's husband which by extension made the Plaintiff an interested person over it. The said ownership had not been challenged. They stated that there had been numerous efforts to resolve this matter amicably through the Provincial Administration but all in vain. They held that this assertion was supported by



numerous correspondences. Some of which were contained in the list of documents by the Plaintiff dated February 10, 2015. For instance, the Plaintiff Exhibit – 4 being a letter dated November 9, 2012 from the Land registrar, Mombasa addressed to the District Officer Changamwe Division and to the District Land Adjudication and Settlement Officer (DLAO) Mombasa stating verbatim:-

' The above refers.

Kindly assist in solving this case of ownership dispute. There is a construction currently being carried out on parcel No 60 instead of No 63 with impunity regardless of the ground position. Even though the aforesaid scheme has not officially been registered, it is important to ensure a peaceful co-existence to avoid unnecessary future litigation especially during the process of settling the squatters. You should therefore stop the ongoing construction on parcel No 60 and involve the Government Surveyor in identifying the position on the ground unless otherwise'.

28. The Learned Counsel held that the Land Registrar wrote the above letter after having visited the suit land and listened to the parties and hence it's not true that the Defendant was constructing on parcel No 63. The letter was written in the year 2012 almost three (3) years before the Plaintiff instituted the suit yet the Defendant never challenged it – an unusual conduct by one claiming to be a genuine owner to a property.
29. The Learned Counsel held the Defendant was the wife to the chief of the neighboring Mikindani Location – See Plaintiff Exhibit No 5. Further, he relied on Plaintiff Exhibit No 6 being a letter dated December 6, 2012 from the District Commissioner, Changamwe addressed to the Area Chief Miritini Location holding that the Plot No 60 belonged to Mr Patrick Maelo and other people had encroached on it and urging him to ensure this illegal construction and encroachment on the said Plot No 60 was stopped.
30. The Counsel further relied on the letter dated February 20, 2013 by DLAO who had presided over the Land Adjudication process within this area to the District Commissioner Changamwe holding that the Plot No 60 belonged to Patrick Maelo – Plaintiff Exhibit 7. He further relied on the Land Surveyor report dated April 1, 2017 by the Land Surveyor – Mr Edward K Kiguru – PW - 2 he conducted a Topo Cadastral Survey. In his report he prepared a sketch map showing the two plots No 60 and 63 it shows the structure being constructed was on Plot No 60 and not 63. They argued the report was not only accurate and reliable but also plausible.
31. The Learned Counsel also relied on the report by the Government Surveyor dated March 25, 2019 which was produced by the Defendant but which covered Plot No 63 but cleverly avoided mention plot No 60 – the suit land and hence this report does not help the court in the matter before it. It deals with a matter which the court has not issue with. He made a comparison between the Land Survey report by Mr Edward Kiguru and the one by the Government Surveyor and according to them the position of Plot No 63 as placed and replaced on the sketch map by Mr Kiguru and how it was placed on by the Government surveyor, the position by Mr Kaguru was properly reflected and accurate.
32. The Learned Counsel submitted that the Defendant never provided a building plan duly approved by the County Government of Mombasa as required by Part 3 of the Sections 30, 32 and 33 of the Physical Planning Act and hence it is supposed to be declared null and void and should be discontinued.
33. On the issue of damages the Plaintiff's counsel held that in the case of trespass a party needs not prove that he suffered any specific damages or loss to be awarded as general damages. The court in such circumstances was under a duty to assess the damages awarded depending on the unique circumstances of each case. To buttress on this assertion, the Counsel relied on the authorities of [John K Koeh –](#)



*Versus- Peter Chepkwony ELC No 32 of 2017* and court of Appeal *Park Towers Limited – Versus - John Mithima Njika & 7 Others 2014 eKLR* and Halsbury Laws of Singled 4<sup>th</sup> Edition Volume 45 Paragraph 26 1503

34. In the instant case the Learned Counsel held that taking into consideration of the fact that the structure complained of land encumbered on the Plaintiff's land for almost ten (10) years thereby stopping her and her husband from enjoying their land. Hence, he sought for the Plaintiff to be awarded a sum of Kenya Shillings One Million (Kshs 1,000,000/=) as damage.

#### **B. The Defendant's Written Submissions**

35. On November 26, 2021, the Learned Counsel for the Defendant the Law firm of Messrs. MK Mulei & Co Advocate for the Defendant filed their written submissions dated November 26, 2021. M/s Kanyatta Advocate brought out the following three (3) issues for consideration by this court. These were:-
- (a) On the legal ownership to Plots No 60 & 63 (b) Whether the Defendant had trespassed onto the Plaintiff's Plot No 60 and hence causing any construction on it (c) Whether the orders for damages and permanent injunction should issue.
36. She submitted and admitted that the Defendant was not claiming Plot No 60 as she owned Plot No 63 of which both were located within the same locality. According to her, the dispute arose from the fact that both parties seemed to claim the same physical location where they claimed the two plots were situated. The Learned Counsel averred that the Defendant denied that she trespassed into Plot No 60. It is for this reason that she had commenced some construction which according to her it was on Plot No 63 and not Plot No 60 as alleged by the Plaintiff herein.
37. The Learned Counsel argued that he who alleges must prove. She contended that the Plaintiff claimed ownership to Plot No 60 and relied on Plaintiff Exhibit numbers 4, 5, 6 and 7 and a Land Surveyor report dated April 1, 2017. She strongly held that the said Land Surveyor failed to ascertain the exact physical location of Plot No 60. She asserted this as in spite of claiming that the construction was ongoing thereon, the Land Surveyor nonetheless still directed that a government surveyor to be involved for purposes of identifying the actual position on the ground. There was no indication that both parties were involved in the exercise.
38. The Counsel castigated the Plaintiff Exhibit No 5, 6 and 7 as the allegation that the Defendant was the wife to the chief, thus took advantage of that fact of the husband being in authority, was mere speculation. She held that none of the officers to whom the Plaintiff had raised complainant had been able to pin point the exact physical location or place where Plot No 60 was on the ground. She pointed out that the said surveyor had failed to visit Plot No 63. She argued that it was incumbent upon the said surveyor upon whom the Plaintiff relied on to have proved its case in order to table evidence dispelling the Defendant's allegations that where she did her construction was where her plot was located. She held that the Defendant produced Defence Exhibit No 6 confirming her ownership to Plot No 63.
39. The Learned Counsel's contention was that the Defendant produced documents showing that she requested for beacons identification of her Plot being Defence Exhibit No 2 and 3 confirming that the same was done and that was why she was confident that she was on her right portion of plot and commenced construction. She opined that the Plaintiff was silent on how they identified their plot since these plots were awarded by the Government in a settlement Scheme. She submitted that indeed the Defendant further produced a letter from Changamwe District Commissioner confirming that Plot No 63 belonged to her after the surveyor had put beacons.



40. The Learned Counsel averred that the Defendant's Exhibit No 7 being the Regional Surveyors Report indicated that the Defendant was the owner of Plot No 63 and that the existing boundary foundation on the ground was in her plot. They admitted that both Plots No 60 and 63 existed and the only issue of contention was just a matter of identifying their exact physical location on the ground. She submitted that the Plaintiff had failed to prove its claim on a balance of probabilities and where there were conflicting reports on a matter before court by two experts, the court was left to make a finding in favour of either parties based on not only the experts reports but other evidence furnished. To buttress on these points, the Learned Counsel relied on the authority of '[Rael Mwonjia Gichunge & Another – Versus- Faud Mohamed Abdulla \(2014\) eKLR](#)' where the Court of Appeal faced with two conflicting expert opinion held that:-

' The contradictions in the two expert reports raised an issue of burden of proof if the two contradictory hand written expert reports are to be given zero evidential weight and cancel each other what is left is to determine who has the burden to prove that the sale agreements is a forgery. The legal adage is he who alleged must prove. The appellants allege that the sale agreement is a forgery we are satisfied that on balance of probability; the appellant did not discharge this legal burden.

41. The Counsel reiterated by denying that the Defendant trespassed onto the Plaintiff's Plot No 63 contrary to the Provision of Section 3 (1) of the [Trespass Act](#) Cap 294. The Counsel stated that the Defendant had commenced construction on it with the belief it was her plot and with the two conflicting surveyor's reports one indicating that the structure was on her Land No 63 she could not be stated to have trespassed.

42. On the issues of damages and permanent injunction sought by the Plaintiff, the Learned Counsel submitted that the Plaintiff had failed to prove their case on a balance of probability and on the allegations that the Defendant had caused any trespass onto her Land Plot No 60. This was exacerbated by the existence of two conflicting Land surveyors report. Hence, in the given circumstances, a joint surveyors report would have assisted court in determining the matter with finality. However, she stated that the surveyors had failed to do so. For these reasons they prayed that the suit be dismissed with costs to the Defendant they relied on the cases of [HCCC \(Succession\) Cause No 465 of 2013 – In the matter of the Estate of Pradeep Behal & ELC No 712 of 2017 – Simon Lengata ole Mashua –Versus- Joseph Samproi & Another.](#)

## **V. Analysis And Determination.**

43. I have keenly read and perused all the pleadings, the proceedings and testimony by all the witnesses herein the written submissions by the Plaintiff and the Defendant and the relevant provisions of the [Constitution](#) of Kenya, 2010 and statutes.

In order to arrive at an informed, reasonable, just, equitable and fair decision in this matter, I have framed the following three (3) salient issues for consideration and determination. These are:-

- a. Whether the Plaintiff is entitled to the Permanent Injunction orders and other reliefs sought against the Defendant herein.
- b. Whether the Defendant has encroached onto the Plaintiff's land known as Land Reference Numbers Plot 60.
- c. Who will bear the costs of the suit?



**Issue No. a). Whether the Plaintiff is entitled to the Permanent Injunction orders and other reliefs sought against the Defendant herein.**

**Brief facts.**

44. Before embarking onto the full fledged analysis of the above framed issues, this Honorable Court feels it imperative to, first and foremost, extrapolate on the brief facts of the case. From the filed pleadings and the testimony adduced herein, the suit was instituted by the Plaintiff as the Attorney Agent of her husband Mr Patrick Maelo on February 12, 2015 almost over seven (7) years ago. Currently, the husband is sickly with a heart condition. Based on the Letter of allotment/offer dated March 25, 2000, the Plaintiff is the absolute and registered owner to all that parcel of land known as Land Reference Number MSA/Mikanjuni Scheme/60 while the Defendant is the legal owner to Land Reference numbers MSA/Mikanjuni Scheme/63. There was no dispute on the ownership of these properties. The main substratum of the Plaintiff's case is that the Defendant encroached and trespassed into her land without any lawful claim and without her authority or that of her husband. She started construction of a permanent house on the said parcel of land belonging to the Plaintiff. The main dispute is on the location of these plots on the ground. The Defendant had been constructing a permanent house on what she claimed to be her Plot. The Plaintiff who was alleging trespass and encroachment onto her Plot by the Defendant had been raising complaints to several public offices including the location Chief, the District officer and the Division of the Land Adjudication and Settlement Offices. All efforts to resolve this matter amicably has been unsuccessful. The Plaintiff pretested against this act and on several attempts to stop the same using the Provisional Administration and attempts to resolve the dispute having failed, it necessitated her to instate this suit against the Defendant.
45. In the course of time both the Plaintiff and the Defendant engaged their private and independent Land Surveyor who after conducting the surveying exercise independently and separately, prepared and presented their reports. The two reports were produced in court. Now, this is where the main challenge lies as the said report were conflicting. Thus, in the given circumstances and with the consensus of the parties, led the Court to demand for more evidence by invoking the provision of the Section 173 of the *Evidence Act*, Cap 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010 whereby a site visit and a surveying exercise were conducted in the presence of all the parties hereof. A joint survey report was presented in Court and the Surveyors examined by the Learned Counsels before the Honorable Court reserved a day for rendering of this Judgement. That is adequate on the facts.

**VI. The Site Visit Report.**

46. For clarity sake, I now wish to reproduce the site visit verbatim herein.

Republic of Kenya

In The Environment And Land Court

At Mombasa

Elc Case No 19 Of 2015

Mary Nameamba Juma (Suing in her Capacity as Attorney of Patrick Maelo). Plaintiff

Versus -

Asha Mohamed. DefendanT



Site Visit Report Held on May 13, 2022 at Jomvu Mikanjoni (funga Shati) Settlement Scheme on May 13, 2022 At 11.30 am

- a. Court
  1. Hon Justice LL Naikuni - Presiding Judge-ELC No 3
  2. Mr Wilson Rabongo - Court Assistant
  3. Mr Rowland – Judge’s Usher
  4. Mr Thoya – Assistant
- b. Security Operations
  - a. Inspector Adow K Hubiya – Head Scenes of Crime Jomvu Police Station
  - b. Police Constable Gilbert Simiyu – Jomvu Police Station
  - c. Police Constable Jack Sigira – Jomvu Police Station
  - d. Police Constable Harrison Njagi – Jomvu Police Station
- c. Parties Representation
  1. The Plaintiff
    - a. Mr Odongo Advocate for the Plaintiff;
    - b. M/s Mary Nameamba Juma – The Plaintiff
    - c. Mr Omar Karisa – Chairman Nyumba Kumi
    - d. Neighbors – 18 persons
  2. The Defendants
    - a. M/s Kanyatta – Advocate for the Defendant
    - b. M/s Aisha Mohamed – The Defendant
    - c. Mr Fadhili Nasser – Son to the Defendant
    - d. 15 neighbors
  3. Experts
    - a. Mr Walid Abbas – Land Surveyor (Coast Regional Officer Mombasa
    - b. Mr James Gitonga – Land Surveyor (Private) attached with Edward K Kiguru Surveyors.
  - d. The purpose for the site visit  
Explained to detail.
  - e. The Procedure:  
The tools used.



- (i) GPS Machine
- (ii) Hand Held Machine

#### Documents

- i. Copies of the Certificate of Title deed for the two Plots Land Reference No Mombasa/Mikanjuni Scheme/60 and Land Reference No Mombasa/Mikanjuni Scheme/63.
- ii. The Registered Index Map (Hereinafter referred to RIM)

#### Methodology

- a. To physically identify the Seven (7) plots No 58, 59, 60, 61, 62, 63 and 64 respectively.
- b. To pick and plant the existing beacons
- c. To measure the exact distances in between the plots using the tapes and the coordinates and existing beacons
- d. To prepare a hand survey report and drawing up of sketch map.

The Land Surveying Exercise was conducted by physically walking through all the 7 plots in order taking notes on the discrepancies and other observations made by the 2 surveyors.

#### e. The Observations Made

The following were the observations made:-

- a. This is an informal settlement scheme where the government stepped in to draw RIM and settle people. Apparently, there appears to exist several RIM maps amended with time – ideally, the amendment had been intended to cause mixing up the indigenous Coastal people with people from upcountry communities to see whether this approach would influence rapid development within this region. The formula was to be based on 60% to 40% settlement of both the ordinary residents from the Coast region and those from upcountry.
- b. There existed land dispute over the actual physical location to three plots – No 60, 61, 62 and 63.
- c. All the plots are almost the same size with an exception of small variations



- d. The land is sloppy with some thicket tunnel on the lower side. There are some few (6) well grown trees along the cemented narrow paths. There were some trees plantations well grown on the suit land. The trees might have been planted ten to fifteen years earlier. The Plaintiff and the neighbors who spoke held they were planted by the Plaintiff. They all seem to state the plot was hers. There was no structure on both the suit land site apart from a few insignificant debris scattered all over and covering a hole where a pit latrine stood once.
- e. It appears by the time a major survey was conducted, people had already settled down for many years, hence leading to mass displacement of the habitants.
- f. The land pecuniary values of the land predominantly with both permanent and semi-permanent Swahili Shelter and well-manicured narrow cement foot paths, and a Mosque from within is approximately Kshs 500,000/=.

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Sloppy

Plot No 60

Plot No 62

Road



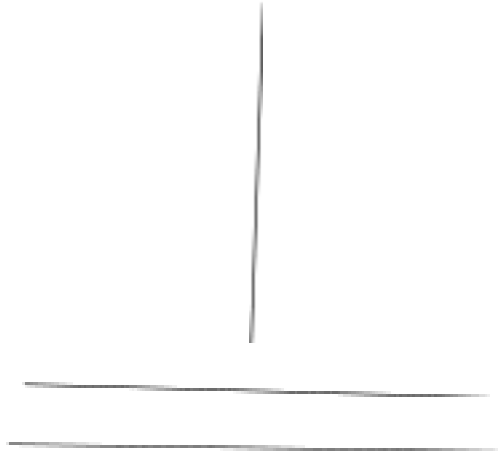
Plot No 63

Plot No 58

Plot No 64

Plot No 65 Plot No 59

Thicket Tunnel



- g. None of the plots No 63, 62, and 60 are occupied – apart
- h. from some traces of foundation and a covered pit latrine. The Plaintiff claims to have had a semi house there but it was demolished during the re-settlement programme.
  - i. Plot No 67 is fully developed with a neat permanent Swahili house and two plastic 5,000 Liters water tanks for rain harvest. Plots No 57 and 58 are also developed.
  - j. The RIM Map was for August 2006
  - k. It was noted the re-survey exercise has been done severally as each new leader comes in and demands for further demarcation of the land Ideally in order to settle more people.
  - l. Generally, the people indicated the plaintiff had hived on the upper side of the Plot – she had constructed her house there and planted trees. They were surprised to gather her plot had been pushed to the lower sloppy side of the land by the new RIM while the Plaintiff was extremely agitated



all through the surveying exercise, the Defendant remained calm and very composed.

- m. It was agreed that a joint report be prepared by the surveyor.
- n. The matter to be mentioned in court on June 15, 2022 to ascertain further progress on the land survey report and take a date for the delivery of the judgment.

The site visit was concluded at 2.00 pm with a word of prayer.

Hon. Justice LL Naikuni (judge)

Environment and Land Court

47. The issue at hand is whether the Plaintiff herein is entitled to be granted the Permanent Injunction restraining the Defendant from interfering with the Plaintiff's Plot No 60. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

48. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory.

The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of '[Malier Unissa Karim – Versus - Edward Oluoch Odumbe \(2015\)](#) *eKLR* as follows:-

'The test for granting a Mandatory Injunction is different from that enunciated in the 'Giella –Versus- Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of 'Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109' had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

' A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application'.



Further the same Court of appeal in the case of '*Jay Super Power Cash and Carry Limited –Versus - Nairobi City Council and 20 others CA 111/2002*' held that:-

' This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it'.

49. In the instant case, it is not in dispute and it has not been contested at all that both the Plaintiff and the Defendant were the legal registered and absolute owners to their own Plots being numbers 60 and 63 respectively. The only issue of contention was to appreciate and know the exact physical location of these Plots on the ground. Based on the pleadings filed, the numerous correspondences exchanged on the subject matter, almost over four (4) land surveying exercises conducted by private and Government Surveyors and the Site Visit conducted by court, it was indicative that there was no structure on the ground apart from a few debris and trees grown on it were found on the suit land. The suit parcels were flat with no single development on it. Hence, there was no evidence of any construction having been undertaken by the Defendant as alleged. The Honorable Court would find it difficult to consider the issue of any trespass by the Defendant onto the Plaintiff's land. Be that as it may, for the sake of preserving the suit land Court finds that the Plaintiff has a 'prima facie' case and the legal inclination to the Suit property. For these reasons therefore this Court finds that the Plaintiff has adequately and effectively demonstrated her case and met the fundamental threshold on being granted Permanent Injunction as laid down in law.

50. Secondly as per the pleadings by the Plaintiff and for benefit of doubts, it will be prudent that the Defendant herein, if all was in any way in occupation onto Plot No 60 which was not seen, should then legally vacate from it under the laid down Provision of Section 152 E (1) & (2) (a), (b), (c) & (d) of the Land (Amended) Act, 2016. I am reminded of the legal ratio envisaged by Madan, JA (as he then was) in the case of '*Chase International Investment Corporation and Ano. – Versus – Laxman Kesbra & 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' .

The Honorable Court need say no more on the issue under this sub heading.

**Issue No. b). Whether the Defendant has encroached onto the Plaintiff's land known as Land Reference Numbers Plot 60.**

51 Under this sub heading, it is instructive while tendering her evidence in chief, the Defendant herein admitted having caused some construction on the suit land. Indeed, she informed Court that upon being shown the exact place where her plot was, there was a fracas by the community vehemently protesting it as they all alleged that place was where the Plot for the Plaintiff was situated. However, as indicated above, although the Plaintiff from the pleadings filed and evidence adduced in court to the effect that the Defendant had encroached onto her land and caused some constructions, this Court never saw any such evidence at all on the ground when it visited it. It is still not clear whether the said structure had been demolished prior to the Court visitation or not. This fact was not clear at all. There were only a few debris presumably from a construction of a pit latrine and of course several grown tree plantations on the ground and nothing else.



52. Thus, the Honourable able Court is persuaded and fully concurs with the Counsel for the Defendant based on the provision of Section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya to the effect that its the one who alleges who has to prove the said allegation. As stated the umpteenth times, the Plaintiff has not been able to demonstrate through empirical evidence that the Defendant ever trespassed onto her land. It my view therefore that there never any trespass action onto the Plaintiff's Plot No 60 by the Defendant.
53. However, all facts remaining constant and based on the information supplied by the Land Surveyors and their filed reports, the site visit and the views tendered by the neighbours there was any doubt whatsoever that the portion of land known as Plot number 60 is the one on the upper side of the suit land adjacent to where there are several tree plantations and the concrete pedestrian foot path while the Plot No 63 is on the lower side of the suit land next to the valley. In my view this now brings this land dispute to rest once and for all.

**Issue No. c). Whether the parties are entitled to the reliefs sought.**

54. Under this sub heading, the issue of the ownership of the two Plots numbers 60 and 63 was well established to be belonging to

Both the Plaintiff and the Defendant herein. Both of them should be secured by law on the rights, title and interest to the said parcels.

This dispute has caused a total of over four (4) Land Surveying exercises being conducted with different conclusions. From the information gathered from the Site Visit by Court and in the presence of the parties and their Surveyors the root cause of this land tussle was explained graphically by the Surveyors, the local leaders on the ground and the neighbours. It was stated that the settlement scheme there existed a Government policy on accommodating people from upcountry to mingle and settle amongst the indigenous people in order to see whether this would influence them to embrace development of their land. As a result, it led to frequent amendment of the RIM of the area and hence the confusion of the physical location of people's parcels of land particularly those which had not been occupied or developed.

This policy was susceptible to regular and frequent political interference upon the coming up of new leaders. The explanation sounded very plausible. Be that as it may, from the visitation and the cogent evidence from the community and village leadership, it was evident that the Plaintiff had planted trees on the ground which were over ten (10) years old on the spot where she always claimed to be her land. For this reason, the Court was convinced that the exact location for the Parcels of the Plot no. 60 and 63 were clear and plain as per the Site Visit report and corroborated by the Surveyors reports.

**Issue No. d). Who will bear the costs of the suit?**

55. The issue of Costs is discretionary of the Court. Costs is attained after the conclusion of any action or proceeding in all litigation process by parties. The proviso of the provision of Section 27 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya states that costs follow the event. By event, it means the result of any action or proceedings by parties.

In this case, the results are that the Plaintiff has been able to prove its case in a preponderance of probability against the Defendant herein and therefore she is entitled to costs of the suit as prayed from the filed Plaints accordingly. The Honorable Court proceeds to award Costs to the Plaintiff to be borne by the Defendant herein.



**vi. Conclusion & Determination.**

56. Ultimately, having critically analysed all the framed issues herein, the upshot of it all is that this Honorable Court finds that the Plaintiff has been able to prove her case against the Defendant herein on the preponderance of probability. For this reason, therefore, this Court proceeds to enter Judgement in her favour under the following terms. These are:-

- a. That a declaration that all that property known as Plot Number Mombasa/Mikanjuni Scheme/60 be and is legally, absolutely owned by the Plaintiff's principal and husband Mr Patrick Maelo with all its indefeasible rights, title and interest vested on him by law.
- b. That an order of Permanent Injunction be and is hereby granted to the Plaintiff herein restraining the Defendant by herself, her family, agents, servants, employees and/or personal representatives from going into or in any way whatsoever entering and/or interfering with or any part of all that parcel of land known as Plot Number Mombasa/Mikanjuni Scheme/60.
- c. That the Plaintiff be awarded the damages and interests at the Court rates from the date of the Judgement until payment in full.
- d. That the Costs of the suit to be borne by the Defendant.

It is so ordered accordingly

**JUDGMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022**

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

**ENVIRONMENT & LAND COURT**

**MOMBASA**

**In the presence of:**

- a. Mr. Buko & Mr. Omar – Court Assistant.
- b. Mr. Odongo Advocate for the Plaintiff
- c. M/s. Kanyatta Advocate for the Defendant

