



REPUBLIC OF KENYA



**Mungai v Kaplich & 5 others (Environment & Land Case 20 of 2015)
[2022] KEELC 15175 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 20 OF 2015
LA OMOLLO, J
DECEMBER 5, 2022**

BETWEEN

ELIUD MACHARIA MUNGAI PLAINTIFF

AND

RICHARD CHELIMO KAPLICH 1ST DEFENDANT

JOSEPH KORIR LANGAT 2ND DEFENDANT

PAUL BII 3RD DEFENDANT

JACOB ONYANGO 4TH DEFENDANT

NAKURU LAND REGISTRAR 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit vide a plaint dated 27th January, 2015 which was later amended on 1st October, 2021.
2. He avers that he is the legal proprietor of land plot No Nakuru/Municipality Block 29/910, the suit property herein.
3. He avers that in the year 1997, he bought the suit property from one Isaiah Cherotich Arusei.
4. It is his averment that he was registered by the Kalenjin Enterprises Limited as a member and a share certificate No 2264 was issued to him in respect of the suit parcel.
5. The Plaintiff avers that his claim is that sometimes in the year 2014 the defendants took over the operations of harvesting sand on the suit property after unlawfully obtaining the title deed to the suit property.



6. The Plaintiff prays for judgement against the Defendants for:
 - a. A declaration that the registration of suit property Plot No Nakuru/Municipality/ Block 29/910 in the name of the 1st and 2nd Defendants is null and void and should be cancelled.
 - b. The 1st and 2nd Defendants do execute the necessary and relevant conveyance documents to effect registration in favor of Plaintiff as the proprietor of parcel of land Plot No Nakuru/Municipality/ Block 29/910 and/or in alternative the Deputy Registrar do execute the necessary and relevant conveyance document incase the 1st Defendant declines to execute.
 - c. *Mesne* profits and interest thereof.
 - d. Eviction and a permanent injunction restraining either by themselves, their agents, servants, workmen and or relatives from trespassing, entering, using, occupying the suit land, restricting the Plaintiffs use and occupation of parcel of land Plot No Nakuru/Municipality/ Block 29/910 and or interfering with the suit land in any manner whatsoever.
 - e. Interest
 - f. Cost of the suit.
 - g. Any other relief the Honorable Court deems fit to grant.
7. The 1st and 2nd and 3rd Defendants did not file a written statement of defence. The record, however, shows that a Memorandum of Appearance was filed by counsel for the 1st, 2nd and 3rd defendants.
8. Subsequent to filing of the amended plaint, appearance was entered for the 1st 3rd and 4th Defendants. On 25th November, 2021 counsel on record filed an application to cease acting, which application was allowed on 10th March, 2022.
9. On 26th May, 2022 the matter proceeded to hearing after the court was satisfied that proper service has been effected on all the Defendants as set out in the affidavit of service dated 20th May, 2022 and filed in court on 25th May, 2022.
10. The 4th and 5th Defendants filed a Statement of Defence dated 26th February, 2015 wherein they deny the Plaintiffs claim and sought that the Plaintiff's suit be dismissed with costs.

Plaintiff's evidence.

11. Gladys Wanjiru testified as PW1. She stated that the Plaintiff is her husband that he has since suffered a stroke and that he had authorized her to testify on his behalf.
12. She prayed that her husband's statement dated 27th June, 2015 be adopted as part of his evidence.
13. She also testified that her son Arthur Wainaina Macharia wrote a statement dated 27th January, 2015 which she produced as Exhibit P1.
14. It was her testimony that she does not know the 1st and 2nd Defendants and explained that they were sued because after they conducted a search at the Lands Office, the search revealed that they (the 1st and 2nd Defendant) were the registered owners of Plot No Nakuru/Municipality Block 29/910.
15. She further testified that she knows the 3rd and 4th Defendants as persons who were harvesting sand from the suit property.



16. It was her evidence that the Plaintiff purchased the suit property from Isaiah Cherotich Arusei in 1997 and that Isaiah Cherotich Arusei died in the year 2021.
17. She testified that Isaiah did not have the title to the suit property when he sold one acre to the Plaintiff. She produced the land sale agreement as Exhibit P2.
18. She testified further that even though he did not have the title to the suit property, he had shares with Kalenjin Enterprises Limited. The Plaintiff was therefore given a Share Holder card No 2264, for Plot No 910 for 25 shares. She explained that 25 shares are equivalent to one acre.
19. She also testified that she had photographs showing that sand harvesting had been taking place in the suit property. She produced them as Exhibits P 4(a) & 4(b).
20. It was her evidence that initially they had planted maize on the suit parcel but the maize crop did not do well so they gave it to their son Arthur, who is now deceased, to use it for sand harvesting business.
21. She testified that she has a map for Nakuru Municipality Block 29 (Ronda) which she produced as Exhibit P5.
22. PW1 testified that after purchasing the suit property, the Plaintiff's name was entered in the register of Kalenjin Enterprises Limited. She had a copy of the list with her in court which she referred to and stated that the Plaintiff's name appears against Plot No 910.
23. It was her further evidence that Kalenjin Enterprises Limited changed its name to Rift Valley Enterprises Limited so that it would cease to have a tribal outlook. She produced the register as Exhibit P6.
24. Pw1 testified that her son Arthur was charged in court on account of a complaint made by the 3rd Defendant. Stated that he was charged with the offence of forcible detainer in Nakuru Criminal Case No 527 of 2015 adding that the charge was later withdrawn by the 3rd Defendant. She produced in court the release order as Exhibit P7(a) and the surety bond as Exhibit P7(b). She also produced an affidavit sworn by the 3rd Defendant stating that he wished to withdraw charges against the deceased as Exhibit P8.
25. PW1 also testified that this court issued an order on 10th May, 2016 wherein the Defendants were ordered to cease from harvesting sand. She explained that the said order was given before the 3rd and 4th Defendants started harvesting sand from the suit property and that despite the court order, the Defendants continued to harvest sand until it was depleted. She stated that what now remains is a gaping hole on the suit parcel. She produced the Order as Exhibit P9.
26. She further testified that her son had harvested sand on ½ an acre but the 3rd and 4th Defendant illegally harvested the remaining half acre even after the court order was issued.
27. PW1 also testified that her advocate wrote a letter to the District Land Registrar dated 19th May 2021 requesting the Land Registrar to supply the Plaintiff with a Certified Copy of the green card for the suit land. She produced a Certified Copy of the green card for the suit land as Exhibit P10. She also produced the Green Card as Exhibit P 11(a).
28. It was her further evidence that according to the green card entry No 2, Richard Chelimo & Joseph Langat were issued with the title to the suit property on 28th November 2006. She testified that she paid for the green card and was given a receipt dated 25th May 2021 which she produced as Exhibit 11(b).



29. Pw1 testified that the 1st and 2nd Defendants obtained the title fraudulently adding that she did not know them and only discovered that they were registered as owners when they did a search.
30. It was her evidence that she wants the title issued to the 1st and 2nd Defendants cancelled and the court declares that it is null and void. She sought for her prayers as set out in the Amended Plaint.
31. The Plaintiff in his witness statement states that Isaiah Cherotich Arusei was a shareholder with Kalenjin Enterprises when he sold the suit property to him.
32. He further states that after he bought the land, he took possession after which he gave his son the authority and duty to manage the suit land as a sand harvesting site adding that his son was receiving income from the sale of harvested sand.
33. The Plaintiff also states that his occupation of the suit property has never been interrupted until 26th October 2014 when the 1st, 2nd and 3rd Defendants with assistance from CID officers took his son to the CID offices to write a statement under duress after which he surrendered the suit property to the Defendants/Respondents.
34. In his written statement, the plaintiff states that from 26/10/14 he has not been able to harvest sand because the 1st, 2nd and 3rd Defendants took over his land and business.
35. He states further that the Respondents have sold over 800 lorries of sand and earn Kshs 1500/= per lorry adding that the 1st and 2nd Defendant was fraudulently registered as the owner of the suit land.
36. The Plaintiff's case was closed.
37. The Defendants' case was also closed. They were not present in court during the hearing despite having been served with a hearing notice.

Plaintiff's submissions.

38. The Plaintiff filed his submissions on 22nd June 2022. He gave a background of the case and identified the following issues for determination:
 - a. Whether the Plaintiff has proved his case on a balance of probabilities.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
 - c. Whether the Plaintiff is entitled to costs.
39. On the first issue, the Plaintiff submitted that he tendered evidence to show how he acquired the one acre of land from the late Isaiah Cherotich Arusei vide the land Sale Agreement dated 20th November 1997.
40. The Plaintiff further submitted that the Defendants did not defend the matter as it was only the 5th Defendant that filed a Defence but did not tender evidence.
41. The Plaintiff relied on the cases of *Justin Mwangi Chonga v Mwarome Munga Janji & 4 others* [2021], *Kenya Power & Lighting Co. Ltd v Rasul Nzembe Mwadzaya* [2020] eKLR and submitted that his evidence was not controverted in any way.
42. The Plaintiff further relied on Sections 26 and 80 of the *Civil Procedure Rules* and Article 40 of the *Constitution* and submitted that he is the lawful owner of land parcel No Nakuru Municipality Block 29/910 which the 1st and 2nd Defendants are also laying claim to.



43. He cited the decisions in the cases of *Joseph Igogo Gathirwa v Peter Nduati Mbau & 2 others* [2021] eKLR, *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No 239 of 2009 and submitted that the Defendants had the opportunity to show the root of the title in question but they failed to participate in the proceedings.
44. On the second issue he sought that the orders he prayed for in the Plaintiff be granted. He relied on the cases of *Joseph Igogo Gathirwa v Peter Nduati Mbau & 2 others supra*, *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* [2013] and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR in support of his arguments.
45. On the third issue, the plaintiff relied on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR and submitted that costs follow the event and should therefore be allowed in the present case.

The 4th defendant's submissions.

46. The 4th Defendant filed his submissions on 27th July 2022. He identifies the following issues for determination;
 - a. Whether the Plaintiff has proved his case against the 4th Defendant.
 - b. Whether the 4th Defendant should be struck out of the suit for being improperly joined.
47. On the first issue, the 4th Defendant submitted that apart from the Plaintiff's claim in his pleadings, that the 4th Defendant jointly with the 1st to 3rd Defendants took over the operations of sand harvesting on the suit property in January 2016, which allegations were not proved, the Plaintiff has no legal claim against him.
48. The 4th Defendant further submitted that he is neither the registered nor the beneficial owner of the suit property and therefore has no claim on the land. Further that no orders were sought against him and he was therefore improperly joined in the suit.
49. On the second issue it was submitted that the Plaintiff did not demonstrate any justifiable grounds for suing the 4th Defendant and that no substantial evidence was given to support the allegations against him by the Plaintiff.
50. The 4th Defendant relied on the case of *Alumark Investments Limited v Tom Otieno Anyango & 4 others* [2018] eKLR and Order 1 Rule 3 and 10(2) of the *Civil Procedure Rules* in support of his arguments.
51. In Conclusion, the 4th Defendant sought to be struck out from the suit as per the provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules*.

Analysis and Determination.

52. After considering the pleadings in this matter, the submissions filed and the Judicial Decisions cited, the following:
 - a. Whether the registration of Land parcel No Nakuru Municipality Block 29/910 in the name of the 1st and 2nd Defendants was fraudulent and should be cancelled.
 - b. Whether the plaintiff is entitled to an order of eviction and permanent injunction against the 1st and 2nd Defendant.



- c. Whether the plaintiff is entitled to an order for *mesne* profits.
 - d. Whether there was misjoinder of the 4th defendant.
 - e. Who should bear the cost of this suit?
 - f. Whether the registration of Land parcel No Nakuru Municipality Block 29/910 in the name of the 1st and 2nd Defendants was fraudulent and should be cancelled.
53. The Plaintiff's case is that he bought the suit property measuring one acre from Isaiah Cherotich Arusei. The land sale agreement dated 20th November 1997 was produced as Exhibit P2.
 54. The said land sale agreement is for land parcel No Nakuru Municipality Block 29/910 between Isaiah Cherotich Arusei and the Plaintiff for a consideration of Kshs 150,000/=.
 55. The Plaintiff's case is that Isaiah Cherotich Arusei acquired suit land by reason of membership at Kalenjini Enterprises. After the said purchase, the Plaintiff was given a Shareholder card from Kalenjini Enterprises which card is produced as Exhibit P3.
 56. It is the Plaintiff's case that after purchase and issuance with the shareholders card, his name was entered into the Register of Kalenjini Enterprises. The register was produced as Exhibit P6.
 57. It is the Plaintiff's case that after purchase he took possession of the suit property, cultivated it initially and subsequently his son Arthur engaged in sand harvesting.
 58. It was further the Plaintiff's case that on 26th October 2014 the 2nd Defendant together with CID officers went to his son's house and took him to the CID Offices where he was forced to write a statement in which he stated that he had surrendered the suit land to the Defendant after which the Defendants took possession of the suit property and commenced sand harvesting.
 59. In the amended Plaintiff, he states that sometime in November 2006, the 1st and 2nd Defendants fraudulently obtained the title documents for the suit land in their names.
 60. From the evidence adduced, there is no doubt that land parcel No Nakuru/Municipality Block 29/910 is registered in the names of Richard Chelimo Kaplich and Joseph Korir Langat the 1st and 2nd Defendants herein.
 61. Section 24 of the [Land Registration Act](#) provides as follows:
 24. Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
 62. Section 26 (1) of the [Land Registration Act](#) provides as follows:
 - 26.



- (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 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 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.

63. The Courts are therefore mandated to consider title document as prima facie evidence of ownership. This presumption holds true until a third party challenges the title on grounds set out in Section 26 as set out above.

64. In the present case, it is not in dispute that the suit property is registered in the names of the 1st and 2nd Defendants. The Plaintiff alleges that the 1st and 2nd Defendants acquired the said title fraudulently.

65. Fraud is a serious allegation and must be proved on a standard higher than that of proof on a balance of probabilities but lower than that of Criminal Law standard of proof of beyond reasonable doubt.

66. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR stated as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13th Edition at page 427:

‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged.’

67. The plaintiff in his testimony has explained the process that led to his acquisition and occupation of the suit land. His evidence is that even before conclusion of the necessary transfer processes with Kalenjin enterprises, he woke up to the realization that the 1st and 2nd defendant had been registered as owners. This registration was without the knowledge or participation of the plaintiff and he terms it as fraudulent.

68. Section 80 of the *Land Registration Act* provides:

80. Rectification by order of Court.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or



amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

69. The defendants were given an opportunity to defend themselves and explain the root of their title but they failed to do so. I have no reason to doubt the evidence and testimony of the plaintiff in so far as it is intended to show that the title as acquired by the 1st and 2nd defendant was fraudulent and unprocedural.
70. *Black's Law Dictionary* 11th edition at page 802 defines fraud as follows;
- “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
71. The plaintiff in his amended complaint sets out the particulars of fraud on the part of the 1st and 2nd defendant as follows;
- a. Obtaining title when they knew or ought to have known that the suit parcel was not allocated to them.
 - b. Failing to make full disclosure to the relevant authorities that the suit parcel belonged to the plaintiff.
 - c. Obtaining title documents without consent of the plaintiff.
72. The plaintiff in his amended complaint gives particulars of fraud on the part of the 5th and 6th defendant as follows;
- a. Registering the suit land Plot No Nakuru Municipality Block 29/910 in the name of the 1st defendant instead of the plaintiff.
 - b. Failing to register the suit land in the name of the Plaintiff.
73. The Plaintiff produced a copy of the Green Card for land parcel No Nakuru Municipality Block 29(Ronda)/910 measuring 0.1875 Ha as Exhibit P10. Entry No 1 is dated 29th March 2000. It shows that the land is registered in the name of the Government of Kenya. Entry No 2 is dated 28th November 2006 when the property was registered in the names of Richard Chelimo Kaplich and Joseph Korir Langat and a title deed issued on the same date.
74. The plaintiff has produced a member's register. It is titled Rift Valley Enterprises Ltd (Kalenjin Enterprises Ltd) for Block 29 Nakuru Municipality Ronda Farm LR No 6273. The members register is for 1998/910. The Plaintiff's name is entered at No 910.
75. I have no evidence, whatsoever, as to how the suit property might have been acquired by the 1st and 2nd Defendant. The evidence of the plaintiff is therefore uncontroverted.



76. In *Shaneebal Limited v County Government of Machakos* [2018] eKLR, the learned judge evaluated the consequences of a party failing to adduce evidence and cited with approval various decisions. They are as follows;

24. What are the consequences of a party failing to adduce evidence" In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002, Lesiit, J citing the case of *Autar Singh Bahra And another v Raju Govindji*, HCCC No 548 of 1998 appreciated that: "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".
25. Again in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCS No 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.
26. In the case of *Karuru Munyororo v Joseph Ndumia Murage & another* Nyeri HCCC No 95 of 1988, Makhandia, J (as he then was) held that: "The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".
27. In *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)* Kisumu HCCC No 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997 held that: "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".
28. Similarly in the case of *Interchemie EA Limited v Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.
29. If one is still in doubt as to the legal position reference could be made to the case of *Drappery Empire v The Attorney General* Nairobi HCCC No 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the



failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.

77. Based on the foregoing, I find that the registration of Land parcel No Nakuru Municipality Block 29/910 in the name of the 1st and 2nd Defendants was fraudulent and should be cancelled.

Whether the plaintiff is entitled to an order of eviction and permanent injunction against the 1st and 2nd Defendant.

78. My finding on question A above is in the affirmative. I am persuaded that an order of eviction and permanent injunction should issue against the 1st, 2nd and 3rd Defendants restraining them from trespassing, entering, using, occupying the suit land, restricting the plaintiffs use and occupation of the suit land and/or interfering with it in any manner whatsoever.

Whether the plaintiff is entitled to an order for *mesne* profits.

79. The Plaintiff has sought an order for *mesne* profits. The basis for this prayer is the sand harvested from the suit parcel by the 1st and 2nd Defendants.
80. In *Rajan Shab T/A Rajan S. Shab & Partners v Bipin P. Shab* (2016) eKLR the Learned Judge held as follows;

“The term ‘mesne profits’ relates to damages or compensation from a person who has been in wrongful possession of immovable property...they are the rents and profits which a trespasser has or might have received or made during his occupation of the premises and which therefore he must pay over to the true owner as compensation for tort which he has committed.”

81. In the case *Peter Mwangi Msuitia & another v Samow Edin Osman* (2014) eKLR, the Court of Appeal held as follows:

“As regards the payment of *mesne* profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaint as *mesne* profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

82. In *Nakuru Industries Ltd v S.S. Mehta and Sons* (2016) eKLR it was held that *mesne* profits are a form of special damages which must be specifically pleaded and strictly proved.
83. No evidence was led by the Plaintiff as to the specific amounts received by the 1st and 2nd Defendant from harvesting sand from the suit land. It follows therefore, that the Plaintiff has failed to meet the criteria for an award of *mesne* profits. Consequently, the prayer for *mesne* profits is declined.

Whether there was misjoinder of the 4th defendant.

84. The amended plaint mentions 3rd defendant at paragraph 10. The plaintiff avers that on 26th October, 2014 the 3rd defendant unlawfully employed the services of CID officers to have the plaintiff son arrested on trumped-up charges of forcible detainer. He alleges further that his son was forced to write a statement which statement was to the effect that he would not enter the suit land, harvest or sell sand from it. At paragraph 10A of the amended plaint, the plaintiff avers that further to the trumped-up charges, criminal proceedings were initiated vide Nakuru CMC Criminal case No 527 of 2015 and later withdrawn by the 3rd Defendant.



85. The 4th defendant is mentioned at paragraph 11 of the amended plaint. The plaintiff avers that the 1-4th defendant took over the sand harvesting operations and that they have sold over 800 lorries of sand priced at Kshs 1500 per lorry. He avers that these sand harvesting operations continued despite the existence of the orders of this Honourable Court.
86. The plaintiff has produced a release order and bond and an affidavit dated 6/5/21 sworn by the 3rd defendant as evidence of these averments. There is no doubt that there was some level of involvement on the part of the 3rd defendant and I have no reason to doubt the plaintiff's evidence.
87. On a perusal of the prayers sought, the plaintiff is seeking orders of eviction and permanent injunction against all the defendants. However, the allegations against the 4th defendant have not been proved. I find that no cause of action has been established against him.

Who should bear the cost of this suit?

88. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).
89. In the case of *Jabir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

Disposition.

90. Lord Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372, discussing the burden of proof had this to say-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

91. It is my view, that the Plaintiff has sufficiently proved his case against the 1st, 2nd, 3rd and 5th defendants. Therefore, the Plaintiff's suit as against the 1st, 2nd, 3rd and 5th Defendants succeeds.
92. Consequently, I declare and grant orders as follows:
- a. The registration of suit property Plot No Nakuru/Municipality/ Block 29/910 in the name of the 1st and 2nd defendants is null and void and is hereby cancelled.
 - b. The 5th defendant shall rectify the register of land parcel No Nakuru/Municipality/ Block 29/910 by deleting the 1st and 2nd Defendant's name and registering the name of Eliud Macharia Mungai.
 - c. Orders of eviction and permanent injunction are hereby issued against the 1st, 2nd and 3rd Defendant restraining them either by themselves, their agents, servants, workmen and or relatives from trespassing, entering, using, occupying the suit land, restricting the plaintiffs



use and occupation of parcel of land Plot No Nakuru/Municipality/ Block 29/910 and or interfering with it any manner whatsoever.

- d. The suit against the 4th defendant is dismissed with no order as to costs
- e. The eviction order in (c) above shall take effect after the lapse of 90 days from the date hereof.
- f. The Plaintiff shall have costs of this suit and interest thereon from date of filing till payment in full.

93. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF DECEMBER 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Mogire for Magata for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance 3rd Defendant

Miss Kipruto for the 4th Defendant

No appearance for the 5th Defendant

No appearance for the 6th defendant

Court Assistant; Ms. Monica Wanjohi

