



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bos Shipping (East Africa) Limited v Mohamed & 9 others (Environment & Land Case 89 of 2021) [2025] KEELC 4211 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4211 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 89 OF 2021**

**SM KIBUNJA, J**

**JUNE 4, 2025**

**BETWEEN**

**BOS SHIPPING (EAST AFRICA) LIMITED ..... PLAINTIFF**

**AND**

**KHELEF ABDULLA MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**UMAIR MUHAMMAD ..... 2<sup>ND</sup> DEFENDANT**

**SAMUEL MUDAKI MUGARO T/A MISA MUGARO AUCTIONEERS .... 3<sup>RD</sup> DEFENDANT**

**OMONDI LAWRENCE OBONYO T/A LAWRENCE OBONYO LEGAL ADVOCATES ..... 4<sup>TH</sup> DEFENDANT**

**NGETHE HITHCLIFF OYIEKE ALIAS HITCHCLIFF N OYAS 5<sup>TH</sup> DEFENDANT**

**ALBERT CHEBII ..... 6<sup>TH</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE ..... 7<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF LANDS, MOMBASA ..... 8<sup>TH</sup> DEFENDANT**

**EBENEZER SECURITY SERVICES ..... 9<sup>TH</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 10<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through the plaint dated 12th May 2021, inter alia averring that it is the registered, beneficial and legal owner of parcel of land known as subdivision Number 890 of Section I Mainland North, the suit property. That one Abdallah Abdul Rehman and Texas Alarms



(K) Limited laid illegal claim over the suit property leading it to file Mombasa ELC Case No. 121 of 2019, Bos Shipping (East Africa) Limited versus Abdallah Abdul Rehman & Texas Alarms (K) Limited, which is still pending in court. That the 1st defendant filed Mombasa CMELC 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited claiming the suit property on grounds of adverse possession. The plaintiff averred that the way the suit was allegedly served, heard and determined was unprocedural, irregular and illegal, in that inter alia:

- a. Service was done by means of substituted service where a minute classified advertisement was put up on 12th June 2019 in the rarely read People Daily Newspaper giving the plaintiff 14 days to enter appearance. However, before the 14 days expired, the 1st defendant filed a request for judgment on 20th June 2019 upon which an interlocutory judgment was endorsed on 21st June 2019.
- b. On 24th June 2019, the matter was listed for mention and on the said date, an *ex parte* hearing date of 28th June 2019 was scheduled, and judgment was delivered on the same date, 28th June 2019. That due to the rushed nature of proceedings and the procedural lapses the judgment was irregular, unprocedural and fraudulent.

The plaintiff averred that the 1st defendant in collusion with the 8th defendant, used the above judgment to obtain a provisional certificate of title dated 5th July 2019, without publishing it in the Kenya Gazette, while the decree was not issued until 9th October 2019. That as the provisional title could not have been obtained before the issuance of the decree, the same was obtained through fraud, collusion and illegally. That the 1<sup>st</sup> defendant then subdivided the suit property into two portions, subdivision number 22672 and 22673/I/MN, and transferred the said parcels to the 2nd defendant in unclear circumstances. That due to the collusion, fraud and illegality in the said judgement, decree and provisional certificate of title, they were all null and void and could not confer any legal rights to the 1<sup>st</sup> defendant and or any other person, including the 2<sup>nd</sup> defendant.

2. The plaintiff further averred that it found out about the said subdivisions and transfer from a neighbour and launched investigations through which it got to know about Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited. The plaintiff filed an application dated 2<sup>nd</sup> September 2020 in that suit seeking to set aside the judgment and decree on basis of the numerous irregularities and lack of jurisdiction. The application was heard on merit with 1<sup>st</sup> and 2<sup>nd</sup> defendants participating, after which Hon. C.N Ndegwa delivered a ruling on 26th April 2021 striking out the suit on the basis that the court did not have pecuniary jurisdiction to determine the case, without specifically setting aside the judgement. The plaintiff averred that after the striking out the suit, the said judgment and decree were null and void. Further that the actions taken on the strength of the said judgement and decree, including the issuance of certificate of title over the suit property in the name of 1<sup>st</sup> defendant, subdivision and transfer to the 2<sup>nd</sup> defendant were all null and void as per the legal principle that a nullity is a nullity and nothing can stand on nothing.
3. Even as the plaintiff was fighting off the 1<sup>st</sup> and 2<sup>nd</sup> defendants in Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited, it came to latter know of another suit, Mombasa CELC No. 154 of 2019, Umair Mohamed versus Khelef Abdulla Mohammed, filed on 1st October 2019 where the 2nd defendant sued the 1st defendant and sought inter alia for a declaration that he is the registered owner of 22672/I/MN; eviction orders against all third parties, and demolition of structures on the said parcel to be overseen by the OCS, Nyali. The plaintiff averred that Mombasa CMELC No. 154 of 2019 Umair Mohamed versus Khelef Abdulla was a calculated move meant to dispossess the plaintiff and its agent/tenant as by the date of filing it on 1<sup>st</sup> October 2019, the 2nd defendant had already been registered as owner on 20th September 2019. In furtherance to the



collusion between the two defendants, a consent was filed on 7th October 2019, adopted as an order of the court on 16th January 2020, and issued on 17th January 2020, while 1<sup>st</sup> defendant's statement of admission was filed by the 2<sup>nd</sup> defendant on 11<sup>th</sup> December 2019. The plaintiff set out the particulars of fraud and collusion attributed to the 1st and 2nd defendants to be inter alia that:

- a. The 2<sup>nd</sup> defendant filed Mombasa CMELC No. 154 of 2019 Umair Mohamed versus Khelef Abdulla, on 1<sup>st</sup> October 2019 seeking for superfluous orders, including to be registered as beneficial owner while he had been registered as owner.
  - b. The 2<sup>nd</sup> defendant relied on non-existent agreement for sale whose date and consideration was neither stated nor disclosed and was not even filed in court, to hoodwink the court to believe that he had bought the suit property from 1<sup>st</sup> defendant for valuable consideration.
  - c. The 1st defendant did not defend the suit, but chose to file a statement of admission. Further, the 1<sup>st</sup> and 2<sup>nd</sup> defendants entered into consent to evict third parties who had not been named, through the police.
  - d. The 2nd defendant filed the suit in a court without jurisdiction as the value of the suit property exceeded the court's pecuniary jurisdiction.
4. The plaintiff averred that following the ruling of Hon. C.N Ndegwa, delivered on 26th April 2021, it follows that the said consent adopted in MCELN No. 154 of 2019 Umair Mohamed versus Khelef Abdulla is null and void. Further. It stated that the 1st and 2nd defendants did not act on the consent order until the lapse of one year and three months when they evicted the plaintiff's tenant, OMERIYE LIMITED, from the suit property on 10th May 2021. That the eviction was after the Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited had been struck out, and was therefore illegal. The plaintiff pleaded the particulars of the illegality of the eviction as follows:
- a. OMERIYE LIMITED was not bound by the orders in Mombasa CMELC No. 154 OF 2019, as it was not a party in the suit.
  - b. The order issued on 17th January 2020, was over one year old as at 10th May 2021, when eviction was carried out, yet under Order 22 Rule 18 of the Civil Procedure Rules as read with section 28 of the *Civil Procedure Act*, a notice to show cause why execution should not be done, should first have been issued and served upon the plaintiff, but that was not complied with.
  - c. No warrants or notice were served on the plaintiff and its above stated tenant before eviction, contrary to Order 22 Rule 30 of the Civil Procedure Rules, 2010.
  - d. No application for execution was made in the prescribed form No. 14 Appendix A, as required under section 28 of the *Civil Procedure Act*.
  - e. No warrants of execution and eviction were issued or obtained from the court before execution through eviction was carried out.
  - f. Eviction was conducted by a 3<sup>rd</sup> defendant, a private auctioneer, instead of a court bailiff or any other officer deputized by the court.
  - g. The instructions to evict issued by the 4th and 5th Defendants to 3<sup>rd</sup> defendant were illegal, irregular and unlawful, as they were never on record for 2<sup>nd</sup> defendant in Mombasa CMELC No. 154 of 2019, as no notice of change of advocates had been filed from Onyango Onunga & Company Advocates by Lawrence Obonyo Legal Advocates.



5. The plaintiff claims that it suffered loss and damage as a result of the illegalities set out above, and the 2<sup>nd</sup> to 8<sup>th</sup> defendants should be held jointly and severally liable. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable for the loss and damage suffered by the plaintiff as a consequence of the unlawful eviction. Further, that 3<sup>rd</sup> defendant actions amounted to negligence and illegality for the following reasons:
- a. The 3<sup>rd</sup> defendant evicted the plaintiff and its tenant knowing that they were not parties in Mombasa CMELC No. 154 OF 2019 and therefore, not bound by the order issued on 17<sup>th</sup> January 2020.
  - b. The 3<sup>rd</sup> defendant being a licensed auctioneer, and by extension an officer of the court, acted on instructions of the 4<sup>th</sup> and 5<sup>th</sup> defendants knowing that they were not properly on record. Further that the 3<sup>rd</sup> defendant failed to apply for warrants of execution and consequently did not serve the same upon the plaintiffs as provided by Order 22 Rule 30 of the Civil Procedure Rules.
  - c. The 3<sup>rd</sup> defendant did not satisfy itself that notice to show cause had been served upon the plaintiff and its tenant taking into account that the order was more than a year old.
  - d. The letter of instructions from the 4<sup>th</sup> and 5<sup>th</sup> defendants indicated that the same were acting on behalf of Umair Muhammad who was neither a party to Mombasa CMELC No. 154 of 2019, nor named in the consent order of 17<sup>th</sup> January 2020.

The 3<sup>rd</sup> defendant acted negligently, illegally and unprocedurally as he ought to have known that the said eviction could only be undertaken by a court bailiff or a duly authorized by the court, and is therefore liable for the plaintiff's loss.

6. The plaintiff also particularized the negligence and illegality attributed to the 4<sup>th</sup> and 5<sup>th</sup> defendants as follows:
- a. They gave instruction to the 3<sup>rd</sup> defendant for eviction knowing that the plaintiff and its tenant were not parties to Mombasa CMELC No. 154 of 2019.
  - b. They gave instruction without having capacity as they were not on record for the parties in Mombasa CMELC No. 154 of 2019.
  - c. Further, that they gave eviction instructions on behalf of UMAIR MUHAMMAD who was not a party to Mombasa CMELC No. 154 of 2019 and was not named in the order dated 17<sup>th</sup> January 2020.
  - d. Being advocates of the High Court of Kenya, they gave instructions to the 3<sup>rd</sup> defendant knowing that no warrants or notice of eviction had been obtained from the court, and no notice to show cause had been served upon the plaintiff as required by Order 22 Rule 18 Civil Procedure Rules.
  - e. They ought to have known that eviction can only be carried by a court bailiff. They were also aware of the circumstances under which their purporting instructing client obtained alleged title to the suit property, and that the court had struck out Mombasa CMELC No. 64 of 2019 and therefore the predecessor to their client did not have good title.
  - f. The plaintiff averred that the 4<sup>th</sup> and 5<sup>th</sup> defendants could not hide under advocate client privilege as they have clearly demonstrated professional negligence.
7. The plaintiff pleaded negligence and illegality attributed to the 6<sup>th</sup> defendant including inter alia that:



- a. The 6th defendant dispatched a contingent of uniformed and armed police officers and employed public resources in eviction of the plaintiff and its tenant, which was a purely private exercise.
  - b. The dispute was a civil one and the police should not have been involved, but the 6th defendant participated and supervised the eviction of the plaintiff and its tenants from the suit property, while knowing that the plaintiff and its tenant were not party to Mombasa CMELC No. 154 of 2019.
  - c. The 6th defendant had in his possession the letter of instructions dated 5th May 2021 issued by the 4th and 5th defendants and ignored the fact that the letter was written on behalf of one Umair Muhammad, who was not a party to Mombasa CMELC No. 154 of 2019.
  - d. The 6th defendant participated in the eviction while knowing no warrants of execution had been issued by the court or even served on the plaintiff as required by Order 22 Rule 30 of the Civil Procedure Rules.
  - e. The 6th defendant was negligent by participating in the eviction exercise of an order that was over one year old and incapable of execution until a notice to show cause was served.
  - f. The 6th defendant ought to have known that the eviction could only be undertaken by a court bailiff or an officer so authorized by the court.
  - g. The 6<sup>th</sup> defendant was aware of the plaintiff's interest and legal rights as a dispute concerning the suit property had been reported by the plaintiff's caretaker to Nyali Police Station on 25h March 2019 under OB NO. 89/25/3/2019, and should be held liable for the plaintiff's loss.
8. The plaintiff averred that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 6<sup>th</sup> defendants trespassed on the suit property, on 10<sup>th</sup> May 2021, through their actions of hiring thirty goons while purporting to execute a court order, which was incapable of being executed, and thus engaged in forceful entry acts of vandalism, destruction of property, theft and damage. Furthermore, the plaintiff averred that the defendants have threatened to come and demolish the buildings upon the suit property under the guise that the land belongs to the 2nd defendant.
  9. The plaintiff also averred that apart from the aforementioned two cases, there is also Mombasa ELC CASE NO. 121 of 2019 – Bos Shipping (East Africa) Limited versus Abdalla Abdul Rehman & Texas Alarms (K) Limited which is pending determination.
  10. The plaintiff therefore prays for the following jointly and severally against the defendants:
    1. “An order of permanent injunction to restrain the defendants either by themselves, officers, agents, employees, assigns or any person acting for them or on their instruction from demolishing any development, house, building, gate or any other structure erected on the property known as Subdivision Number 890 Section I Mainland North situate along Green Wood Avenue in Nyali, Mombasa County.
    2. An order of permanent injunction to restrain the defendants either by themselves, officers, agents, employees, assigns or any person acting for them or on their instructions from selling, transferring, leasing, charging, visiting, invading, trespassing on, occupying and taking possession of the property known as Subdivision Number 890 of Section I Mainland North situate along Green Wood Avenue in Nyali, Mombasa County.



3. A declaration that the Plaintiff is the lawful, legal, rightful, registered and beneficial owner of the property known as Subdivision Number 890 of Section I Mainland North situate along Green Wood Avenue in Nyali, Mombasa County and is entitled either directly or through the Plaintiff's authorized persons to occupy, enjoy, charge, lease, develop, dispose of or any other manner whatsoever use the said property Subdivision Number 890 of Section I Mainland North.
4. An order of mandatory injunction compelling the Defendants jointly and severally to reinstate the plaintiff and/or its tenant, employees, agents, assigns or any other person so authorized by the Plaintiff to the property Subdivision Number 890 of Section I Mainland North situate along Green Wood Avenue in Nyali, Mombasa County.
5. The Regional Police Commander, Coast Region and/or the County Police Commander, Mombasa County either directly or through the Sub-County Police Commander, Kisauni Sub-County or any other nearest police station to ensure that the orders of this Honourable Court is complied with and implemented and that law and order is maintained at all times that this Honourable Court's orders are in force.
6. A declaration be an is hereby made that the judgment delivered by Hon. C.N Ndegwa on 28th June 2019 in Mombasa Chief Magistrate ELC Case No. 64 of 2019 (OS): Khelef Abdulla Mohammed v Bos Shipping (East Africa) Limited and the decree ensuing therefrom are illegal, null and void and are hereby set aside.
7. A declaration be and is hereby made that all actions and steps taken pursuant to the judgment delivered by Hon. C.N Ndegwa on 28th June 2019 in Mombasa Chief Magistrate ELC Case No. 64 of 2019 (OS): Khelef Abdulla Mohammed v Bos Shipping (East Africa) Limited and the decree ensuing therefrom including but not limited to the issuance of the respective certificates of title in favour of the 1st and 2nd defendant are illegal, null and void and are hereby set aside.
8. A declaration be and is hereby made that the consent order made by Hon. C.N Ndegwa on 16th January 2021 in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed vs Khelef Abdulla Mohamed be and is hereby dismissed/struck out forthwith.
9. A declaration be and is hereby made that all actions undertaken pursuant to the consent order made by Hon. C.N Ndegwa on 16th January 2021 in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed vs Khelef Abdulla Mohamed including the eviction of the Plaintiff and its tenant from the suit property are illegal, null and void and are hereby set aside.
10. An order of mandatory injunction be and is hereby issued to compel the 8th defendant to cancel, revoke and nullify the 1st and 2nd Defendant's respective titles over the suit property including but not limited to the 2<sup>nd</sup> Defendant's titles for Subdivision Number 22672/I/MN (Original No 890/1) and Subdivision Number 22673/I/MN (Original No 890/2) and to remove all records relating to the same from the Land's Register.
11. A declaration be and is hereby made that the provisional Certificate of Title issued on 5th July 2019 in respect of the property known as Subdivision Number 890 of Section I Mainland North and the resultant subdivision in favour of the 2nd defendant being Subdivision Number 22672/I/MN (Original No 890/1) and Subdivision Number 22673/I/MN (Original No 890/2) are hereby cancelled, annulled, nullified and revoked forthwith.



12. An order of mandatory injunction be and is hereby issued to compel the 8th Defendant to remove from the register and cancel all the registration documents and the file for subdivision Number 22672/I/MN (Original No 890/1) and Subdivision Number 22673/I/MN (Original No 890/2).
  13. An order of mandatory injunction be and is hereby issued to compel the 8th defendant to reinstate the plaintiff's title for subdivision number 890 of Section I Mainland North and to keep, maintain and preserve the Register records and all the files relating thereto.
  14. An order of declaration be and is hereby made that the Plaintiff is entitled to compensation from the defendants jointly and severally for the loss of rental income that the plaintiff would have otherwise earned in respect of the Tenancy Lease Agreement dated 23rd December 2020 between the plaintiff and OMERIYE LIMITED including rental income under the said TENANCY Lease Agreement for the period commencing from the date of eviction on 10th May 2021 to 31st December 2025.
  15. Damages and compensation to the Plaintiff for unlawful eviction against the Defendants jointly and severally.
  16. Damages and compensation to the Plaintiff for trespass against the 2nd, 3rd, 6th and 7th defendants jointly and severally.
  17. Costs of this suit.
  18. Any other and further relief this court may deem just to grant.”
11. The 1<sup>st</sup>, 3<sup>rd</sup> and 10<sup>th</sup> defendants never entered appearance. The 2nd defendant entered appearance but filed no defence.
  12. The 4th and 5th defendants opposed the plaintiff's claim through their defence and counterclaim dated 20th April 2024 inter alia denying all the particulars of negligence attributed to them, claiming that they were strangers or not party to the allegations levelled against them. In their counterclaim, they averred that upon receiving instructions from the 2nd defendant, they instructed the 3rd defendant pursuant to the court order dated 17th January 2020, to obtain vacant possession over the suit property, after ascertaining the authenticity of the order and case file. That pursuant to a postal search dated 3rd February 2020, they also confirmed that plot number 22672/I/MN belonged to the 2nd defendant, and therefore prayed that the suit against them be struck out.
  13. The 6th, 7th, 8th and 9th defendants filed their defence dated 14th November 2023 denying all the allegations against them. They inter alia pleaded that they became aware that the proceedings and judgment in Mombasa CMELC No. 64 of 2019 - Khelef Abdualla Mohammed versus BOS Shipping (East Africa) Limited were set aside for want of jurisdiction after they were served with the pleadings of this suit on 26<sup>th</sup> April 2021. They admitted that the court orders issued without jurisdiction are null and void, but stated that the court orders issued on 16th January 2020 in Mombasa CMELC No. 64 of 2019 - Khelef Abdualla Mohammed versus BOS Shipping (East Africa) Limited, and served on the OCS Nyali Police station, had been verified by the court as authentic on 10th May 2021. Further, they stated that if any loss was suffered by the plaintiff, then it should be indemnified by the 1<sup>st</sup> to 5<sup>th</sup> defendants against any award of damages. They denied the particulars of negligence and justified their actions by stating that they acted in good faith on the basis of the authentic court order above stated. They also averred that the suit against the 6th defendant offends the provisions of section 66 of the *National Police Service Act*. They denied the particulars of trespass and averred that no demand or notice to sue was made on them as required by section 13A of the *Government Proceedings Act*.



14. During the hearing, the plaintiff called two witnesses. The first witness was Ayoob Mohammed, human resource officer at Masters Powers System Limited, who testified as PW1, and inter alia stated that Mukesh Hirani is the owner of the plaintiff and also, the Managing director at Masters Powers Limited. He relied on his statement dated 25th March 2024, which generally reiterated the allegations in the plaint. He also produced the 13 documents in the list of documents of even date that were attached to his supporting affidavit sworn on 12th May 2021. He told the court that on 10th March 2021 a large group of people, escorted by the police came to the suit property and forcefully evicted them, and their tenant, Omeriye Limited, on the basis of a purported court order issued in Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited. On cross examination he agreed that there was a court order issued on 17th January 2020 and that the plaintiff was not a party in the suit according to the citation in the court order. He also agreed that the court order issued on 29th June 2019 in Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited was directed to the Land Registrar, who was not a party, just like the police. PW1 also agreed that the 6th defendant had requested the court to verify the order issued in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed versus Khelef Abdulla Mohamed, which was verified on 10th May 2021 by the court's Executive Officer. He also agreed that the Land Registrar and Police are expected to obey court orders. The second witness was Anup Lalji Kerai, an electrician with Masters Powers System, who testified as PW2. He relied on his statement dated 25th March 2024 in which he stated he was the manager of the plaintiff at the Mombasa Office. He told the court that he is the person who took photos and videos at pages 74 to 88 of the plaintiff's afore mentioned bundle of documents when goons came and evicted them and their tenants. He testified that one of their people is currently occupying the suit property. On cross-examination, PW2 admitted that he did not ask why they were being evicted. He stated that he was not even aware that there was a court order. He also added that police officers only provided security and did not carry any goods.
15. The 6<sup>th</sup> to 9<sup>th</sup> defendants called CIP Albert Chebii, former OCS, Nyali Police Station, who testified as DW1, and relied on his statement dated 14th November 2023. He produced as exhibits a letter to the Chief Magistrate Mombasa dated 10th May 2021, letter dated 5th May 2021 to auctioneers and decree issued in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed versus Khelef Abdulla Mohamed. He testified that he was the OCS at Nyali police station at the time, and that he provided security as per the said court order issued in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed vs Khelef Abdulla Mohamed. He was unequivocal that he verified the court order from the Court's executive officer on 10th May 2021. On cross-examination, DW1 stated that he was not aware of what happened in court or at the Land Registrar's office before the court order was issued.
16. The 4<sup>th</sup> & 5<sup>th</sup> defendants called Ngethe Hithcliff Oyieke alias Hithcliff N. Oyas, the 5<sup>th</sup> defendant, who testified as DW2. He inter alia testified that he is an Advocate of the High Court of Kenya working for the 4th defendant. He relied on his statement dated 20th April 2024 and produced the documents in the list of documents of even date. In cross-examination, he stated that the letter dated 5th May 2021 by the 4th defendant instructed the auctioneer, 3<sup>rd</sup> defendant, to evict the tenants on the land which was the subject matter of the case. He testified that he had confirmed the court order was in force at the time he was writing the above-mentioned letter, and was not aware that the said court order had been set aside in Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited. DW2 further stated that he had been instructed by the 2nd defendant to have the court order executed. He admitted that the said court order was issued on 17th January 2020, but the 2nd defendant gave him instructions on 5th May 2021, which was more than a year later. He further agreed that he did not seek for a notice to show cause to be issued, because he was not acting for any



of the parties then. He also did not follow up on whether any of the parties had issued notice to show cause, but admitted that a notice to show cause is required where an order is over one year old before execution. DW2 further stated that he was not aware of who was evicted from the suit premises as they were not party to the consent leading to the court order. He revealed that his client, 2<sup>nd</sup> defendant, had told them that they had obtained the suit property upon adverse possession, that was given in their favour. DW2 told the court that he had relied on the postal search dated 3rd February 2020, which the 2<sup>nd</sup> defendant gave him, to confirm the 2<sup>nd</sup> defendant's ownership of the suit property. He admitted that his firm was not on record for any of the parties in any of the aforementioned two suits. He informed the court that he had perused court file for Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed vs Khelef Abdulla Mohamed and confirmed the consent that was adopted. He added that he did not peruse Mombasa CMELC No. 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited. He further admitted that his letter dated 12th May 2021 to the plaintiff's counsel contradicts the position of the ruling to set aside the court order on adverse possession that his client had relied on. He also admitted that all the letters he wrote from 5th May 2021 were after the adverse possession order had been set aside. He agreed that the said ruling has not been challenged, and that the 2<sup>nd</sup> defendant's title had been set aside. DW2 admitted that he had not filed a notice of appointment of advocates or the consent of the previous advocates, so as to come on record, and execute the said order. He maintained that he acted under instructions from the 2<sup>nd</sup> defendant and on the strength of the order issued in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed versus Khelef Abdulla Mohamed and not MCEL 64 of 2019 - Khelef Abdulla Mohammed versus BOS Shipping (East Africa) Limited, in execution of the decree.

17. The Plaintiff filed his submissions dated 13th December 2024, while the 6th to 9th defendants filed their submissions on 14th February 2025, which the court has considered.
18. The issues for determinations by the court are as follows:
  - a. Who is the legal and beneficial owner of the original parcel 890/I/MN, which was later subdivided into section MN/1/22672 & 22673.
  - b. Whether 4<sup>th</sup> & 5<sup>th</sup> counterclaim has merit.
  - c. Whether the plaintiff is entitled to any of the orders sought.
  - d. Who bears the costs in the main suit and counterclaim?
19. The court has carefully considered the pleadings filed, oral and documentary evidence tendered by PW1, PW2, DW1 and DW2, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
  - a. It is important to set out some facts before determining the suit herein. The case is primarily between the plaintiff on one part, and the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the other part, while the rest of the defendants aided in one way or the other in subsequent events leading to the filing of this suit. Despite the primary role played by the 1<sup>st</sup> & 2<sup>nd</sup> defendants as pleaded by the plaintiff, the two never entered appearance or defended the suit. As is usual, the question of ownership of the suit property will therefore be determined based on the pleadings and evidence on record. The plaintiff's pleadings and the testimony of PW1 show that the 2<sup>nd</sup> defendant obtained a judgment in his favour under adverse possession, against the 1<sup>st</sup> defendant in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed versus Khelef Abdulla Mohamed. There is therefore no doubts that the title to the suit property was originally in the name of the plaintiff as per the attachment certificate of title marked "AMB 1A" and annexed to the said supporting affidavit of PW1, that was produced as exhibit.



- b. As can be seen from the judgment on page 96 of the above mentioned supporting affidavit, the trial magistrate, Hon C.N Ndegwa delivered the ex-parte judgment on 28th June 2019, and the decree was issued on 9th October 2019 in favour of the 1st defendant in Mombasa CMELC No. 64 of 2019. However, upon the plaintiff making an application dated 2<sup>nd</sup> September 2020 to set aside the above judgment and decree, the said honourable magistrate delivered a ruling on 26<sup>th</sup> April 2021 inter alia holding as follows:

“ Having found that the suit was filed in a court without jurisdiction, I strike out the entire suit.....”

It is clear, that ruling has not been successively challenged or set aside through review or appeal. Accordingly, there is no doubt that all the actions that resulted in the issuance of provisional certificate of title over the suit property, transfer to 1<sup>st</sup> defendant’s name, and subsequently to the 2nd defendant, including the subdivision thereof into 22672/I/MN and 22673/I/MN was based on non-existent court order and therefore null and void ab initio.

- c. The hitherto practice of the lower courts entertaining adverse possession claims has since been put to rest through the recent decisions of the Court of Appeal. In the case of LSK versus Malindi Law Society & 6 Others (2017) eKLR the Court of Appeal held as follows:

“

“ 62. Article 169 of *the Constitution* has already been reproduced elsewhere in this judgment. It identifies four types or classes of subordinate courts, namely, magistrates’ courts, Kadhis courts, court martials, and any other court or local tribunal “as may be established by an Act of Parliament”. In our view, it is in respect of the fourth category of subordinate courts that a restriction is placed so that Parliament is not at liberty to establish, under that category, courts established under Article 162(2). That is to say, while Parliament is empowered under Article 169(1)(d) to establish “any other court or local tribunal”, that power of establishing courts and tribunals does not extend to the power to establish the specialized courts required under Article 162 (2).

63. We are unable to construe that Article as limiting the power of Parliament to confer jurisdiction, on the courts already established by *the Constitution* under Article 169(1)(a), (b) and (c). Article 169(2) provides that Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause 169(1). A distinction should thus be drawn between the power given to Parliament under *the Constitution* to establish courts, which in this case is restricted, and the power to confer jurisdiction on courts. It is acknowledged in the preamble to the Magistrates Courts Act, that it is an Act of Parliament to give effect to Article 169(1)(a) of *the Constitution* “to confer jurisdiction, functions and powers on the magistrates’ courts”. We do not consider that in doing so, Parliament in any way exceeded its mandate or acted ultra vires.”

It can thus be said that the magistrates’ courts have the same jurisdiction as the Environment and Land Court if they have been gazetted and it is subject to pecuniary jurisdiction. However, in the case of Sugawara versus Kiruti (Sued in



her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepas alias Mutaragwa Kiruti Lepas alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others [2024] KECA 1417 (KLR), the Court of Appeal held that that:

- “48. It is our view that, if it was intended that claims for adverse possession be determined by the Magistrates’ Court, nothing would have been easier than for Parliament to have expressly enacted such a provision. So that in view of the express provisions of the law, a strict interpretation of section 38 would mean that hearing and determination of such matters is specifically limited to the Environment and Land Court to the exclusion of Magistrates’ Court.
49. We come to this conclusion also bearing in mind that the jurisdiction of Magistrates’ Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of courts, in terms of section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates’ Court’s pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.
50. In the circumstances, in view of the express provisions of section 38 of the *Limitation of Actions Act*, as did the Environment and Land Court, we find that Magistrates’ Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In the result, this ground is without merit and is accordingly dismissed.”

Therefore, any judgments and decrees purporting to arise out of claims of adverse possession in magistrates’ courts are null and void ab initio, and are incapable of being enforced. The court therefore holds that the suit property, original parcel No. 890/I/MN, undoubtedly belongs to the plaintiff, and any transactions purportedly transferring ownership and or causing subdivision thereof, without its consent or authority of the plaintiff, was illegal, unprocedural and unlawful. Such transactions are liable to be cancelled, and ownership reverted to the plaintiff as per the last entry of the transfer to the plaintiff dated 25th May 2016.

- d. The plaintiff has sought for a declaration that the consent made in Mombasa Chief Magistrate ELC Case No. 154 of 2019: Umair Mohamed versus Khelef Abdulla Mohamed is illegal, null and void and should be struck out. Considering that the consent was filed on the foundation of the impugned judgment of 28th June 2019, in Mombasa CMELC No 64 of 2019, which suit the honourable trial magistrate struck out on 26<sup>th</sup> April 2021, then the impugned consent became null and void ab initio and the court need not say more on that.



- e. The plaintiff has sought for permanent injunction against the defendants not to conduct any transaction or development on the suit property. In the case of *Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib* (2018) eKLR the court held that:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

And in the case of *Margaret Nguhi Mbugua v Ruth Karii Kagwe, Mary Njoki Gichuru & Another* [2019] KEELC 3922 (KLR) the court held as follows:

“The fifth issue is whether the trial court failed to appreciate and apply the principles upon which jurisdiction to grant a permanent injunction is granted. The principles upon which a permanent injunction is granted are well settled. To be granted a permanent injunction, a plaintiff must establish the existence of a right and violation of that right by the defendant.”

In the Black’s law dictionary the definition of a permanent injunction has been set out as follows;

“A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law”

Therefore, having found that title to the suit property legally belongs to the plaintiff, it is only proper that a permanent injunction order be issued against the defendants from further transacting or developing on the suit property.

- f. A mandatory injunction was also sought by the plaintiff against the defendants to reinstate the plaintiff to the suit property, and against the 8th defendant, the Land Registrar, to cancel or revoke the 1st and 2nd defendants title to the suit property, and subdivisions thereof. The principles in a mandatory injunction are as set out in the case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR, where the court stated as follows;

“The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the court of appeal in the case of “*Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109” had occasion to discuss and consider the principles that govern the grant of mandatory injunction was correctly stated in volume 24 *Halsbury Laws of England* 4th Edition paragraph 948 which states as follows;

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will



not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and a summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

In this case, the claim over the ownership of the suit property has already been concluded, and determination made in favour of the plaintiff. The court is of the considered view that the plaintiff deserves to be granted the mandatory injunction orders sought as it has proved that it is the legal owner.

- g. In considering prayer 15 of damages and compensation to the Plaintiff for unlawful eviction against the Defendants jointly and severally, the court has considered the case of Martha Wangari Karua versus Independent Electoral & Boundaries Commission & 3 others [2018] eKLR where the court held that:

“We draw from the judgment of this Court in [\*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others \[2013\] eKLR \(Civil Appeal No. \(Application\) 228 of 2013\)\*](#) where Ouko, JA. in the majority stated that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the Constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of *the Constitution* implies an approach leaning



towards substantive determination of disputes upon hearing both sides on evidence.

...”

The court is in agreement with the above jurisprudential ideology, and finds that the 4<sup>th</sup> and 5<sup>th</sup> defendants, should have been more prudent when dealing with or acting on the alleged instructions received from the 2<sup>nd</sup> defendant, and the issues surrounding the suit property, bearing in mind that they are officers of this court. The plaintiff has shown that they are liable for the loss and damages it suffered.

- h. The 6<sup>th</sup> defendant was the OCS Nyali Police Station at the time of eviction, and he testified as DW1 that he was only keeping the security as directed under the impugned order. The court has observed from the CD Rom which contains videos of the day’s events, and is convinced that DW1’s role was limited to only ensuring the security in the eviction exercise. The alleged negligence particularised by the plaintiff against the 6<sup>th</sup> defendant cannot hold water as the police are mandated by law to provide security for life and property. In the instant matter, the police acted in accordance with the order that had been verified as authentic. In asking the police to venture beyond authentication of orders, as the plaintiff seem to demand of them, and start investigating matters already decided in court, will be tantamount to requiring of them to review the judgments or orders, which is outside their operational, statutory and constitutional mandate.
- i. The claim against the 10<sup>th</sup> defendant and its participation in the eviction activities was not clearly set out, by the plaintiff and though it did not enter appearance or defend the suit, the plaintiff failed to prove any claim against it and its name is to be struck out of the suit.
- j. In these proceedings, the court has noted that no evidence has been provided to show whether there was actual demolition of buildings. It is only fair that the 1<sup>st</sup> & 2<sup>nd</sup> defendants, together with the 4<sup>th</sup> & 5<sup>th</sup> defendants, their advocates, and the 3<sup>rd</sup> defendant, auctioneer, should be deemed liable for the miscarriage of justice upon the plaintiff. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, being auctioneer and advocates are officers of this court, and ought to have exercised due diligence before executing the instructions allegedly emanating from the 2<sup>nd</sup> defendant and or issued to 3<sup>rd</sup> Defendant through the 5<sup>th</sup> defendant. They acted negligently, and although, there are other statutory bodies mandated to deal with claims of negligence against the 3<sup>rd</sup> to 5<sup>th</sup> defendants in the first instance, I find it fair, just and cost effective to award the plaintiff the appropriate damages sought against them, instead of subjecting the plaintiff to another legal process through those other fora.
- k. That in view of the findings above against the 4<sup>th</sup> & 5<sup>th</sup> defendants, their counterclaim against the plaintiff is evidently without merit and is dismissed with costs.
- l. On the prayer for damages for trespass against the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants, the amount claimed has not been established and no documentary evidence has been produced as evidence to show the loss. However, as there is no doubt the team of people taken to the suit property by the 3<sup>rd</sup> defendant on instructions of the 4<sup>th</sup> & 5<sup>th</sup> defendants, and the 1<sup>st</sup> & 2<sup>nd</sup> defendants, entered onto the suit property when evicting the plaintiff and its tenant, without the plaintiff’s authority or consent or lawful order, purportedly on the strength of a court order that was null and void, the plaintiff is entitled to damages. I am of the view an award of Kshs.2,000,000/- against the 1<sup>st</sup> to 5<sup>th</sup> defendants for trespass is fair and just.
- m. On prayer 14 for an order of declaration that the Plaintiff is entitled to compensation from the defendants jointly and severally, for the loss of rental income that the plaintiff would



have otherwise earned, in respect of the Tenancy Lease Agreement dated 23rd December 2020 between the plaintiff and OMERIYE LIMITED, including rental income under the said TENANCY Lease Agreement for the period commencing from the date of eviction on 10th May 2021 to 31st December 2025, there is evidence of loss of rental income by virtue of eviction of the plaintiff's tenant. There is a tenancy agreement marked "AMB 2" which places the rent at Kshs.125,000 per month, commencing on 1st January 2021. The plaintiff has sought for the lost rental income from 10<sup>th</sup> May 2021, when the tenant was evicted, to the end of the unexpired period of the lease, which totals 55 months multiplied by 125,000 coming to a total of Kshs.6,875,000, which I find the plaintiff is entitled to.

- n. Costs follow the event unless where for good cause, the court directs otherwise, as provided for under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya. That as the plaintiff has successfully prosecuted its claim, it is entitled to costs.

20. From the foregoing determinations, the court finds and orders as follows:

- a. The 4<sup>th</sup> & 5<sup>th</sup> defendants have failed to prove their counterclaim against the plaintiff to the standard required and it is hereby dismissed with costs.
- b. The plaintiff has proved its claim to the standard required by the law of balance of probabilities, and judgment is hereby entered for it in terms of prayers (1) to (13) of the plaint dated 12<sup>th</sup> May 2021.
- c. The plaintiff is also awarded Kshs.2,000,000/- as damages for trespass against the 1<sup>st</sup> to 5<sup>th</sup> defendants.
- d. The plaintiff is awarded Kshs.6,875,000 being loss of rental income against the 1<sup>st</sup> to 5<sup>th</sup> defendants.
- e. The 1<sup>st</sup> to 5<sup>th</sup> defendants to bear the plaintiff's costs in the suit.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4<sup>TH</sup> DAY OF JUNE 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : M/s Lelu For Makori

Defendants : M/s Hadija For Oyas For 4<sup>th</sup> And 5<sup>th</sup> Defendants

Shitemi- Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

