



**Omar v Juma (Administrator of the Estate of the Late Khamis Juma) (Environment & Land Case 60 of 2022) [2025] KEELC 4291 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4291 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 60 OF 2022**

**LL NAIKUNI, J  
MAY 30, 2025**

**BETWEEN**

**ABDDULRAHMAN MOHAMED OMAR ..... PLAINTIFF**

**AND**

**AZIZA KHAMIS JUMA (ADMINISTRATOR OF THE ESTATE OF THE LATE  
KHAMIS JUMA) ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to the Plaint dated 30<sup>th</sup> May, 2022 and filed on 31<sup>st</sup> May, 2022 by Abdulrahman Mohamed Omar, the Plaintiff herein against Aziza Khamis Juma (Administrator of the estate of the Late Khamis Juma the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant filed her memorandum of appearance dated 17<sup>th</sup> June, 2022 and a Statement of Defence dated 14<sup>th</sup> July, 2022 and filed on 15<sup>th</sup> July, 2022 accordingly.

**II. Description of the Parties in the suit**

3. The Plaintiff was described as a male adult of sound mind, residing and carrying out business in the County of Mombasa within the Republic of Kenya.
4. The Defendant was described as a female residing and working for gain in County of Mombasa within the Republic of Kenya.

**III. Court directions before the hearing**

5. Nonetheless, on 23<sup>rd</sup> February, 2023, the Honourable Court fixed the hearing dated on 19<sup>th</sup> June, 2023 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010



and the matter proceed for hearing on 19<sup>th</sup> June, 2023 by way of adducing “viva voce” evidence with the Plaintiff’s witnesses testifying in Court whereby they closed their case and the Defendant’s called her witnesses on 15<sup>th</sup> October, 2024 and closed their case thereafter.

#### **IV. The Plaintiff’s case**

6. From the filed pleadings, at all material times to this suit, the Plaintiff was the registered proprietor of all that parcel of land known as Sub - Division 4379 (original number 862/2 Section I Mainland North); C.R.19749 located at Bamburi in Mombasa. The Defendant was and still is the duly appointed Legal administrator of the Estate of the late Khamis Juma and the deceased was a ground rent paying tenant to the late Salma Abdulla who was also a joint-proprietor of Subdivision 4379 (original number 862/2 Section I Mainland North); C.R.19749 located at Bamburi in Mombasa.
7. At the time of his demise, a notice dated 27<sup>th</sup> August 2013 on termination of his tenancy had been served upon him for refusing and/or neglecting to pay the arrears of ground rent demanded and was indeed required to vacate the premises and a suit was filed for vacant possession & recovery of rent arrears of Kshs. 36,000/- being “Rmcc No. 1367 of 2014 - Salma Abdulla - v - Khamis Juma”.
8. The Plaintiff had just discovered that on the 16<sup>th</sup> October 2014, the Defendant was Issued with a Certificate of confirmation by HON. Lady Maureen Odero in succession cause no. 296 of 2012 in the matter of the estate of Khamis Juma Kiriba (deceased)” and the said Defendant had misrepresented facts by purporting that the deceased owned one - quarter (1/4) of an acre extracted from Sub - Division NO. 4379 (Original No..862) Section I(Mainland North) and at the time that the said judge was making the aforesaid orders, the property was registered in the joint names of the Plaintiff & Salma Abdulla H.
9. According to the Plaintiff, the Defendant was fully aware that they did not own any part of the subject suit and indeed were only tenants paying ground rent to the Plaintiff family and at the time RMCC NO.1367 OF 2014 Salma Abdulla v Khamis Juma was being filed in court, they were in rental arrears of a sum of Kenya Shillings Thirty Six Thousand (Kshs. 36,000/-) and had been given a notice to vacate from the afore-said parcel of land. Upon discovery that the Defendant had misled the afore said succession High Court, the Plaintiff had moved the said court with a notice of motion to set aside, vacate and/or revoke the confirmation orders Issued on the written grant of representation & same be annulled.
10. Further the Plaintiff stated that based on the Certificate of Confirmation by the afore – mentioned High Court succession cause the Defendant proceeded with her fraud to purport to be the owner of the said property and even began selling plots therein to innocent purchasers whilst promising them that the title documents are being processed and has even attempted to prepare a sub-division scheme covering the aforesaid portion of land with strangers invading the land of the Plaintiffs hence causing substantial loss to the Plaintiff who was unable to access his land and take possession of the same due to the fraud committed by the Defendant.
11. The Plaintiff relied on the following particulars of fraud of the Defendant;
  - a. The Defendant misrepresented to the court that they own one-quarter of the subject land which was a fraud and a lie.
  - b. The Defendant has taken possession of a portion of the land and sold, to strangers plots purporting to be the registered owner which fact is very false.
  - c. The Defendant is attempting to produce a separate subdivision process with the aim of obtaining title deeds which indeed would be fake.



12. The Plaintiff relied on the following particulars of loss and damages of the Defendant;
  - i. The Plaintiff was being denied access and possession of the whole land due to the illegal activities of the Defendant.
  - ii. The Plaintiff was entitled to the quiet & enjoyment of his property which he had been denied due to the illegal activities of the Defendant.
  - iii. The Plaintiff could not gain any income from the said property which income is wrongfully being given to the Defendant a fraudster purporting to be the owner of the subject land.
13. The Plaintiff further averred he had verbally engaged the Defendant to stop their illegal activities of trespassing and/or interfering with the suit property but the Defendants have ignored his request and was blatantly carrying out illegal activities on the suit land. Despite demand and notice of intention to sue the Defendants had failed to comply, hence this suit.
14. According to the Plaintiff he stood to suffer irreparable loss in the event that the Defendants/ Respondents continue with their illegal activities that are indeed detrimental to the Plaintiff. There was no other suit pending and there had been no previous proceedings in any Court between the Plaintiff and the Defendant over this cause of action. The Plaintiff acknowledged the jurisdiction of the court.
15. The Plaintiffs prayed for Judgment entered against the Defendant for:-
  - a. A declaration that the Defendant and/or other administrators of the estate of the deceased Khamis Juma have no proprietary interest on the Plot No.4379/i/MN that wholly belongs to the Plaintiff who is the registered title deed holder.
  - b. Orders of injunction restraining the Defendants themselves, their employees, servants and/or her Agents or assignees and/or any other person acting under them from further trespassing upon, and/or in any manner whatsoever interfering with the Plaintiff's use, possession and quiet enjoyment of all that parcel of Land known as Plot No.4379/I/MN located at Bamburi in Mombasa Municipality.
  - c. Demolition of the illegal structures constructed by the defendants and/or their agents/ assignees or any other person acting under them.
  - d. The defendant themselves, their employees, servants and/or her Agents or assignees and/or any other person acting under them be evicted from Plot No.4379/MN and vacant possession be given to the plaintiffs.
  - e. Mesne profits be awarded to the plaintiffs herein for the duration of the time trespassed by the defendants.
  - f. Costs of and incidental of this suit.
16. The Plaintiffs called their witness - PW - 1 on 19<sup>th</sup> June, 2023 at 3.30 pm where he averred that: -

**A. Examination in Chief of PW - 1 by Mr. Tindi Advocate.**

17. PW - 1 testified on oath in English/ Swahili language. He identified himself as being Abdulrahman Mohamed Omar. He was a citizen of Kenya with all the particulars as found in the national identity card showed to Court. He filed a statement dated 1<sup>st</sup> May, 2022 and he adopted the same as his evidence in chief and list of seven (7) documents dated 8<sup>th</sup> July, 2022 marked as Plaintiff Exhibits Numbers 1 to 7.



18. In June 2013, he filed a Certificate of Title Deed on 16<sup>th</sup> June, 2023 marked as Plaintiff Exhibit number 8 and a supplementary list of documents – receipts of rates Plaintiff Exhibit number 9. He was the legal owner to the property. The Defendant was as ground rent tenant.

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

19. PW - 1 confirmed that he was 77 years old and resided both in Kenya and Germany. The original owner of the suit property in fee simple Ali Ahmed Salle and the original file was No. 862. He was not aware of another Claimant to the suit property. The witness was aware there were court cases before over the Claimant i.e. purchasers interest. At the time he was testifying there were no court cases. The suit land measured 0.6247 - 1 ½ Acres. The original owner Ali Ahmed Salle was his maternal uncle. The title deed was Issued on 18<sup>th</sup> October, 1989 – Ahmed Ali Salle; who passed away. PW - 1 was not in Kenya; he was in Germany most of the time. Ali Ahmed Salle was living alone and was buried by the people around him in Mombasa.
20. PW - 1 reiterated that the suit land was an inheritance property. It as Mr. Abdalla Salle who inherited from Ahmed Ali Salle in the 2000 i.e. the brother. The witness told the court that he met Mr. Abdalla Salle several times. After Abdalla transferred the land to his mother Salma Abdalla; in the year 2005 PW - 1 was given ½ share of the property. He visited the land several times. After his mother passed on; PW - 1 got her share and hence had full entitlement to the whole parcel of land.
21. With reference to paragraph 4 of the Plaint, PW - 1 reiterated that Khamis Juma – the deceased was a ground rent paying tenant to the late Salma Abdulla. The witness did not have the agreement between them. Initially they used to pay ground rent through Khalid Salim Advocate but they stopped. There were no receipts. He assumed they used to be ground rent i.e. Khamis Juma was paying ground rent. There were no receipts or agreements to show Khamis Juma was paying rent to Ahmed Ali. PW - 1 was not aware whether Ali Ahmed Salle had initiated any case against Khamis Juma. There were no receipts or agreement between Abdalla Salle and Khamis Juma.
22. PW - 1 told the court that he was not living in Kenya. Whether Abdalla filed any case against Khamis Juma; the witness was unaware of the same. His mother inherited the property in the year 2004. PW - 1 told the court that he was not aware whether she had entered with the deceased. There were no receipts or agreement between the deceased and his mother. From 2004 his mother sued the deceased in the Lower Court. Between years 2004 and 2014, there was no actions by his mother. On being referred to the contents of Paragraph 7 of the Plaint, the Plaintiff reiterated that the civil case “RMCC No. 1367 of 2014 Salma Abdalla – v – Khamis Juma”. From that case his mother was demanding for ground rent and vacant possession – that was for a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). The monthly rent was for a sum of Kenya Shillings Five Hundred (Kshs. 500/-) per month.
23. According to PW - 1 from the year 2004 to 2014 i.e. 11 years per year being a sum of Kenya Shillings Six Thousand (Kshs. 6,000/-) which amounted to a sum of Kenya Shillings Sixty Six Thousand (Kshs. 66,000/-) for 11 years yet she demanded for a sum of Kenya Shillings Thirty Six Thousand (Kshs. 36,000/-). PW - 1 further averred that his mother knew Khamis Juma and they met severally but he was never there. On being referred to the contents of Plaint at Paragraph 5, the witness told the court that a notice dated 27<sup>th</sup> August, 2013 on termination of his tenancy had been served upon him for refusing and neglecting to pay the arrears of the ground rent demanded for.
24. PW - 1 told the court that he did not know that by the time his mother filed the case in the year 2014 Khamis Juma had already died. They would serve them and there was no response to the summons neither did they come to court when required to attend. Khamis Juma was served through a court



- bailiff. The first court action was filed in the year 2014 against Khamis Juma. The witness stated that he went to serve the deceased's son at their premises – a normal Swahili house.
25. On being referred to Paragraph 9 of the Plaintiff. The PW - 1 stated that he discovered there were Sub - Divisions of the plot and were selling the suit property. They had nothing to prove their allegations; they were claiming  $\frac{1}{4}$  which was theirs and they were the ones who were selling out to the 3<sup>rd</sup> Party. On the  $\frac{1}{4}$  acre there were structures on it. There was no open space on the  $\frac{1}{4}$  acre. The witness recalled that he said there was no space on the  $\frac{1}{4}$ . PW - 1 had never filed any case challenging the Letters of Administration. He had sued Aziza Khamis Juma – the Administrator of the Estate of late Khamis Juma as she was claiming.
26. The witness told the court that he had never applied for cancellation or annulment of the Grant of Letters of Administration. With reference to the Plaintiff at paragraphs 6 and 8; the witness told the court that he still insisted he did not make such application. He did not have any evidence to the effect that the plot was sold to 3<sup>rd</sup> parties. The witness was not aware of what was on the  $\frac{1}{4}$  acre – which they were claiming to be their portion. The witness did not know whether they would be there after they dealt with the deceased. From the Plaintiff, he had suffered a lot and could not access the land. From the whole land there was nobody paying rent i.e. from the 2  $\frac{1}{2}$  acres. The witness asked the people to pay him but they had refused to pay him as they claimed that they had been paying Aziza. The persons on the land had denied him entry to the entire Plot No. 4379 – measuring 2.5 acres. On the property there were units built by different people. Aziza had built on  $\frac{1}{4}$ . PW - 1 told the court that he did not know them and he did not have any house on the land. They were about 25 units.
27. Further the witness told the court that he could not recover any rental income from these units. He told the court that the persons had sold the entire land and units. PW - 1 did not know Aziza at all and had only met her after the Court case. PW - 1 did not know the heirs of Khamis Juma; he had never engaged them at all. He had never Issued any notices to the heirs – to vacate from the land. It was all being done through the Advocate. He bought land and left his title deed with his children which they would be entitled to pursue the said property. The witness had never preferred any complaint against Aziza on the allegations of fraud. Khamis died in 10<sup>th</sup> September, 1979 and his mother died in year 2020. He knew Ali Mchangamwe; he resided on the land at Bamburi; the witness did not know for how long he had lived there. He had known him for over 10 years. He had met the chief of the area. They had resided on the same was but not on the suit land.

**C. Re - examination of PW - 1 by Mr. Tindi Advocate.**

28. PW - 1 confirmed that the original owner of the land was Ali Bin. Ahmed Swaleh as shown on the title deed. The land was then transferred to Abdalla Swaleh. The latest entry was him – Abdulrahman Mohamed Omar. From the title, there were no encumbrances. With reference to the demand notice from the Advocate to Khamis Juma PW - 1 reiterated that as they were not paying rent – the letter was written in the year 2013. By then the advocate confirmed there were tenants. From the place there was normal Swahili house. The witness confirmed that Aziza only had a Swahili house. The Defendant was relying on a sale agreement.
29. PW - 1 reiterated that he did not recognize the agreement as there was no original title. The name of the seller who sold the  $\frac{1}{4}$  acre did not appear/ feature on the title deed. When he went to the land area i.e. in the year 2014; they told him they only knew Aziza and nobody else. After the Judgment from the Court PW - 1 came to learn that they put the land in their grant. He prayed for the Court to cancel the title to the  $\frac{1}{4}$  acre and for him to be given vacant possession of the land.
30. The Plaintiff called PW - 2 on 14<sup>th</sup> May, 2024 who testified as follows:-



#### **A. Examination in Chief of PW - 2 by Mr. Tindi Advocate.**

31. PW - 2 testified under oath in Kiswahili language. He identified himself as Halfan Shaban Boma. He was born in year 1947 thus 80 years old. PW - 2 signed a witness statement dated 8<sup>th</sup> July, 2022 which was adopted as evidence in chief. The witness had retired in the year 1990 from Mombasa Beach Hotel as a painter. The witness knew the family of Aziza Khamis Juma for a long time. After retirement he became a village elder (“Mzee a Mtaa”) which was for more than 15 years at Bamburi area of the County of Mombasa. He had known the family of Salma Abdalla since the year 1990. He knew the land in question it belonged to Ahmed Ali. He was the son of Abdulrahman. The witness knew Aziza Khamis Juma; He had a house in the said land.
32. PW - 2 told the court that he knew Salma; when she died in the year 2019, she left the land to Abdulrahman Mohamed Omar. According to the witness, when Salma was alive there was a dispute between her and Aziza Khamis Juma. They were being asked to pay the ground rent. What he knew was that Aziza Khamis Juma was on his portion – 10 acres - elsewhere – at Bamburi Msalani. But he left the land and came to settle.
33. He knew the family of Khamis Juma though told the land belonged to Salma they refused to accept it. The dispute was heard by the Provincial Administration – the DO and the Chief and who confirmed that the land belonged to Salma. Although they claimed some portion of the land but they never tabled any documents in support of the said claim. They were only tenants on the arrangement of “House without land” on the land belonging to the Plaintiff.

#### **B. Cross examination of PW - 2 by Mr. Abdalla Advocate.**

34. PW - 2 reiterated that he only knew part of the family of Abdulrahman Mohamed Omar. Salma used to live in Gasi – the side of Mwembeni. He confirmed having been the Village elder – it was appointment by people and not official. That was from the year 2000. He did not know the size of the land. Ali Ahmed used to live at Bamburi. Salma inherited the land from Ali Ahmed. He did not know a person by the name Abdalla Salim Mazrui. He used to be sent to people to serve them with which from the offices of the chief. The witness told the court that he never knew M/s Salma Abdalla; he started getting involved on the suit land from year 2004. Ali was brother to Salma.
35. PW - 2 stated that Khamis Juma had a house on the land; he resided slightly far from the suit land. He never knew Salma inherited the assets from Ali. Khamis Juma used to live in the house on the suit land when M/s Salma inherited the land. The witness never used to live with Ali and hence he would not know how he got or undertook the business. The witness confirmed that the land belonged to Ali and Khamis Juma had his house on it.
36. The Plaintiff called PW - 3 on 14<sup>th</sup> May, 2025 who testified as follows:-

#### **A. Examination in Chief of PW - 3 by Mr. Tindi Advocate.**

37. PW - 3 testified under oath in Kiswahili language. He identified himself as Ali Mchangamwe Omari. He was born in the year 1939. He recalled that on 7<sup>th</sup> July, 2022, he affixed a thumbprint to his witness statement. He knew Mr. Abdulrahman Mohamed Omar, the Plaintiff herein from the time he was very young. The mother was Salma Abdalla; the witness knew Abdalla. He knew that this was ancestral land.
38. He also knew Aziza Khamis Juma as they resided near their land. They had a house on land belonging to Salma, the problem was that Khamis Juma had built on the land. They were tenant to Salma. They had land somewhere else. They only came to the land that belonged to Salma. He knew that they had



been given notices to vacate the land but they refused. He told the court that he was testifying to help Salma's son get his land (That is the Plaintiff).

#### **B. Cross examination of PW - 3 by Mr. Abdalla Advocate.**

39. PW - 3 reiterated that he knew the PW - 1 from when he was 15 years. He stated that PW - 1 used to live at Bamburi. The witness only knew the mother and not his father. PW - 3 did not know the brother. He only knew PW - 1. According to the witness it was only the mother Salma who got the land having inherited the land from her father; Ali Ahmed Salle died but the witness did not know when he died. Khamis Juma used to reside on the suit land alone in a house.
40. With reference to paragraph 4 of his statement, the witness told the court that he was the neighbor of Salma. She used to be there and Gasia. She inherited the land almost 30 years ago. The witness did not know how many years had been written on the title deed; He never resided in the house with Ali Ahmed. Khamis Juma and Ali Ahmed Salle resided nearby. When M/s. Salma inherited the land the witness was not aware whether Khamis Juma used to reside there but the house was already in existence. He knew Khamis Juma who used to live a short distance from their homestead at Bamburi.
41. The Plaintiff marked his case closed through his Counsel Mr. Tindi Advocate on 14<sup>th</sup> May, 2024.

#### **V. The Defendant's case**

42. The Defendant responded to the Plaint through a defence dated 14<sup>th</sup> July, 2022 and filed on 15<sup>th</sup> July, 2022. The Defendant denied the contents of paragraph 3 of the Plaint and puts the Plaintiff to strict proof thereof. Save that the Defendant was together with Ali Khamis Juma the co-administrator of the estate of the Khamis Juma KIRIBA (deceased) the Defendant denied the rest of the contents of Paragraph 4 of the Plaint especially the allegation that the deceased was allegedly a ground rent paying tenant to the late Salma Abdulla or any other person either as alleged or at all.
43. The Defendant denied the contents of Paragraph 5 of the Plaint in toto. The Defendant stated that the alleged notice dated 27<sup>th</sup> August 2013 could not have been served on the deceased either as alleged or at all since the deceased passed away on 24<sup>th</sup> November 1996 and the deceased was not a ground rent paying tenant of the Plaintiff or any other person. The suit number "RMCC No. 1367 of 2014 Salma Abdulla v Khamis Juma" as filed by the Plaintiff therein was a suit filed against a deceased person and thus a nullity from the outset.
44. The Defendant denied the contents of Paragraph 6 of the Plaint. The Defendant stated that the deceased actually owned one quarter (1/4) of an acre to be extracted from the Sub - Division Number 4379 (Original Number 862) Section I Mainland North pursuant to a Sale Agreement dated 6<sup>th</sup> October 1976 between the original owner of the land Ali Bin Ahmed Bin Saleh and Khamis Juma and that there was no misrepresentation of facts by the Defendant before the Honourable Lady Justice Maureen Odero either as alleged or at all. The Defendant in further response to Paragraph 6 of the Plaint stated that the applications for Grant of Letters of Administration and the Confirmation of the Grant in Succession Cause No. 296 of 2012 in the matter of Khamis Juma KIRIBA (deceased) were made by the administrators with the consents of the beneficiaries while presenting to the Honourable Court the facts available to and in the possession of the beneficiaries in relation to the estate of the deceased. The deceased was the beneficial owner of the quarter (1/4) of an acre of the suit property at the time the Honourable Judge was making the orders for the Letters Confirmation of the Grant in Succession Cause No.296 of 2012 in the matter of Khamis Juma KIRIBA (deceased).
45. The Defendant denied the contents of Paragraph 7 of the Plaint. The Defendant stated that the deceased was not a ground rent paying tenant of the Plaintiff or his family, had therefore no rent arrears



or was given a notice to vacate the land either as alleged or at all. The Defendant admitted the contents of Paragraph 8 of the Plaintiff's suit in so far that there is pending before the High Court in Succession Cause Number 296 of 2012 the Plaintiff's said Notice of Motion application dated 23<sup>rd</sup> May 2022 which the Defendant has duly opposed but the Defendant denied that she misled the Honourable Lady Justice Odera in any way whatsoever either as alleged or at all.

46. The Defendant denied the contents of Paragraph 9 of the Plaintiff's suit in toto and puts the Plaintiff to strict proof thereof. The Defendant vehemently denied having perpetuated any fraud or selling any plots to any person with any promises made to them or preparing any Sub - Division scheme covering the portion of land either as alleged or at all. Accordingly, the particulars of fraud by the Defendant and the particulars of loss and damages of the Plaintiff as set out at Paragraph 9 of the Plaintiff's suit are all denied as if the same were herein set out verbatim and traversed seriatim.
47. The Defendant in view of the foregoing denied the contents of Paragraph 10 of the Plaintiff's suit and stated that the suit by the Plaintiff who was therefore not entitled to any of the prayers sought was misconceived as against the Defendant or estate of the deceased. The Defendant denied the contents of Paragraphs 11 and 12 of the Plaintiff's suit and puts the Plaintiff to strict proof thereof. The Defendant stated that she had never met the Plaintiff and neither did she know him.
48. The Defendant denied the contents of Paragraph 13 of the Plaintiff's suit and puts the Plaintiff to strict proof thereof. The Defendant averred that it was indeed the estate of the deceased that stands to suffer substantial and irreparable loss and damage due to the unlawful actions of the Plaintiff. The Defendant was a stranger to the contents of Paragraph 14 of the Plaintiff's suit and therefore makes no admission thereof. The Defendant averred that the Plaintiff's suit did not disclose any or any reasonable cause of action and thus ought to be dismissed. Subject to and without prejudice to the foregoing, the Jurisdiction of this Honourable Court was admitted.
49. For the reasons averred in the defence the Defendant prayed that the Plaintiff's suit be dismissed with costs.
50. On 15<sup>th</sup> October, 2024, the Defendant called DW - 1 who testified as follows:-

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

51. DW - 1 testified under oath and in Swahili language. She identified herself as AZIZA Khamis Juma. She was the Defendant herein. She resided in Bamburi and was a house wife and a farmer. She was one of the Legal Administrators to the Estate of Khamis Juma who was her father. She saw the Plaintiff in court. She filed a witness statement dated 14<sup>th</sup> July, 2022 and she relied on it as her evidence in chief. She told the court that she also filed a list of documents dated 14<sup>th</sup> July, 2022 – 3 documents which she produced as Defendant Exhibits numbers 1, 2 and 3. Her father died on 24<sup>th</sup> November, 1996 and that she was aware that he had purchased and owned a quarter of the suit land at the time of his death. She found the sale agreement dated 6<sup>th</sup> October, 1976 entered between Ali Bin Ahmed Saleh and Khamis Juma from the files of his father.
52. On the suit land there were construction of a house by M/s. Juma; She was 53 years old. She had been living in that house to date. She had never tried to sub – divide the land nor sell them. There were houses of other people constructed by them during the lifetime of her father and through his authority. It was not true that she sub – divided the land with intentions of selling them. As the legal administrator; she had never been brought any claim of the land and the development by anyone. Neither had she had claim with any ground rent to anyone. She recalled her father died on 24<sup>th</sup> November, 1996. The claim that the deceased owed ground rent by 27<sup>th</sup> August, 2013 was false as he had already died. He was not



a ground paying tenant to the late Salma Abdalla or the Plaintiff or his family or any other person as he was the owner of the portion he lived on. She was aware the said Salima Abdalla filed suit number RMCC No. 1367 of 2014 – Salima Abdalla – v – Khamis Juma which was a suit that had been filed against the deceased after his death purporting that the deceased had had arrears of ground rent.

53. She denied that she had perpetuated any claim of fraud or sold any plot to any person with the promise of issuing to him a title deed and neither had she prepared any sub – division of the suit land. She denied all the allegations of fraud, loss and damages.
54. She urged the Court to dismiss the suit by the Plaintiff and have her portion it transferred to her.

#### **B. Cross Examination of DW - 1 by Mr. Tindi Advocate.**

55. DW - 1 confirmed that before her father died he gave several people i.e. almost seven (7) of them to settle and construct house. There were Mzee Hamidi; Rahmani; Hussein; Mzee Mbaruku; Fowadi; Wandaria and Captain. They occupied the ¼ acres. They were tenants. She did not know about the tenancy; She did not know about the tenancy agreement through she had a few of them for instance that for Captain. They were on lease on the ¼ acres and that was their house was situated.
56. On being referred to the sale agreement, she confirmed it was not a title deed. She had an official search to show that Khamis Juma was the legal owner of the land; but he had the official receipts for the ground rent payable to the municipality of Mombasa. They never filed the documents in court but she had them. He bought the land in the year 1976. That was close to 48 years ago. They had never processed the title deed as they had a court case. She had been the Legal administrator of the Estate from 3<sup>rd</sup> December, 2012 – she had to wait until the case was over to enable them process the title deed. The tenants were currently not paying any rent. She had never seen the letter by Khatib & Co. Advocates dated 27<sup>th</sup> August, 2013.
57. DW - 1 confirmed that there was a court case No. 1367 of 2014 and in which when aggrieved by the trial court decision, they preferred an appeal; which was dismissed by the Court (Paragraph 5) of the witness statement. She knew the original owner of the land who was Ali Bin Ahmed Swaleh. On being referred to the last Paragraph of the statement, the witness told the court that she was praying for the right to be registered i.e. ¼ acres as per the sale agreement terms and conditions. She confirmed they did not have a title deed. They presented the sale agreement before the succession cause. The 7 people were the tenants that they were not paying ground rent to date. With reference to the sale agreement; it was Ali Bin Ahmed Swaleh who sold the land to the deceased. He had a title deed (She showed the court a copy of the title deed).
58. With reference to the title deed already produced, the witness told the court that the second title was for the land at Bamburi/ Utange. There were people who had bought the land – paragraph 9 of the Plaintiff. She refuted having undertaken the sub – division of the land for business purposes. With reference to the sale agreement the witness told the court that she was not aware of the payment of the stamp duty and the registration. She did not have the official receipts and hence it was null and void. The sale agreement was incomplete.

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

59. DW - 1 reiterated that the sale agreement was not a title deed, but she was sure her father bought the land. She was not part of the tenancy agreement between her father and the seven (7) tenants and she was concerned with the ¼ acres. With reference to the title deed produced by the Plaintiff the witness told the court that legal owner was of the land was Ali Ahmed Bin Swaleh. On reference to sale agreement, DW - 1 told the court that he was the same person in the agreement. She refuted having



undertaken any business with other people. Clause No. 3 of the sale agreement; he found the official stamp; duty stamp. It had witnesses hence it was valid and it was franked as well. Ali Ahmed Bin Swaleh died in the year 1979.

60. The Defendant marked her case closed on 15<sup>th</sup> October, 2024 through her counsel on record Mr. Abdalla Advocate.

## VI. Submissions

46. On 15<sup>th</sup> October, 2024 after the close of the case by the Plaintiff and Defendant, the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. Subsequently, the Honourable Court was only able to access and off load the written submissions by the Plaintiff through the Judiciary CTS portal. Following Pursuant to that the Honourable court reserved a date to deliver its Judgement on 28<sup>th</sup> May, 2025.

### A. The Written Submissions by the Plaintiff.

46. The Plaintiff through the Law firm of Messrs. Martin Tindi & Company Advocates filed their written submissions dated 9<sup>th</sup> December, 2024. Mr. Tindi Advocate commenced his submissions by providing the court with a brief background of the matter herein. He stated that the Plaintiff sought for the above stated orders within the Plaint filed on the 30<sup>th</sup> May 2022.
47. The Learned Counsel submitted that at all material times, the Plaintiff was the legal and registered proprietor of all that parcel of land known as being Sub - Division 4379 (original number 862/2 Section I (Mainland North) – the suit land. Further, that the Plaintiff claimed that the Defendant misled the Honorable lady Justice Odera in “Succession Cause No.296of 2012 in the matter of the estate of Khamis Juma Kiriba” purporting to be the owner of one-quarter of one acre to be extracted from Plot No.4379(NO.862) Section 1Mainland North.
48. Further, according to the Learned Counsel, she proceeded with the fraud by selling plots therein to innocent purchasers whilst promising them that the title documents were being processed. However, the said fraud had occasioned substantial loss to the Plaintiff who was unable to access his land and take possession of the same and hence the need of this court's urgent intervention. The Learned Counsel averred that during his testimony, the Plaintiff produced Plaintiff Exhibit numbers 1 & 2 being the certificate of title deed for the sub – division number 862/2 Section 1Mainland North) and Certificate of postal search indicating the registered in his name - Abdulrahman Mohamed Omar registered owner to be the Plaintiff. The Learned Counsel submitted that under the provision Section 26 of the Land Registration Act, No. 3 of 2012, the Certificate of title would be held as conclusive evidence of proprietorship, the Section provides as follows:-
- '(1) The certificate of title Issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as the prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:-
- a) On the ground of fraud or misinterpretation to which the person is proved to be a party.
- b) Where the certificate of title has been acquired illegally, unprocedural or through a corrupt scheme."
50. The Learned Counsel further averred that the provision of Section 24(a) of the Land Registration Act on the other hand provides as follows:-



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

In the case of:- “Samwel Ambasa & 3 Others v Stella Ingasia [2022] eKLR”- at para .24 - the court observed this position was reiterated in “Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua & 50 others civil appeal no. ca 60 of 1997” where the court of appeal stated as follows:

“Section 23(1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misinterpretation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

- a). For 47 years, she failed to carry out a Sub - Division of PLOT NUMBER 4379 to transfer and obtain a title deed for the purported 1/4 acre of the Plaintiffs.
- b). When she became an administrator of the deceased-Khamis Juma in 2012, that was 11 years ago, they were unable to register with the LAND REGISTRAR to obtain a valid title deed;
52. Thus, the Learned Counsel argued that that the purported sale agreement dated 6<sup>th</sup> October 1976 featured nowhere in the records of the Land Registrar. Hence, it could override the sanctity of the title document of the Plaintiff. The certificate of postal search - Plaintiff Exhibit number 2 confirmed that the registered owner was the Plaintiff and nil encumbrances. If at all there was an encumbrance, then it would have been registered but it featured nowhere within the records of the Land Registrar.
53. The Learned Counsel contended that the Defendant never challenged the validity of the title deed or certificate of official search of the suit property held by the Plaintiff on any grounds of misrepresentation or illegality, unprocedural as provided for within the relevant statute; She had no grounds to challenge the sanctity of the title. On the contrary, what she did ask the court was to transfer the portion of one-quarter in her favor. The Counsel took note that the Defendant could only do that by claiming adverse possession which was not even pleaded by the Defendant. The Defendant was bound by their own pleadings
54. On whether the Defendants were paying ground rent and the concept of house without land PW - 2 Halfan Shaban Boma confirmed that he had been “the Mzee wa Mta” for more than 15 years within this area of Bamburi wherein the subject-land was located. He confirmed that he was aware that SALMA (mother of the Plaintiff) inherited the said portion being 4379. The Defendant - Khamis Juma had no supporting documents to proof his claim when matter was presented to the local administration. This witness confirmed that the late Khamis Juma owned “a house without land”. The said house was situated on the parcel of land of the Plaintiff who was subjected to pay ground rent for the use of the land which he defaulted in payment.
55. PW – 3, Ali Mchangamwe confirmed that a suit was filed against Khamis Juma seeking for vacant possessions and a sum of Kenya Shillings Thirty Six Thousand (Kshs.36,000/=) which was the ground rent arrears. Indeed, the Plaintiff Exhibit numbers 3 & 4 confirmed a demand notice dated 27<sup>th</sup> August, 2013 demanding for the payment of the ground rent. A suit was also filed against Khamis Juma claiming said ground rent and vacant possession. The Defendant admitted that she was aware that Salma Abdulla filed suit number “RMCC no.1367 of 2014 – Salma Abdulla v Khamis Juma”. Despite



of all this, she failed to disclose to this court that the appeal court upheld the Judgement which confirmed that Khamis Juma was a ground rent-paying tenant and not the owner. All the witnesses and the Defendant confirmed that they owned the house within the land of the Plaintiff and hence the concept of 'house without land" came into play. To buttress on that point, the Counsel referred Court to the Court of Appeal case of case of:- "Abdukrazak *Khalifa Salimu v Harun Rashid Khator, Ibrahim Rashid & Mustafa Rashid (Civil Appeal 18 of 2017)* [2018] Keca 151 (klr) (8<sup>th</sup> November 2018) (Judgement)- at PARA.28'-----one of the novel submissions made by the appellants is on 'equity of expectation". Counsel submitted that the appellant has an equity of expectation to continue being on that suit property. We have considered the submission, and it has no merit. The house without land was erected on the suit property with permission of the registered proprietor of the property. The only expectation of the appellant was that this occupation of the suit property and the continued presence of the house without land on the suit property was subject to continued consent and permission of the registered proprietor. The expectation both in equity and in law is that if consent or permission is withdrawn, the appellant becomes a trespasser. From, the evidence on record, the consent or permission was withdrawn and there is no legal or equity doctrine of expectation that can make the appellant continue to occupy and have the house without land on the suit premises".

57. The Defendant confirmed that they had a house within the subject land that the registered owner is the Plaintiff. In the case of:- "Rmcc no.1367 of 2014 -Salma Abdulla v Khamis Juma", the court confirmed that the Defendant was a ground rent paying tenant. The Defendants had declined to continue to pay the ground rent and hence their continued stay on the suit premises was illegal and according to the above case-law, they ought to be removed. The expectation both in equity and in law was that they was no consent granted to the Defendants to continue residing on the suit premises and they ought to be removed forthwith and the court could grant them 3 months to remove their house from the suit-land.

59. On whether the Defendant misrepresented to the succession High Court Judge in the case of "HCCC No. 296 of 2012 - Abdulrahman Mohamed Omar v Aziza Khamis Juma" as being the proprietor of Plot No.4379. The Plaintiff Exhibit No. 7 was a Notice of motion application filed within Mombasa High Court Succession cause number 296 of 2012 - wherein the Plaintiff contents that the Defendant misrepresented to the court that he was the owner of one-quarter(1/4) portion of an acre of subdivision NO.4379 as being part of the estate of Khamis Juma. This was false since the deceased was a tenant paying ground rent to the land owners of Plot No.862/2 Section 1 Mainland . Hence, the property of the Plaintiff was wrongly distributed to the beneficiaries since the deceased was not the owner of the subject-land as he misrepresented to the High Court Judge.

Hence the rebuttal by the Defendant that he was the beneficial owner of the quarter of an acre had no basis when they misled the succession court to include the same for distribution since that land never belonged to the deceased. They were attempting to steal a march by using the court process to create a title document pegged on the one-quarter of 4379 through confirmation of a grant. This court should see through their scheme and confirm that there was no title deed that had been placed before the succession court to confirm that the one-quarter acre belonged to the deceased-Khamis Juma to process the distribution of the property amongst the beneficiaries. This alone confirmed one of the particulars of fraud carried out by the Defendant against the sanctity of the title deed of the Plaintiff.

60. In conclusion, the Learned Counsel urged the Court to find that the Plaintiff had demonstrated and was entitled to the reliefs sought within the Plaintiff. He should be granted the prayers as sought accordingly.



## VII. Analysis and Determination

61. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
62. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) for its determination. These are: -
- a. Whether the suit by the Plaintiff has any merit or not whatsoever.
  - b. Who is the legal and absolute proprietor of the suit property known as Plot No. 4379/I/MN title number CR. 19749?
  - c. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
  - d. Who bears the costs of the suit?

### **Issue No. A). Who is the legal and absolute proprietor of the suit property known as Plot No. 4379/I/MN title number CR. 19749**

63. Under this sub - title, the Honourable Court shall examine the legal ownership of the suit property and the concept of “House without Land”. The right to own and acquire property in Kenya is a Constitutional right to be enjoyed by all persons. It is hinged on Article 40 of *the Constitution* of Kenya, 2010 which provides as follows:-
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) Parliament shall not enact a law that permits the State or any person--
    - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
  - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
    - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
      - (i) requires prompt payment in full, of just compensation to the person; and
      - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law....”
64. Further, the efficacy and effect of registration of land as stipulated under the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 whereby the proprietor to land is vested with



indefeasible rights, interest and title to land vested in him/her by law. It is evident that the rights of a registered owner of property are clearly set out under Sections 24, 25 and 26 of the [Land Registration Act 2012](#), which provide as follows; -

24. “Subject to this Act

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

65. Further, the provision of Section 25(1) provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. A title holder through being Issued with a Title Deed as “Prima facie” evidence enjoys statutory protection by dint of Section 26 (1) (b) of the [Land Registration Act, No. 3 of 2012](#) which provides: -

The certificate of title Issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or  
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

66. The Plaintiff contends that at all material times to this suit, the Plaintiff was the registered proprietor of all that parcel of land – fee simple known as Sub - Division 4379(original number 862/2 Section I Mainland North ); C.R.19749 located at Bamburi in Mombasa. It is the contention by the Plaintiff that the Defendant was and still is the Legal administrator of the estate of the late Khamis Juma and the deceased was a ground rent paying tenant through what was and still is very common parlance within the Coastal region as “House Without land” to the late Salma Abdulla who was also a joint-proprietor of Sub - Division 4379(original number 862/2 Section I Mainland North);C.R.19749 located at Bamburi in Mombasa.

67. On the contrary, the Defendant though never filed any Counter – Claim vigorously denied being a tenant paying ground rent to the Plaintiff or any other person as alleged. She held that her father bought one-quarter(1/4) portion of an acre of sub-division NO.4379 as being part of the estate of Khamis Juma through a Sale agreement dated 6<sup>th</sup> October 1976. She denied that she had perpetrated any fraudulent or sub – division acts of omission or commission over the said land. She admitted though claiming ownership to the portion of the land but a sale agreement could not confer ownership to the land by law.

68. It is trite that when a person’s title is called into question, the said proprietor has to show the root of his ownership. In the case of *Hebert L Martin & 2 Others v Margaret J Kamar & 5 Others* [2016] the Court held:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they



need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

69. Having been so guided, this Court will move to ascertain which party has proved the root of it's title. The Plaintiff has led evidence that he acquired ownership of the suit property from his late mother. The Plaintiff has corroborated his evidence with a gazette notice. This Court has no reason to doubt the evidence adduced by the Plaintiff and the contents of the aforementioned.
70. On the other hand the Defendant has produced a sale agreement terms and conditions stipulated thereof and claimed that the land belonged to her late father and that he had bought the sale from one Ali Ahmed Swaleh. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap. 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan law and the Land Titles Act, Cap 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent.
71. The Court of Appeal's analysis of the concept of: "House without Land", commonly referred to as: "Nyumba Bila Shamba", as was articulated in the case of *Abdukrazak Khalifa Salimu v. Harun Rashid Khator & 2 others* [2018] eKLR (Supra) as herein under:-
- “ 1. Once again, the concept of “House without Land” is back before this Court. In coastal Kenya, a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In the case of “*Famau Mwenye & 19 others v Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005 (Ouko, J.)* (as he then was) described the concept of house without land as follows:  
  
“The dispute arises from land tenure unique to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, “*cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”
  2. In this appeal, the appellant is the owner of that “house without land” on Plot No. 3891 (Original 284/197) Sec. III MN. In his amended plaint filed before the trial court, the appellant concedes that he is the owner of “house without land” situated on Plot No. 3891. However, he contends that the Respondents or persons acting under their authority unloaded building materials to wit sand and stones on the road leading to the appellant's house and further dug up a foundation and are putting up a building barely seven (7) feet from the front entrance of the appellant's house. That the stones and building have the



effect of denying the Appellant free and or unhindered access to his house; that the construction would have the effect of denying the appellant free flow of air and natural light; and that the windows and or ventilations on the front of the house would be rendered useless; that the said developments could well lead to an onset of upper respiratory tract diseases were the Appellant and his household be denied ventilation; that the developments interfere with the Appellant's right of easement; that the developments are being carried out in complete disregard to all notions of public rights over private property; that the Respondents have been cutting down the Appellant's trees growing on the portion let to him.

3. In the Amended Pleint, the Appellant sought injunctive relief restraining the Respondents' from blocking the Appellant's access to his house and an order restraining the Respondents from putting up developments at the frontage of his house. An order was also sought that the developments and structures being put up by the Respondents was a nuisance and a violation of the Appellant's easement. The Appellant sought an order to compel the respondents to forthwith pull down and remove the structure and or building now erected on Plot 3891(Original284/197) Sec. III MN and overlapping on the road reserve between the Appellant's house and Kanamai/Beach Road. damages and costs of the suit were also prayed for.
4. Conversely, the respondents are the legal and registered owners of Plot No. 3891 (Original 284/197) Sec. MN. More specifically, the respondents aver that Plot No. 3891 once belonged to their deceased father one Rashid Khator Salim and the same is currently vested in the 1st respondent as the administrator of the deceased estate. In their amended defence and counterclaim filed before the trial court, the respondents assert that the appellant is a trespasser on Plot 3891 and he is liable for eviction. The respondents denied that their construction and development had barred the appellant from accessing his house or that the said developments had become a health hazard.

...

21. On the Issue whether the appellant as owner of house without land is entitled to Notice under Sections 3, 8, 51, 105, 106 and 108 (h) of the Transfer of Property Act, we are persuaded by dictum in *Famau Mwenye & 19 Others v Mariam Binti Said*, Malindi High Court Civil Case No. 34 of 2005, where the trial judge likened the concept of house without land to a lease stating,  
"No matter what that arrangement is called, in my view it is a lease within the meaning of Section 105 of the Transfer of Property Act". A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid.
24. The next Issue for our consideration is whether in the instant case, such notice was given. The appellant contends that no notice was given. In contrast, the respondents contend that notice was given more specifically at the time the Masjid Rahma mosque was told not to accept any rent from the appellant. The trial court in its judgment gave the appellant three (3) months' notice



to remove the house without land. It is not disputed that the appellant has never paid rent for the house without land since 2003. It is also not in dispute that whoever erected or constructed the house without land on the suit property did so with the consent and permission of the registered proprietor. In the instant appeal, the house without land having been erected by consent, the continued presence of the house on Plot No. 3891 can only be with the consent of the registered owner of Plot No. 3891. This being so, the respondents as registered owners of Plot No. 3891 have a right in law to withdraw and terminate the permission or consent granted to have the house without land on the suit property. We are of the considered view that when the respondents informed the Masjid Rahma mosque not to receive any rent from the appellant, they unequivocally expressed the intention to terminate the appellant's continued presence in and occupation of the suit property.

26. In the instant appeal, the appellant concedes that he entered the suit property and owns the house without land through consent and permission given by the registered proprietor of Plot 3891 and his successors in title thereto. Having conceded that the house without land was erected with permission, it follows that if such permission is withdrawn or cancelled then the house must be removed.
27. The respondents being registered proprietors of the suit property by way of counterclaim sought an order to evict the appellant from the suit property. Having entered the suit property by consent, the appellant's continued presence or occupation of the suit property can only be by consent or permission of the registered proprietor. When the respondents informed the Mosque not to accept or receive rent from the appellant, such intimation constituted an implied cancellation of permission to remain on the suit property. Upon such permission being cancelled, the appellant became a trespasser.
37. In penultimate, in obedience to Section 108 (h) of the TPA, we set aside the alternative orders made by the trial court granting the parties at liberty to enter into a House without Land Agreement under which the appellant would pay the respondents such ground rent as may be negotiated between the parties from time to time. We also set aside the alternative order allowing the respondent to negotiate and enter agreement with the appellant whereby the respondent is to pay the appellant such compensation for the value of the house as may be agreed between the parties. In line with Section 108 (h) of TPA, the appellant as lessee on the suit property should remove his house without land and all things which he has attached to the earth; provided he leaves the suit property in the state in which he received it.
38. The final order of this Court is that this appeal has no merit and is hereby dismissed. The judgment of the trial court dated 6<sup>th</sup> February, 2016 is upheld and varied to the extent that the alternative orders be and are hereby set aside. The appellant is hereby given three (3) months' notice from the date of this judgment to vacate the suit property and remove his house without land. Upon expiry of the three months, the respondents shall be at liberty to evict the appellant from the suit property.”(Emphasis added).



72. There has been no evidence adduced by the Defendant to show that indeed she owned the property as she had no title nor could she determine whether the said Sale agreement was void or not. Indeed, the property on the sale agreement indicates the intention was to apportion a portion of the suit Plot number 862, Section I Mainland North (Utange) and not the entire suit land. I reiterate that the Sale agreement never conferred any title to the land but intention to sub – divide and transfer it. That never happened 48 years down the line. On the contrary, if there was anything to go by and based on the evidence available in this suit, the Defendant was a tenant on the land paying ground rent based on concept of:- “House without land”. Having found as above, the Court finds and holds that the Plaintiff has proved the root of his title and the Certificate of Postal search as on 24<sup>th</sup> May, 2022 was the legal and absolute registered owner of the suit property with all the indefeasible title, right and interested vested in him by law to the exclusion of all others including but not limited to the Defendant.

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

73. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaint, herein. Having concluded that the Plaintiff has proved his case; prayer (a), (b), (c) and (d) of the Plaint are hereby granted.

74. The provision of Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

75. The provision of Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-

13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
  - (i) the delivery of possession to the decree-holder;
  - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

76. The Court of Appeal in the case of “Attorney General v Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful



period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

77. The court in the case of “Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR” had this to say in considering an Issue of whether the Plaintiff had established a case for mesne profits:-

“In *Bramwell v Bramwell*, Justice Goddard stated that ‘... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.’ Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.

Halsburys, *op. cit.*, 4<sup>th</sup>, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market valuerent.

The Black's Law Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession between (2) two dates.” The Concise Oxford English Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.



In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation Issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18<sup>th</sup> October 2007 was a denial of the averments in the Plaint. The Respondents claim as enumerated in the Plaint discloses a rent dispute. An amended defense was filed on 9<sup>th</sup> August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

“ . the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.The Issues your clients are raising .....are the same Issues already in court. Your clients notice of termination of lease ....is therefore inconsequential.”

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the Issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

78. From the afore – going, it is my humble opinion that the Plaintiff has not tabled evidence before this court to enable the court make a determination on the same.

#### **Issue No. C: Who bears the costs of the suit**

79. 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 v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v 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 v 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.

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

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

81. In the present case, I reiterate that the Plaintiff has proved his claim against the Defendant there he shall have the costs.

### **VIII. Conclusion and Disposition**

82. 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 established his case against the Defendant. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Plaintiff in accordance with the Plaint dated 30<sup>th</sup> May, 2022 and filed on 31<sup>st</sup> May, 2022 in its entirety with costs.
- b. That a declaration do and is hereby entered that the Defendant and/or other administrators of the estate of the deceased Khamis Juma have no proprietary interest on the Plot No.4379/I/MN that wholly belongs to the plaintiff who is the registered title deed holder.
- c. That an Order of Injunction be and is hereby Issued restraining the Defendants themselves, their employees, servants and/or her Agents or assignees and/or any other person acting under them from further trespassing upon, and/or in any manner whatsoever interfering with the Plaintiff's use, possession and quite enjoyment of all that parcel of Land known as Plot No.4379/I/MN located at Bamburi in Mombasa Municipality.
- d. That an Order of demolition do and is hereby Issued of the illegal structures constructed by the defendants and/or their agents/assignees or any other person acting under them.
- e. That the Defendant themselves, their employees, servants and/or her Agents or assignees and/or any other person acting under them be evicted from Plot No.4379/MN and vacant possession be given to the Plaintiffs pursuant to the provision of Section 152E of *Land Act*, No. 6 of 2012.



f. That the court awards the costs of litigation of the Plaintiff to the Plaintiff.

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

**HON. MR. JUSTICE L.L. NAIKUNI**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Tindi Advocate for the Plaintiff.
- c. Mr. Abdalla Advocate for the Defendant.

