



REPUBLIC OF KENYA



**Mwenye & 5 others v Tsama & 3 others (Environment & Land Case
136 of 2020) [2025] KEELC 152 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 136 OF 2020**

**LL NAIKUNI, J
JANUARY 24, 2025**

BETWEEN

**MKUZI TSAMA MWENYE 1ST PLAINTIFF
SALIM ABDALLA TSAMA 2ND PLAINTIFF
DZUYA JOHA KANYONGE 3RD PLAINTIFF
PANGA KWALE MKUZI 4TH PLAINTIFF
ADMA KANGO SAID 5TH PLAINTIFF
RICHARD CHIBULE JOHA 6TH PLAINTIFF**

AND

**JULIUS MKAUMA TSAMA 1ST DEFENDANT
MBODZE TSAMA MKAUMA 2ND DEFENDANT
KILIFI LAND REGISTRAR 3RD DEFENDANT
KILIFI DISTRICT LAND ADJUDICATION OFFICER 4TH DEFENDANT**

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a Civil suit instituted through a Plaint dated 21st September, 2020. It was filed 24th September, 2020 by Mkuzi Tsama Mwenye, Salim Abdalla Tsama, Dzuya Joha Kanyonge, Panga Kwale Mkuzi, Adam Kango Said, and Richard Chibule Joha, the Plaintiffs herein against the Julius Mkauma Tsama, Mbodze Tsama Mkauma and Kilifi Land Registrar, Kilifi District Land Adjudication Officer, the Defendants herein.



2. Upon service of the pleading and Summons to Enter Appearance, the 1st and 2nd Defendants entered appearance through a Memorandum of Appearance. Subsequently, they filed a Statement of Defence and Counter - Claim dated 29th October, 2020 filed on 30th October, 2020 and the Plaintiffs subsequently responded to the statement of Defence and Counter - Claim through a reply to Defence dated 16th November, 2020 filed on 10th December, 2020. The 3rd Defendant entered appearance through a Memorandum of Appearance dated 24th October, 2022.

II. Description

3. The Plaintiffs were all described as a male adult of sound mind residing at Mazeras the County of Kilifi in the Republic of Kenya. The 1st Defendant was described as a male adult of sound mind residing in Mombasa within Mombasa County in the Republic of Kenya. The 2nd Defendant was described as a Female adult of sound mind residing in Mazeras within Kilifi within Kilifi County in the Republic of Kenya. The 3rd Defendant as an employee at the Ministry of land and housing and Registrar at Kilifi Land Registry within Kilifi County in the Republic of Kenya. The 4th Defendant was an employee at the Ministry of land and Housing and District Adjudication Officer at Kilifi Land Adjudication Office Kilifi County in the Republic of Kenya.

III. Court directions before the hearing

4. Nonetheless, on 17th May, 2022, the Honourable Court fixed the hearing dated on 25th October, 2022 with the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Defendants/ Plaintiffs in Counter - Claim witnessed (DW - 1 and 2) testifying in Court after which they marked their case closed and the Plaintiffs/Defendants in Counter - Claim opted not to call any witness and they subsequently closed their case.

IV. The Plaintiffs’ case

5. From the filed pleadings, it was the Plaintiffs’ case at all relevant times to this suit, the Plaintiffs are the bona fide legal and beneficial owner of a piece of Plot Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 Measuring Approximately One One Decimal Four Four (11.44) ha and five Decimal two nine (5.29) ha respectively. The Plaintiff averred that they had been on the piece of land over seventy (70) years and the land was and is there clan property which they have use and known as their home, they have occupied the same to date.
6. Their ancestors according to the Plaintiffs resided on the land and that the Land Adjudication Committee awarded the land to Mkuzi Kango family who continued utilizing the same till all the Adjudication process as per the *Land Adjudication Act*, Cap. 284 Laws of Kenya were finalized and to date they are using the said land. Sometimes on or about September, 2020, the 1st Defendants without any colour of right and/or legal claim and/or justification whatsoever moved into the suit land and issued notice to the plaintiffs to vacate the said land after he had fraudulently obtained title in his name.
7. According to the Plaintiffs their tenure and right over the subject property herein is unfettered, the demarcation of boundaries thereon having been clearly and completely identified by the Adjudication Tribunal the 1st Defendant was nowhere near the said land neither is his clan claiming any interest in the aforesaid land. The 1st and 2nd Defendants herein had been clearly and completely identified by the Adjudication Tribunal the 1st Defendant was nowhere near the said land neither was his clan claiming any interest in the aforesaid land.



8. The Plaintiffs claimed that the 1st and 2nd Defendants herein had threatened to evict them with police without court order from the land Plot Mgumopatsa/Mazeras/135 to Julius Mkauma Tsama and Mbodze Tsama Mkauma and thus their acts are oppressive. The Plaintiff also averred that the Defendants had deliberately without any justifiable reason whatsoever, forcibly, through the assistance of the adjudication office fraudulently registered the Plot No. Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 to Julius Mkauma Tsama and Mbodze Tsama Mkauma without their knowledge when they are the one living and using the land denying the Plaintiffs their right of use and enjoyment of the land.
9. Further it was the Plaintiffs' aversion that unless the Defendants were restrained by way of an order herein sought, they would continue with their illegal action on the said land and thus occasioning the Plaintiffs irreparable loss and prejudice. Despite demand and notice of intention to sue having been given to the Defendants, the Defendants had failed, refused and neglected to heed to the Plaintiffs' call thereby rendering this suit necessary .
10. The Plaintiffs prayed for Judgment against the Defendants severally and jointly as follows: -
 - a. A permanent injunction restraining the Defendants either acting by themselves, their employees, agents, and/or servants and/or through any other means whatsoever from trespassing, alienating, encroaching, wasting, damaging, dealing and/or interfering with Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 Measuring Approximately One One Decimal Four Four (11.44) ha and five Decimal two nine (5.29) ha respectively and/or do issue direction compelling the 1st Defendants to surrender the Title Deed Number Mgumopatsa/Mazeras/135 to the Kilifi Land Office and release Title Deed Number Mgumopatsa/Mazeras /130 to the registered owners.
 - b. A Declaration that the Plaintiffs are the legal and/or beneficial owners of all that piece of Mgumopatsa/Mazeras /130 and Mgumopatsa/ Mazeras/135 Measuring Approximately One One Decimal Four Four (11.44) ha and five Decimal two nine (5.29) ha respectively in Kilifi county contained in Land's Adjudication Section of Mgumopatsa/Mazeras Adjudication scheme.
 - c. That the Registrar do registered the plaintiffs as the proprietor and issue certificate of title for the parcel of land situated in the Kilifi in the Kilifi District Subdivision Number Mgumopatsa/ Mazeras/135 measuring five Decimal two nine (5.29) hectares without gazettelement which said piece of land is comprised in a Certificate of title registered in the Land Registry at Kilifi in the names the Plaintiffs.
 - d. Costs and interest.
 - e. Any other relief the court may deem fit.
11. Subsequently, the Plaintiffs responded to the filed Statement of Defence and Counter - Claim through a reply to Statement of Defence and Counter - Claim dated 16th November, 2020 filed on 10th December, 2020 where they averred on the response to statement of defence that: -
 - a. The Plaintiffs joined issue with the 1st and 2nd Defendant's Statement of Defence save where the same was comprised of admissions.
 - b. In response to the contents of Paragraphs 3,4, 6, 7, 8 and 10 of the Defendant's Statement of Defence, the Plaintiff reiterated the contents of Paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 of the Plaintiff.



- c. In response to Paragraphs 3, and 4 of the Defendant's Statement of Defence the Plaintiff reiterated the contents of Paragraphs 6, 7 and 8 of the Plaintiff.
 - d. In response to Paragraphs 6 and 7 of the Defendant's Statement of Defence the Plaintiffs reiterated the contents of Paragraphs 10, 11, 12 and 13 of the Plaintiff.
 - e. Further and without prejudice to the generality of the foregoing the Plaintiff averred that the Defendant's Statement of Defence as presently filed was a mere sham, comprised of mere denials, was bad in law, incurably defective, it afforded no reasonable defence to the Plaintiff's claim and/or the same was otherwise an abuse of the court process and they shall at the opportune time crave leave of the court for the same to be struck it out with costs.
12. For the reasons thereof the Plaintiffs prayed that the Defendant's Statement of Defence be struck out and Judgment be entered as prayed in the Plaintiff.
13. In defence to the Counter - Claim, Plaintiffs/Defendants in Counter - Claim averred that:-
- a. The Plaintiffs denied the contents of Paragraphs 11 to 24 of the Counter - Claim and puts the 1st and 2nd Defendants to strict proof thereof. The Defendant specifically denied the particulars of error as outlined in and/or set out in paragraphs 6 to 9 of the Plaintiff.
 - b. The Plaintiffs denied the contents of Paragraph as outlined in Paragraphs numbers 14, 15, 16 and 17 of the Plaintiff.
 - c. In the alternative and without prejudice to Paragraphs 18, 20 and 22 hereof, the Plaintiff averred that if any government officer erred and declared the Defendant the owners of the suit land the same is null and void ab initio as the portion of the land known as Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 belongs to the Interested Party.
 - d. The Interested Party contends that the Plaintiff's suit is bad in law, incompetent, vexatious and at most never disclosed any reasonable cause of action against the Interested Party ownership of the land known as Mgumopatsa/Mazeras/130 and Mgumopatsa/Mazeras/135 and at the appropriate time, the Interested Party shall seek leave to have the Plaintiff suit dismissed.
 - e. Liability and demand notice were denied.
 - f. The jurisdiction of the Court was admitted
14. The Plaintiffs prayed that the Defendant's Counter - Claim be struck out and Judgment be entered as prayed in the Plaintiff.

V. The 1st and 2nd Defendants' case

15. The 1st and 2nd Defendants filed a Statement of Defence and Counter - Claim dated 29th October, 2020 filed on 30th October, 2020 where in the Statement of Defence they averred that:-
- a. Save for the allegations in the Plaintiff as were herein after admitted the Defendants deny each and every allegation therein contained in the Plaintiff as if the same were set forth seriatim and specifically traversed.
 - b. The 1st and 2nd Defendants admitted contents of Paragraphs 1, 2, 3, 4 and 5 of the Plaintiff as the same were merely descriptive of the parties herein, save that the Defendants address for the purposes of this suit shall be care of:-M.K.Mulei & Company Advocates, T.S.S Towers, 4th floor, Nkrumah road, P.O Box Numbers 80812 Mombasa.



- c. They denied contents of Paragraphs 7 and 8 of the Plaintiff.
 - d. Further they admitted contents of Paragraph 9 only to the extent that the 1st Defendant issued a notice to the Plaintiffs to vacate and handover vacant possession of plot No. Mgumopatsa/Mazeras/135 but denied allegations of lack of right/legal claim or justification and fraud.
 - e. Further the 1st and 2nd Defendants vehemently contents of Paragraphs 10, 11 and 12 of the Plaintiff.
 - f. The plaintiffs were not entitled to any of the orders sort herein since their claim was fabricated, fuelled by greed and an abuse of the court process.
 - g. They denied ever receiving any notice and or demand from the Plaintiffs.
 - h. The 1st and 2nd Defendants admitted the jurisdiction of this Honourable court, except to state that this suit ought to have been filed in Malindi high court, which has the proper geographical jurisdiction.
 - i. The 1st and 2nd Defendants further averred that the Plaintiffs suit was statute bared, incompetent and vexious and at the earliest will raise a preliminary objection to that effect.
16. In the counter claim, the 1st and 2nd Defendants argued:-
- a. They reiterated the contents of Paragraphs 1 to 10 of their Statement of Defence.
 - b. They claimed for vacant possession of part of plot No. Mgumopatsa/Mazeras/135 being occupied by the plaintiffs.
 - c. It was the 1st and 2nd Defendant's contention that they were the legal owners of the subject plot being the beneficiaries of the estate of the late Tsama Mkuzi Saha who was the registered proprietor of the plot.
 - d. The 1st and 2nd Defendants were related to the plaintiffs by didn't of belonging to the same clan the Mwajohadzuya whose original ancestry was at Ruruma from where part of the kin moved to Mwadzembe, further to Riani location of subject plot No.Mgumopatsa/Mazeras/130 then further to Kilifi Kaliangombe/Jimba.
 - e. It was the 1st and 2nd Defendant's contention that the deceased Tsama Mkuzi Saha acquired the land before demarcation when he successfully concluded a case against one Ambari Wahshe Mlangi who was tilling the land and claimed ownership.
 - f. The deceased owned the same exclusively until Abdalla Tsama Mkuzi the father to two of the Plaintiffs requested the deceased to allow him occupy a portion of the said plot since he had differed with his brothers who were then all occupying plot No. Mgumopatsa/Mazeras/130 which was the communal land in occupation of all the brothers who had then settled there.
 - g. After the demise of the said Abdalla Tsama Mkuzi, his family relocated back to the communal land which was plot No. Mgumopatsa/Mazeras/130.
 - h. The government subsequently declared the area a settlement scheme and in the year 1981 during adjudication his father was registered as the legal owner of the plot without any objection from the 1st Defendant and or from any of his kin who were still alive.



- i. It was after his death in the year 1984 that the Plaintiffs invaded the plot and began making baseless ownership claims.
 - j. The matter had since been adjudicated upon from local administration, to the land tribunal and even this Honourable Court with the same verdict in the 1st and 2nd Defendant's favour.
 - k. The invasion of the Plaintiffs into the said plot has occasioned them to suffer loss, by their wanton degradation and illegal occupation of portions of the plot and unending feuds apart from curtailing their freedom in dealing fully without interest in the land.
 - l. In spite demand and notice to sue the Plaintiffs have refused to hand over vacant possession of the plot to the 1st and 2nd Defendants.
 - m. In reference to the subject matter hereof there were no proceedings between them and the Plaintiffs in this court or any other court within and outside the jurisdiction. This Honourable court's jurisdiction is admitted.
17. The 1st and 2nd Defendants prayed for Judgment for:-
- a. That the Honourable court be pleased to order the Plaintiffs and or their agents, assigns and or any other person claiming any right and or interest through them to vacate and hand over vacant possession of plot No. Mgumopatsa/ mazeras/135 to the 1st and 2nd Defendants.
 - b. Costs and interest of this suit and Counter - Claim.
 - c. Any other relief that this court may deem fit to grant.
18. The Defendant called their 1st witness on 25th October, 2022 at 2.15 pm where he told the court that:-

A. Examination in chief of DW - 1 by Ms. Kayatta Advocate.

19. DW – 1 testified under oath and in Swahili language. He identified himself as Julius Mkalim Tsama, a citizen of Kenya with all the particulars as founded in the national identity card shown to Court. He informed Court that the 2nd Defendant was his biological mother. He knew the Plaintiffs. They were from the same clan – called Mwajohazui Clan in Rabai. He understood the case before court which involved two parcels (a) land reference no. Mgumopatsa/Mazeras/135 and (b) Mgumopatsa Mazeras/130. It was alleged that he got this parcels in fraudulent means. Plot No.135 belonged to Mzee Tsama Mkuzi Saha who was his father got this parcel of land from Government after a land dispute with one Ambari Washe Mlangi.
20. According to DW - 1 during the burial of his father the documents got misplaced. He had participated in the adjudication exercise for 10 years. Then he stopped following up the matter. Later on, he found out that the Plot No. 135 was registered in the names of his father. But the Plot 130 was registered in the names of the community - with his father and uncles –Tsawe Nguze Saha and Kango Mkakuzi and Mkuzi Saha Panga.
21. DW - 1 was given the title for Plot No.135 and using Letters of Administration documents they transferred the land to Mbodze Tsama Mkauma, his Mother, that is Plot No.135. That they were the legal owners as it was his father who got it from his own efforts. It was allocated to him. There was an elder called Abdalla Tsama Mkuzi who asked to be accommodated as where he had come from Plot No.130 there had been a problem. When he died he was buried there by the family members who used force to do so.



22. DW - 1 told the court that he was of the same clan with them; his children demolished the houses and structures he had constructed and went back to Plot No. 130. By this time his father had also died. Other members of the clan invaded Plot No.135 from Plot No.130- Maberia. They were the 3rd, 4th 5th & 6th Plaintiffs herein. Before that there had existed a land dispute at Malindi, being “ELC No.163 of 2013” (see Paragraph 16 of his statements). The case was decided to their favour. They served them with a demand but they filed yet another civil Case – “ELC No.136 of 2020” as Plaintiffs.
23. DW - 1 further told the court that on 3rd September, 2008, he lodged a complaint with the police through the OCS. By that time he had already obtained the Grant Letters of Administration for the estate of the late Tsama Mkuzi Saha on 21st February, 2012. It was issued in HCCC Succession No. 216 of 2010 to Julius Mkauma Tsama. On 30th October, 2012 the Certificate of Confirmation of Grant was issued and the shares were distributed to the beneficiaries as follows:-
- a. Mbodze Tsama Mkauma - 60% = No.113.
 - b. Julius Mkauma Tsawe 40% = No.135 & 130.
24. DW - 1 told the court that on 26th September, 2011, he lodged a complaint with the District Lands Adjudication Officer (DLAO). They came to the land. The complainant were barring him from using the land. There was no solution as they had no papers on the land. They went to the chief but there was no solution. Later on they registered the restrictions against the land. They filed the Civil Case ELC No.163/2013 at Malindi High Court. It was decided in their favour. In the year 2005, they had lodged a complaint before Kilifi Tribunal. The matter was heard in the year 2006. It was decided to his father’s favour and Plot No.130 was to be divided into 3 portions.
25. Further, the witness told the court that the Ruling by the Tribunal was adopted as an award in SRMCC (Mbsa) No.27/2006. There had been no appeal preferred from these two above decisions. The plot number 135 measured 13 acres. There were people living on it. The Plaintiffs were still in occupation. Some had built both permanent and semi-permanent structures. They also cultivated on it. But they were unable to access the land. They restricted them. They lived elsewhere at a place called Kalia Ngombe Jimba; his father was never buried there. On the said suit land their father had mango plantation which was still there. There were three (3) trees on it. They were the ones who planted the coconut trees.
26. DW - 1 told the court that Plot No. 130 (Community Land) which had three owners. His father had shares. The title for the land was still at the offices of the Land Registrar, Kilifi. The land had never been sub - divided. But they knew their portions physically though it had been formally sub – divided no title deeds were issued. He had filed a copy of the title deed filed in Court. It was a copy for the land known as Land Reference No. Mgumopatsa/Mazeras 130 measuring 11.44 Ha (28 acres) - registered in the names of:-
- a. Tsama Mkuzi Saha (his father).
 - b. Kango Mkuzi Mdza Vudzo.
 - c. Mkuzi Saha Panga.
27. DW - 1 told the court that it was issued on 5th March, 2005 each having 1/3 undivided shares. Their father would use his 1/3 shares to cultivate-maize and cassava. But now they were not able to use it. The Plaintiff caused them problems. They used violence. They had not benefited at all from the Plot No. 130 due to these disruptions. DW - 1 told the court that he would have loved to provide the following Exhibits 1 to 11:-



- a. A copy of the Title Deed Mgumopatsa 135.
 - b. A copy of Title Deed Plot 130.
 - c. Chief Letter dated 3rd September, 2008.
 - d. Chief Letter dated 16th September, 2011.
 - e. Letter dated 4th October, 2011.
 - f. Chief Letter dated 7th October, 2011.
 - g. Grant Letter of Administration dated 21st February, 2012.
 - h. Certificate of Confirmation of Grant dated 30th October, 2012.
 - i. Copies of proceedings and award 27/2006
 - j. A copy of the Judgement of ELC NO.163/2013 - Malindi.
 - k. A copy of a letter dated 11th August, 2020.
28. DW - 1 also adopted his witness statement dated 3rd September, 2021 as his evidence. He prayed to be given the ownership of Plot 135 and their share of 1/3 of Plot numbers 130. Further, he asked the Court to evict and give them vacant possession of Plot No.135 and 1/3 share of 130.

A. Examination in Chief of DW - 2 by Ms. Kayatta Advocate.

29. DW - 2 testified under oath and in Swahili language. He identified himself as being Mkuzi Saha Mkauma, a citizen of Kenya with all the particulars as found in the national identity card shown to Court. He was born in Rabai Kilifi. He knew Julius Nkauma Tsama. He was his cousin. He knew the Plaintiffs. They had no blood relation. They were just neighbours. He knew about the 2 parcels of Plot No. 130 and 135 respectively. They belonged to Tsama Mkuzi Saha. He knew that one was in his own name but the bigger one was for three persons arising from its size and physical locations. Plot No. 135 belonged to Tsama Mkuzi Saha. He got it from taking that he was always there. Hence, he benefitted from the Land Adjudication. He was present during the demarcation. He had his share of land elsewhere.
30. DW - 1 adopted his witness statement dated 3rd September, 2021 produced as evidence and admitted.
31. The Defendants through their advocate Ms. Kayatta closed their case on 25th October, 2022. Likewise, it followed that the Case of the 3rd and 4th Defendants was closed out of their non - attendance.

VI. Submissions

32. On 16th May, 2024 after the Plaintiffs and Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. By the time of penning down this Judgement, the Honourable Court was only able to access the submissions by the 1st and 2nd Defendants. Pursuant to that on 30th September, 2024 the Honourable court reserved a date to deliver its Judgement on Notice.

A. The Written Submissions of the 1st and 2nd Defendants

33. The 1st and 2nd Defendants through the Law firm of Messrs. M.K Mulei & Co Advocates filed their written submissions dated 23rd November, 2022. M/s. Kayatta Advocate submitted that the Plaintiff



- through a Plaint dated the 21st of September 2020 filed a claim against the Defendants and sought for the above stated reliefs.
34. In response according to the Learned Counsel the 1st and 2nd Defendants herein opposed the claim through their filed Statement of Defence and Counter - Claim dated the 29th of October 2020. The matter was then set down for hearing after pre-trial directions were taken. The plaintiffs failed to appear and the 1st and 2nd defendants proceeded with their counterclaim after seeking a dismissal of the plaintiffs suit for want of prosecution which orders were duly issued.
35. The 1st and 2nd Defendants thereafter proceeded with their Counter - Claim the 1st and 2nd Defendants prayed for the following orders:-
- a. That the Honourable court be pleased to order the Plaintiffs and or their agents, assigns and or any other person claiming any right and or interest through them to vacate and hand over vacant possession of plot No. Mgumopatsa/ Mazeras/135 to the 1st and 2nd defendants.
 - b. Costs and interest of this suit and counterclaim
 - c. Any other relief that this court may deem fit to grant
36. The Learned Counsel provided Court with the brief facts of the case. She stated that the Plaintiffs had through their filed Plaint dated 21st July 2020 claimed to be the bona fide legal and beneficial owners of plots Nos. Mgumopatsa/Mazeras/130 and 135. They claimed these properties belonged to the clan property and that they have been in occupation for over 70 years. Further, they claim that the Defendants/Respondents had colluded and fraudulently registered the 1st and 2nd Defendants/ Respondents as the owners of both plots.
37. The 1st and 2nd Defendants on the other hand averred that plot No. Mgumopatsa/Mazeras/135 solely belonged to the 1st Defendant's late father Tsama Mkuzi who was also the 2nd Defendant's husband. The deceased obtained the plot before the land was adjudicated after concluding a land dispute with one Ambari Washe Mlangi and subsequently adjudication was done and the deceased was registered as the owner of the said parcel of land. Contrary to the Applicants further assertions, the 1st and 2nd Defendants had averred that plot No. Mgumopatsa/Mazeras/130 was registered in the names of their 3 deceased kin and the land having been divided before, each of the 3 beneficiaries of the dead kins men were entitled to their respective portions of plot No. Mgumopatsa/Mazeras/130 hence, the Applicants assertions with regards to this plot were falsehoods. A copy of the title was annexed hence the claim was fabricated. Therefore, it was the Learned Counsel's contention that the Applicants suit was a sham and baseless hence orders sought should not be granted.
38. The Learned Counsel relied on the following issues for determination:-
- a. Ownership of plots Nos. Mugumopatsa/Mazeras/135 and Mgumopatsa/Mazeras/130.
 - b. Whether an order for vacant possession can issue.
 - c. The issue of Limitation.
 - d. The Costs and interest of the suit and Counter - Claim.
39. On the ownership of the plots No. Mgumopatsa/ Mazeras/135, the Learned Counsel submitted that it was the 1st and 2nd Defendant's evidence that the plot solely and legally belonged to Tsama Mkuzi Saha (deceased). He acquired the same after successfully concluding a case against one Ambari Washe Mlagi who was tiling the land and claimed ownership, the 1st Defendant further informed the court that the case papers together with others got lost after his father died, nonetheless it is the 1st and



- 2nd Defendants further evidence that after acquiring the land and tiling the same for some time the government declared the area a settlement scheme and as was the norm the deceased was the one found on the portion claiming ownership and was registered as the legal owner.
40. The process of adjudication, sub - division and finally issuance of titles was done, with no objection from any of the Plaintiffs and/or their fathers. In fact the time that adjudication was being done in the year 1987, the 1st Defendant was still a child and would therefore not have had the ability to interfere with any records with regards to the land subject matter. The Plaintiffs witness also testified and confirmed knowing that the land belonged to the late Tsama Mkuzi Saha. He confirmed he was present during adjudication exercise and/or process and the deceased was duly registered as the owner of the said portion.
41. The Learned Counsel submitted that the 1st Defendant also testified on how he had made attempts to secure possession of the plot from the Plaintiffs. That it was after his father's death that most of the Plaintiffs forcefully occupied the said plot the 1st Defendant produced as annexures 3, 4, 5, 6 letters from the local administration addressed to the Plaintiffs and others who had forcefully retained and occupied the land. The 1st Defendant further produced proceedings in the land award case No. 27 of 2006 which was dated 4th October 2006, which confirmed that the land parcel No. Mgumopatsa/ Mazeras/135 belonged solely to the deceased and subsequently the Defendants the 1st Defendant also produced as exhibit 10 a copy of a Judgment arising out of ELC No. 163 of 2013 (Malindi) in which the court made a finding in favour of the 1st Defendant to the effect that a restriction registered against the plot No.135 be lifted.
42. According to the Learned Counsel, the provision of Section 26 the [Land Adjudication Act](#), Cap. 284 provides as follows:-
- 1) Any person who is aggrieved by the determination of an objection under Section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the minister by:-
 - a) Delivering to the minister an appeal in writing specifying the grounds of appeal; and
 - b) Sending a copy of the appeal to the Director of land Adjudication, and the minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”
 - 2) The minister shall cause copies of the order to be sent to the Director of land Adjudication and to the Chief Land Registrar.
 - 3) When the appeals have been determined, the Director of land Adjudication shall:-
 - a) Alter the duplicate adjudication register to confirm with the determination; and
 - b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificates to the chief land Registrar, who shall alter the adjudication register accordingly.”
43. On the issue Plot No. Mgumopatsa/ Mazeras/ 130, the Plaintiffs alleged that similarly this plot had been grabbed by the Defendants who fraudulently had the same registered in their names. However the 1st Defendant had produced as annexure 2 a copy of the title to the plots which clearly showed that the plot was registered in the name of 3 people, Tsama Mkuzi Saha (the 1st Defendant's father, Kengo Mkuzi Mdzavudzo and Mkuzi Saha panga) similarly in this plot no objections were raised after the plot also fell under the land adjudication scheme and allocation was done to the proprietors named therein.



44. According to the Learned Counsel, the 1st and 2nd Defendants had further produced the title documents of both plots as exhibit no. 1 and 2. The law provides under the provision of Section 26 of the Land Registration Act thus:-

“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”

45. Therefore, it was their humble submissions that the 1st and 2nd Defendants had proved their proprietary rights over the two parties of land in Mgumopatsa/ Mazeras/ 135 solely belonged to the 1st and 2nd Defendants after transmission was successfully done from the 1st registered owner who was then kin and 1/3 share portion from plot No. Mgumopatsa/Mazeras/130. The 1st and 2nd Defendants produced as exhibits 7 and 8 the grant giving them the basis and authority to inherit the deceased registered owner portions. According to the Learned Counsel there was no proof of fraud and or evidence that the title documents were fraudulently acquired and or that the Plaintiffs were entitled to the said parcels of land. Thus, they humbly submitted that the 1st and 2nd Defendants were entitled to their shares in the plots as indicated in the title.

46. On the orders of vacant possession, the Learned Counsel submitted that the 1st Defendant testified that the Plaintiffs. That their kin had forcefully occupied both plots and threatened the 1st and 2nd Defendants whenever attempts had been made to occupy their respective plots. They submitted that in view of the foregoing, the court in order to meet the ends of justice has the authority to order that vacant possession be issued on plot No. Mgumopatsa/Mazeras/135 and for the 1/3 portion on Mgumopatsa/Mazeras/130 after survey was done and the land be divided into 3 portions as ordered even by the Land Control Board. They submitted that this order was merited. They also prayed for costs of the suit and Counter - Claim. To buttress on this point, the Learned Counsel was guided by the authority of “ELC Case No. 200 of 2016 – Kazungu Kaingu Pembe (as legal representative of Kaingu Pembe Mwachaka – Versus – Kitsao Ogunyo & 2 Others”).

VII. Analysis and Determination

47. The Honourable Court has considered all the filed pleadings by the parties herein, the responses, the written submissions and authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

48. In order to reach an informed, equitable, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

- a. Whether the 1st and 2nd Defendants are the registered owners of the suit properties?
- b. Whether the 1st and 2nd Defendants are entitled to the orders sought in the Counter claim?
- c. Who bears the costs of the suit?

Issue No. a). Whether the 1st and 2nd Defendants are the registered owners of the suit properties;

49. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter the rights of the 1st and 2nd Defendant on the suit property.

50. Nonetheless, prior to embarking on the issues of analysis, its imperative to note that on 25th October, 2022, the Plaintiff's case was dismissed for non-attendance under the provision of Order 12 Rule 1 and



for want of prosecution under the provision of Order 17 Rules 1 and 3 of the Civil Procedure Rules, 2010 with costs to the Defendants.

51. Although the Counter - Claim was undefended, the 1st and Defendants have a duty to formally prove their case on a balance of probabilities as is required by law. In the case of “Kirugi and Another – Versus - Kabiya & 3 Others (1987) KLR 347”, the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

52. Similarly, in the case of “Gichinga Kibutha – Versus - Caroline Nduku (2018) eKLR”, the Court held that;

“It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

53. From the facts of the case, the 1st and 2nd Defendants on the other hand averred that plot No. Mgumopatsa/Mazeras/135 solely belonged to the 1st Defendant’s late father Tsama Mkuzi who was also the 2nd Defendant’s husband. The deceased obtained the plot before the land was adjudicated after concluding a land dispute with one Ambari Washe Mlangi and subsequently the land adjudication process was undertaken in accordance with the provision of the Land Adjudication Act, Cap. 284 and the deceased was registered as the owner of the said parcel of land. Contrary to the Applicants further assertions, the 1st and 2nd Defendants had averred that plot No. Mgumopatsa/Mazeras/130 was registered in the names of their 3 deceased kin and the land having been divided before, each of the 3 beneficiaries of the dead kins men are entitled to their respective portions of plot No. Mgumopatsa/Mazeras/130 hence, the Applicants assertions with regards to this plot are falsehoods. A copy of the title was produced as Plaintiff Exhibit no. 2 hence the claim was fabricated.

54. The 1st and 2nd Defendant’s evidence was that the plot solely and legally belonged to Tsama Mkuzi Saha (deceased) who acquired the same after successfully concluding a case against one Ambari Washe Mlagi who was tiling the land and claimed ownership, the 1st defendant further informed the court that the case papers together with others got lost after his father died, nonetheless it is the 1st and 2nd Defendants further evidence that after acquiring the land and tiling the same for some time the government declared the area a settlement scheme and as was the norm the deceased was the one found on the portion claiming ownership and was registered as the legal owner.

55. According to the 1st and 2nd Defendant the process of adjudication, sub - division and finally issuance of titles was done, with no objection from any of the Plaintiffs and or their fathers. And in fact the time that adjudication was being done in the year 1987, the 1st Defendant was still a child and would therefore not have had the ability to interfere with any records with regards to the land subject matter. The Plaintiffs witness also testified and confirmed knowing that the land belongs to the late Tsama Mkuzi Saha. He confirmed he was present during adjudication and the deceased was duly registered as the owner of the said portion.

56. There is no doubt from the material on record that the suit properties were declared an adjudication section under Section 3 of the Land Adjudication Section (Cap. 284) in the year 1980. It is instructive to note that the Act provides detailed mechanisms for resolving disputes raised through objections by the members or persons who are ordinarily residents within the declared adjudication section. This Honourable Court has no role at all under the given circumstances unless they are issues of lapse or



capricious application during the adjudication process. Based on that, an aggrieved party may seek for prerogative writs from Court or institute a Civil proceedings upon obtaining a consent from the Land Adjudication Officer as provided for under the provision of Section 30 of the Act.

57. From the facts of this case, there is no doubt that they were sub-divided. The material on record is that the property was then registered in the name of the 1st Defendant's father.

58. The provision of Section 26 of the *Land Adjudication Act* stipulates as follows:

“(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

59. Upon resolution of such objections any party dissatisfied with the decision of the Land Adjudication Officer could still seek further redress from the Minister for Lands under the provision of Section 29 of the *Land Adjudication Act*. Section 29 (1) stipulates that:

“(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

60. The process of adjudication, sub - division and finally issuance of titles was done, with no objection raised whatsoever from any of the Plaintiffs and or their fathers. In fact the time that adjudication was being done in the year 1987, the 1st Defendant was still a child, therefore would not have had the ability to interfere with any records with regards to the land subject matter. The plaintiffs witness also testified and confirmed knowing that the land belongs to the late Tsama Mkuzi Saha. He confirmed he was present during adjudication and the deceased was duly registered as the owner of the said portion.

61. DW - 1 told the court that on 26th September, 2011, he lodged a complaint with the District Lands Adjudication Officer (DLAO) and they came to the land- the complainant they were barring him from using the land. There was no solution as they had no papers on the land. They went to the chief but there was no solution. Later on they registered the restrictions against the land. They filed the Case at ELC No.163/2013 Malindi High Court. It was decided in their favour. On 2005, they had lodged a complaint before Kilifi Tribunal. The matter was heard in the year 2006. It was decided to his father's favour and Plot No.130 to be divided into 3 portions. The Ruling by the Tribunal was adopted as an award in SRMCC (Mbsa) No.27/2006. There had been no appeal preferred from these two decisions above. Further the 1st Defendant produced a Certificate of Confirmation of Grant dated 30th October,



2012 as Plaintiff Exhibit 8 and the Grant Letter of Administration dated 21st February, 2012 as Plaintiff Exhibit 7.

62. Accordingly, this Court finds that being that the case had already been determined. DW - 1 was issued with the Limited Grant of Letters of Administration ad litem. To that extent and scope of the 1st and 2nd Defendants' rights it is imperative to take cognizance of the provisions of Sections 24 (b), 25 and 26 of the Land Registration Act, 2012. For convenience, the provisions of Section 24(a) are reproduced as hereunder;

24. Interest conferred by registration Subject to this Act—

(a) 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 appurtenant thereto; and

63. Section 25 provides for the rights of such a proprietor and states that;

“The rights 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 interests and claims whatsoever, but subject-

64. Section 152A of the Land Act No. 6 of 2012 prohibits unlawful occupation of land and states that “A person shall not unlawfully occupy private, community or public land.”

65. The above rights, interests and privileges accorded to a registered proprietor of land apply to the 1st and 2nd Defendants in this case having established that they are the proprietors of the suit properties. For the reasons tendered herein above, the Counter claim by the 1st and 2nd Defendants succeeds.

Issue No. b). Whether the 1st and 2nd Defendants are entitled to the orders sought in the Counter claim?

66. Under this substratum we shall discuss whether the 1st and 2nd Defendants have made out their case for the grant of the following prayers:-

- a. That the Honourable court be pleased to order the plaintiffs and or their agents, assigns and or any other person claiming any right and or interest through them to vacate and hand over vacant possession of plot No. Mgumopatsa/ mazeras/135 to the 1st and 2nd defendants.
- b. Costs and interest of this suit and counterclaim.
- c. Any other relief that this court may deem fit to grant.

67. Section 24 (a) of the Land Registration Act, 2012 provides that:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.”

68. Section 26 (1) of the said Act provides a follows:

“The certificate of title issued by the registrar 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, easement, restrictions and conditions contained or endorsed in the certificate, and the title of the 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.”

69. There was no evidence challenging the 1st and 2nd Defendants’ title to their land. The Plaintiffs did not adduce any evidence in support of their claim. The 1st and 2nd Defendants through their witnesses averred that the 1st and 2nd Defendant’s contention that they were the legal owners of the subject plot being the beneficiaries of the estate of the late Tsama Mkuzi Saha who was the registered proprietor of the plot. The 1st and 2nd defendants were related to the plaintiffs by did not belonging to the same clan the Mwajohadzuya whose original ancestry was at Ruruma from where part of the kin moved to Mwadzembe, further to Riani location of subject plot No.Mgumopatsa/Mazeras/130 then further to Kilifi Kaliangombe/Jimba.
70. It was the 1st and 2nd Defendant’s contention that the deceased Tsama Mkuzi Saha acquired the land before demarcation when he successfully concluded a case against one Ambari Wahshe Mlangi who was tilling the land and claimed ownership. The deceased owned the same exclusively until Abdalla Tsama Mkuzi the father to two of the plaintiffs requested the deceased to allow him occupy a portion of the said plot since he had differed with his brothers who were then all occupying plot No. Mgumopatsa/Mazeras/130 which was the communal land in occupation of all the brothers who had then settled there.
71. As the absolute and indefeasible owners of the suit property, the 1st and 2nd Defendant are entitled to enjoy the rights and privileges associated with ownership which includes exclusive use and possession thereof without interference from any other person except with their consent.
72. The Plaintiffs did not adduce any evidence to justify their actions and therefore the 1st and 2nd Defendant’s evidence on these actions have not been controverted. In the circumstances, I am satisfied that the 1st and 2nd Defendant have proved that the Plaintiffs entered the suit property without the 1st and 2nd Defendant’s consent, took possession of it and undertook the acts complained of. Therefore, I find that the 1st and 2nd Defendants have proved their case against the Defendants in the Counter – Claim on a balance of probabilities and are therefore granted the prayers sought.

Issue No. c). Who bears the costs of the suit and the Counter - Claim

73. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.



74. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

75. In the present case, the Honourable Court elects and finds it reasonable that the 1st and 2nd Defendants shall have the costs of the Plaintiff and the Counter - Claim to be paid by the Plaintiffs jointly and severally. The 3rd and 4th Defendants shall bear their own costs.

VIII. Conclusion and Disposition

76. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the 1st and 2nd Defendants have established their case against the Defendants partially. Thus, for avoidance of doubt, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of Julius Mkauma Tsama and Mbodze Tsama Mkauma, 1st and 2nd Defendants herein in respect to the Counter - Claim dated 29th October, 2020 filed on 30th October, 2020 in its entirety with costs and interests.
- b. That the Plaintiff dated 21st September, 2020 and filed 24th September, 2020 by Mkuzi Tsama Mwenye, Salim Abdalla Tsama, Dzuya Joha Kanyonge, Panga Kwale Mkuzi, Adam Kango Said, and Richard Chibule Joha, the Plaintiffs herein be and is hereby as of 25th October, 2022 stand dismissed for non-attendance under Order 12 Rule 1 of the Civil Procedure Rules, 2010 and Order 17 Rules 1 and 3 for want of prosecution with costs to the Defendants.
- c. That this Honourable court do and hereby orders that the Plaintiffs and or their agents, assigns and or any other person claiming any right and or interest through them to vacate and hand over vacant possession of plot No. Mgumopatsa/Mazeras/135 to the 1st and 2nd Defendants.
- d. That the 1st and 2nd Defendants shall have the costs of the Plaintiff and the Counter - Claim to be paid by the Plaintiffs jointly and severally. The 3rd and 4th Defendants shall bear their own costs.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JANUARY 2025.

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HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. No appearance for the Plaintiffs.



c. M/s. Kayatta Advocate for the 1st and 2nd Defendants.

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

