



**Fundi v Kaverenge & another (Civil Suit 212 of 2019)  
[2025] KEELC 4294 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 212 OF 2019  
LL NAIKUNI, J  
MAY 30, 2025**

**BETWEEN**

**ATANASIO MBAE FUNDI ..... PLAINTIFF**

**AND**

**ANICETA GICUKU KAVERENGE ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The judgment of this court pertains to the Amended Plaintiff dated 3<sup>rd</sup> November, 2020 filed on 9<sup>th</sup> November, 2020 by Atanasio Mbae Fundi the Plaintiff herein. It was against Aniceta Gicuku Kaverenge and Registrar of Titles, the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the 1<sup>st</sup> Defendant entered appearance through filing of a Memorandum of Appearance dated 13<sup>th</sup> January, 2020 and filed on 13<sup>th</sup> January, 2020. Whist, the 2<sup>nd</sup> Defendant entered appearance through filing of a Memorandum of Appearance and filed a Statement of Defence dated 21<sup>st</sup> October, 2020.
3. It is instructive to note that the dispute herein involving a husband and wife who were not divorced, on 16<sup>th</sup> May, 2022, the Honourable Court referred the parties to the Court Annexed Mediation pursuant to the provision of Article 159 (2) ( c ) of *the Constitution* of Kenya, Section 20 (1 ) and ( 2 ) of the Environment & Land Court *Act, No. 19 of 2011* but without any success. On 19<sup>th</sup> September, 2022, the parties reported back indicating that there had been no positive result from that out of court mediation. They were adamant insisting that the matter be determined by this Honourable Court through hearing and final determination.



## II. Description of the parties

4. The Plaintiff was described as an adult of sound mind residing and/or working for gain in the County of Mombasa within the Republic of Kenya.
5. The 1<sup>st</sup> Defendant was described as a female adult of sound mind residing and working for gain at Mombasa within the Republic of Kenya whilst the 2<sup>nd</sup> Defendant is a government body tasked with the Registration and custody of titles of land within the said County.

## III. Court directions before the hearing

6. On 19<sup>th</sup> September, 2022, with the parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010, the Honourable Court fixed the hearing of the matter to take place on 18<sup>th</sup> October, 2022. The matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witness PW - 1 testifying in Court after which it closed his case. Thereafter, the Defendants called their witness DW - 1 on 30<sup>th</sup> May, 2024.

## IV. The Plaintiff’s case

7. From the filed pleadings, at all material times relevant to the suit the Plaintiff was the absolute registered owner of all that property known as Mombasa/MN/Block 1/519 (Herein referred as “The Suit Property”) having bought the same from one Michael Njoroge Thion’go. The Plaintiff discovered after scrutiny of the land title register that the Defendant had without any colour of right whatsoever and secretly in collusion with the 2<sup>nd</sup> Defendant registered another title in the name of the 1<sup>st</sup> Defendant as the proprietor thereof. The Defendants action was fraudulent, illegal and were adverse to the Plaintiff’s proprietary rights by denying the Plaintiff peaceful possession of the Suit property.
8. The 1<sup>st</sup> Defendant by use of the fake certificate had laid claims and demanded that the tenants on the property pay rent to her. The Plaintiff’s claim against the 1<sup>st</sup> Defendant was for an order of injunction restraining the 1<sup>st</sup> Defendant by herself, agents or servants from occupying, alienating, working on or in any way whatsoever dealing with parcel of land known as Mombasa/MN/Block 1/519. The Plaintiff’s claim against the 2<sup>nd</sup> Defendant was for rectification of Title by removing the name of the 1<sup>st</sup> Defendant as the proprietor of parcel of land number Mombasa/MN/Block 1/519 and cancelling any title certificate obtained by her.
9. According to the Plaintiff, he stood to suffer irreparable loss of land should such orders not be granted. Despite demand made and notice of intention to sue given, the Defendants have refused to stop their illegal activities. There was no case pending between the Plaintiff and the Defendants. The cause of action arose within the jurisdiction of the Honourable Court.
10. The Plaintiff prayed for judgment against the Defendants in the following terms:-
  - a. A declaration that the Plaintiff is the rightful owner of land known as Mombasa/MN/Block 1/519
  - b. An injunction restraining the 1<sup>st</sup> Defendant from by herself, her agents, her servants and or employees from claiming, occupying, alienating, working or in any way whatsoever dealing with that parcel of land known as - Mombasa/MN/Block 1/519.
  - c. An Order directing the 2<sup>nd</sup> Defendant to rectify the Title of Plot known as Mombasa/MN/Block 1/ 159 Mombasa/MN/Block 1/519 by removing the name of the 1<sup>st</sup> Defendant as the Proprietor of that parcel of land.



- d. Costs of this Suit.
  - e. Any other just relied this Honourable Court may deem appropriate.
11. The Plaintiff called their witnesses on 18<sup>th</sup> October, 2022 at 12.30 pm who testified as follows:-

**A. Examination of PW - 1 by Mr. Paul Magolo Advocate.**

12. PW - 1 testified under oath and in Swahili language. He identified himself as Atanasio Mbae Fundi. He was citizen of Kenya with all the particulars as indicated in his national identity card. He was a retired Navy Warrant Officer in September 2011. The 1<sup>st</sup> Defendant was his wife. They wedded in the year 1985 and separated in the year 1998. They cohabited in Mtongwe Kenya Navy Camp, within the County of Mombasa. They were blessed with two (2) children namely:- (a) Mr. Munene (male) – aged 32 Years and (b) Mr. Dominic Karani (male) – aged 35 years. According to PW – 1. while in the course of their marriage, they never acquired any property together. He got the property MN/Block/I/519 on 25<sup>th</sup> March, 2002 from Michael Njoroge Thiong’o. Subsequently, they got the title in year 2016. He wished to produce the documents filed by him as Plaintiff Exhibit Numbers 1 to 10 as per the List of documents dated 8<sup>th</sup> December, 2020. When he was given the title deed being Plaintiff Exhibit No. 1, he developed the plot by constructing a 4 storey building. It was completed in year 2012 using financial resources he had garnered from the retirement from the navy on 31<sup>st</sup> December, 2012; and rental income from Mtongwe Commercial Plot; the 1<sup>st</sup> Defendant never contributed anything towards the development of this property. She was domiciled in Great Britain.
13. PW - 1 told the court that he conducted an official search on 20<sup>th</sup> April, 2018 which search indicated that the property belonged to the himself. However, two years later when he conducted a search, it indicated to be in the names of the 1<sup>st</sup> Defendant. He wrote a letter dated 2<sup>nd</sup> February, 2018 to the Land Registrar. They responded vide a letter dated 9<sup>th</sup> February, 2018 indicating the Plot was his. He had never transferred the same to the 1<sup>st</sup> Defendant.
14. According to PW - 1, the 1<sup>st</sup> Defendant had gotten the land from Michael Ngure Thiongo – the plot generated rent a sum of Kenya Shillings One Seventy Four Thousand (Kshs. 174,000/-) per month. He was aware that from June 2022, the Court directed that he should be getting 50:50 basis; which orders had not been honored. She had been enjoying the rent being a sum of Kenya Shillings Nineteen Thousand (Kshs. 19,000,000/-) which he prayed to be given his land and his personal belongings. The witness told the court that he had been arrested at the behest of the 1<sup>st</sup> Defendant; He had been poisoned. The 1<sup>st</sup> defendant wanted him dead and completely out of the scene. He needed to be given the rent she had been collecting and the changed electricity metre.

**B. Cross examination of PW - 1 by Mr. Ngure Advocate.**

15. PW - 1 confirmed that he had not divorced his wife. They had a Certificate of Marriage. She went abroad in the year 2018 at the Great Britain for employment. Later on, she had gone to the Gulf and back. Her children were left with him while agreed 7 and 9 years. They were not his children. When she left, the witness decided to get married to another wife. She was called Mary Wambiri Jeremiah. His certificate of lease was dated 30<sup>th</sup> November, 2016. The witness had not seen her title deed. He was referred to the title deed registered in the names of Aniceta Gicuku Kaverenge – dated 4<sup>th</sup> November, 2014.
16. The witness told the court that he had not done any other official search. He completed the construction in the year 2006 and he occupied the ground floor. She came back in the year 2009. While around, she would be staying at Mtongwe. Mtongwe was not a matrimonial home. He never shared



any proceeds from it. There were ground floor – 4 one bedroom houses, 1<sup>st</sup> floor 2 one bedroom and 3<sup>rd</sup> Floor 4 one bed room. In total they were 14 rooms. According to the witness, he did not know where the 1<sup>st</sup> Defendant resided. He did not have the list of tenants. In the year 2008, the 1<sup>st</sup> Defendant went to him but they never shared anything bed, food, she fed him poison and he was hospitalized. With reference to the lease – from that time the witness told the court he had never enjoyed any proceeds from the suit property.

### **C. Re – examination of PW - 1 by Mr. Magolo Advocate.**

17. PW - 1 reiterated that they were no longer together. They separated in the year 1998. The 1<sup>st</sup> Defendant was the one who collected rent. He had written many letters to the tenants. The witness did the transfer – Plaintiff Exhibit 3. He told the court he had the original title deed dated 30<sup>th</sup> November, 2016. The witness had also seen the original title deed dated 4<sup>th</sup> November, 2014 in the names of Aniceta Gicuku.
18. On 18<sup>th</sup> October, 2022, the Plaintiff through their counsel Mr. Magolo closed his case.

### **V. The 1<sup>st</sup> Defendant's case**

19. On 30<sup>th</sup> May, 2024, the 1<sup>st</sup> Defendant testified as DW - 1 as follows:-

#### **A. Examination in Chief of DW - 1 by Mr. Ngure Advocate.**

20. DW - 1 was sworn and she testified in English language. She identified herself as Aniceta Gicuku Kaverenge. She was a citizen of Kenya with all the particulars as indicated from the national identity card. She recorded a statement dated 15<sup>th</sup> June, 2021 which she adopted as her evidence in chief. She had a list of documents dated 15<sup>th</sup> June, 2021 which she produced as 1<sup>st</sup> Defendant Exhibit 1 to 9 and she filed a supplementary list of documents dated 2<sup>nd</sup> February, 2023 which had three documents “1<sup>st</sup> Defendant Exhibit Numbers 10, 11 and 12”. She resided at Mikindani and worked in the United Kingdom as a domestic worker. She knew the Plaintiff. He was her husband from the year 1990. In the course of their marriage they were blessed with two (2) issues. They had been separated. She was aware of Plot No. 519 and it belonged to her. She had a title deed to it which was issued on 4<sup>th</sup> November, 2014. She was equally aware her husband had been issued with a title deed dated 30<sup>th</sup> November, 2016 which was issued 2 years later on after hers.
21. DW - 1 told the court that on the land, there were some apartments for residential. She resided on the suit property with her children and grandchildren. Before there were tenants. It was a 3 storey building of 7 units of one bedroom each. Currently, there were no tenants. But previously there were tenants who had since vacated due to the frequent threats from the Plaintiff. He would come there using weapons. He would be demanding rent, and since he never knew them they vacate from the premises. She used to collect rent.
22. DW - 1 told the court that she had never colluded with the Land Registrar to have his title cancelled and get hers. She built the structure from year 2003, by then they had already separated. The witness was the one who paid the Land Rent and Rate. If the search was conducted at the Municipal Council, it would show her name. The witness never colluded with any of the Land Officer to defraud him. She had no idea how the same plot had two title deed.

#### **B. Cross Examination by DW - 1 by Mr. Magolo Advocate: -**

23. DW 1 confirmed that she worked in the UK, Saudi Arabia and the Middle East from the 1998. She told the court that she came back in 1998 and she went to the United Kingdom upto 2003 but she would be coming back to Kenya regularly. She stayed away from 1999 to 2003, four (4) years without coming



back to Kenya. She bought the suit land in the year 2000 from one Njoroge Thiongo. She bought it while she was in the UK. With reference to the sale agreement dated 25<sup>th</sup> January, 2002, the witness told the court that in the year 2000 she would be sending the money to her husband's account, but got the sale agreement in the year 2002. According to her the signature was a forgery; it was not her signature.

24. On being referred to a letter dated 6<sup>th</sup> March, 2018, DW - 1 denied having ever seen it. With reference to sub – lease between Municipal Council of Mombasa and herself. It was signed by herself, the Mayor and the Municipal Council in the year 2014. She was directed to a Mayor. The tenant would be paying a sum of Kenya Shillings Seven Thousand (Kshs. 7,000/-) each per month until February, 2024. The DW - 1 stated that she was not aware of the Court order directing her to share the monthly rent on 50:50 basis. The witness told the court that she was before the DCIO and they asked her a lot of questions pertaining to the sale agreement between Mr. Michael Njoroge and herself.

### **C. Re - examination of DW - 1 by Mr. Ngure Advocate.**

25. DW - 1 reiterated that he went to the DCIO regarding how he bought the land. It was in the year 2014 over the sale of the land and the ownership of the land. He was not aware of any investigation going on.

### **VI. The 2<sup>nd</sup> Defendant's case**

26. The 2<sup>nd</sup> Defendant filed its Statement of Defence dated 21<sup>st</sup> October, 2020. They contended that:-
- a. The averments in Paragraphs 4 and 5 were denied and the Plaintiff was put to strict proof thereof.
  - b. Further in response to Paragraphs 4, 5 and 6, the Defendant stated that he was a diligent civil servant who has discharged his duties as mandated under statute and any form of fraudulent collusion with the 1<sup>st</sup> Defendant was denied and the Plaintiff was put to strict proof.
  - c. In response to Paragraphs 7 and 8, the 2<sup>nd</sup> Defendant averred that mandatory Notice of Intention to Sue the Government prior to the institution of the suit herein was not served on the Attorney General hence the suit herein is fatally and incurably defective and the Plaintiff was not entitled to the orders therein in paragraph 7 and 8.
  - d. In response to Paragraph 8 without any admission thereof, the 2<sup>nd</sup> Defendant stated that the Plaintiff had not submitted an iota of proof of irreparable loss alleged.
  - e. There had been no previous proceedings in this or any other court between the parties over the same cause of action.
  - f. For the foregoing reasons; the 2<sup>nd</sup> Defendant stated that the reliefs sought by the plaintiff were neither available nor merited.
27. The 2<sup>nd</sup> Defendant prayed that the Plaintiff's suit be dismissed as against them with costs. The 2<sup>nd</sup> Defendant never called any witnesses though had indicated the Land Registrar would appear and testify accordingly.

### **VII. Submissions**

28. On 20<sup>th</sup> November, 2024 after the Plaintiff and Defendants marked the closure of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 11<sup>th</sup> February, 2025 but it could not be possible due to unavoidable circumstances. It was eventually done on 30<sup>th</sup> May, 2025.



## A. The Written Submissions by the Plaintiff.

29. The Plaintiff through the Law firm of Messrs. J. O Magolo & Company Advocates filed their written submissions dated 29<sup>th</sup> January, 2025. Mr. Magolo Advocate commenced his submissions by providing the Court with a brief background of the matter. He stated that before the Honourable Court was the Plaintiff's amended Plaint dated 3<sup>rd</sup> November 2020, where the Plaintiff herein prayed for several orders as stated above. The suit was defended by way of a Defence.
30. According to the Learned Counsel, at all the material times relevant to this Suit the Plaintiff was the absolute registered owner of the suit property having bought it from one Michael Njoroge Thion'go. However, in the course of time, the Plaintiff discovered after scrutiny of the land title register that the Defendant had without any colour of right whatsoever and secretly in collusion with the 2<sup>nd</sup> Defendant registered another title in the name of the 1<sup>st</sup> Defendant as the proprietor thereof.
31. The Defendants action was fraudulent, illegal and adverse to the Plaintiff's proprietary rights by denying the Plaintiff peaceful possession of the Suit property. The 1<sup>st</sup> Defendant by use of the fake certificate had laid claims and demanded that the tenants on the property pay rent to her. The Plaintiff's claim against the 1<sup>st</sup> Defendant was for an order of injunction restraining her by herself, agents or servants from occupying, alienating, working on or in any way whatsoever dealing with parcel of the suit land. The Plaintiff's claim against the 2<sup>nd</sup> Defendant was for rectification of Title by removing the name of the 1<sup>st</sup> Defendant as the proprietor of parcel of the suit land and cancelling any title certificate obtained by her.
32. The Learned Counsel stated that the Plaintiff as PW – 1 testified that he bought the plot from one Michael Njoroge Thiongo on the 25<sup>th</sup> March 2002. He relied on the filed documents In the list of documents dated 30<sup>th</sup> May 2024. In Plaintiff's exhibit No. 8, he produced a letter from the office of Planning and Housing dated 6<sup>th</sup> March 2018 addressed to the Chief Officer, Land Administration, where it was confirmed that the suit premises belonged to Michael Njoroge Thiongo who later transferred it to the Plaintiff. Further, the Plaintiff filed a bank statement that showed how he paid for the suit remises when he bought it.
33. On her part, the Defendant alleged that she bought the premises on the 25<sup>th</sup> January 2024. It was noted that that fact was not in her filed statement. She produced the copy of title among other documents as exhibits – being a sub - lease dated 4<sup>th</sup> November 2014 between the defunct Municipal Council of Mombasa and herself. It was noted that upon the promulgation of *the Constitution* of Kenya, 2010, Municipal councils were scrapped off and replaced with Counties. It was surprising how she found a town clerk to sign the lease on 4<sup>th</sup> November 2014. On cross examination, the 1<sup>st</sup> Defendant also confirmed that she had been called by the officers from the Division of Investigation Office (DCIO) and interrogated as to the agreement for sale of the suit premises because the said Michael Njoroge Thiongo had denied selling the premises to her.
34. In conclusion, the Learned Counsel submitted that the Plaintiff had proved his case on a balance of probabilities as required by the Law. That he had also shown that the title by the 1<sup>st</sup> Defendant was acquired fraudulently and illegally. The Plaintiff was entitled to prayers as prayed in the Plaint.
35. Further, on the 16<sup>th</sup> May 2022, the court had ordered that the 1<sup>st</sup> Defendant and the Plaintiff share all rental income on 50:50 basis with effect from 1<sup>st</sup> June 2022. The suit premises had been in the possession of the 1<sup>st</sup> Defendant and despite the Court order of 16<sup>th</sup> May 2022, the Plaintiff had never received his share of the rental income as required by the law. He was therefore entitled to mesne profits.



## **B. The Written Submissions by the Defendant.**

36. Through the Law firm of Messrs. Michael Ngure & Company Advocates The 1<sup>st</sup> Defendant filed her written submissions dated 19<sup>th</sup> December, 2024. Mr. Ngure Advocate did a brief recap of the matter. It was summarized as follows – that vide an Amended Plaintiff dated 3<sup>rd</sup> November, 2020 and filed in court on 19<sup>th</sup> November, 2020, the Plaintiff herein sought for a declaration that he is the rightful owner of the suit land. The Plaintiff's sole claim was a result of being in possession of Certificate of Lease dated 30<sup>th</sup> November, 2016.
37. On the other limb, the 1<sup>st</sup> Defendant equally claimed proprietary interest in the same parcel of land by virtue of being in possession of Certificate of Lease dated 4<sup>th</sup> November, 2014. The Learned Counsel asserted that it was just sad that when the Plaintiff was asked how he acquired the suit property, he placed his reliance on a sale Agreement dated 25<sup>th</sup> March, 2002 being Plaintiff Exhibit Number 2 - that was between him and one Michael Njoroge Thiong'o but which sale agreement related to PLOT NO.1416/Mikindani and NOT the suit parcel of land. On the contrary, the 1<sup>st</sup> Defendant derived her title deed from a sub - lease created from the Municipal Council of Mombasa to her favour on 4<sup>th</sup> November, 2007 – See Defendant Exhibit Number 4. Suffice to say, whilst the Plaintiff exhibits a copy of a certificate of lease dated 30<sup>th</sup> November, 2016 (Plaintiff Exhibit Number 1), as evidence of his proprietary interests over the suit property, the 1<sup>st</sup> Defendant equally holds one dated 4<sup>th</sup> November, 2014 (Defendant Exhibit Number 5). The Learned Counsel averred that it was the 1<sup>st</sup> Defendant's title Deed that was issued first. Again more surprisingly, the Plaintiff, in his Amended Plaintiff dated 3<sup>rd</sup> November, 2020 at paragraph 4 cited that the 1<sup>st</sup> Defendant acted secretly in collusion with the 2<sup>nd</sup> Defendant by registering another title. The Counsel posed - If there was another title that was infact registered, then it was the one belonging to the Plaintiff because it came in much later!
38. The Learned Counsel noted that the 2<sup>nd</sup> Defendant entered appearance and filed its defence on 5<sup>th</sup> March, 2021 denying any collusion with the 1<sup>st</sup> Defendant and further alluded that the Plaintiff failed to exercise reasonable due diligence prior to purchasing the property from MICHAEL NJOROGE THIONG'O. And that the Plaintiff failed to serve the mandatory notice of intention to sue the Government prior to the institution of the suit hence the same is fatally and incurably defective hence the Plaintiff was NOT entitled to the orders sought herein.
39. The Learned Counsel submitted that through a Marriage Certificate No. 375150 produced as Defendant Exhibit Number 1, the Plaintiff and the 1<sup>st</sup> Defendant solemnized their Marriage with the Plaintiff as a Kenya Navy Sailor and the 1<sup>st</sup> Defendant as a house-wife way back on 28<sup>th</sup> December, 1996. This was way after they had sired their two (2) children in the year 1987 and 1990. However, the said marriage was short-lived since as early as 1998, the parties separated and the 1<sup>st</sup> Defendant re-located to SAUDI-ARABIA and currently United Kingdom doing nanny jobs to fend for herself and the children. Whereas the Plaintiff retired as a Navy officer in September, 2011, from where he alluded that he used his terminal dues to put up a four (4) storey building in the subject property, such allegations were neither here nor there as the plaintiff was at loss to explain then how and/or from what proceeds he acquired the subject plot and further when he started the construction of the building. On the other hand, the 1<sup>st</sup> Defendant alluded that after separating with the Plaintiff, she relocated to Saudi Arabia working as a nanny and would send proceeds back in Kenya and it was then that she acquired the suit property. The 1<sup>st</sup> Defendant's evidence, seemed more probative and practical. Both parties concurred that the suit property was not matrimonial property since AS AT the time of its acquisition, the parties had already separated.



40. While submitting on matters of law, the Learned Counsel paused on whether the Plaintiff obtained good title, if at all from one Michael Njoroge Thiong'o. According to the Plaintiff Exhibit Number 2 being the sale agreement supposedly conferring title and/or proprietary interest in favour of the Plaintiff related to Plot No. 1416/Mikindani. There was NO iota of evidence to show the nexus between that, Plot No. 1416 and the subject property being Mombasa/MN/Block/1/519. Thus such allegation of proprietary interest derived from such a sale agreement in favour of the Plaintiff must fail.

41. Further, the title deed for the Plaintiff was dated 30<sup>th</sup> November, 2016. Whilst, the 1<sup>st</sup> Defendant's Title Deed was dated 4<sup>th</sup> November, 2014. It was now well settled in Law in the case of:- "Wreck Motor Enterprises - Versus - The Commissioner of Lands & 3 others (1997) eKLR" that in a case of two titles, the first in time prevails. The court had this to say:-

B...the first in time takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific and sanctifies title".

42. Suffice to say, whilst the Plaintiff exhibited a copy of a certificate of lease dated 30<sup>th</sup> November, 2016 (Plaintiff Exhibit No.1), as evidence of his proprietary interests over the suit property, the 1<sup>st</sup> Defendant equally held one dated 4<sup>th</sup> November, 2014 - (Defendant Exhibit No. 5). Clearly, the 1<sup>st</sup> Defendant's title Deed was issued first. Similarly, the Learned Counsel referred Court to the case of:- "Gitwany Investment Limited -Versus - Tajmal Limited & 3 others [2006] eKLR, Lenaola .J. on 12<sup>th</sup> May, 2006 made this articulate observation:-

".....Like equity keeps teaching us, the first in time prevails.....if both are apparently and on the face of them issued regularly and procedurally without fraud, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity."

43. And the court again in the case of:- "Gitwany Investment Limited (Supra)" actually asks itself the hard question:-

"What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in s. 23 (1) of the Registered Land Act. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere...."(underline emphasis mine).

44. That being the legal position, the Plaintiff totally failed to prove any particular of fraud occasioned by the 1<sup>st</sup> Defendant in her acquisition of her title Deed and his viva voce evidence in court remained just that-sensational statements calculated to attract sympathy which was of no probative value. The Learned Counsel averred that any acquisition and conferment of Title Deed must come with a price. It was NOT enough to hold a title. To-date, the 1<sup>st</sup> Defendant did annex proof that:

- (a) Upto the year 2022, official search from the Lands Registrar showed the 1<sup>st</sup> Defendant as the proprietor/registered owner thereat (see Defendant's supplementary list of Documents dated 17<sup>th</sup> October, 2022 and filed on 18.10.2022- document no. 3 produced as Dexh.12)
- (b) To date, the 1<sup>st</sup> Defendant paid for land rates to Mombasa county Government (Pexh.7) shows various payment receipts.



- (c) The 1<sup>st</sup> Defendant, a law abiding citizen gives to Caesar what belonged to Caesar as she paid for any rental income from the suit property to Kenta Revenue Authority (see various payment receipts-Pexh.8)
- (d) All the billing statements from Kenya power & lightening company were in favour of, and paid by the 1<sup>st</sup> Defendant.
45. The Plaintiff was just a mere spectator and did not dispense any payment in favour of such subject matter. Furthermore, it was admitted that the 1<sup>st</sup> Defendant was in occupation of the suit property, where she held a two (2) bedroomed house and occupied the same whenever she was in the country, the two (2) children equally reside there plus some tenants since she obtained title. The Plaintiff had never resided in the suit property.
46. To buttress on this point, the Learned Counsel cited the legal works of: “In Cheshire and Burn’s Modern Law of Real property 15<sup>th</sup> ed[1994] at page 26:
- “ All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership but only a law of possession”.
47. In conclusion, the learned Counsel asserted that the Plaintiff had failed to make out a case in his favour warrant this court issue such orders sought in the Amended Plaint dated 3<sup>rd</sup> November, 2020. He prayed for the suit to be dismissed with costs to the 1<sup>st</sup> Defendant. Equally, he urged the Court to find that Plaintiff’s certificate of Title dated 30<sup>th</sup> November, 2016 was a nullity and order the 2<sup>nd</sup> Defendant to consequently cancel it.

### **VIII. Analysis and Determination**

48. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
49. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a. Whether the suit instituted by the Plaintiff herein has any merit whatsoever.
  - b. Who is the lawful owner of the suit property known as Mombasa/MN/Block 1/519
  - c. Whether the Plaintiff is entitled to the orders sought in the Plaint
  - d. Who bears the costs of the suit?

#### **Issue No. A). Whether the suit instituted by the Plaintiff herein has any merit whatsoever.**

50. Under this sub title the Court shall discuss the legal ownership of the suit properties. As indicated, this is a rather complex matter where the main substratum of it is on the legal ownership to the suit property and compensation of the parties herein. From the very onset, the Honourable Court wishes not to extrapolate on the brief facts of the case as that task has been ably executed by all the Learned Counsels for the Plaintiff, 1<sup>st</sup> Defendant herein. Therefore, the Honourable Court will just proceed on analysis of the framed issues under this sub – heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of



livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

51. The provision of Sections 24, 25 and 26 of the *Land Registration Act* 2012 No. 3 of 2012 critically deal with the efficacy and effect of registration of land in Kenya. Section 24 provides as follows:

“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.”

52. Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the 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 to any lawful encumbrances, set out in this section.”

53. Section 26 (i) of the Act provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.”

54. As both parties hold a title deed over the suit property, the Court is guided by the holding of the Court in the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

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

55. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the*



Constitution and Statutory provisions. At the center of the dispute between the parties is the protection of private property as enshrined in Section 75 of the retired Constitution and Article 40 of the 2010 Constitution.

56. The provision of Article 40 (2), (3), (4) and (6) of the Constitution of Kenya provide as follows:

- “ 40 Parliament shall not enact a law that permits the State or any person:-
- (2) a. To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description ....
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation:
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:- i. requires prompt payment in full of just compensation to the person, and ii. allows any person who has an interest in, or right over, that property a right of access to a court of law. (
- 4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) ....
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

57. Both parties have certificate of titles that were issued but the Land Registrar Mombasa in respect of the suit property. The Plaintiff alleged that he bought the property in the year 2002 through a sale agreement and transfer form dated 9<sup>th</sup> April, 2002. On a more critical observation, the Honourable Court noted that when the Plaintiff was asked how he acquired the suit property, he placed his reliance on a sale Agreement dated 25<sup>th</sup> March, 2002 being Plaintiff Exhibit Number 2 - that was between him and one MICHAEL NJOROGE THIONG'O. Interestingly, the sale agreement related to PLOT NO.1416/Mikindani and NOT the suit parcel of land. On the contrary, the 1<sup>st</sup> Defendant derived her title deed from a sub - lease created from the Municipal Council of Mombasa to her favour on 4<sup>th</sup> November, 2007 – See Defendant Exhibit Number 4. Suffice to say, whilst the Plaintiff exhibits a copy of a certificate of lease dated 30<sup>th</sup> November, 2016 (Plaintiff Exhibit Number 1), as evidence of his proprietary interests over the suit property, the 1<sup>st</sup> Defendant equally holds one dated 4<sup>th</sup> November, 2014 (Defendant Exhibit Number 5). The Learned Counsel averred that it was the 1<sup>st</sup> Defendant's title Deed that was issued first. However, he claimed to have gotten the suit land registered in his names and issued with a Certificate of Lease dated 30<sup>th</sup> November, 2016 – close to fourteen (14) years down the line!! while the 1<sup>st</sup> Defendant got her title issued on 4<sup>th</sup> November, 2014.

58. Clearly, this has been the herculean tasks faced by Court. The Honourable Court has had to seek for the Solomonic wisdom based on the Scripture from the famous story of the two Harlots claiming the same child and the wise decision by the King as graphically narrated in 1Kings 3: 16 to 28 of the Holy Bible. Legally speaking, it is trite law that when there are two competing titles, the first in time will prevail.



This position was emphasized in the case of “Wreck Motors Enterprises – Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997”, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’.

59. The same position was held in the case of “Gitwany Investment Ltd – Versus - Tajmal Ltd & 3 Others (2006) eKLR” where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

60. I find the Defendant’s title was first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then the Defendant’s title deed was the first in time and should prevail there having been evidence called by the Plaintiff to challenge the same. In as much as the Plaintiff called evidence to show how he obtained the title he never called evidence to show how the 2<sup>nd</sup> Defendant was involved in his claim.

61. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double registration. Balancing the two competing titles, it is my view that the 1<sup>st</sup> Defendant holds good title to the suit property. The title of the Plaintiff in my view, and in the absence of evidence to rebut the same, could only have been obtained either by the fraud, or by the mistake of the Land Registry, or both.

**ISSUE No. B). Whether the Plaintiff is entitled to the orders sought in the Plaint.**

62. Under this sub - title, the court shall examine if the Plaintiff has proved his case. The Plaintiff prayed for judgment against the Defendants in the following terms:-

- a. A declaration that the Plaintiff is the rightful owner of land known as Mombasa/MN/Block 1/519
- b. An injunction restraining the 1<sup>st</sup> Defendant from by herself, her agents, her servants and or employees from claiming, occupying, alienating, working or in any way whatsoever dealing with that parcel of land known as - Mombasa/MN/Block 1/519.
- c. An Order directing the 2<sup>nd</sup> Defendant to rectify the Title of Plot known as Mombasa/MN/Block 1/ 159 Mombasa/MN/Block 1/519 by removing the name of the 1<sup>st</sup> Defendant as the Proprietor of that parcel of land.
- d. Costs of this Suit.

63. The provision of Section 26(1) of the [Land Registration Act](#) provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of 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
  - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.”
64. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
65. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
66. The Court of Appeal in the case of “Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR”, held as follows:-
- ‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’
67. The provision of Section 80 (1) of the *Land Registration Act* provides that:-
- “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
68. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. Be that as it may, therefore, I proceed to hold that the Plaintiff has not proved his case on a balance of probabilities and is not entitled to the prayers sought in the Plaintiff.

**ISSUE No. C). Who bears the costs of the suit**

69. 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.

70. 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) Limited 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.”

71. In the present case, for the fact that the Plaintiff has not proved his claim; the 1<sup>st</sup> and 2<sup>nd</sup> Defendant shall have the costs of the suit for participating in the suit.

## **VII. Conclusion and Disposition**

72. 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 Plaintiff has not established his case against the Defendants. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Defendants as the Plaintiff has failed to prove his case in respect to the Plaint dated 3<sup>rd</sup> November, 2020 filed on 9<sup>th</sup> November, 2020 with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- b. That an order made that the Land Registrar to have the Land Register amended according by having the Certificate of Lease dated 4<sup>th</sup> November, 2014 in the names of the 1<sup>st</sup> Defendants being the absolute and legally registered owner to the suit land – Land reference Numbers Mombasa/MN/Block/519 with all indefeasible title, interest and rights over it by law and thus to be inserted accordingly.
- c. That the costs of the suit to be awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as per the Plaint dated 3<sup>rd</sup> November, 2020 filed on 9<sup>th</sup> November, 2020.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT Mombasa THIS 30<sup>TH</sup> DAY OF MAY 2025.**

.....  
**HON. 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. Mr. Paul Magolo Advocate for the Plaintiff.
- c. Mr. Ngure Advocate for the 1<sup>st</sup> Defendant.



d. No appearance for the 2<sup>nd</sup> Defendant.

