



**Aroko & 2 others (Suing as Personl Representatives & Administrators of the Estate of Gonda Elkana Syongoh (Deceased)) v Macharia (Environment & Land Case 5 of 2021) [2025] KEELC 4092 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4092 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 5 OF 2021**

**EM WASHE, J**

**MAY 29, 2025**

**BETWEEN**

**ROSE ALUOCH AROKO ..... 1<sup>ST</sup> PLAINTIFF**

**NANZALA SIWENKOLO GONDA ..... 2<sup>ND</sup> PLAINTIFF**

**KANDIRE NJERI NAKATONDA GONDA ..... 3<sup>RD</sup> PLAINTIFF**

**SUING AS PERSONL REPRESENTATIVES & ADMINISTRATORS OF THE  
ESTATE OF GONDA ELKANA SYONGOH (DECEASED)**

**AND**

**ANGELINE NJERI MACHARIA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff through a Plaint dated 23.08.2002 (hereinafter referred to as “the present suit”) sought the following orders against the Defendant; -
  - a. A Permanent Injunction restraining the Defendant, whether by herself, agents and/or servants from entering or in any manner interfering or dealing with L.R. No. NAIROBI/ BLOCK X3/ X1 – GOLDEN GATE SOUTH B NAIROB.
  - b. An Order of Eviction of the Defendant from the suit premises known as L.R. No. NAIROBI/ BLOCK X3/X1 – GOLDEN GATE SOUTH B NAIROBi.
  - c. Mesne Profits
  - d. Costs of the suit
  - e. Interest on (c) and (d) above.



- f. Any other relief this honourable court may deem just and fit to grant.
2. The facts in support of the prayers above were provided as follows:-
- i. The Plaintiff purchased the property known as L.R. No. NAIROBI/ BLOCK X3/X1 – GOLDEN GATE SOUTH B NAIROBI (hereinafter referred to as “the suit property”) through a Public Auction from a financial institution known as Fidelity Bank Limited on the 19.10.2001 based on its Statutory Power of Sale.
  - ii. By virtue of the purchase by the Plaintiff, the suit property was registered in his name on 08.03.2002.
  - iii. At the time the Plaintiff purchased the suit property, the Defendant was in occupation and use of the same.
  - iv. Unfortunately, the Defendant refused and/or failed to give vacant possession, use and /or occupation of the suit property and has continued to unlawfully occupy the said to the detriment of the Plaintiff.
  - v. The Plaintiff therefore is seeking the Orders outlined in the Plaint herein to enable him enjoy use and/or occupation of the suit property in line with his ownership rights.
3. The present suit was duly served on the Defendant who opposed the same through an Amended Defence and a Counter-claim dated 26.10.2020.
4. The Defendant through the Amended Defence opposed the present suit on the following grounds; -
- i. That prior to the Plaintiff purchasing the suit property, the same was under litigation in the proceedings known as MILIMANI HCCC NO. 1804 OF 1999 between ZAHRA SPARES LIMITED & THE DEFENDANT VS FIDELITY COMMERCIAL NBANK LIMITED.
  - ii. Based on the proceedings known as MILIMANI HCCC NO. 1804 OF 1999, the Court issued injunctive orders on the 27.10.1999 and 26.07.2002 prohibiting any selling, disposition and / or alienation of the suit property registered in the name of the Defendant.
  - iii. In addition to the two Orders issued on 27.10.1999 and 26.07.2002, the Court further issued a status quo order on 22.10.2001 directed to the Registrar of Titles to stop any registration of transfer or any consequential entries relating to the suit property.
  - iv. The Defendant pleaded that the orders of 22.10.2001 were indeed registered by the Registrar of Titles on 07.11.2001.
  - v. The Defendant therefore pleaded that the registration of the Plaintiff’s name as the owner of suit property was done illegally and in contravention of lawful Court orders hence no valid title was passed to him.
  - vi. The Defendant further challenged the powers of the financial institution known as Fidelity Commercial Bank Limited to sale and/or transfer the suit property through the auction dated 19.10.2001 on the basis that there were valid Court Orders issued on 27.10.1999, 26.07.2002 and 22.10.2001 prohibiting and sale, transfer and/or registration any dealings regarding the suit property.
  - vii. In conclusion therefore, the Defendant sought for the present suit to be dismissed with costs.



- viii. As regards the Counter-claim, the same was struck out by the Hon. Justice Angote at a preliminary stage.
- ix. Upon service of the Amended Defence, the Plaintiff did not file any reply to the same and the pleadings closed.

**Plaintiff's case.**

5. The Plaintiff's case began on the 05.12.2024 with the testimony of one ROSE ALUOCH AROKO (PW1).
6. PW1 introduced herself as a resident of Migori County and whose occupation was business.
7. PW1 further stated that she was the wife of the deceased Plaintiff and an Administrator of the estate of his estate.
8. PW1 confirmed that she had prepared, signed and filed a witness statement dated 19.05.2017, which she adopted as her evidence in chief.
9. In support of her testimony in chief, she produced the following documents; -
  - Pw1 Exhibit 1 – A Copy Of The Letter Of Administration Issued On 29.09.2014 In Relation To The Plaintiff.
  - Pw1 Exhibit 2 – A Copy Of The Rectified Letters Of Administration Dated 23.02.2015 In Relation To The Plaintiff's Estate.
  - Pw1 Exhibit 3 – A Copy Of The Certificate Of Lease Related To The Suit Property Registered In The Name Of The Plaintiff Dated 08.03.2002.
  - Pw1 Exhibit 4 – Copy Of The Transfer Executed By The Financial Institution In Favor Of The Plaintiff Relating To The Suit Property Dated 05.02.2002.
  - Pw1 Exhibit 5 – A Copy Of The Advertisement Notice By Keysian Investments Limited On Instruction Of The Financial Institution In Relation To The Suit Property Dated 19.10.2001
  - Pw1 Exhibit 6 – A Copy Of The Official Search Of The Suit Property Dated 25.05.2017
  - Pw1 Exhibit 7 – A Copy Of The Rental Assessment Report Of The Suit Property Dated 05.06.2017.
  - Pw1 Exhibit 8 – A Copy Of The Invoice From The Valuer Regarding The Rental Assessment Report Dated 05.06.2017.
10. PW1 informed the Court that the suit property was lawfully purchased by the Plaintiff as indicated in the Certificate of Lease dated 08.03.2002.
11. PW1 stated to the Court that the acquisition of the suit property by the Plaintiff was through an auction which occurred on 19.10.2001 in line with an advertisement undertaken by Keysian Investment Limited, who were the authorized agents of the financial institution.
12. PW1 confirmed to the court that the Plaintiff participated in the auction and emerged the highest bidder with a consideration of Kshs. 2,600,000 (Two Million Six Hundred Thousand Shillings)
13. The Plaintiff after emerging the highest bidder paid the full purchase price and the financial institution executed a transfer form dated 05.02.2002 in favour of the Plaintiff.



14. On the Plaintiff being registered the owner of the suit property on 08.03.2002, the plaintiff was able to take possession of the suit property for a short time before the Defendant evicted the Plaintiff.
15. PW1 informed the court that the dispossession of the Plaintiff's occupation was based on an eviction order obtained by the Defendant.
16. PW1 indicated that during the Plaintiff's short occupation in the year 2002, he had undertaken various repairs and there were a number of receipts to confirm the renovations done in the suit property.
17. PW1 averred that since the year 2002 when the suit property was registered in the name of the Plaintiff, the same has been in the possession of the Defendant up to date.
18. In essence, PW1 sought for orders of mesne profit, vacant possession, a permanent injunction, costs of the renovation and costs of this suit.
19. On cross-examination by the Defence Counsel, PW1 reiterated that she was the wife of the Plaintiff.
20. PW1 further informed the court that the other Administrators in the estate of the Plaintiff were her daughters, of whom she had authority to proceed with this matter.
21. PW1 stated that in the succession proceedings, the suit property was not vested to any beneficiaries.
22. According to PW1, the Plaintiff had other properties but the suit property was the only one that had been purchased by way of auction.
23. Referring to PW1 EXHIBIT 5, PW1 confirmed that there was an advertisement which was done by the financial institution but could not tell the date of the newspaper in which it appeared.
24. PW1 nevertheless reiterated that although she did not know the date and the newspaper in which the advertisement was done, she was sure that her husband had complied with the conditions that had been outlined in the advertisement.
25. PW1 confirmed that the Plaintiff emerged the highest bidder with a purchase price of Kshs. 2,600,000/ = of which he deposited 25% at the fall of the hammer and the balance within the agreed period.
26. PW1 could not however confirm whether or not the Plaintiff had undertaken a search as to the ownership of the suit property at the time of purchasing the same on auction.
27. On being referred to Defence bundle dated 28.10.2021 (page 37 – 41) PW1 confirmed that it was a ruling dated 27.10.1999 issued in the proceedings known as MILIMANI HCCC NO. 2433 OF 1998 BETWEEN ZAHRA SPARES LIMITED & THE DEFENDANT VS FIDELITY COMMERCIAL BANK.
28. PW1 informed the court that she was not aware of this ruling and could not tell whether the orders issued therein were ever set aside
29. PW1 informed the court that on the face of the ruling, there is a stamp dated 17.10.2001 from the offices of the Registrar of Titles.
30. PW1 admitted that she had not seen any other order contrary to the one issued on 27.10.1999.
31. Referring to Defence Bundle dated 28.10.2021 (page 43 – 44), PW1 noted that there was an order dated 22.10.2001 in the proceedings known as MILIMANI HCC NO. 1804 OF 1999 BETWEEN ZAHRA SPARES LIMITED & TE DEFENDANT VS FIDELITY COMMERCIAL BANK.



32. PW1 confirmed to the Court that this was an Injunction Order stopping the registration of the suit property from the Defendant to any other person.
33. PW1 informed the Court that there is a stamp from the offices of the Registrar of Titles that this order was received in their offices on 07.11.2001 and there is no other order issued contrary to this one.
34. Referring to Defence Bundle dated 28.10.2021 (page 63), PW1 informed the Court that there was a letter dated 04.12.2001 from Fidelity Commercial Bank Limited, through their lawyers to the Auctioneers handling the suit property.
35. PW1 averred that the lawyers of Fidelity Commercial Bank Limited was informing the Auctioneers of a pending litigation over the suit property in Court.
36. Referring to the Defendant's Bundle dated 28.10.2021 (page 82), PW1 referred to a Ruling dated 09.10.2002 in the proceedings known as MILIMANI CMCC NO. 6427/2002 BETWEEN THE PLAINTIFF AND THE DEFENDANT.
37. PW1 informed the Court that this was the Ruling which resulted in the eviction of the Plaintiff.
38. PW1 informed the Court that after their eviction by the Defendant from the suit property, they informed Fidelity Commercial Bank Limited and the Auctioneers.
39. On being referred to PW1 EXHIBIT 4 PW1 could not confirm the name of the Advocate who witnessed the signatures of the parties.
40. Nevertheless, PW1 insisted that the Plaintiff had executed all the transfer documents properly and legally after paying the full purchase price which was acknowledged by the Bank on 08.03.2002.
41. PW1 confirmed that it was the Plaintiff who had instructed the Valuer to prepare the Rent Assessment Report produced as PW1 EXHIBIT 7 and also settled the invoice produced as PW1 EXHIBIT 8, although there was no receipt for payment produced in court.
42. PW1 concluded the cross-examination by admitting that the Plaintiff had not paid the rates in relation to the suit property due to this ownership dispute.
43. On re-examination, PW1 was referred to PW1 EXHIBIT 5 of which she reiterated that there was no dispute as to whether the terms and conditions therein were complied with or not.
44. On being referred to Defence bundle dated 28.10.2021 (pages 46 & 47), PW1 informed the Court that the proceedings were between the Defendant and Fidelity Commercial Bank only and the Plaintiff was not a party.
45. PW1 informed the Court that there were no orders directed to the Plaintiff in that suit.
46. On being referred to Defence Bundle dated 28.10.2021 (page 41), PW1 stated that there was a stamp of the Deputy Registrar but could not explain the reason why the said stamp appears on it.
47. On being referred to Defence Bundle dated 28.10.2021 (page 43), PW1 informed the Court that she was not aware of any other order contrary to that but was aware the main had been dismissed.
48. On being referred to Defence Bundle dated 28.10.2021 (page 63) she commented that as at 04.12.2001, the Auction had already taken place.
49. Referring to PW1 EXHIBIT 4, PW1 informed the Court that they were not parties to the charge and had no idea about the terms and conditions therein.



50. PW1 reiterated that the Bank confirmed that the full purchase price had been paid by the Plaintiff which was in the year 2002 and there is no dispute.
51. In concluding her testimony, PW1 confirmed to the Court that the Defendant is the one in occupation of the suit property since the year 2002 up to date.
52. At the end of this re-examination, PW1 was discharged from the witness box and the Plaintiff closed their case.

#### **DEFENCE CASE.**

53. The Defendant's case proceeded on 11.12.2024 with the testimony of the Defendant who was marked as DW1.
54. DW1 introduced herself as a resident of Kilimani.
55. DW1 confirmed to the Court that she had prepared signed and filed a witness statement dated 26.10.2021 of which she adopted as her evidence in chief.
56. DW1 informed the Court that she was the registered owner of the suit property which had been transferred to her in the year 1997 from her mother ANNE WAMBUI NJUGUNA.
57. DW1 informed the Court that her mother ANNE WAMBUI NJUGUNA purchased the suit property in 1981 and has been in occupation of the same since then up to date.
58. However, DW1 who is engaged in business required financial assistance to grow her business and approached Fidelity Commercial Bank Limited for some credit facilities.
59. DW1 confirmed that indeed the credit facilities were granted by Fidelity Commercial Bank Limited which included an overdraft facility that was secured by the suit property which had since been transferred from ANNE WAMBUI NJUGUNA to the Defendant.
60. Fidelity Commercial Bank Limited duly charged the suit property as a collateral to the Overdraft facility but along the way, the Defendant did not access the funds that were provided for in the overdraft facility.
61. A dispute then arose between Fidelity Commercial Bank Limited and the Defendant which resulted to repossession of various assets belonging to DW1's company and termination of the Hire Purchase Agreements.
62. DW1 filed the first suit known as MILIMANI HCCC NO. 2443 OF 1998 from which an Order of Injunction was issued on 03.11.1999 prohibiting the selling or disposing of the suit property pending further orders of the Court.
63. According to DW1, this suit known as MILIMANI HCCC NO. 2443 OF 1998 was subsequently registered as MILIMANI HCCC NO. 1804 OF 1999.
64. In the case known as MILIMANI HCCC NO. 1804 OF 1999, another application dated 22.10.2001 was filed and orders of Status Quo issued on the same day directing the Registrar of Titles to maintain status quo in the register of the suit property by ensuring that there were no further registrations or entries recorded therein pending the interpartes hearing of that application.
65. DW1 informed the Court that the ex-parte orders issued on 22.10.2001 was presented to the Registrar of Titles for registration on 07.11.2001 and there is a stamp to acknowledge the same.



66. DW1 also insisted that the earlier orders of 27.10.1999 were made known to the financial institution due to the stamps that appear on the same.
67. DW1 testified that there are no other orders reversing the 2 earlier orders dated 27.10.1999 and 22.10.2001.
68. Ultimately, the proceedings known as MILIMANI HCC NO. 1804 OF 1999 were determined on the 09.07.2004 by a Judgment dismissing the same.
69. However, DW1 stated that they were not aware of the date when the judgment was read and were only surprised to find auctioneers at the suit property evicting the occupants.
70. DW1 immediately filed an Application for Stay before the Court of Appeal, which application was recorded as COURT OF APPEAL CIVIL APPLICATION NO. 266 OF 2004.
71. According to DW1, the Court of Appeal granted Interim Stay Orders on the 10.11.2004 that included the prohibition of the sale relating to the suit property.
72. On the 27.04.2005, the Court of Appeal again reissued the orders of Stay of execution of the judgment of the trial court until further orders.
73. However, DW1 informed the Court that they did not file the Record of Appeal as the suit property had already been sold.
74. DW1 reiterated that they only came to learn that Fidelity Commercial Bank had sold the suit property through an Order issue in the original file known as MILIMANI CMCC NO. 6427 OF 2002.
75. In this suit known as MILIMANI CMCC NO. 6427 OF 2002, the Plaintiff had obtained an Order dated 23.08.2002 allowing him to take possession pending the hearing and determination of the said application.
76. Based on the Order dated 23.08.2002, the Plaintiff evicted DW1's mother ANNE WAMBUI NJUGUNA but later on, the said order was set aside on 09.10.2002.
77. Upon the setting aside of the orders issued on 23.08.2002, the Defendant retook possession of the suit property and has continued to occupy the same to date.
78. The Plaintiff never appealed against the order issued on 09.10.2002.
79. According to DW1, the Plaintiff filed another case in 2009 vide MILIMANI HCC NO. 82 OF 2009 BETWEEN THE PLAINTIFF HEREIN AND DW1.
80. The proceeding known as MILIMANI HCC NO. 82 OF 2009, were subsequently dismissed on 27.09.2013 and there is no appeal against the said decision.
81. Going back to MILIMANI CMCC NO. 6427 OF 2002, the matter was heard in full and a judgment in favour of the Plaintiff pronounced on the 10.06.2019.
82. DW1 being aggrieved by the Judgment pronounced on 10.06.2019 filed an appeal to the ELC Court which appeal is MILIMANI ELC APPEAL NO. 47 OF 2019.
83. The Appeal known as MILIMANI ELC APPEAL NO. 47 OF 2019 was heard on merit and a decision was pronounced on the 14.07.2020 that this matter be heard afresh.
84. According to DW1, the registration of the Plaintiff's name as the owner of the suit property was done illegally and in disobedience of valid Court orders and hence could not stand the test of legality.



85. DW1 therefore urged this court to dismiss the suit with costs.
86. DW1 further insisted that she was not aware of the Bank's intention to auction the suit property as indicated in PW1 EXHIBIT 5.
87. DW1 then produced the following documents in support of her testimony; -
- Dw1 Exhibit 1 - Copy Of The Plaint Dated 03.11.1998 In The Proceedings Known As Milimani Hcc No. 2443 Of 1998.
  - Dw1 Exhibit 2 – Copy Of Order Dated 27.10.1999 In The Proceedings Known As Milimani Hcc No. 2443 Of 1998.
  - Dw1 Exhibit 3 – Copy Of An Order Dated 22.10.2001 In The Proceedings Known As Milimani Hcc No. 1804 Of 1999.
  - Dw1 Exhibit 4 – A Copy Of The Decree Dated 09.07.2004 In The Proceedings Known As Milimani Hcc No. 1804 Of 1999.
  - Dw1 Exhibit 5 – A Copy Of The Ruling Dated 10.11.2004 In The Court Of Appeal Application No. 266 Of 2004.
  - Dw1 Exhibit 6 – Copy Of A Ruling Dated 27.04.2005 In The Proceedings Known As Court Of Appeal Civil Application No. 82 Of 2005.
  - Dw1 Exhibit 7 – Copy Of The Os Dated 04.03.2009 In The Proceedings Known As Milimani Civil Suit No. 82 Of 2009.
  - Dw1 Exhibit 8 – A Copy Of The Memorandum Of Appeal; Dated 26.06.2009 In The Proceedings Known As Milimani Elc Appeal No. 47 Of 2019.
  - Dw1 Exhibit 9 – A Copy Of The Judgment Dated 14.07.2020 In The Proceedings Known As Milimani Elc Appeal No. 47 Of 2019.
  - Dw1 Exhibit 10 – A Copy Of A Letter From Fidelity Commercial Bank To The Firm Of Tkt Advocates Dated 29.08.2002
88. After producing the above exhibits, DW1 closed her testimony in chief.
89. On cross-examination, DW1 acknowledged being aware of both the advertisement for auction and the auction itself.
90. DW1 informed the Court that she became aware of the advertisement for auction through the pleadings in MILIMANI HCC NO. 1804 of 1999.
91. DW1 further informed the Court that the suit property had been auctioned when the auctioneers came to take possession on behalf of the plaintiffs in the year 2002.
92. DW1 confirmed that she had challenged the sale of the suit property in the proceedings known as MILIMANI HCCC NO. 1804 OF 1999.
- X3. Referring to DW1 EXHIBIT 2 & 3, DW1 could not remember what transpired after those orders were issued.
94. On being referred to DW1 EXHIBIT 3, DW1 informed the Court that the order was to set aside previous orders issued on 20.06.2001.
95. DW1 indicated that the Orders contained in DW1 EXHIBIT 3 were issued on 22.10.2001



96. According to DW1's view, the period between 20.06.2001 and 22.10.2001 the order was still valid.
97. Referring to PW1 EXHIBIT 5, DW1 confirmed that the Bank had placed an advert for auctioning of the suit property on 02.10.2001.
98. However, the auction of the suit property took place on 19.10.2001.
99. It was DW1's position that on the 19.10.2001 when the suit property was auctioned, the Order of 22.10.2001 had not been issued.
100. Referring to DW1 EXHIBIT 3, DW1 indicated that this Order was to maintain status quo pending the inter-parte hearing of the said application.
101. The interpartes hearing of that application was to be on 29.10.2001.
102. DW1 was not however aware whether the orders were extended after the 29.10.2001.
103. DW1 admitted that the proceedings known as MILIMANI HCC NO. 1804 OF 1999 were ultimately dismissed in the year 2004.
104. DW1 referring to DW1 EXHIBIT 4 confirmed that the same is the Decree dismissing the proceedings known as MILIMANI HCCC NO. 1804 OF 1999.
105. Based on the Decree produced as DW1 EXHIBIT 4, DW1 admitted that the sale was deemed to be valid and proper.
106. DW1 also admitted that she has never filed an appeal against the Decree produced as DW1 EXHIBIT 4.
107. On being referred to DW1 EXHIBIT 5 & 6, DW1 could not recall any other Orders that were issued by the Court of Appeal.
108. DW1 denied knowledge of any Orders made by the Court of Appeal on 19.06.2006 in the proceedings known as COURT OF APPEAL CIVIL APPLICATION NO. 266 OF 2004.
109. On being referred to Defendant's Bundle dated 28.10.2021 (page 81), DW1 insisted that the Plaintiffs were aware of the Orders issued on 09.10.2002 in the proceedings known as MILIMANI HCC NO. 1804 OF 1999.
110. On being referred to DW1 EXHIBIT 10, DW1 averred that this was the letter that made them aware of the suit before Court on or about August, 2003.
111. DW1 confirmed to the Court that at this time, the Plaintiff had already filed this suit.
112. DW1 emphatically informed the Court that her bone of contention was that the suit property was transferred while there were valid Court Orders in place.
113. DW1 concluded her cross-examination by referring to DW1 EXHIBIT 9, which was a Judgment that the proceedings in MILIMANI CMCC NO. 6427 OF 2002 were a mistrial.
114. On re-examination, DW1 reiterated that the advertisement to auction the suit property was brought to her attention by the auctioneer in the year 2002 when they came to take possession.
115. DW1 insisted that the proceedings known as MILIMANI HCC NO. 1804 OF 1999 did not end on 29.10.2001 but were determined on 09.07.2004.
116. On being referred to DW1 EXHIBIT 4, DW1 stated that the Order was for an intended sale.
117. However, at that time, the sale had already occurred.



118. Nevertheless, DW1 insisted that the Plaintiff was aware of the Orders based on his averments in an Affidavit dated 04.03.2004
119. DW1 further relied on a letter authored by the Plaintiff to Fidelity Commercial Bank seeking for a refund of the purchase price.
120. At the end of this re-examination, DW1 was discharged.
121. The second defence witness was one WANDERI MARK MUGAI who was marked as DW2.
122. DW2 introduced himself as a Principal Land Registrar in the Ministry of Lands stationed at Nairobi.
123. DW2 informed the Court that he was in attendance to produce the Green Card of the suit property in line with Summons issued by the Court.
124. DW2 confirmed that the suit property measures 0.017Ha and is on a lease of 99 years from 01.07.1980.
125. DW2 indicated that in Entry No. 8 on the Green Card of the suit property, there is a registration of a Prohibition Order issued in the proceedings known as MILIMANI HCC NO. 1804 OF 1999.
126. According to DW2, once an Entry of Prohibition based on a Court Order was recorded, there can be no further entries.
127. DW2 further stated that there is an Entry No. 9 in the Green Card of the suit property that was recorded on 08.03.2002 removing the Entry No. 8 which is the Prohibitory Order.
128. However, there was no Raising Order in support of Entry No. 9.
129. DW2 then produced a certified copy of the Green Card relating to the suit property as DW2 EXHIBIT 1.
130. On cross-examination, DW2 reiterated that he had attended Court based on summons issued to him.
- 1X1. DW2 averred that the Summons had requested him to produce the Green card and all other documents relating to the suit property.
132. DW2 nevertheless admitted that he had not produced all the documents that related to the suit property except the Green Card.
133. DW2 further admitted that in the absence of the other documents, he could not tell when the Orders that were entered as Entry No. 8 & 9 could have been issued.
134. DW2 stated that he only saw the Prohibitory Orders entered as Entry No. 8 from the Advocates but the same is not in their file.
135. DW2 could not also confirm how long the Prohibitory Orders recorded as Entry No. 8 were to exist.
136. According to DW2, the Entry No. 8 was to exist until the determination of the matter.
137. As regards to Entry No. 9, DW2 indicated that the Raising Order should emanate from the Court with a view of vacating the earlier Prohibitory Order.
138. According to DW2, the Raising Order should include the suit number.
139. Unfortunately, the Raising Order which was recorded as Entry No. 9 is also not in the file.



140. DW2 confirmed to the Court that Entry No. 10 was the registration of a Transfer from Fidelity Commercial Bank to the Plaintiff and upon registration, a Certificate of Lease was issued on the same date.
141. DW2 stated that the Raising Order recorded as Entry No. 9 and the Transfer recorded as Entry No. 10 were done on the same day.
142. In essence, DW2 informed the Court that the registered owner of the suit property was the Plaintiff.
143. In concluding the cross-examination, DW2 stated that it was not possible for the Transfer to be registered before the Raising Order was recorded and the Prohibition Order lifted.
144. There was no re-examination by the Defence counsel and DW2 was therefore discharged.
145. The Defendant thereafter closed their case.
146. The Court has carefully perused the pleadings filed herein by the parties, considered the testimonies of the witnesses and evaluated the Exhibits produced at the trial and identifies the following issues for determination: -

Issue No. 1 – What Orders Were Issued In Milimani Hcc No. 2443 Of 1998 (milimani Hcc No. 1804 Of 1999)?

Issue No. 2 – Were There Any Orders Prohibitinhg The Registration Of The Plaintiff As The Owner Of The Suit Property Issued In This Present Suit (originally Milimani Cmcc No. 6447 Of 2002)?

Issue No. 3 – Is The Transfer And Registration Of The Suit Property To The Plaintiff’s Name Lawful?

Issue No. 4 – Is The Plaintiff Entitled To The Prayers Sought?

Issue No. 5 – Who Bears The Costs Of The Suit?

147. The Court having identified the above issues for determination, the same will now be discussed as provided hereinbelow; -

**Issue No. 1 - What Orders Were Issued In Milimani Hcc No. 2443 Of 1998 (milimani Hcc No. 1804 Of 1999)?**

148. The first issue for determination is to understand the previous proceedings in particular, MILIMANI HCC NO. 2443 OF 1998 which was later renamed as MILIMANI HCC NO. 1804 OF 1999 – between ZAHRA SPARES LIMITED & ANGELINE NJERI MACHARIA VERSUS FIDELITY COMMERCIAL BANK LIMITED.
149. The reason why the Court has to look at these proceedings is to appreciate the legal Orders that were issued affecting the suit property and the final determination of the issues that were before Court.
150. According to the Defence Exhibits in particular DW1 EXHIBIT 2 which is the Order dated 27.10.1999, the same read in part as follows; -

“ 1. That the Defendants/ Respondents, by themselves, their agents, servants and assignees whatsoever be and are hereby restrained jointly and severally from selling, transferring, disposing off the premises known as NAIROBI/ BLOCK X3/ 91.”



151. After the issuance of this Order on 27.10.1999, there is nothing else that shows what happens to these Orders.
152. On the 22.10.2001, the Defendant again in the same suit (now renamed as MILIMANI HCCC NO. 1804 OF 1999) sought the following orders: -
- “ a. That the matter be certified urgent and in the first instance be heard ex-parte.
  - b. That the ex-parte orders of this court made on 20.06.2001 dismissing the suit and entering judgment for the Defendant and all consequential orders made thereon be set aside.
  - c. That the injunctive orders made by Hon. Justice Sheikh Amin on 27.10.1999 be reinstated forthwith and;
  - d. the suit be fixed for hearing
  - e. That the Registrar of Titles be directed to stop any registrations of transfer or entry consequent upon any sale by the Defendant.
  - f. The costs of this Application be provided for.”
153. The Application dated 22.10.2001 was duly presented before the Judge for consideration and the following orders were issued; -
- “ a. That the Application dated 22.10.2001 be and is hereby certified urgent.
  - b. That the Application be served forthwith for hearing interpartes on 29.10.2001.
  - c. To maintain status quo, the Registrar of Titles be and is hereby directed to stop any registration or transaction of transfer or entry consequent upon any sale by the Defendant of the premises known as NAIROBI/ BLOCK X3/ X1 pending the interpartes hearing on 29.10.2001.”
154. After the two orders highlighted hereinabove, the Defence produced the Decree dated 09.07.2004 which was dismissing the entire suit.
155. The question that this Court begs to answer is which Orders were in place between the year 1998 and 2004 relating to the suit property.
156. It is not in dispute that the first interim Orders were issued on 27.10.1999 in the proceedings initially known as MILIMANI HCC NO. 2433 OF 1998.
157. It is clear from these Orders that the Court did not specify the period within which the Orders were to subsist.
158. However, looking at the Order produced as DW1 EXHIBIT 3, it is clear that the original suit MILIMANI HCC NO. 2433 OF 1998 was dismissed on 20.06.2001.
159. Using the same Order produced as DW1 EXHIBIT 3, a second Order was issued on the 22.10.2001 in the proceedings known as MILIMANI HCC NO. 1804 OF 1999.
160. In the orders produced as DW1 EXHIBIT 3, the Court granted a Status Quo in terms of the registration of the suit property and specifically directed the Registrar of Titles not to register any



transfer or entry presented by the Defendant over the suit property pending interpartes hearing on the 29.10.2001.

161. The Defendant did not produce any Order for the extension of the Status Quo Order after the 29.10.2001.
162. It is important to point out that the Orders issued on 27.10.1999 initially in the proceedings known as MILIMANI HCC NO. 2433 OF 1998 were injunctive in nature prohibiting the Defendant from selling, alienating and/or disposing off the suit property while the Orders of 22.10.2001 were to maintain the status quo existing in the title of the suit property and further stopping the Registrar of Titles from recording any entries and/or alienating the suit property to any third party through the Defendants herein.
163. Based on the above scenario, this Court makes a finding that the Orders issues on 27.10.1999 in the proceedings known as MILIMANI HCC NO. 2433 OF 1998 were in force until the 20.06.2001 when the same was dismissed.
164. Further to that, the Status Quo order issued on the 22.10.2001 were valid from 22.10.2001 to 29.10.2001 only.
165. It is also this Court's finding that there was no Status Quo Orders issued beyond the 29.10.2001 when the Application dated 22.10.2001 came up for inter-parte hearing and the Defendant herein did not produce such an Order to prove this fact as required under Section 107 of the Evidence Act, Cap 80.

**Issue No. 2 - Were There Any Orders Prohibiting The Registration Of The Plaintiff As The Owner Of The Suit Property Issued In This Present Suit (originally Milimani Cmcc No. 6447 Of 2002)?**

166. As regards the present suit, the same was initiated after the registration of the Plaintiff as the registered owner of the suit property.
167. It is not disputed that there was no Order prohibiting the Plaintiff's registration as the legitimate owner of the suit property after it was instituted.
168. The only Orders that were issued in the present suit related to the possession initially granted to the Plaintiff and subsequently thereafter, granted to the Defendant.

**Issue No. 3 - Is The Transfer And Registration Of The Suit Property To The Plaintiff's Name Lawful?**

169. The third issue is the legality of the Plaintiff's registration as the lawful owner of the suit property.
170. According to the PW 1, an advertisement was placed by the agents of Fidelity Commercial Bank Limited inviting the public to bid for the suit property which was on sale pursuant to its statutory power of sale.
171. The Plaintiff indicated that the advertisement for the auction was dated 02.10.2001 and the actual auction happened on 19.10.2001.
172. After the auction on 19.10.2001, the Plaintiff paid the full purchase price and was now entitled to a transfer and issuance of the Certificate of Lease.
173. Going back to Issue No. 1 hereinabove, the injunctive Orders issued in the proceedings known as MILIMANI HCC NO. 2433 OF 1998 had lapsed on the 22.06.2001 upon the dismissal of the suit.



174. Similarly, the second Orders that were issued in MILIMANI HCC NO. 1804 OF 1999 began running from the 22.10.2001 to 29.10.2001.
175. In other words, at the time when the auction occurred on 19.10.2001, there was no validly existing Court Order prohibiting the selling, transfer or disposal of the suit property against Fidelity Commercial Bank Limited.
176. As regards the second Order issued on 22.10.2001 in the proceedings known as MILIMANI HCC NO. 1804 OF 1999, the Court directed the Registrar of Titles not interfere and/or register any Transfer of the suit property pursuant to the Defendant's Powers of Sale pending the inter-parte hearing of the application on the 29.10.2001.
177. The Court's interpretation of the Orders issued on 22.10.2001 is that the Court was alive to the fact that an auction could have happened on the 19.10.2001 and therefore the next preventive measure was to ensure that no registration is effected.
178. Unfortunately, the Defendant was not open to this Court and explain what happened on the 29.10.2001 when the Application dated 22.10.2001 was to come up for inter-parte hearing.
179. The expectation of this Court would have been the Defendant to produce another Order issued on the 29.10.02001 either extending the Interim Orders issued on the 22.10.2001 or confirming the same pending the hearing and determination of the main suit.
180. In the absence of an Order issued on the 29.10.2001 either extending the Interim Orders issued on the 22.10.2001 or confirming the same pending the hearing and determination of the main suit, then this Court cannot assume that the Orders issued on the 22.10.2001 were validly and/or legally in existence beyond the 29.10.2001.
181. Keeping in mind that there was no extension of the Court Orders issued on 22.10.2001 beyond 29.10.2001, it therefore goes without saying that the Court Orders issued on 22.10.2001 expired and/or lapsed on the 29.10.2001 when the said Application was coming up for inter-parte.
182. In essence, this Court is of the considered opinion and finding that on the 19.10.2001 when Fidelity Commercial Bank Limited auctioned the suit property and the Plaintiff purchased the property, there was no Court Order prohibiting such an action being taken in line with the Statutory Powers of sale.
183. Similarly, the registration of the Plaintiff's Transfer on 08.03.2002 was lawful as the Status Quo orders issued on 22.10.2001 had lapsed on the 29.10.2001.
184. Looking at DW2 EXHIBIT 1, the Entry Nos. 8 and 9 are not supported by any lawful orders issued by the Court.
185. Referring to Entry No. 8 which is the Order prohibiting the transaction on the Green Card of the suit property, DW2 admitted that he did not have the actual Court Order which they registered on the 07.11.2001.
186. If by any chance the Court Order that was relied upon to register the Entry No. 8 in the Green Card is the Order issued on the 22.10.2001, then this entry was irregularly recorded because the said Order had since lapsed on the 29.10.2001 and as at the 07.11.2001 when it was registered, it was no longer legally enforceable by the Registrar of Titles.
187. It is surprising that the Green Card can have entries that are not supported by certified copies of Court Orders thereby creating confusion.



188. The same situation applies to Entry No. 9 which talks of a Raising Order registered on the 08.03.2002 yet there is no any certified copy of a Court Order to that effect.
189. It is actually these two entries that have created the litigation before this Court and there is no other way to resolve this confusion other than declare these entries as having been recorded without any basis and are not reflective of the legal position in the proceedings known as MILIMANI HCC NO. 1804 OF 1999.
190. As such, the Plaintiff's registration as the lawful owner of the suit property on the 08.03.2002 is legitimate, lawful and does not contravene any Court Orders issued in the previous proceedings between the Defendant and the financial institution known as Fidelity Commercial Bank Limited.

#### **Issue No. 4 - Is The Plaintiff Entitled To The Prayers Sought**

191. On this issue, the Plaintiff's first prayer is a permanent injunction against the Defendant by herself, agents, servant and/or assignees from entering or in any other manner interfering with the suit property.
192. In view of the fact that this court has made a finding that the Plaintiff is the lawful registered owner of the suit property, Section 24 of the [Land Registration Act](#), No. 3 of 2012 grants all rights and privileges to such an owner to enjoy the benefits of their property.
193. This being the case, the Plaintiff is entitled to an Order of Permanent Injunction, restraining Defendant by herself, agents, servant and/or assignees from entering into, interfering with, occupying and /or dealing with the suit property which belongs to the Plaintiff.
194. The second prayer is an Order of eviction of the Defendant by herself, agents, servant and/or assignees from the suit property forthwith.
195. It is not in doubt and it has been admitted by the Defendant that the person in occupation of the suit property is her mother who has been in occupation of the same since 2002 based on a Court Order.
196. However, in view of the finding that the property lawfully belongs to the Plaintiff, the Defendant needs to yield vacant possession forthwith failure to which an Eviction Order shall issue to ensure that possession, use and occupation of the suit property is vested in the registered owner.
197. The third prayer is one of Mesne Profits for the period in which the Defendant has been in occupation of the suit property without the consent and authority of the Plaintiff.
198. The Plaintiff presented a Rent Assessment Report from one Qmacs Realtors Limited dated 05.06.2017.
199. The Rent Assessment Report assessed the payable monthly rent at Kshs. 55,000/=.
200. The Defendant did not put any Rent Assessment Report to counter the same and neither did they address the same during the hearing.
201. Indeed, it is not in contention that the Defendant has been and is still in occupation of the suit property up to the date of pronouncing this Judgement.
202. However, the Court takes judicial notice that the occupation of the Defendant on the suit property was based on a Court Order issued in the year 2002.



203. The Court Order issued in the year 2002 was premised on the fact that the ownership of the suit property was being challenged and therefore the Defendant who was in occupation of the same was given a right to continue with the said occupation pending the determination of the ownership dispute.
204. It is therefore this Court's finding that the claim for Mesne Profits is not sustainable based on the fact that the Defendant's occupation since 2002 up to now is from the Orders issued in the year 2002.
205. However, this Court having determined who the lawful and legitimate owner of the suit property is in this Judgement, the Plaintiff is entitled to Mesne Profit at the rate of KShs 60,000/- per month until the Defendant vacates or any further Court Orders are issued to the contrary.

#### **Issue No. 5 - Who Bears The Costs Of The Suit?**

206. On costs, the same usually follow the event and in this matter, the Plaintiff has been successful in prosecuting his case and the Defendant is condemned to pay the costs of the suit.

#### **Conclusion.**

207. In conclusion, the Court hereby makes the following orders in determination of the Plaintiff dated 23.08.2002; -
- A. The Plaintiff Dated 23.08.2002 Be And Is Hereby Allowed.
  - B. The Plaintiff Be And Is Hereby Declared The Lawful Registered Owner Of The Suit Property Known As Nairobi/ Block 91/x1 – Golden Gate Estate South B.
  - C. The Defendant By Herself, Her Agents, Servants, Employees And/or Any Other Person Claiming Rights Through The Defendant Are Hereby Directed To Vacate, Grant Possession, Occupation And Use Of The Property Known As Nairobi/ Block 91/x1 – Golden Gate Estate South B To The Plaintiff Within 60 Days From The Date Of This Judgment.
  - D. In The Event Of Non-compliance Of Order No. (c) Hereinabove, An Order Of Eviction Do Automatically Issue And The Deputy Registrar To Ensure It Is Executed.
  - E. The Plaintiff Is Further Granted Mesne Profit Payable At The Rate Of Kshs 60,000/- Per Month From The Date Of This Judgement From The Defendant Until Vacant Possession And/or Occupation Of The Suit Property Is Handed Over To The Plaintiff Herein.
  - F. In The Event The Defendant Shall Not Comply With Order No. E Hereinabove, The Plaintiff Is At Liberty To Levy Distress For Any Outstanding Mesne Profit That Will Become Due After The 30 Days From The Date Of This Judgement.
  - G. An Order Of Permanent Injunction Be And Is Hereby Issued Restraining The Defendant, By Herself, Her Agents, Servants, Employees And/or Assigns From Entering Or In Any Manner Interfering Or Dealing With L.r. No. Nairobi/ Block X3/x1 – Golden Gate South B Nairobi.
  - H. The Plaintiff Is Awarded Costs Of The Suit Payable By The Defendant.

**DATED, SIGNED & DELIVERED Virtually at ELDORET ELC this 29<sup>TH</sup> DAY OF MAY 2025.**

**EMMANUEL.M. WASHE**

**JUDGE**

In The Presence Of:

Court Ass: Brian



Plaintiff: Ms. Wanyonyi

Defendant: Ms. Ochieng Holding Brief Mr. Ataka

