



Nyenyee (Suing as the Administrator of the Estate of the Late Salim Nyenyee Ahmad) v Muslim Education & Welfare Association & 3 others (Environment & Land Case 276 of 2015) [2025] KEELC 146 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 146 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 276 OF 2015
LL NAIKUNI, J
JANUARY 24, 2025

BETWEEN

IBRAHIM SALIM NYENYE PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SALIM NYENYE AHMAD

AND

MUSLIM EDUCATION & WELFARE ASSOCIATION 1ST DEFENDANT
AWADH ALI SLEM 2ND DEFENDANT
AWADH SALEH 3RD DEFENDANT
SAID SALEH SAID 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the civil suit instituted through the Plaint dated 21st October, 2015 filed on 4th November, 2015 by Ibrahim Salim Nyenyee (Suing as the administrator of the Estate of the Late Salim Nyenyee Ahmad), the Plaintiff herein. It was against Muslim Education & Welfare Association, Awadh Ali Slem, Awadh Saleh and Said Saleh Said the 1st, 2nd, 3rd & 4th Defendants herein.
2. Upon service of the pleading and Summons to Enter Appearance, the 1st Defendant obliged, through filing of a Memorandum appearance dated 16th November, 2015 and filed on 18th November, 2015; the 2nd and 4th Defendants entered appearance through a Memorandum of Appearance filed on 9th March, 2016. The 1st Defendant's case was contained in the civil suit "Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association – Versus - Wakfu



of Madrasatul Hassaniya”. The 2nd Defendant’s case was contained in “the Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus - Salim Nyenye. While, the 3rd and 4th Defendants never filed any Statement of Defence in rebuttal of support of the suit.

3. It is instructive to note that upon the request by the parties, on 17th May, 2024 with the consensus of the parties and in their presence the Honourable Court did conduct a site visit (“Locus in Quo”). A detailed report is attached to this Judgement for ease of reference hereof.

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. The Plaintiff brought this suit on his own behalf, on behalf of the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad and on behalf of the Estate of the Late Salim Nyenye as the Administrator of the said Estate pursuant to a Grant of Letters of Administration Ad Litem Issued to him by the High Court of Kenya at Mombasa.
5. The 1st Defendant was described as a Muslim Education and Welfare Association in Mombasa; whilst the 2nd - 4th Defendants were described as adults of sound mind, residing and carrying out business for gain in the County of Mombasa within the Republic of Kenya.

III. Court directions before the hearing

6. Nonetheless, on 10th February, 2020, the Honourable Court fixed the hearing dated on 15th October, 2020 with the parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010. The matter proceeded on for hearing by way of adducing “Viva Voce” evidence. The Plaintiff’s witness PW - 1 testified in Court on 15th October, 2020 after which he marked his case closed. Thereafter, the Defendants called their witness DW - 1 and DW - 2 on 21st June, 2022.

IV. The Plaintiff’s case

7. From the filed pleadings, the Plaintiff was the administrator of a Madrassa known as Madrasatul Hassaniya. The Plaintiff took over the running of the Madrassa after the demise of his late father Salim Nyenye Ahmad. The Madrassa was built on what is now known as land reference numbers Mombasa/Block/XV/222 and Mombasa/Block/XV/223.
8. The Madrassa was initially constructed on the 2 parcels of land, then un-surveyed, in the year 1962 by the late Salim Nyenye Ahmad. He did that with the permission of one late Swaleh Nguru who owned the un-surveyed land at that point in time. The permission was to erect a Madrassa thereon for purposes of teaching and learning Islam. Therefore, the late Swaleh Nguru had donated the entire parcel of land to the late Salim Nyenye Ahmad to be used for purposes of furthering the Islam faith. The late Swaleh Nguru was the late father to the 3rd and 4th Defendants. Madrasatul Hassaniya has been on the parcels of land from year 1962 to date and had always been used for purposes of teaching and learning Islam as per the wishes of the late Swaleh Nguru and the late Salim Nyenye Ahmad.
9. Later on, in the year 1992, the whole un-surveyed area around land parcel numbers Mombasa/Block/XV/222 and Mombasa/Block/XV/223 was surveyed and title deeds Issued to the proprietors of such land as appropriate in the year 1994. By this time, Swaleh Nguru had passed on. The late Salim Nyenye Ahmad then approached the 3rd and 4th Defendants being the sons and beneficiaries of the Estate of the late Swaleh Nguru were to assist with the process of securing the title deed to the parcel of land where the Madrassa was erected. The 3rd and 4th Defendants requested the late Salim Nyenye Ahmad to avail a sum of Kenya Shillings Forty-Five thousand only (Kshs 45,000/-) in order for them to facilitate



- the process of securing the title deed to the parcel of land where the Madrassa is built. The late Salim Nyenye Ahmad availed the requested cash.
10. Following this, the 3rd and 4th Defendants caused the parcel of land now known as Mombasa/Block/XV/223 to be transferred to the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad in the year 2004. Years after the demise of the late Salim Nyenye Ahmad, the Plaintiff came to learn that the 3rd and 4th Defendants had fraudulently and through misrepresentation caused the said parcel of land where the Madrassa was built to be sub - divided into what was now known as Mombasa/Block/XV/222 and Mombasa/Block/XV/223. As it currently stood, the substantial portion of Madrassa Hassaniya lied on Mombasa/Block/XV/222 whereas a lesser portion thereof lies on Mombasa/ Block/XV/ 223. The latter is the land parcel that the 3rd and 4th Respondents registered to the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad.
 11. The Plaintiff particularized the fraud and misrepresentation by the 3rd and 4th Defendants as follows:-
 - a. Misrepresenting the exact particulars of the parcel of land where Madrasatul Hassaniya was built during the survey exercise.
 - b. Causing the then un-surveyed parcel of land where Madrasatul Hassaniya was built to be surveyed and subdivided into two parcels of land instead of it being surveyed and registered as a single parcel of land.
 - c. Causing land that had been donated and/or set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad and his Wakfu for purposes of furthering the Islamic faith to be wrongly sub - divided without the knowledge and consent of the Late Salim Ahmad Nyenye or his Estate or his Wakfu with a view to personally benefitting from the extra portion thereof.
 - d. Transferring the suit property to the 2nd Defendant without the knowledge and consent of the Late Salim Ahmad Nyenye or his Estate and pocketing the proceeds thereof.
 12. The Plaintiff had since learnt that after the fraudulent and illegal sub - division as above - stated, the 3rd and 4th Defendants then sold Mombasa/Block/XV/222 to the 2nd Defendant who in turn sold it to the 1st Defendant. By so doing, the 3rd and 4th Defendants sold land that had been donated and/or set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad for purposes of furthering the Islam faith. Consequently, the 1st Defendant therefore owned a title to Mombasa/Block/XV/222 where a substantial portion of the Madrassa lied. The lesser portion of the Madrassa lied on Mombasa/Block/XV/223, the land registered to the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad. The title deed to Mombasa/Block/XV/222 registered to the 1st Defendant was obtained illegally. It was therefore invalid, null and void and of no legal effect.
 13. The Plaintiff relied on the following particulars of illegality:-
 - i. Mombasa/Block/XV/222 forms part of the land set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad in the year 1962 for purposes of furthering the Islamic faith. This portion of the said land could not therefore form part of the estate of the late Swaleh Nguru inherited by the 3rd and 4th Defendants as the sons and beneficiaries of the late Swaleh Nguru. They could not, in their individual capacities and/or jointly, get a good title thereto because this was a trust property gifted to the Late Salim Nyenye by their late father Swaleh Nguru in the year 1962, and subsequently, a Wakf was created thereon. As such, this portion of land which later on came to be known as Mombasa/Block/XV/222 was no longer available for alienation to them.



- ii. Consequently, the 3rd and 4th Defendants never got good title to Mombasa/Block/XV/222 on the first alienation which they could transfer to the 2nd Defendant. In the circumstances, the acquisition of Mombasa/Block/XV/222 by the 2nd defendant was legally ineffective; hence he also could not pass good title to the 1st Defendant.
 - iii. As at the time when both the 1st and 2nd Defendants purportedly acquired Mombasa/Block/XV/222, they were very much aware of the presence of the Wakf & the Madrassa thereon and cannot in the premises plead bona fide acquisition of the property for valuable consideration
14. The 1st Defendant had filed a case in the Magistrates Courts at Mombasa being “Senior Resident Magistrate’s Court Civil suit number 2316 of 2012; Muslim Education and Welfare Association - Versus - Wakfu of Madrasatul Hassaniya” in which they inter alia sought the demolition of the Madrassa. Further, the 2nd Defendant had also instituted an earlier suit, being Mombasa “Senior Resident Magistrates Civil Suit Number 4694 of 2003; Awadh Ali Slem - Versus - Salim Nyenye” in which he sought inter alia a vacation order against the Defendant. This suit had been pending unprosecuted in court since 2005 and has since abated following the failure to substitute the deceased defendant one year after his death.
 15. Further, and in any event, since the registration of the 3rd and the 4th Respondents as the proprietors of Mombasa/Block/XV/222 in 1992, Salim Ahmad Nyenye, his Wakfu and his Estate of the Late Salim Nyenye Ahmad and the Madrassa, had remained in open, defiant use and occupation of the land without their permission or interruption for a continuous period of over 12 years. Therefore, any subsequent purported acquisition of any interest in this property could only have been subject to the unregistered rights of the Late Salim Nyenye Ahmad, his Wakfu and his Estate. Consequently, the occupation of the Madrassa on Mombasa/Block/XV/222 had always been adverse to that of the Defendants.
 16. Despite demand made and notice of the Plaintiff’s intention to sue having been duly served, the 1st and 4th Defendants had refused, neglected and/or failed to make good of the Plaintiff’s case making this suit necessary. Save for the existing suits, there was no other suit between the parties herein touched the matter in question. The Court had jurisdiction to hear and determine the suit.
 17. The Plaintiff humbly prayed for Judgment against the Defendant in the following terms:-
 - a. A declarstion that the substantial portion of Madrassatul Hassaniya erected or built on Mombasa/Block/XV/222 is rightfully erected or built thereon.
 - b. A declarstion that the registration of the Mombasa/ Block/ XV/ 222 in the names of the 3rd and 4th Defendants resulted in the creation of a trust in favour of the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad.
 - c. A declarstion that the purported sale and transfer of Mombasa/Block/XV/222 by the 3rd and 4th Defendants to the 2nd Defendant and the subsequent purported sale and transfer thereof by the 2nd Defendant to the 1st Defendant to be null and void and of no legal effect.
 - d. An order for the cancellation of Entries Numbers 3, 4, 5 and 6 in the Register of Mombasa/ Block/XV/222 conveying the said parcel or plot of land respectively to the 2nd and 1st Defendants and the nullification of the Certificates of Title Issued in respect thereof to the 1st and 2nd Defendants as a consequence of the said entries.
 - e. A Mandatory Injunction against the 3rd and 4th Defendants to compel them to forthwith, and in any event, within 21 days of service of this Order, to deliver the original Certificate of Title



for Mombasa/Block/XV/222 together with duly executed triplicate copies of the instrument of transfer in favour of the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad and copies of their identity cards, pin certificates and triplicate passport size photographs and to execute all other documents necessary for purposes of effecting the transfer of the property to the Wakfu.

- f. In default of [e] above, an order directing the Land Registrar, Coast Lands Registry, to forthwith register the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad as the proprietor of Mombasa/Block/XV/222 upon the payment of any applicable fees on this disposition by the Wakfu.
- g. A Permanent Injunction restraining the 1st Defendants, its agents and/or servants or any other person acting under its authority from interfering with the Plaintiff's quiet and peaceful possession and occupation of Mombasa/Block/XV/222.
- h. Alternatively, a declaration that the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad has acquired a legally valid title Mombasa/Block/XV/222 by virtue of adverse possession.
 - i. Any other expedient, fair and just relief in the circumstances of this case.
 - j. Costs of this suit.

18. The Plaintiff called his witness on 15th October, 2020 at 12.15 pm who testified as follows:-

A. Examination of PW - 1 by Ms. Gitari Advocate.

19. PW - 1 testified under oath and in Swahili language. He identified himself as being IBRAHIM SALIM NYENYE, a citizen of Kenya bearing all the particulars as appearing on his National Identity card. He stated that he was the Plaintiff in this case. He lived in Majengo, Plot No. Mombasa XV/222 and Mombasa Block XV/223. He was a teacher at a Madrassa which was left to him by his late father, Salim Nyenye. He knew why he was before the Court. He was fighting for the right of the Madrassa. PW - 1 recorded a witness statement dated 27th October, 2015 and filed on 4th November, 2015 which he adopted as his evidence in chief.
20. Further, PW - 1 produced the list of documents filed on 4th November, 2015 consisting of the following documents:
 - a. The Certificate of death was produced as Plaintiff Exhibit – 1; Receipts were produced as Plaintiff Exhibits 2 and 3.
 - b. Title Deed in name of WAKF Madrassul Hassinya for Mombasa Block IV/223 Issued on 26th January, 2004 was produced as Plaintiff exhibit 4.
 - c. A Copy of Instrument of Transfer of Land received on 26th January, 2004 was produced as Plaintiff Exhibit 5.
 - d. Certified Copy of the Green Card in respect of Mombasa/Block XV/222 Certified on 15th October, 2015 was produced as Plaintiff Exhibit No. 6;
 - e. Title in name of Muslim Education and Welfare Association in respect of Mombasa Block XV/222 Issued on 23rd January, 2009 was produced as Plaintiff Exhibit 7.
 - f. An Official search for Mombasa Block XV/222 dated 9th October, 2015 was produced as Plaintiff Exhibit;



- g. 8 copies of proceedings in CMCC No. 2316 of 2012 – Muslim Education and Welfare Association – Versus- Wakfu of Madrasaful Hassamiya – Plaintiff Exhibit 9. Proceedings in Mombasa SRMCC No. 4094 of 2003, Awadh Ali Slem –Versus- Salim Nyenye – Plaintiff Exhibit 10.

B. Cross examination of PW - 1 by Mr. Gitonga Advocate.

21. PW - 1 confirmed that he was the son of the late Salim Nyenye and he knew the 4th Defendant, Said Saleh Said. He was the son of Swaleh Nguru. His late father requested for the space herein from Swaleh Nguru in the year 1962. By then the land had not been surveyed. He was not yet born. There was no written agreement. However, there were witnesses. The witnesses were not present. The witness told the court that he was stating what he had been told.
22. According to PW - 1, the 3rd Defendant was also a son to Swaleh Nguru. He had produced the titles. A big portion of the madrassa was on Plot No. Mombasa/Block/ XV/ 222 while a small portion was on Block XV/ 223. The titles had different names. Block XV/222 was in name Muslim Education & Welfare Association, the 1st Defendant. The Block XV/223 name was in name of Wakfu of Madrassaful Hassainaiya Salim Nyenye Ahmad. A big portion of the Madrassa iwas Block XV/222, while a small portion was in Block XV/223. When Swaleh Nguru passed on, he left his properties to his children. The children of Swaleh Nguru had the right to deal with the deceased's properties; he could see the Green Card.
23. Further, PW - 1 told the court that the first entry in year 1992 was in the names of the 3rd and 4th Defendants second entry dated 17th August, 1992 title was Issued. The third entry was in name of 2nd Defendant, Awadh Ali Slem who was a student in that Madrassa. He had no relation with Swaleh Nguru. The 5th Entry was in name of 1st Defendant. When the 1st Defendant was established the Madrassa was already in existence. The Madrassa was there since the year 1962. The Madrassa had title in name of Wakfu and was on Plot No. 223. It was an un-surveyed plot. During demarcation, they gave money to the children of Swaleh Nguru for processing of the title. The receipt of a sum of Kenya Shillings Fouty Thousand (Kshs. 40,000/-) for parcel MSA/BLCOK XV/223. When he paid, he knew it was for the whole plot. According to the receipt, it was for Plot 223.
24. PW - 1 stated that he could see a survey report. He saw a surveyor come but he did not know he was from court. PW - 1 had attached the transfer documents. He reported to the police. PW - 1 told the court that he gave the documents to his advocate. His advocate went to the DCI. The witness told the court that he did know the outcome of the report made to the DCI as he had not been shown. His claim was genuine. The sub - division was done in the year 1992. By then he was in school; he knew the portion covered the two plots. Before the Madrassa came, the land belonged to Swaleh Nguru who gave a portion to his father. He had no agreement but he had a receipt which he had proved.

C. Re – examination of PW - 1 by Ms. Gitari Advocate.

25. PW - 1 reiterated that the Madrassa was built in the year 1962. The sub - division was done in the year 1992. A big portion of the Madrassa was Plot No. 222 while a small portion was on Plot 223. He was born on the land and was brought up there. The 1st Defendant obtained title in the year 2009.
26. On 15th October, 2020, the Plaintiff through their Counsel, Ms. Gitari closed their case.



V. The 1st Defendant's case

27. The 1st Defendant's case as contained in the Civil Case "Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association – Versus - Wakfu of Madrasatul Hassaniya" was in the Plaint dated 25th October, 2012; the facts in the suit being that:-
- a. At all material times to this suit the Plaintiff was the owner of all that piece of land known as PLOT NUMBER Mombasa/Block XV/ 222.
 - b. The Defendant had now unlawfully and illegally invaded and/ or trespassed on the said plot and was now constructing structures and buildings on the said plot without the Plaintiff's authority. By reasons of the matters aforesaid, the Plaintiff had been deprived of the use and enjoyment of the said land and had thereby suffered loss and damages.
 - c. The Defendant continued being in possession of the suit property unless compelled to hand over possession by this Court they threatened to continue trespassing therein.
 - d. There had been no previous proceedings in this Court between the Plaintiff and the Defendant over the subject matter and that the cause of action related to the Plaintiff named in the plaint.
 - e. For the reasons thereof the 1st Defendant (Plaintiff in the lower court matter) prayed for:-
 - i. An eviction order do Issue against the Defendant and any other person currently on PLOT NO. Mombasa/ Block XV/ 222.
 - ii. That the structures and houses built by the Defendant on PLOT NO. Mombasa/ Block XV/ 222 be demolished.
28. The 1st Defendant called its first witness on 21st June, 2022 at 12.40 pm who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Gitonga Advocate.

29. DW - 1 was sworn and he testified in English language. He identified himself as ABDUL WAHAB MWINYI ALI, a Citizen of Kenya with all the particulars as stated out in the national identity card shown to court. He was a businessman. He bought land from AWADH ALI SALIM. He was a trustee to the 1st Defendant and a member and chairman for the 1st Defendant. The 1st Defendant bought the suit from Awadh Ali Slem. They wanted to develop a hospital. The seller disclosed to them that there was a dispute between him and Madrassa known as Madrassaful Hassamiya and the Plaintiff were the one running the Madrassa. He was the owner and they entered into a sale agreement executed terms and condition at a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-). They paid a deposit of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) in the year 2015. The balance was not yet paid. It was to be paid upon the settlement of the dispute.
30. According to the witness, to date the dispute had not been resolved; but they had yet to pay the balance. The 2nd Defendant had bought the land from Swaleh Guru. He had the title. They were given good title. After they bought the land, they had never gotten into the land. 70% of the land being encroached by the Madrassa. Their intention while the land was for them to have moved the Madrassa. By that point it was temporary structure. However, by the time of his testimony they had modified it.
31. DW - 1 told the Court that to date they had not done anything on it. Although, they had the original title but it had not been transferred. They had a title of parcel No. 222 which was in the name of MEWA. According to him, the Madrassa had encroached. He asked the court to allow them to take over possession by removing the Madrassa.



B. Cross examination of DW - 1 by Ms. Gitari Advocate.

32. DW - 1 confirmed to the court that they bought land from Awadh Ali Slem. He had bought it from Swaleh Guru. On being referred to the Green Card dated 7th August, 1992 - Awadh Saleh Said 23rd January, 2009, it indicated to belong to MAWE. "Guru" was a nick name. The father was selling dry fish. The witness was a member of MEWA from the year 1985. From that time, he had never seen the Madrassa there. He only saw the Madrassa in the year 2005, they bought land in 2009. Before they exchanged the money they knew the Madrassa was there.
33. DW - 1 stated that when they bought the land the seller disclosed to her that there was a dispute though they still bought it Mr. Salim Nyenye was not alive. The Madrassa as exactly adjacent to MEWA. The purpose of Madrassa was to teach the Islamic Religion and how to adhere to the Muslim Religion.

C. Re - examination of DW - 1 by Mr. Gitonga Advocate.

34. The witness reiterated that by the time of buying the land the Madrassa was there, but they were convinced by the fact they needed the place for the expansion of hospital. They wanted to convince them to move to a vacant place on Plot No. 223 and even to use money. They tried to get elders and the location Chief but all in vain.

VI. The 2nd Defendant's case

35. The 2nd Defendant's case was contained in "Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus- Salim Nyenye" where in the Plaint the 2nd Defendant (Plaintiff in the lower court matter averred that:-
- i. He was the legal and/ or registered owner of a parcel of land known as Mombasa/Block/XV/ 222.
 - ii. The Defendant (Salim Nyenye) had unlawfully entered into, occupied and even built a Madras in the Defendant's aforesaid parcel of land.
 - iii. The aforesaid unlawful entry and occupation of the Plaintiff's property had really inconvenienced and/or interfered with the Plaintiff's quite enjoyment of his property.
 - iv. The Plaintiff prayed for a vacation order against the Defendant.
 - v. In spite of demand made and notice of intention to sue having been given, the Defendant had failed refused and/ or ignored to obey the Plaintiff's notice to vacate.
 - vi. The 2nd Defendant (Plaintiff) in this case prayed for Judgment against the Defendant for:-
 - a. Vacation order against the Defendant.
 - b. Costs and interest of this suit.
36. The 2nd Defendant called DW - 2 testified as follows:-

A. Examination in Chief of DW - 2 by Mr. Gitonga Advocate.

37. DW - 2 testified under oath in Kiswahili language. He identified himself as AWADH ALI SLEM a citizen of Kenya with all the particulars as stated out in the national identity card shown to Court. He told the court that he sold the suit property to MEWA. He had bought it from Awadh Saleh (these were the children of Swaleh Guru). When he bought it was vacant apart from a mud house - a temporary



structure. He bought it at a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-). He got title deed. He travelled to Saudi Arabia. They claimed it was Madrassa but people used to leave in it. When they came wanting to buy the plot, he informed them of the dispute. It was plot No. 222. As result, they went to the Advocate. He conducted an official search and he told him there were encumbrances. Before he sold the land he approached the owner of the temporary structure – Mr. Ngenye. He had sued them to get out of the land but they ran away.

B. Cross examination of DW - 2 by M/s. Gitari Advocate.

38. DW - 2 confirmed that resided at the suit premises. It was a temporary structure which had been on the land when he bought it in the year 1992.

VII. The 3rd and 4th Defendant's case

39. The 3rd and 4th Defendants never filed any statement in rebuttal of support of the suit.

VIII. Submissions

40. On 25th September, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their written submissions within stringent timeframe thereof on. All the parties fully complied accordingly. Pursuant to that the Honourable Court reserved a date to deliver its Judgement on 24th January, 2025 on its merit.

A. The Written Submission by the Plaintiff

41. The Plaintiffs through the Law firm of Messrs. Munyao, Muthama & Kashindi Advocates dated 2nd July, 2024 filed their written submissions. M/s. Gitari Advocate commenced by stating that the Plaintiff instituted this suit through Plaint dated 21st October, 2015 and filed on 4th November, 2015. The Plaintiff sought the above stated reliefs.

42. At the time of filing the suit, the Plaintiff equally filed a Notice of Motion Application brought under Certificate of Urgency, The Application was dated 27th October, 2015 and sought interim injunctive reliefs against the 1st Defendant from dealing with the suit property Mombasa/Block/XV/222 pending the hearing and determination of the substantive suit herein. On 29th July, 2016, Hon. Lady Justice A. Omollo in determining the Application allowed the Prayer's sought in the Plaintiff's Motion Application dated 27th October, 2015 and further allowed the consolidation of this sit with two other suits filed in the Magistrates Court by the 1st and 2nd Defendants herein and being; "Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus- Salim Nyenye" and "Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association -Versus - Wakfu of Madrasatul Hassaniya" for further hearing and determination.

43. Consequently, in their Defense, the 1st Defendant adopted the contents of their Plaint in Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association - Versus - Wakfu of Madrasatul Hassaniya as their defense in this suit while the 2nd Defendant equally adopted the contents of their Plaint in Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem - Versus- Salim Nyenye as his defense to this suit. The 3rd and 4th Defendants did not file any Statements of Defense.

44. The Learned Counsel submitted that on the case of the Plaintiff's case was that he was the administrator of the Madrassa known as Madrassatul Hassaniya having taken over the running of the Madrassa after the demise of his late father-Salim Nyenye Ahmad. The Madrassa was built on what was now known as land reference numbers Mombasa/Block/XV/222 and Mombasa/Block/ XV/223. The Madrassa



was initially constructed on the 2 parcels of land, then un-surveyed, in 1962 by the late Salim Nyenye Ahmend with the permission of the late Swaleh Nguru who was the father the 3rd and 4th Defendants herein, and who owned the un-surveyed land at that point in time.

45. The late Swaleh Nguru had permitted the late Salim Nyenye Ahmed to erect the Madrassa thereon for purposes of teaching and learning Islam and had therefore donated the entire parcel of land to the late Salim Nynye Ahmed to be used for purposes of furthering the Islam Faith. Madrasa Hassaniya had therefore been on the parcel of land from year 1962 to date and had always been used for purposes of teaching and learning Islam as per the wishes of the late Swaleh Nguru and the late Salim Nyenye Ahmed. In the year 1992, the whole un-surveyed area around land parcel numbers Mombasa/Block/XV/222 and Mombasa/Block/XV/223 was surveyed and title deeds Issued to the proprietors of such land as appropriate. By this time, Swaleh Nguru had passed on but the titles to the 2 parcels were however Issued to 3rd and 4th Defendants who were the beneficiaries of the estate of the late Swaleh Nguru.
46. The late Salim Nyenye Ahmad then approached the 3rd and 4th Defendants being the sons and beneficiaries of the Estate of the late Swaleh Nguru to assist with the process of securing the title deed to the parcel of land where the Madrassa was erected. The 3rd and 4th Defendants requested the late Salim Nyenye Ahmad to avail a sum of Kenya Shillings Forty Five Thousand (Kshs. 45,000/-) in order for them to facilitate the process of securing the title deed to the parcel of land where the Madrassa was built and he indeed availed the money. Following this, the 3rd and 4th Defendants caused the parcel of land now known as Mombasa/Block/XV/223 to be transferred to the Wakfu of Madrassatul Hassaniya Salim Nyenye Ahmad in the year 2004.
47. Years after the demise of the late Salim Nyenye Ahmad, the Plaintiff learnt that the 3rd and 4th Defendants had fraudulently through misrepresentation caused the parcel of land where the Madrassa was built to be sub - divided into what was now known as Mombasa/Block/XV/222 and Mombasa/Block/XV/223. As it stood, the substantial portion of Madrassa Hassaniya lies on Mombasa/Block/XV/222 whereas the lesser portion thereof lies on Mombasa/Block/XV/223-which was registered in the name of the Wakfu of Madrassa Hassaniya Salim Nyenye Ahmad.
48. Following the fraudulent and illegal sub - division, the 3rd and 4th Defendants then sold Mombasa/Block/XV/222 to the 2nd Defendant who in turn sold it to the 1st Defendant. By doing so, the 3rd and 4th Defendants sold land that had been donated and/or set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad for purposes of furthering the Islam faith. Consequently, the 1st Defendant now held the title to Mombasa/Block/XV/222 where a substantial portion of the Madrassa lies. The lesser portion of the Madrassa lies on Mombasa/Block/XV/223 which was registered to the Wakfu of Madrassatul Hassaniya Salim Nyenye Ahmad.
49. The Learned Counsel submitted that it was the Plaintiff's case that the title deed to Mombasa/Block/XV/222 registered to the 1st Defendant was obtained illegally and is therefore invalid, null and void and of no legal effect. It was also the Plaintiff's case that since the registration of the 3rd and 4th Defendant as the proprietors of Mombasa/Block/XV/222 in 1992, the late Salim Nyenye Ahmad, his Wakf, his Estate and the Madrassa have remained open and in defiant use and occupation of the land without their permission and interruption for a continuous period of over 12 years. Therefore any subsequent purported acquisition of any interest in this property can only have been subject to the unregistered rights of the Late Salim Nyenye Ahmad, his Wakfu and his Estate. As a consequence, the occupation of the Madrassa on Mombasa/Block/XV/222 has always been averse to that of the Defendants.



50. On the 1st Defendant's case, the Learned Counsel averred that it was contained in Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association -versus- Wakfu of Madrasatul Hassaniya was that;
- i. They were the owners of all that piece of land known as Mombasa/Block XV/2022
 - ii. The Plaintiff herein had unlawfully and illegally invaded and or trespassed on the said plot by constructing structures and buildings on the said plot without authority.
 - iii. The 1st Defendant herein had been deprived of the use and enjoyment of the said land and had thereby suffered loss and damage for which it holds the Plaintiff herein liable.
 - iv. The Plaintiff herein continued being in possession of the suit property and unless compelled to hand over possession by the Court, they threaten to continue trespassing.
 - v. The 1st Defendant consequently sought an order of eviction to Issue against the Plaintiff herein and demolition of the structures built of the said suit property.
51. The Learned Counsel asserted that the 2nd Defendant's case was contained in Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus- Salim Nyenye was that:-
- a. He was the legal and/or registered owner of the parcel of land known as Mombasa/Block XV/2022.
 - b. The Plaintiff herein had unlawfully entered into, occupied and even built a Madrassa on the said parcel of land.
 - c. The entry and occupation of the said parcel was unlawful and had inconvenienced and/or interfered with the and Defendant's quiet enjoyment of the property and he therefore prays for a vacation order against the Plaintiff herein.
52. According to the Learned Counsel, the 3rd and 4th Defendants never filed any statement in rebuttal of support of the suit. On the evidence and the testimony, both the Plaintiff's and the Defendants cases were heard by way of viva voce evidence on 15th October, 2020 and 21st June, 2022. The Plaintiff had filed a List of Documents dated 27th October, 2015 and a Witness Statement dated 27th October, 2015. The Defendants did not file any List of Documents and relied of the Replying Affidavits dated 18th November, 2015, 9th March, 2016, 1st December, 2015 and 9th March, 2016 sworn by Abdul Wahab M. Ali, Awadh Ali Slem, Awadh Saleh and Said Saleh Said respectively in response to the Plaintiff's Notice of Motion Application dated 27th October, 2015 as their Witness Statements.
53. On the testimony by the Plaintiff, the Learned Counsel submitted that Mr. Ibrahim Salim Nyenye (PW-1) testified on behalf of the Plaintiff. In his Examination in Chief, he informed the Court that he lives in Majengo on Plot No.Mombasa/Block/XV/222 and Mombasa/Block/XV/223. He was a teacher at a Madrassa which was left to him by his late Father Salim Nyenye. He informed the Court that he was before the Court because he was fighting for the rights of the Madrassa and that he recorded a statement dated 27th October, 2015 which he wished to adopt as his evidence in chief.
54. Mr. Ibrahim Salim Nyenye further produced the following documents as his evidence which were marked as exhibits in the following sequence;
- a. Copy of Death Certificate of the late Salim Nyenye Ahmad-Plaintiff exhibit-1



- b. Receipt Number 006 dated 30th July, 2003 for a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/-) Plaintiff exhibit-2
 - c. Petty Cash Voucher receipt for a sum of Kenya Shillings Two Thousand Four Hundred and Fifty (Kshs. 2,450/) dated 13th August, 2003 - Plaintiff exhibit - 3.
 - d. Copy of Title Deed to Mombasa/Block/XV/223 in the name of Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmed Plaintiff exhibit - 4
 - e. Copy of Transfer of Mombasa/Block/XV/223 from Awadh Saleh and Said Saleh Said to Wakfu of Madrassatul Hassaniya Salim Nyenye Ahmad-Plaintiff exhibit-5
 - f. Copy of Green Card to Mombasa/Block/XV/222-Plaintiff exhibit-6
 - g. Copy of Title deed to Mombasa/Block/XV/222 in the name of Muslim Education & Welfare Association-Plaintiff exhibit-7
 - h. Certificate of official search to Mombasa/Block/XV/222 dated 9th October, 2015-Plaintiff exhibit-8
 - i. Copies of extracts of Pleadings filed by the 1st Defendant in Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association-versus-Wakfu of Madrasatul Hassaniya-Plaintiff exhibit - 9
 - j. Copies of extracts of Pleadings filed by the 2nd Defendant in Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem-Versus-Salim Nyenye-Plaintiff exhibit-10
55. On cross - examination by the Counsel for the Defendant, Mr. Ibrahim Salim Nyenye told the Court that he was the son of the late Salim Nyenye and confirmed that knows the 4th Defendant who was the son of the Late Swaleh Nguru. Mr. Ibrahim told the Court that his late father requested for the space of land from Swaleh Nguru in 1962 and that by then, the land had not been surveyed. He confirmed that there was no written agreement and that he was informing the Court what his late father had told him. Mr. Ibrahim further confirmed that the 3rd Defendant was also the son of the late Swaleh Nguru. He confirmed that he had produced the titles to two parcels of land and informed the Court that a big portion of the Madrassa was on Plot No. Mombasa/Block/XV/222 while a small portion is on Mombasa/Block/XV/223.
56. Mr. Ibrahim confirmed that the titles had different names-Mombasa/Block/XV/222 was in the name of Muslim Education & Welfare Association, the 1st Defendant and Mombasa/Block/XV/223 was in the name of Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad. Mr. Ibrahim told the court that when Swaleh Nguru passed on, he left his properties to his children and the children and the right to deal with the deceased properties.
57. On being referred to the Copy of the green card produced as Exhibit-6, Mr. Ibrahim confirmed that the first entry on the green card made in the year 1992 was in the names of the 3rd and 4th Defendants. He further confirmed that the second entry dated 17th August, 1992 showed that a title was Issued and a third entry on the green card was in the name of the 2nd Defendant, Awadh Ali Slem who was a student that Madrassa and had no relation with Swaleh Nguru. Mr. Ibrahim confirmed that the 5th entry is in the name of the 1st Defendant. Mr. Ibrahim told the Court that when the 5th Defendant was established, the Madrassa was already in existence as it had been there since the year 1962. He confirmed that the title to the Madrassa was in the name of the Wakf and is Plot No. 223.



58. Mr. Ibrahim told the Court that the Madrasa was built on an un-surveyed plot and that during demarcation, they gave money to the children of Swaleh Nguru for processing title. He referred the Court to the receipt of a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/-) which was in reference to Mombasa/Block/XV/223 and informed the Court that when he paid the said money he knew that it was for the whole plot. On being shown referred to a survey report, he confirmed that he saw a surveyor come to the Madrassa buy he did not know that the land surveyor was from Court. He confirmed that he had produced transfer documents before court. He informed the Court that when the sub - division was done in the year 1992 he was in school and that he knew the potion covered the two plots. He reiterated to the Court that before the Madrasa came, the land belonged to Swaleh Nguru who gave a portion to his father. He confirmed that he did not had e an agreement but he had produced a receipt for payment.
59. On re - examination, Mr. Ibrahim reiterated to the Court that the Madrassa was built in the year 1962 and sub - division was done in the year 1992. He confirmed that a big portion of the Madrassa is on Plot No. Mombasa/Block/XV/222 while a small portion is on Mombasa/Block/XV/223.He further told the Court that he was born on the land and was brought up there and that the 1st Defendant obtained title in the year 2009.
60. On the Defendants' testimony, the Learned Counsel submitted that Mr. Abdul Wahab M. Ali (DW - 1) and Mr. Awadh Ali Slem (DW-2) testified on behalf of the Defendants. On examination in Chief, Mr. Abdul Wahab M. Ali (DW-1) informed the Court that he was a business man and the holder of National Identity Card No. 4582512 and was born in the year 1949. He informed the Court that he was a Trustee to the 1st Defendant, a member and a Chairman to the 1st Defendant. Mr. Abdul Wahab informed the Court that the 1st Defendant bought the suit land from the 2nd Defendant-Awadh Ali Slem as they wanted to develop a hospital. He informed the court that the seller disclosed to them that there was a dispute between him and the Madrassa known as Masrassatul Hassaniya and the Plaintiff was the one running the Madrassa and that the Plaintiff is the owner.
61. Mr. Abdul Wahab went on to tell the Court that they entered into a sale agreement, executed terms and condition at a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) from which they paid a deposit of a sum of Kenya Shillings One Million (Kshs.1,000,000/-) in the year 2015 and the balance was to be paid upon settlement of the dispute. Mr. Abdul Wahab informed the Court that the dispute had not been resolved to date and as a consequence, they had not paid the balance. He further told the Court that the 2nd Defendant had bought the land from Swaleh Guru and that he had the title. He told the Court that they were given good title.He went on to tell the Court that after they bought the land, they have never gotten into the land as 70% of the land had been encroached by the Madrassa and that they have not done anything with the land to date. He told the Court that they have the original title but have not transferred. He confirmed that they have a title of the parcel No, Mombasa/Block/ XV/222 in the name of MEWA and that the Madrassa has encroached. He asked Court to allow them to take possession by removing the madrassa form the land.
62. On Cross-examination, Mr. Abdul Wahab told the Court that they had bought the land from Awadh Ali Slem who had bought it from Swaleh Nguru. On being referred to a Copy of the Green Card, je confirmed that on 7th August, 1992, the land was registered in the name of Awadh Sahel and Said Saleh Said and on 23rd January, 2009 registered in the name of MEWA. He informed the Court that he was a member of MEWA from the year 1985 and that he had never seen the Madrassa there. That he only saw the Madrassa in the year 2005 and that they bought the land in the year 2009. He confirmed that before they exchanged money, they knew the Madrassa was there. He further confirmed to the Court that when they bought the land, they knew there was a dispute and they still bought the land. Mr.



- Abdul Wahab confirmed that Mr. Salim Nyenye is not alive and further informed the Court that the madrassa is exactly adjacent to MEWA. He told the Court that the purpose of the Madrassa was to teach the Islamic religion and how to adhere to the Muslim religion.
63. On re-examination, Mr. Abdul Wahab confirmed to the Court that at the time of buying the land, the madrassa was there but they were convinced by the fact that they needed the place for expansion of the hospital and wanted to convince them to move to the vacant place on Plot No.223. He informed the Court that they tried to get the elders and chief to assist but it was all in vein
64. The Learned Counsel on DW - 2 and on the examination in chief submitted that Mr. Awadh Ali Slem (DW - 2) informed the Court that he was a drive and that he sold the land to MEWA and had bought it from Awadh Saleh and Said Saleh Said who were the children of Swaleh Nguru. Mr. Awadh informed the Court that when he bought the plot, there was a mad house and that he paid a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-) and got a title deed. He further informed the Court that the house was a madrassa but people used to live in it. He told the Court that when MEWA came to buy the plot, he informed them of the dispute over Plot No. 222 and they went to an advocate who conducted an official search. He further informed the Court that before he sold the Plot to MEWA, he approached the owner of the temporary structure - Mr. Nyenye who he had already sued and requested him to get out of the land.
65. On cross-examination, Mr. Awadh Ali Slem confirmed to the Court that the temporary structure had been on the land when he bought it in 1992.
66. On the site visit, the Learned Counsel submitted that on 17th May, 2024, a site visit of the suit property was conducted by the Court in the presence of the parties and a surveyor - Mr. Abas Swaleh. The Surveyor presented to the Court a Survey Report dated 29th September 2015 and with concurrence of the parties, the said report was admitted as evidence.
67. On the Issue for determination, the Learned Counsel submitted that from the forgoing paragraphs, the testimony of the witnesses in the case and the evidence adduced in support of the parties cases the following key Issues remain undisputed;
- i. The Madrassa known as Madrassatul Hassaniya Salim Nyenye Ahmed was erected on Plot No. Mombasa/Block/XV/222 and Mombasa/Block/XV/223.
 - ii. The Title to Mombasa/Block/XV/222 was in the name of Muslims Education & Welfare Association while that of Mombasa/Block/XV/223 was in the name of Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmed.
 - iii. A substantive portion of the Madrassa lies on Plot Number Mombasa/Block/XV/222 while a small portion was on plot no. Mombasa/Block/XV/223.
 - iv. Muslims Education & Welfare Association, the 1st Defendant herein acquired the title to Plot No. Mombasa/Block/XV/222 on or about 23rd January, 2009 following transfer of the said plot from Awadh Ali Slem, the 2nd Defendant herein, who had acquired title over the said plot on or about 18th November, 1994 following transfer from Awadh Saleh Said and Said Saleh Said, named as 3rd and 4th Defendants herein and who were the initial registered owners as tenants in common.
 - v. When Muslims Education & Welfare Association bought the Plot from Awadh Ali Slem, the Madrassa was on the properties and similarly, when Awadh Ali Slem bought the plot from Awadh Saleh Said and Said Saleh Said, the Madrassa was already on the properties.



- vi. Awadh Saleh Said and Said Saleh Said transferred title to Plot No. Mombasa/Block/XV/223 to Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmed on or about 26th January, 2004.
 - vii. The 2 suits instituted by the 1st and 2nd Defendants herein, being Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem-Versus-Salim Nyenye and Mombasa Senior Resident Magistrate's Court Civil Suit Number 2316 of 2012 Muslim Education both sought the eviction and or demolition of the Madrassa from Plot No. Mombasa/Block/XV/222.
 - viii. The disputed plot as far as this suit is concerned is Plot No. Mombasa/Block/XV/222 where a substantive portion of the Madrasatul Hassaniya Salim Nyenye Ahmed lies.
68. The Learned Counsel submitted that it was against the backdrop of these undisputed facts that we discern the following Issues as the Issues for determination by this Honorable Court.
- a. Whether the parcel of land donated by the late Swahel Nguru to the late Salim Nyenye became trust property.
 - b. Whether the subdivision of the initial plot of land to Mombasa/Block/XV/222 and Mombasa/Block/XV/223 was illegal and fraudulent.
 - c. Whether the subsequent sale and transfer of Plot Number Mombasa/Block/XV/222 from the 3rd and 4th Defendants to the 2nd Defendant and thereafter from the 2nd Defendant to the 1st Defendant was legal.
 - d. Whether the Madrasatul Hassaniya Salim Nyenye Ahmed has encroached and/or trespassed onto parcel no. Mombasa/Block/XV/222
 - e. Whether the Plaintiff has proven his case against the Defendants on a balance of probabilities
 - f. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff
69. On whether the parcel of land donated by the late Swahel Nguru to the late Salim Nyenye became trust property, the Learned Counsel submitted that it was not disputed that the suit property herein-Mombasa/Block/XV/222 formed part of a land that was set aside by the late Swaleh Nguru, who was the father to the 3rd and 4th Defendants, to the Late Salim Nyenye Ahmad in 1962 for purposes of furthering the Islam Faith. As such, a Wakf was created on the parcel of land.
70. It was further not disputed that the late Salim Nyenye Ahmed erected the Madrassatul Hassaniya on that parcel of land for purposes of teaching and learning Islam in the year 1962. Since 1962 to date, the Madrassa has been on the said land and had always been used for purposes of teaching and learning Islam as per the wishes of the late Swaleh Nguru. After this land, which included the portion of the suit property, was set aside by the late Swaleh Nguru, it became Trust property. Therefore, the suit property could not form part of the estate of the late Swaleh Nguru inherited by the 3rd and 4th Defendants. Neither could the 3rd and 4th Defendants in their individual capacities and/or jointly get good title thereto. Consequently, no part of the land set aside by the late Swaleh Nguru was available for alienation by the 3rd and 4th Defendants at all.
71. A.I Hayanga J (as he then was) in the case of:- "Twalib Swaleh Salim – Versus - Ali Mohamed Mwinzungu [2003] eKLR" held that:-

“..... There is no beneficiary in Wakf and that once it is Wakf property, it remains Wakf property.”



72. The Learned Counsel submitted that they were guided further by the case of “*Twalib Hatayan Twalib Hatayan & Another – Versus - Said Saggat Ahmed Al-Heidy & Others (2015) eKLR*” where the Court expounded on the law of trusts and stated as follows:
- “.....A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment....”
73. On whether the sub - division of the initial plot of land to Mombasa/Block/XV/222 and Mombasa/Block/XV/223 was illegal and fraudulent. The Learned Counsel contended that it was not disputed that the 3rd and 4th Defendants caused the sub - division of the land that had been set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmed. Arising from the sub - division, 2 plots being Mombasa/Block/XV/222 and Mombasa/Block/XV/233 emerged and both of which were initially registered in the names of the 3rd and 4th Defendants’ herein.
74. The Learned Counsel submitted that Mombasa/Block/XV/233 was on 26th January, 2004 transferred from the 3rd and 4th Defendants to Madrasatul Hassaniya Salim Nyenye Ahmed while Mombasa/Block/XV/222 was transferred to the 2nd Defendant and subsequently to the 1st Defendant on 18th November, 1994 and 23rd January, 2009 respectfully. The Counsel referred Court to Plaintiff’s Exhibits 5 and 6.
75. It was their humble submission that the 3rd and 4th Defendants illegally and fraudulently misrepresented that the suit property was capable of inheritance and omitted the fact that a Wakf had been created over the property. The 3rd and 4th Defendants then went ahead to cause the property now comprising of the suit property to be surveyed and sub - divided with the full knowledge that the suit property was a Wakf property. This act was in itself illegal and fraudulent.
76. In the given circumstances, it was their submission that any alienation leading to a transfer of any part of this land to any party became legally ineffective. The corollary of this was that no good title could be passed to anyone. At the time, the 1st and 2nd Defendants purportedly acquired the suit property, they were very much aware of the presence of the Madrassa on the suit property. They both could not, in the premises, plead bona fide acquisition of the property for valuable consideration.
77. Further, it was their humble submission that the 3rd and 4th Defendants had no good title to the suit property which they could possibly have transferred to the 2nd Defendant. In the circumstances, the acquisition of the suit property by the 2nd Defendant was illegal and he could not thereafter pass good title to the 1st Respondent. Their submissions herein had addressed their Issue (c) on whether the subsequent sale and transfer of Plot Number Mombasa/Block/XV/222 from the 3rd and 4th Defendants to the 2nd Defendant and thereafter from the 2nd Defendant to the 1st Defendant was legal. They saw no need to submit further.
78. On whether the Madrasatul Hassaniya Salim Nyenye Ahmed had encroached and/or trespassed on parcel no. Mombasa/Block/XV/222. The Learned Counsel averred that the two prior suits filed by the 1st and 2nd Defendants sought orders of eviction and demolition of the portion of the madrassa that sits



on Plot No. Mombasa/Block/XV/222. By its suit, the 1st Defendant herein alleged that the Madrassa had unlawfully and illegally invaded and or trespassed on the said plot by constructing structures and buildings on the said plot without authority and as a consequence, deprived the 1st defendant off their right to use the said plot.

79. The 2nd Defendant had by his suit sued the Late Salim Nyenye Ahmed for unlawfully entering, occupying and even building a Madrassa on the said parcel of land. Both the 1st and 2nd Defendants sought orders of eviction and demolition of the Madrassa. The Surveyors Report dated 29th September, 2015 produced at the site visit remarked that

“There is a Swahili house and mabati fencing encroaching on plot Mombasa/Block/XV/222...”

80. Attached to the said report was a diagram showing the position of the house on Plot No. Mombasa/Block/XV/222 and Mombasa/Block/XV/223. The Learned Counsel submitted that while the survey report confirmed the Plaintiff's position in this case, and having submitted hereinabove that the parcel of land set aside by the late Swaleh Nguru was a Wakf and consequently became trust property, it was not amendable for sub - division and/or alienation to third parties, it was their submission that the Madrassa could not be said to have encroached and/or trespassed on Plot no. Mombasa/Block/XV/222.

81. According to the Learned Counsel, in the Black Law Dictionary 11th Edition Thomson Reuters Page 667 encroachment is defined as “infringement of other's right, interference with or intrusion onto another's property”. Trespass at page 1810-1811 is defined as “wrongful entry on another's land which may take the form of continuing, innocent, permanent, ab initio”.

82. Retrospectively, because the madrassa was built in the year 1962 before sub - division of the then parcel of land into 2 parcels of land including the suit property, it could not be said that the Madrassa encroached and/or trespassed onto Plot No. Mombasa/Block/XV/ 222. But for arguments sake that the presence of the substantive portion on Plot No. Mombasa/Block/XV/222 was in Issue, they drew the Courts attention to the fact that the Plaintiff's late father, Mr. Salim Nyenye Ahmed had openly operated the Madrassa without interruption from anyone since the year 1962. After his demise in the year 2004, the Plaintiff took over the running of the Madrassa without any interruption.

83. Therefore, any subsequent purported acquisition of any interest in the suit property by any party could only be subject to the unregistered rights of the late Salim Nyenye thereon. In a manner of speaking, the occupation of the Madrassa on Plot No. Mombasa/Block/XV/222 had since become adverse to that of the Defendants. It was only fair and just that the status quo that has prevailed on the suit property since the year 1962 be respected. Ringera J in the case of: “James Obande Wasui – Versus - Jeremiah Ochwada Musumba [2002] eKLR” held that:-

“As I understand the law, perspective rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof.”

84. In the cited case, the Court went further to state that the change of ownership would not affect any rights the Plaintiffs may have acquired prior to the changes as they were in possession.

85. The Learned Counsel on whether the Plaintiff had proven his case against the Defendants on a balance of probabilities submitted that the burden of proof in civil cases is on the balance of probability which was defined in the case of “Kanyungu Njogu – Versus - Daniel Kimani Maingi [2000] eKLR” that when



the court was faced with two probabilities, it could only decide the case on a balance of probability, if there has evidence to show that one probability was more probable than the other.

86. Without rehashing the facts of this case which remained substantially undisputed, it was clear that the substantial portion of Madrassatul Hassaniya was erected in Plot No. Mombasa/Block/XV/222. Testimony by the Defendants had confirmed that Madrassatul Hassaniya had been on the suit property together with plot No. Mombasa/Block/XV/223 prior to the purchase of the suit plot by the 1st and 2nd Defendants from the 3rd and 4th Defendants and as far back as the year 1962.
87. The Plaintiff had adduced evidence to demonstrate that in the year 2003, the late Mr. Salim Nyenye Ahmed made payment to the 3rd and 4th Defendants in an effort to assist him acquire title to the portion of land where the Madrassa was built. Evidence on the record demonstrates that on 26th January 2004 a transfer from the 3rd and 4th Defendants to the Wakfu of Madrassatul Hassanita Salim Nyenye Ahmad was effected and a title to Mombasa/Block/XV/ 223 Issued in the name of the Wakfu. Evidence on record also shows that as at 1992, the 3rd and 4th were registered as the proprietors of plot No. Mombasa/Block/XV/222. This position confirmed that a subdivision had been undertaken without regard to the presence of the madrassa on the parcel of land.
88. While it goes without saying, the reasonable expectation of the late Salim Nyenye Ahmed was that he would obtain title for the entire parcel where the Wakfu of Madrassatul Hassanita had been erected. This was not the case. Further, the suit property is and had always been a Wakf property. The Madrassa had stood on the suit property all along from the year 1962 when it was constructed. The Madrassa had always been used for the purposes of teaching and learning Islam and had been of great benefit to the public at large. The balance of probability therefore in the circumstances of this case, tilts in favor of the Plaintiff and asked this Honorable Court to find as such.
89. On whether the Plaintiff was entitled to the reliefs sought in the Plaintiff. The Learned Counsel submitted that the Plaintiff's claim against the Defendants as it was, not solely pegged on the interest that the Plaintiff would benefit from the suit property per se, but on the interest of the general public, especially those interested in learning in the learning of Islam.
90. As it is, any act or omission directed towards the suit property that would interfere with the already erected Madrassa would occasion irreparable injury that cannot be adequately compensated. This was because, the wishes of the late Swaleh Nguru would be disrespected and this would be against the Wakf created thereon and the current Madrassa students. The future generations would also be deprived of the opportunity to learn and teach Islam.
91. In conclusion, the Learned Counsel submitted that the Honourable Court should look at the case in totality, that the Plaintiff was entitled to the reliefs sought in the Plaintiff and they asked the Honorable Court to grant the relief as prayed.

B. The Written Submissions by the 1st & 2nd Defendants

92. The 1st and 2nd Defendants through the Law firm of Messrs. Michael Itona Advocates filed their written submissions dated 22nd July, 2024. Mr. Gitonga Advocate commenced his submissions by recounting on the background of the case. He stated that before the Honourable Court was a Plaintiff dated 21st October, 2015 and filed on 4th November, 2015 with the Plaintiff seeking the above stated reliefs.
93. According to the Learned Counsel on 29th July, 2016, Hon. Lady Justice A. Omollo allowed the consolidation of the current suit with two other suits filed in the Magistrates Court by the 1st and 2nd Defendants herein, that is – “Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus- Salim Nyenye and Mombasa Senior Resident Magistrate's Court Civil



Suit Number 2316 of 2012 Muslim Education & Welfare Association-versus-Wakfu of Madrasatul Hassaniya” for further hearing and determination.

94. Hence, it followed that the 1st and 2nd Defendants adopted the contents of their Plaints in the Civil case “Mombasa Senior Resident Magistrate Civil Suit Number 4694 of 2003; Awadh Ali Slem -Versus- Salim Nyenye and Mombasa Senior Resident Magistrate’s Court Civil Suit Number 2316 of 2012 Muslim Education & Welfare Association - Versus- Wakfu of Madrasatul Hassaniya” respectively as their defence in the instant suit.
95. On the Issues for determination, the Learned Counsel submitted that from the parties’ pleadings, and from the evidence adduced by the parties during the hearing of the case, the following three (3) Issues for determination.
- a. Whether the subdivision of the initial plot of land to Mombasa/Block/XV/222 and Mombasa/Block/XV/223 was illegal and fraudulent.
 - b. Whether the Madrasatul Hassaniya Salim Nyenye Ahmed has encroached and/or trespassed onto parcel no. Mombasa/Block/XV/222.
 - c. Costs.
96. On the first Issue, the Learned Counsel submitted that there was no doubt that the suit property was owned by the late father to the 3rd and 4th Defendants herein. The late father to the 3rd and 4th Defendants gave ‘Part’ of the suit property to the deceased father of the Plaintiff for purposes of building a mosque. At the time the late father to the 3rd and 4th Defendants was donating part of the suit land to the late father of the Plaintiff; the suit land was un-surveyed.
97. The Learned Counsel submitted that the 3rd and 4th Defendants herein, being the beneficiaries to the estate of their late father, legally caused the suit property to be surveyed and titles were Issued in their names. The Plaintiff’s late father Salim Nyenye Ahmad, later approached the 3rd and 4th Defendants being the sons and beneficiaries of the Estate of the late Swaleh Nguru, to assist with the process of securing the title deed to the parcel of land donated by their late father for purposes of building Madrasa.
98. The 3rd and 4th Defendants openly agreed and caused the suit parcel of land known, be sub - divided giving rise to Mombasa/Block/XV/222 and Mombasa/Block/XV/223. In line with the wishes of their late father of donating part of the suit property to the Plaintiff’s late father, for purposes of building Madrassa, the 3rd and 4th Defendants caused the parcel of land now known as Mombasa/Block/XV/223 to be transferred to the Wakfu of Madrassatul Hassaniya Salim Nyenye Ahmad in the year 2004.
99. The Learned Counsel contended that there was no illegal or fraudulent sub - division of the suit property as the 3rd and 4th Defendants were only fulfilling, the wishes of their late father by allowing part of the suit property, be used to further the Islamic religion by building madrassa on it. The Plaintiff was trying to misdirect this Honourable court, by purporting that the late father to the 3rd and 4th Defendants donated the entire suit property to the Plaintiff’s late father.
100. The Plaintiff had however, failed to adduced evidence to show and prove that indeed the late father to the 3rd and 4th Defendants created a wakf over the whole suit property, and in any case, without prove of a Valid wakf document, the property owned by the late father of the 3rd and 4th Defendants,



automatically formed part of his estates as was the case in “Fatuma Yusuf Aroi – Versus - Juma Lail & 5 others [2020] eKLR”, where it was observed that:-

“.....It is not in dispute that the suit property was owned by the deceased Yusuf Aroi. The property automatically passes on to his estate unless there is proof that the Wakf was valid.”

101. It was their humble submission that the Plaintiff had failed to prove to this court that the Wakf purportedly created by the late father of the 3rd and 4th defendant, was for the entire suit property as opposed to part of the suit property. A Wakf and or Wakf was created legally on the 26th January 2004, after the 3rd and 4th Defendants caused land known as Mombasa/Block/XV/223 to be transferred and registered in the names of Wakfu of Madrassatul Hassaniya Salim Nyenye.

102. According to the Learned Counsel, the provision of Section 14(3) of the Waqf [Act No 8 of 2022](#), provides that:-

“Every trustee of a waqf shall, within three months from the date of the establishment of the waqf, apply to the Commission for its registration in the prescribed manner.”

103. The Learned Counsel averred that since a Wakf was created on property known as Mombasa/Block/XV/223 by the 3rd and 4th Defendants herein, the Plaintiff had never registered the said Wakf, in accordance with the provisions of the Wakf [Act No 8 of 2022](#) and could not therefore purport, to be a trustee of the Wakf created on the property known as Mombasa/Block/XV/223. The Plaintiff by virtue of the Waqf [Act No 8 of 2022](#) had no authority to legally deal with the Wakf created on property known as Mombasa/Block/XV/223, and as such, his claim should fail and be dismissed with costs.

104. The Plaintiff’s argument that the late Salim Nyenye Ahmad has adversely acquired part of property known as Mombasa/Block /XV/222, by virtue of the Madrassa remaining open and in defiant use and occupation of the land, without their permission and interruption for a continuous period of over 12 years was wrong and misplaced. The late father of the Plaintiff was given permission by the 3rd and 4th Defendant’s late father, to operate a madrasa for the purposes of nurturing the Islamic religion. The 3rd and 4th Defendants were equally aware of the same and impliedly gave permission to the operation of the madrasa by the Plaintiff and his late father.

105. To buttressed the case, the Learned Counsel relied on the case of “Oko – Versus – Mbugua & Another (Environment & Land Case E034 of 2021) [2023] KEELC 21338 (KLR)” the Court observed that:-

“In the case of [Samuel Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No.122 of 2001](#), the Court of Appeal delivered the following dictum:

“it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”

106. They submitted that the Plaintiff and his late father had been given permission to operate madrasa on the suit property, by the 3rd and 4th Defendant’s late father and as such the claim of adverse possession cannot arise. The suit property was neither illegal nor unlawful, as the suit property formed part of the estate of the late father to the 3rd and 4th Defendants and that, the sale and transfer of Mombasa/Block/XV/222 to the 2nd defendant was legally done.

107. On the second, the Learned Counsel submitted that there was adduced a Surveyor’s Report - Mombasa/Block XV/222 dated 29th September, 2015 done by R.M Ndambuki, with the credentials



of a District Surveyor before this Honourable court. The Report clearly indicated at the last paragraph that ‘...There is a swahili house and mabati fencing encroaching on the plot Mombasa/Block XV/222.....’. The Surveyor further attached a diagram showing the encroachment on the said plots.

108. From the report, there is no doubt that indeed there is encroachment on property known as Mombasa/Block/XV/ 222, which was private land. This Honourable Court should find that the owner of Mombasa/Block/XV/223 had encroached on property known as Mombasa/Block/XV/222, and that necessary legal steps be taken to remedy the situation.
109. In conclusion, the Learned Counsel submitted that the Plaintiff’s Plaint dated 21st October, 2015 and filed on 4th November, 2015 be dismissed with costs to the Defendants.

IX. Analysis and Determination

110. I have keenly assessed the filed pleadings by the Plaintiffs and Defendants herein, the written submissions, the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
111. 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. Who is the sole proprietor of the suit property known as land reference numbers Mombasa/Block/ XV/222 and Mombasa/ Block/ XV/223.
 - b. Whether there was fraud and misrepresentation perpetrated by the 3rd and 4th Defendants?
 - c. Whether the Plaintiff is entitled to the orders sought in the Plaint
 - d. Who bears the costs of the suit?

Issue No. A. Who is the sole proprietor of the suit properties known as land reference numbers Mombasa/Block/XV/222 and Mombasa/ Block/ XV/223.

112. Before embarking on the analysis of the Issues herein, as indicated the Honourable Court wishes to share the Site Visit report herein.

The Site Visit Report

Republic Of Kenya

In The Environment And Land Court

At Mombasa

Elc. 276/2015

Site Visit (“locus In Quo”) Report At Mewa Hospital At Majengo Ya Musa, Mombasa On 17th May, 2024 AT 3.00 P.M.

I. Introduction.

1. The Site visit was conducted on the 17th May, 2024 pursuant to the request by the parties and thus a Court order Issued to that effect. The site was situated at Majengo ya Musa Plot Numbers Mombasa/Block/XV/223 and 224 respectively within the Main town of the County of Mombasa. Parties assembled at site as directed. It commenced through a word of prayers and directions provided by the Judge.



II. Court:

1. Hon. Justice L.L. Naikuni – ELC No. 3.
2. M/s. Firdaus Mbula – A Court Assistant.
3. Mr. George Omondi – An Usher.
4. Mr. John Mwaniki – A Driver.

III. Plaintiffs

1. M/s. Gitari Advocate.
2. Mr. Ibrahim Salim – The Plaintiff.

IV. Defendants

1. Mr. Gitonga – Advocate.
2. Mr. Salim Ghalgan – Chairman Board of Management.
3. Mr. Said Mohamed – A Board Member.
4. Mr. Mohamed Hassan – A Board Member.
5. Mr. Abbas Swaleh – A Land Surveyor.
6. Mr. Suleiman Maalim – A Land Surveyor.
7. Mr. Collins Oduor – A Land Surveyor.
(Hereinafter referred to as “The Team”.

V. Security Operatives

1. PC. Kaviti – The Judiciary security Unit.
2. PC. Masese – The Judiciary security Unit.

VI. The Purpose for the Site Visit.

2. The Honorable Court explained to the parties present the purpose for the site visit. It was stated that pursuant to a court directive made on diverse dates of 28th February, 2023, 20th February, 2024 and 19th March, 2024 respectively. By consensus of the parties, it was agreed that Site Visit be conducted eventually. It was noted that Court is empowered at any stage to inspect the property or thus concerning which a question may arise - in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

3. And order 40 Rule 10 (1)



(a) of the Civil Procedure Rules, to wit:-

Site Visit Elc E29 Of 2022 Page 2 Of 10 L. Naikuni (judge)

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(10) (1) “The Court may, on the application of any party to a suit, and on such terms as it thinks fit:-

(a) Make an order for.....Inspection of any property which is the subject matter to which any question may arise therein. Ideally the site visit - the Locus in quo was with a view of gathering further evidence on the access road to the suit land to assist it in its decision making functions and/or process.

Site Visit Elc E29 Of
2022 Page 3 Of 10 L.
Naikuni (judge)

4. Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred due to the likely hood of being abused particularly through Social media. The report has endeavored to make some salient findings in order to expedite the hearing and final determination of the case. VII. The Procedure
5. The team agreed by consensus that it be led by the Land Surveyors present from both the Plaintiff and the Defendants side. They experts agreed on using a tape to measure the sizes of the plots starting from Plot Numbers Mombasa/Block/XV/223 and 224 respectively. They would also endeavor to identify the planted beacons on the ground.

VIII. The Observations

6. Pursuant to conducting the intensive land surveying exercise, the team made the following observations. These were:-



- a. The site is situated within the midst of Majengo. On the ground Parcel Number Mombasa/Block/XV/222 is bigger than Mombasa/Block/XV/223. The Plot Number 222 measured approximately 15.07 by 11.42 Meters.
- b. There were several residential – permanent and semi – permanent houses and commercial entities built in the Swahili house versions.
- c. There numerous upcoming buildings. That is being under construction.
- d. The houses are separated from each other using a one (1) meter buffer. This is replicated in the whole of the majengo area. The explanation given was to allow escape or discourage the spread of accidental or unwanted fire break - downs. Unfortunately, in most aspects, the team noted this buffer zones are now misused for dumping of wastes particularly plastics.
- e. The access roads are very congested. They measure approximately 6 metres wide and thus cannot accommodate two vehicles at the same time.
- f. It is a highly populated area with lots of activities taking place therein.
 - a. In the nearby, there is a well structured Muslim Educational & Welfare centre. It comprises of some learning place and health centre - Mewa hospital & College.
- g. It has neat and properly done cabro – works to details.
- h. The team never saw any encroachment.

Conclusion & directions

7. Upon the conclusion of the site visit, the Court provided the following direction. These were:-
 - a. That the Plaintiff report filed on 29th September, 2015 to be adopted.
 - b. That both the Plaintiff and the Defendants granted 21 days each upon service to file their written submissions.
 - c. That the matter to be mentioned on 11th July, 2024 to ascertain compliance and take further directions.
 - d. That the honourable Court reserves 26th September, 2024 as the date to deliver its Judgment.

The Site Visit Report Was Made And Signed At Mombasa On This 11th Day Of July 2024.



Hon. Justice L. L. Naikuni
Environment And Land Court At
Mombasa

113. Under this sub - title the Court shall discuss the main substratum of the suit herein being the ownership of the suit properties with the guidance of the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#) 2012 No. 3 of 2012. The provision of Section 24 of the Act 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.”

114. While 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.”

115. 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.”

116. The Plaintiff has averred that he took over the running of the Madrassa after the demise of his late father Salim Nyenye Ahmad. The Madrassa was built on what is now known as land reference numbers Mombasa/Block/XV/222 and Mombasa/Block/ XV/223. The Madrassa was initially constructed on the 2 parcels of land, then un-surveyed, in the year 1962 by the late Salim Nyenye Ahmad. The late Salim Nyenye Ahmad built the Madrassa with the permission of one late Swaleh Nguru who owned the un-surveyed land at that point in time. The late Swaleh Nguru had permitted the late Salim Nyenye Ahmad to erect a Madrassa thereon for purposes of teaching and learning Islam. The late Swaleh Nguru had therefore donated the entire parcel of land to the late Salim Nyenye Ahmad to be used for purposes of furthering the Islam faith. The late Swaleh Nguru was the late father to the 3rd and 4th Defendants. Madrasatul Hassaniya has been on the parcels of land from 1962 to date and has always been used for purposes of teaching and learning Islam as per the wishes of the late Swaleh Nguru and the late Salim Nyenye Ahmad.

117. Later on, in the year 1992, the whole un-surveyed area around land parcel numbers Mombasa/Block/ XV/222 and Mombasa/ Block/XV/223 was surveyed and title deeds Issued to the proprietors of such land as appropriate in 1994. By this time, Swaleh Nguru had passed on. The late Salim Nyenye Ahmad then approached the 3rd and 4th Defendants being the sons and beneficiaries of the Estate of the late Swaleh Nguru to assist with the process of securing the title deed to the parcel of land where the Madrassa was erected. The 3rd and 4th Defendants requested the late Salim Nyenye Ahmad to avail Kenya Shillings Forty-Five thousand only (Kshs 45,000/-) in order for them to facilitate the process of



securing the title deed to the parcel of land where the Madrassa is built. The late Salim Nyenye Ahmad availed the requested cash.

118. Following this, the 3rd and 4th Defendants caused the parcel of land now known as Mombasa/Block/XV/223 to be transferred to the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad in the year 2004. Years after the demise of the late Salim Nyenye Ahmad, the Plaintiff came to learn that the 3rd and 4th Defendants had fraudulently and through misrepresentation caused the parcel of land where the Madrassa was built to be sub - divided into what was now known as Mombasa/Block/XV/222 and Mombasa/ Block/XV/223.
119. The Plaintiff had since learnt that after the alleged fraudulent and illegal sub - division as above, the 3rd and 4th Defendants then sold Mombasa/Block/XV/222 to the 2nd Defendant who in turn sold it to the 1st Defendant. By so doing, the 3rd and 4th Defendants sold land that had been donated and/or set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad for purposes of furthering the Islam faith. Consequently, the 1st Defendant therefore owned a title to Mombasa/Block/XV/222 where a substantial portion of the Madrassa lies. The lesser portion of the Madrassa lies on Mombasa/Block/XV/223, the land registered to the Wakfu of Madrasatul Hassaniya Salim Nyenye Ahmad. The title deed to Mombasa/Block/XV/222 shows the property was registered to the 1st Defendant.
120. It is also not in dispute that the 1st Defendant and the Wakfu are the registered proprietors of the suit properties. However it is these titles that the Plaintiff is challenging as envisaged under section 26 (1) (a) and (b) of the [Land Registration Act](#), No. 3 of 2012. The Issue of whose land these parcels are will only be adequately responded to upon causing further analysis hereinbelow.

Issue No. B. Whether there was fraud and misrepresentation perpetrated by the 3rd and 4th Defendants.

121. Under the other sub – title, the Honourable Court have already analyzed the contention of the legitimacy of the title and who it belongs to. It is trite that he who alleges must prove, as provided by Section 107 of the [Evidence Act](#), Cap. 80. The Plaintiff has alleged fraud as perpetrated by the 3rd and 4th Defendants. To this effect, the Plaintiff had a duty to prove the existence of such fraud. It is now well established in law that fraud must be specifically proved. See the case of “Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”, where the Court held:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

122. Additionally, this was the case in “Koinange & 13 others – Versus -Charles Karuga Koinange 1986 KLR at page 23”, where the court held that:-

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”



123. Although the suit against the 3rd and 4th Defendants was undefended, the Plaintiff has 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:-

“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 prove his case however much the opponent has not made a presence in the contest.”

124. The provision of Order 2 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 provides as follows: -

“(1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;”

125. I reiterate that it is trite law fraud must be proved on parameters beyond a balance of probabilities but below reasonable doubt. This principle of law was well elucidated in the well cited Court of Appeal decision of: “Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others [2015] eKLR” where the court expressed itself as follows: -

“As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.”

126. According to the Plaintiff, the 3rd and 4th Defendants:-

- a. Misrepresenting the exact particulars of the parcel of land where Madrasatul Hassaniya was built during the survey exercise.
- b. Causing the then un - surveyed parcel of land where Madrasatul Hassaniya is built to be surveyed and sub - divided into two parcels of land instead of it being surveyed and registered as a single parcel of land.
- c. Causing land that had been donated and/or set aside by the late Swaleh Nguru to the late Salim Nyenye Ahmad and his Wakfu for purposes of furthering the Islamic faith to be wrongly subdivided without the knowledge and consent of the Late Salim Ahmad Nyenye or his Estate or his Wakfu with a view to personally benefitting from the extra portion thereof.
- d. Transferring the suit property to the 2nd Defendant without the knowledge and consent of the Late Salim Ahmad Nyenye or his Estate and pocketing the proceeds thereof

127. To prove its allegation of fraud and misrepresentation committed by the 3rd and 4th Defendants were receipts marked as Plaintiff Exhibits numbers 2 and 3. The Title Deed in name of WAKF Madrassul Hassaniya for Mombasa Block IV/223 was Issued on 26th January, 2004 - see Plaintiff exhibit 4. Copy of Instrument of Transfer of Land was received on 26th January, 2004 and marked as Plaintiff Exhibit 5. Certified Copy of the Green Card in respect of Mombasa/Block XV/222. It was certified on 15th October, 2015 and was produced as Plaintiff Exhibit 6 Title in name of Muslim Education and Welfare Association in respect of Mombasa Block XV/222 was Issued on 23rd January, 2009 and marked as Plaintiff Exhibit number 7. The witness produced an Official search for Mombasa Block XV/222 dated



9th October, 2015 – Plaintiff Exhibit 8 copies of proceedings in “the CMCC No. 2316 of 2012 – Muslim Education and Welfare Association – Versus - Wakfu of Madrasaful Hassamiya” – Plaintiff Exhibit number 9.

128. A critical scrutiny and reassessment of these documents, I discern that they do not prove fraud to the required standards. I say so for several reasons. Firstly, at no point did the Plaintiff produce any document to show that his late father had an agreement with the late father of the 3rd and 4th Defendants. As an empirical evidence, the agreement forms the pith and substance of this matter. Its an integral part of the transaction. On this basis, any particulars of fraud touching on modalities of the succession of the Estate of Swaleh Nguru was bound to fail against the Plaintiff. Indeed, in his cross examination he acknowledged there was no agreement. Secondly, in as much as he claimed there were witnesses to the agreement, he did not call those parties to court to substantiate nor adduce evidence to this effect.
129. Thirdly, there was no prove that the late father of the 3rd and 4th Defendants created Wakf over the entire suit land. In that case, there should have been a valid Wakf document produced in Court which was not the case.
130. Fourthly, I fully concur with the evidence adduced in Court and the contention by the Counsel for the 1st and 2nd Defendants to the effect that a Waaf of Wakf was only created legally on 26th January, 2024. This was after the 3rd and 4th Defendants caused the land Mombasa/Block/XV/223 to be transferred and registered in the names of Wakfu of Madrassatful Hassannya Salim Nyenye. However, despite of that, the Plaintiff has never registered the Wakf as required by the provision of Law – Section 14 (3) of Wakf [Act No. 8 of 2022](#).
131. Additionally, the Plaintiff was not able to prove that fraud was perpetrated in the registration of the title in the names of the 3rd and 4th Defendants and was unable to prove that the registration of the suit properties was done and marred with irregularities. For these reasons therefore, I hold that the Plaintiff has failed to establish their case in Preponderance of probabilities.

Issue No. C. Whether the Plaintiff is entitled to the orders sought in the Plaintiff

132. Under this substratum, the Honourable Court shall examine the prayers sought by the Plaintiff. The Plaintiff has sought declarstions that the substantial portion of Madrassatul Hassaniya erected or built on Mombasa/Block/XV/222 is rightfully erected or built thereon and that the registration of the Mombasa/Block/XV/222 in the names of the 3rd and 4th Defendants resulted in the creation of a trust in favor of the Wakfu of Madrassatul Hassaniya Salim Nyenye Ahmad.
133. Legally speaking, the rights of a registered owner are however subject to overriding interests declared by the provision of Section 28 of the [Land Registration Act](#), No. 3 of 2012 as not requiring noting in the register. Section 28 of the [Land Registration Act](#) which is similar to Section 30 of the Registered [Land Act](#), Cap. 300 (repealed) provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a)
- (b) trusts including customary trusts;”



134. Customary trust was well explained by the Supreme Court in the case of “Isack Kieba M’inanga – Versus - Isaaya Theuri M’Lintari & another [2018] eKLR”, where it held as follows:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

135. In the present case, the Plaintiff has pleaded customary trust in the suit land. The 2nd Defendant’s case was the absolute registered owner of the suit land pursuant to the sale by the 3rd and 4th Defendants before he sold the same to the 1st Defendant. The provisions of the law above are to the effect that the overriding interest such as customary trust need not be noted in the Register of the suit land.

136. Therefore, it follows that registration of a person as a proprietor of land does not preclude him from holding an interest in trust for another. Customary trust is an encumbrance on land. These are non - registrable rights which run with the land. They are overriding. They subsist on the land. In the case of “*Kanyi – Versus - Muthiora (1984) KLR 712*”, the Court stated that;

“The registration of the land in the name of the appellant under the Registered *Land Act* (Cap 300) did not extinguish the respondents rights under Kikuyu Customary Law and neither did it relieve the appellant of her duties or obligations under section 28 as trustee.....The trustees referred to in section 28 of the Act could not be fairly interpreted and applied to exclude a trustee under Customary law, if the Act had intended to exclude Customary law rights it would have been clearly so stated.”

137. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that: -

- (a) the suit properties were ancestral clan land;
- (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family;
- (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.



138. In the case of “Njenga Chogera – Versus - Maria Wanjira Kimani & 2 Others [2005] eKLR”, which quoted with approval the holding in the case of “Muthuita – Versus - Muthuita [1982 – 88] 1 KLR 42”, the Court of Appeal held that customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless there was intention to create a trust in the first place. In the case of:- “Peter Ndungu Njenga – Versus - Sophia Watiri Ndungu [2000] eKLR”, the Court held:-
- “The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
139. The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied. This state of affairs appears to be similar in some aspect with the instant case. As stated above, it is trite that customary trust must be proved. The Plaintiff has not show how the suit property was a trust in as much as he produced receipts showing that the father had paid money for the registration of the suit property he could not prove that the money was indeed paid by the deceased.
140. From the above analysis and based on the evidence adduced and weighing it on a balance of probabilities, the Court finds and holds that customary trust did not subsist on the suit land in favor of the Plaintiff herein as claimed. Therefore, prayer number 1, 2 and 3 of the Plaintiff cannot succeed.
141. With regard to the cancellation of the title held by the 1st and 2nd Defendants, the Court has already held that the property belongs to the 3rd and 4th Defendants. Hence as the sole proprietors they have a right to sell. Therefore, prayers numbers 4 and 5 of the Plaintiff must fail. It follows that all the other prayers by the Plaintiff fail by virtue of him not proving his case against the Defendants.

Issue No. D: Who bears the costs of the suit

142. 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.
143. 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.”

144. In the present case, for the fact that the Plaintiff has not proved his claim. Thus, the 1st and 2nd Defendants shall have the costs of the suit for participating in the suit.

X. Conclusion and Disposition

145. 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. For avoidance of doubt, 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 21st October, 2015 filed on 4th November, 2015 with costs to the 1st and 2nd Defendants.
- b. That an eviction order do and is hereby Issued against Wakfu of Madrasatul Hassaniya and any other person currently on Plot No. Mombasa/ Block XV/222 and further the demolition of the structures and the houses built by the Plaintiff on Plot No. Mombasa/ Block XV/ 222.
- c. That costs of the suit to be awarded to the 1st and 2nd Defendants but not the 3rd and 4th to be borne by the Plaintiff herein.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF JANUARY 2025.

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.

M/s. Nancy Gitari Advocate for the Plaintiff.

No appearance for the 1st, 2nd, 3rd & 4th Defendants.

