



**Bajaber Limited v Ramadhan & another (Environment and Land Case 60 of 2019) [2025] KEELC 5241 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5241 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND CASE 60 OF 2019**

**LL NAIKUNI, J  
JULY 11, 2025**

**BETWEEN**

**BAJABER LIMITED ..... PLAINTIFF**

**AND**

**MWANAIKI MKAMBUNI RAMADHAN ..... 1<sup>ST</sup> DEFENDANT**

**IDDI JASTINE KIDUNGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains the Complaint dated 3<sup>rd</sup> April, 2019 filed on the same day by Bajaber Ltd the Plaintiff herein. It is against Mwanaiiki Mkambuni Ramadhani, Iddi Justine Kidunga and Salim Abdalla, the Defendants herein.
2. Upon service of the pleading and Summons to Enter Appearance, the Defendants entered appearance through a Memorandum Appearance dated 6<sup>th</sup> May, 2019 and filed on the same day, and filed a Statement of Defence dated 30<sup>th</sup> May, 2019 on the same day.

**II. Description of parties**

3. The Plaintiff was described as a limited liability company duly registered under the Laws of the Republic of Kenya while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were described as Kenyan adults of sound mind residing and working for gains within the Republic of Kenya.

**III. Court directions before the hearing**

4. Nonetheless, on 6<sup>th</sup> February, 2024, the Honourable Court fixed the hearing dated on 17<sup>th</sup> May, 2024 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “Viva voce” evidence with the Plaintiff’s



witnesses testifying in Court on 17<sup>th</sup> May, 2024 after which closed the case and the Defendants called their witness witnesses on 10<sup>th</sup> December, 2024.

#### **IV. The Plaintiff's case**

5. The brief facts of the case according to the Plaintiff in the Plaint were that at material times, the Plaintiff is the duly registered rightful owner of ALL THAT property known as L.R. No. MN/III/1883 registered as entry No. CR. 21996/2. (hereinafter referred as "The Suit Property"). The Defendants trespassed into the Plaintiff's parcel of land. The Defendants had blatantly ignored and or failed to adhere to the Plaintiff's demands seeking them to desist from their unlawful acts. The Plaintiff averred that there was no other suit pending and that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter. The Plaintiff admitted that the cause of action arose in Malindi within the jurisdiction of this Honourable Court.
6. The Plaintiff prayed for Judgment against the Defendants severally and jointly for: -
  - a. A Mandatory injunction compelling the Defendants whether by themselves, their agents, servants, employees or representatives to remove and/ or demolish structures be it permanent or temporal in any nature constructed on all that parcel of land known as L.R. No. MN/III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company.
  - b. A Mandatory injunction restraining the Defendants whether by themselves, their agents, servants, employees or representatives from trespassing, erecting structures be it permanent or temporal and/ or in any other manner interfering with, selling, sub-dividing and/ or dealing with in any manner of all that parcel of land known as LR. No.MN/III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company.
  - c. Costs of the suit.
7. The Learned Counsel for the Plaintiff Mr. Onduso told the court in his opening remarks that the case was about issuance on injunctive orders against the Defendants as trespassers by the Defendants.
8. The Plaintiff called its first witness PW - 1 on 17<sup>th</sup> May, 2024 told the court that:

#### **A. Examination in chief of the PW - 1) by Mr. Onduso Advocate.**

9. PW - 1 testified under oath and in English language. He was called SWALEH ABUBAKAR BAJABEER, a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court at the commencement of the hearing. He was a businessman and resided in Nyali Estate. He recorded a witness statement dated 20<sup>th</sup> September, 2022 and which he wished to be endorsed as his evidence in chief. He filed a list of documents dated 3<sup>rd</sup> April, 2019, a further list of documents dated 20<sup>th</sup> September, 2022, supplementary list of documents dated 6<sup>th</sup> October, 2023, 1 document dated 15<sup>th</sup> November, 2023 and two further list of documents dated 7<sup>th</sup> May, 2024. Hence in total "the Plaintiff Exhibit Numbers 1 to 9" were produced and 1 marked for identification accordingly.
10. PW - 1 stated that he knew the suit property it was owned by BARJABEER LIMITED; he was one of the Directors to the said company. He had a copy of the Certificate of Incorporation and CR – 12 form. The witness had a copy of Certificate of Title issued to him on 10<sup>th</sup> March, 1998 to Bajabeer Ltd. He did not stay on the property; there were about 2 squatters by the time he visited there. They were Mwanaidi, Mkambuni Iddi Justine Kiunga and Salim Abdalla – Defendants.



11. They came year 2018, when they occupied we fenced it using Chain Link Wire but it was demolished. Then they put the perimeter walls. But they demolished it. They could always report the matter to the Police. Once they report they would disappear. There was a group called BARANI SELF GROUP who invaded it who took them to court – ELC. No. 232 of 2014 at Malindi. They sought to sue them and got a court of status quo. From then they stopped dealing on the land. Hence they went there and they put up permanent structures. Eventually, the case was dismissed. The Defendants according to the witness had denied not invading the suit property but its untrue as they had in his property with reference to the survey exercise, he instructed SALIM RASHID to conduct the survey and to proof from the Google Map that there were no structures. He urged the Court to have the squatters to remove them from their land and had it restored to themselves.

**B. Cross Examination of PW - 1 by Mr. Mohamed Advocate.**

12. PW - 1 reiterated that he had not produced the Board resolution to file the suit in Court but they had it elsewhere. They acquired the property was bought through an auction i.e. public auction. They registered several occurrence book numbers. However, he did not produced it among the documents he had produced. The case at Malindi – the Squatters had taken it to court and claimed that it was theirs through Land Adverse Possession, theirs was among many other parcels of land he did not know the other plots. They managed to get an order against them and he applied to set aside or appeal the orders but the Court declined. It continued with the hearing for over 7 years but they failed to turn up for 10 times. It was dismissed for want of prosecution and not on merit.

**C. Re - Examination of PW - 1 by Mr. Onduso Advocate.**

13. PW - 1 told the court that the Court order meant for the status to be maintained and they obeyed it. There were 4 plots among the ones that were taken to Court.
14. The Plaintiff called PW - 2 who testified that: -

**A. Examination in Chief of PW – 2 by Mr. Onduso Advocate.**

15. PW - 2 was sworn and testified in Swahili language. He identified himself as Ahmed Marei, a citizen of Kenya and holder of the national identity card bearing the details as shown to Court. He was a business man. He had recorded witness statement dated 20<sup>th</sup> September, 2022 which he adopted as his evidence in chief. He was an assistant at Bajabeer Ltd. in charge of taking care of its assets. He was aware of one of the properties at Mtwapa LR. No. 1883 which belonged to Bajabeer Ltd. In the year 2014 they went there with the intentions of fencing it. But while there, they found the chain link wire had been rotten and fallen off. They decided to fence it with a perimeter wall. A lady called Lukuya came to them and demanded for a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) in order to protect them but they declined. They later on came and brought building material for building a “L” shape perimeter wall and placed the gate. It was bushy. After that they found some young people cutting down shrubs and they reported to the police. Later on, they served them with a Court Order from some group called Pole Self Help Group – stopping them from removing them there and status quo.
16. According to the witness there were temporary structures – semi permanent; they continued building the structure, but later on in the year 2018 they were shocked to find that there were permanent houses on the land. They found out that land had been sold out to other people. These were to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. They had to use police. Whenever they got there, these groups would call each other. They would be armed with crude weapons. From the decision of the court the case was dismissed.



**B. Cross Examination of PW - 2 by Mr. Mohamed Advocate.**

17. PW - 2 confirmed that he had worked for Bajabeer Limited for over 20 years. When he met him he had the plot. The chain link wire was put up before he knew him. The lady Rukiya demanded a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) but she was not given the money she asked for. The Defendant's came later on from year 2018. He saw all the Defendants in the Malindi Case. The current Defendants name were not among them. There were many plots in that case.

**C. Re - Examination of PW - 2 by Mr. Onduso Advocate.**

18. PW - 2 told the court that the money was to remitted by the PW - 1 as they saw him as a rich man. M/s. Rukiya was not a party to the case. He did not know her either.
19. The Plaintiff called PW - 3 on the same day who testified that: -

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

20. PW - 3 was sworn and testified in Swahili language. He was called LOSIAI ROTMEN, a citizen of Kenya and holder of the national identity card bearing all the details as shown to Court at the start of his testimony. He told the court that he recorded a witness statement dated 20<sup>th</sup> September, 2022. He knew Bajabeer – he worked for his land at Mtwapa. He was a security guard. Before he used to work for a Mr. Waiyaki – from the year 2008 upto 2009 when he met Bajaber. He stated working for him from the year 2010 to 2013. Before that these parcels were not occupied. They were vacant. From the year 2013, the land was invaded by some young people. It was at the end of year 2013 that they got into Waiyaki's land and then into Mzee Bajaber's land upto year 2014. They would go to the farm and attack the witness. He got scared. He returned back to the Land of Waiyaki. PW - 3 witnessed the Defendants demolish the perimeter wall and carry the building material. He went to report the at the police.

**B. Cross Examination of PW - 3 by Mr. Mohamed Advocate.**

21. PW - 3 confirmed that in the year 2014, is when he saw young people demolishing the perimeter wall. He would report this incidences to Bajabeer all the time. They would report the matter to the police and record statements. But none of his statements had been brought to court.
22. The Plaintiff called PW - 4 on 16<sup>th</sup> October, 2024 at 12 noon where the witness told the court that: -

**A. Examination in Chief of PW - 4 by Mr. Onduso Advocate.**

23. PW - 4 was sworn and he testified in English language. He identified himself as Salim Hashim Rashid, a citizen of Kenya and holder of the national identity card bearing all the details as shown to Court prior to testifying. He was born on 7<sup>th</sup> December, 1982. He was a Land Surveyor (GEO Consultant). He worked for a land Surveyors firm trading in then names and style of Sakkja Geo Systems. There was a survey report dated 16<sup>th</sup> October, 2023 for Plot No. 1883/III/MN. . He was the one who had prepared it. He relied on the RIM and the Deed Plan No. 1607. According to his observation he noted that: -
- a. The property was well defined and two front Beacons (posts BAJ – 1 and BAJ – 2 ) were insitu. The Ground was vacant on 17<sup>th</sup> January, 2017.
  - b. On 14<sup>th</sup> October, 2017 there were some changes as the ground was sub-divided into 4 portions and 4 houses would be seen on the grounds and the Google maps.
  - c. On 25<sup>th</sup> December, 2017 – from the image there were further structures on the land.



- d. On 5<sup>th</sup> August, 2018 – another plot seen – plot meaning further sub-division and another house.
  - e. On 7<sup>th</sup> October, 2018, further sub-division of 2 plots and one house on it and surrounded by a boundary wall.
  - f. In the years 2019 to 2020 there were no more changes until 2023.
  - g. In the years 2022 and 2023, another plot 8 was added and a and a house built on the land.
24. He told the court that the images were obtained from the satellite. From the images one can establish the changes done on the land. In the year 2017 there were no structures. on the suit land, the adjacent there were plots – referring to the deed plan no. 160727 dated 17<sup>th</sup> February, 1992 – by the Plaintiff. These were: -
- a. MN/III/1882.
  - b. MN/III/1883.
  - c. MN/III/1884.
25. On the left was MN/III/1923, on the right is High Water Mark (Ocean). There was no Plot No. MN/337. In conclusion ,PW – 4 stated that the survey was done as per the instructions and the existing situation on the ground was as shown on the attached Google earth images. The satellite images were accurate directly from the satellite and could not be tampered with. MF – 6 was produced as Plaintiff Exhibit 6.

#### **B. Cross Examination of PW - 4 by Mr. Mohamed Advocate.**

26. PW - 4 told the court that the report was dated 16<sup>th</sup> October, 2023. He never indicated when he received instructions to undertake the surveying works. He used two methods – the grounds surveying and satellite earth images. He never indicated when he did the ground survey. He went for the ground survey for only one day and then he did the office work. It was in the month of October 2023. He did not take any photographs when he did the ground survey.

#### **C. Re – examination of PW - 4 by Mr. Onduso Advocate.**

27. PW - 4 confirmed that he conducted the ground survey once then proceeded for office desk.
28. The Plaintiff through its legal representative Mr. Onduso Advocate closed its case on 16<sup>th</sup> October, 2024.

#### **V. The Defendants' case**

29. The Defendants' case as per their joint statement of defence filed on 30<sup>th</sup> May, 2019 was that they admitted that the Plaintiff was the registered owner of the suit property MN/III/1883. The defendants however held physical possession, till the land and reside thereon and have done so for a period exceeding twelve years thus accruing a legal interest in the property capable of being enforced under the law.
30. The Defendants denied the contents of Paragraphs 4, 5 and 6 of the Plaint. They averred that they had been in occupation of the plot Parcel MN/III/1883 for a period exceeding twelve years and that their stay has been notorious, continuous and without the consent of the Plaintiff. They filed the Civil suit - “ELC 232 of 2014 (O.S) Malindi Mitsonga Kabila Chiro & Others (all suing as members of Barani Pole



Pole Self help group) – Versus - Kamimi Company (1976) LTD & Others” where the 5<sup>th</sup> Defendant was BAJABER LTD - The Plaintiff herein. The matter was pending determination. The Defendants admitted the contents of Paragraph 7 of the Plaintiff, the Defendants at the earliest opportune time raise an objection on a point of law that the court did not have jurisdiction in this matter by virtue of “the principle of Res Judicata” and further on statutory territorial jurisdiction in land matters.

31. The Defendants averred that the Plaintiff in the circumstances had no cause of action against them and therefore not entitled to the reliefs sought in the Plaintiff. The Defendants averred that “Malindi ELC No. 232/2014 (O.S) Mitsonga Kabila Chiro and others – Versus - Kamimi Company (1976) Limited & 4 Others”, the plaintiff herein was/ is the 5<sup>th</sup> Defendant/Respondent in the said matter which was pending determination. The plaintiff was thus aware of existing litigation on the subject of this suit. The Defendants prayed that the suit herein be dismissed with costs.
32. The Counsel for the Defendants Ms. Nyawera made the opening remarks. She told the court that they would be indicating that the Defendants were not on the Plot on the Plaintiff's pleading - Plot No. MN/III/1883. They were on different one being Plot No. was MN/III/336 and 337. For expediency sake, they shall be adopting the witness statements.
33. The Defendants on 10<sup>th</sup> December, 2024 at 12 noon called DW 1 who told the court that: -
  - A. Examination in Chief of DW - 1 by M/s. Nyawera Advocate.
34. DW - 1 was sworn and testified in Swahili language. He was called IDDI JASTIN KIDUNGA, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court prior to testifying. He resided at Barani, Mtwapa. He was a boda boda operator. He had authority to testify on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. He recorded his witness statement dated 3<sup>rd</sup> July, 2019. He knew the Plot No. was MN/III/336 and 337. They did not live on Plot No. MN/III/1883.

#### **B. Cross examination of DW - 1 by Mr. Onduso Advocate.**

35. On being referred to paragraph 4 of the Defence, he confirmed that that they resided on the suit land for more than 12 years and when they got there. They had no permission of the Plaintiff. They were claiming land adverse possession .i.e. they filed the case in ELC. No. 232 of 2014 (O.S.). He was not aware there was a decision by the court. On being referred to the ruling by the Court, he informed court of not being aware of it. He told the court that he changed his Advocates and who never informed them of this decision. He stated that he had resided on Plot No. 336 and 337 – they had not produced the title deed to this land. They resided on the land and had their families. He did not have the title deed to the land. The land was approximately 300 acres. They were close to 300 people. None of them had the title to it.

#### **C. Reexamination of DW - 1 by M/s Nyawera Advocate.**

36. DW - 1 told the court that they knew the Plot was numbers 336 and 337 from the Official Search conducted at the Land Registry Malindi. They had resided there all along together with his family. Nobody had asked them to vacate but apart from the year 2019, they got the Plaintiff wanting them to vacate the land. It was rather problematic.
37. The Defendant through their learned counsel M/s. Nyawera Advocate marked their case closed on 10<sup>th</sup> December, 2024.



## VI. Submissions.

38. On 10<sup>th</sup> December, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. Unfortunately, by the time of penning down the Judgement, the Honourable Court had not been able to access the Submissions from neither the Judiciary CTS Portal nor the ELC Registry. Pursuant to that the Honourable Court reserved a date to deliver its Judgment on merit 11<sup>th</sup> July, 2025.

## VII. Analysis and Determination

39. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

40. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

- a. Whether the Plaintiff has been able to establish its case - Who is the lawful owner of the suit property known as L.R. No. MN/III/1883 registered as entry No. CR. 21996/2
- b. Whether the Plaintiff is entitled to the orders sought in the Plaint
- c. Who bears the costs of the suit?

### **Issue No. A). Whether the Plaintiff has been able to establish its case - Who is the lawful owner of the suit property known as Mombasa/MN/Block 1/519**

41. Under this sub - title the Court shall discuss the ownership of the suit properties. As indicated, this is a rather complex matter where the main substratum of it is on the legal ownership to the suit property and compensation of the parties herein. The brief facts of the case according to the Plaintiff in the Plaint were that at material times, the Plaintiff is the duly registered rightful owner of ALL THAT property known as L.R. No. MN/III/1883 registered as entry No. CR. 21996/2. (herein the Suit Property). The Defendants trespassed into the Plaintiff's parcel of land. The Defendants had blatantly ignored and or failed to adhere to the Plaintiff's demands seeking them to desist from their unlawful acts. The Plaintiff averred that there was no other suit pending and that there have been no previous proceedings in any court between the Plaintiff and the Defendant over the same subject matter.

42. Therefore, the Honourable Court will just proceed on analysis of the framed issues under this sub – heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, 2010, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.



43. The effect and efficacy of the registration of land is well governed under the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. The provision of Section 24 of the Land Registration Act 2012 No. 3 of 2012 provides as follows:

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

44. While the provisions of Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

45. The provision of Section 26 (1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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 the 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
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.”

46. Where two parties hold a title deed over the same suit property, the Court is guided by the holding of the Court in the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

47. To succeed in an action for trespass, first, the onus is on the Plaintiff to prove on a balance of probabilities that (s)he is either the bona fide owner or proprietor of the suit property or that (s)he is in or entitled to immediate possession of the suit of the suit property or both; and second, that the



sued party has intruded and/or occupied and/or remained in the suit property without any justifiable cause. In “M’Mukanya – Versus - M’Mbijiwe (1984) KLR 761”, Kneller JA (as he then was) laid the ingredients of trespass in the following words:

“The only issue in this second appeal is whether or not the Magistrate and the judge erred in law in finding M’Mukanya and Nyamu were trespassers? M’Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership.”

48. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone’s property is that the authority must ensure compliance with the Constitution and Statutory provisions. At the center of the dispute between the parties is the protection of private property as enshrined in Section 75 of the former Constitution and Article 40 of the 2010 Constitution.

49. Article 40 (2), (3), (4) and (6) of the Constitution of Kenya provide as follows:

“40 Parliament shall not enact a law that permits the State or any person:-  
(2) a. To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description .... (3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation: (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:- i. requires prompt payment in full of just compensation to the person, and ii. allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) .... (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

50. The Defendants’ have admitted that the land belonged to the Plaintiff they only claimed that they had actual possession of the suit property for the last 12 years. Trespass is something the Plaintiff has contended. A registered proprietor of a parcel of land is the absolute and indefeasible owner thereof, subject only to encumbrances, easements, restrictions, wayleaves, airways, restrictions, conditions contained or endorsed on the certificate, overriding interest and matrimonial rights and and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved by the



opposing party. In that position, the registered proprietor enjoys proprietary rights including the right to possession and the right to admit or licence any person thereinto. In this connection, any person who unlawfully, without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor commits trespass.

51. A claim under the principle of land Adverse possession is one of the exceptional circumstances of land acquisition. It falls under the cluster of (unregistered) overriding interests to which any registered land is subject. It is a prescriptive right, culminating from the combined legal effect of the provisions of Sections 7, 13, 17 and 38 of the *Limitation of Actions Act*, Cap. 22. The way to adverse possession is paved when a person takes possession of land of another without force or stealth or licence/consent of the title holder; openly or publicly asserting rights over it; and the title holder omits or neglects to take action against the adverse possessor - in assertion of his title - for an uninterrupted period of twelve (12) years. The acquisition can only be actualized through a Court action.
52. Relating to the question whether the Defendants have acquired the ownership of the Land by of Adverse Possession, it is submitted that section 38 (1) of the *Limitation of Actions Act* outs the jurisdiction of this Court from determining a claim anchored on adverse possession. It is reasoned that jurisdiction lies in the superior Court charged with determining environment and land matters as envisaged under Article 162 (2)(b) of the *Constitution*. It is further submitted that Order 37, Rule 7 of the Civil Procedure Rule, Cap. 22 provides that “An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.” In this regard, it is submitted that the Defendants having approached the Court via a defense for prayer for adverse possession of land, the same is defective.
53. Similarly, in the Court of Appeal decision in “Charles Ogejo Ochieng – Versus - Geoffrey Okumu [1995] eKLR”, Tunoi, Akiwumi & Lakha, JJA (as they then were) took a view that “Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.” See also “Moya Drift Farm Limited – Versus - Theuri [1973] 1 EA 114”, per Sir William Duffus P, Spry VP and Lutta JA (as they then were); “Ashby – Versus - White [1703] 2 Ld Raynd 938”; “Basely – Versus - Clarkson [1682] 3 Lev 37”; “Hewlitt – Versus - Bickerton [1947] CLC 10504”; “Conway – Versus - Wimpey & Co (No 2), [1951] 2 KB 266”; and “PME & another – Versus - PNE [2019] eKLR”.
54. In that context, the Torrens System of land registration now adopted in Kenya imported the principle of sanctity of title – now housed in the provision of Section 26(1) of the *Land Registration Act* - renders the registered proprietor the absolute and indefeasible owner thereof, subject only to such encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and/or unless fraud or misrepresentation or illegality or unprocedural process or corrupt scheme is proved. See also “Breskvar – Versus - Wall [1971] 126 CLR, per Barwick CJ”; “Gibbs – Versus - Messer (1891) AC 254”; “David Peterson Kiengo & 2 Others – Versus - Kariuki Thuo [2012] eKLR”, per Prof. Ngugi, J.; “Joseph N.K. Arap Ng’ok – Versus - Moiyo Ole Keiwua & 4 others [1997] eKLR”, per Tunoi, Shah and Pall, JJA (as they then were); “Charles Karathe Kiarie & 2 Others – Versus - Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR”, per Onyango Otieno, JA (as he then was), Gatembu and Mohammed, JJA; “Hannah Wangui Ithebu & Other – Versus - Joel Nguigi Magu [2005] eKLR”, per Visram, J. (as he then was); “Nairobi Permanent Markets Society & other eleven – Versus - Salima Enterprises and NCC Appeal No. 185 of 1997”; “Dinshaw Byramjee & Sons Ltd – Versus - A.G. of Kenya [1966] E.A. 198”; “Frazer – Versus - Walker [1967] 649 ALL E.R.”; “Shimoni Resort – Versus - Registrar of Titles & 5 others [2016] eKLR” (per Okongó, J); “Njilux Motors Ltd – Versus - KP&L & Another Civil Appeal Number 206 of 1998”; “Russel & Co. Limited



- Versus - Commercial Bank of Africa Ltd (1986) KLR 633”; and “Wreck Motors Enterprises – Versus - Commissioner of Lands Nairobi, Civil Appeal Number 71 of 1997 (Unreported)”.
55. Having considered the Plaintiff’s evidence and chiefly the title deed (exhibited as the Plaintiff’s Exhibit 2), this Honourable Court, in accordance with the legal provisions of Section 26 of the Land Registration Act, 2012, infers a rebuttable presumption in favour of the Plaintiff that the said title deed is a “prima facie” conclusive evidence that the Plaintiff is the absolute and legal owner of the suit property with all the indefeasible rights, title and interested vested in them by law. In that regard, it is the finding of this Court that the Plaintiff discharged his burden of proof under the provision of Section 107, 108 and 109 of the Evidence Act, Cap. 80. In this connection, the evidential burden shifted to the Defendants to prove that they had acquired the property by way of adverse possession, as asserted by the Defendants.
  56. Whereas this Court finds the Plaintiff’s compelling in this regard, this Court finds the Defendants’ evidence unfortified, unfounded and without any basis at all. Considering the standard of evidence required to prove trespass, which should be above balance of probabilities but below proof beyond reasonable doubt, the assertions are unsupported by evidence which can muster this threshold.
  57. The foregoing reasons yield a conclusion that the Plaintiff has, on a preponderance of probabilities, established that he is the bona fide owner of the suit property.
  58. Further to demonstrating that the Plaintiff is either the bona fide owner or proprietor or entitled to immediate possession thereof, to succeed in an action for trespass, the Plaintiff has to prove trespass. And once a person proves that (s)he is the bona fide owner or proprietor of a parcel of land, then subject to the encumbrances; easements; wayleaves; airways; restrictions; conditions contained or endorsed in the certificate; overriding interests and matrimonial rights, the proprietor attains proprietary rights including the right to admit or licence any person thereunto. See section 25 read with sections 7(4)(c); 26; 36(10); 47; 56(2); 62; 67; 76; 77; 78; 94; 98; 99; 100 and 104 of the Land Registration Act, No. 3 of 2012. See also Sections 20; 21; 23; 24; 26; 28; 32; 35; 36; 133C (6); 143; 144 and 148 of the Land Act, No. 6 of 2012. See also the Wayleaves Act.
  59. The Trespass Act, Cap 294 of the Laws of Kenya, does not directly define trespass. The general meaning of trespass can be gathered from Sections 3; 4; 5; 6 and 8 of the Trespass Act. Gathering from the said sections, it amounts to trespass if any person, unlawfully, without a reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on that land without the consent of the proprietor. The term “occupier” as applied in the Trespass Act means the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively. And “private land” as applied by the Trespass Act means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.
  60. Further, the general meaning thereof can be gleaned from section 152A of the Land Act which prohibits unlawful occupation of land by providing that “A person shall not unlawfully occupy private, community or public land.” In addition, the general meaning of trespass to land according to Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, at page 923, is “any unjustifiable intrusion by one person upon the land in the possession of another.”
  61. Besides, the scholarly text of the learned authors Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, at Paragraph 18-01, defines trespass to mean “Any unjustifiable intrusion by one person upon land in possession of another.” In “La Nyavu Gardens Limited – Versus - Wilson Munguti Mbithi alias Kavuti & 2 others



[2012] eKLR”, Makhandia, J. took a view that any unauthorized entry into another person’s land constitutes trespass.

62. Originally trespass *quare clausum fregit* in Latin, trespass is a Latin terminology which loosely means ‘why he broke the close’ but now anglicized. Henry Black, in his magnum opus work known as *The Black’s Law Dictionary*, 8<sup>th</sup> Edition, at page 173 defines it as follows:

“...1. A person’s unlawful entry on another’s land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another’s unlawful entry on one’s land that is visibly enclosed...”

63. Besides, there is another typology of trespass, *eiusdem generis*, known trespass *ab initio*. This arises when a person was granted access to land but abused the right in which case the trespass is deemed to run from the date the trespasser was allowed access. In instances where Plaintiff is entitled to possession only, but the Plaintiff is not the owner thereof, trespass in this context is a violation of the right to possession, the Plaintiff should prove on a balance of probabilities two ingredients. First, that the Defendant entered the suit property while it was in possession of the Plaintiff. Second, that the Plaintiff had the right to immediate possession.

64. However, in instances where the Plaintiff is the owner, trespass in this context is the violation to the right to ownership and in this case, possession is irrelevant. If possession was to be asserted in such a case, then the principle of indefeasibility of title will be defeated since an owner who does not occupy his property will be dispossessed thereby. In the case of: -“*Moya Drift Farm Ltd – Versus - Theuri* (1973) 1 EA 114”, the Appellant sued the Respondent claiming that it was the registered owner of certain land on which the Respondent was trespassing and who had refused the Appellant entry. The Appellant claimed eviction and a perpetual injunction restraining trespass by the Respondent. At the trial Court (High Court), Miller, J. held that although the Appellant was the registered owner of the suit property, the Appellant had failed to prove that it was in possession of the suit property and thus the claim of trespass was unsustainable. The Appellant proffered an appeal to the Court of Appeal contending that possession was unnecessary in view of the Registration of Titles Act, Cap. 281 (Now repealed). Sir William Duffus P, Spry VP and Lutta JA (as they then were) held that the Appellant was the absolute and indefeasible owner of the land and was entitled to take proceedings in trespass and in the context of a dispute between neighbouring landowners, a perpetual injunction would be granted. Spry VP (as he then was) had this to say in his leading Judgment and Sir William Duffus P (as he then was) & Lutta, J.A. concurred: “These remarks appear to have arisen from a submission by the Advocate for the Respondent in the High Court before evidence was called, that no cause of action was shown in the Plaint as amended, because the Appellant company had to show that at the time of the “alleged act” it was in lawful occupation, which was not the case, as according to the Plaint the alleged wrong was in August 1966, while the Appellant company obtained title to the land in October 1967... The Plaint recites the Respondent’s entry on the land in 1966, but it is quite clear, reading the Plaint as a whole, that it is complaining of a continuing trespass and relates to the period from 25 October 1967, when the Appellant company informed the Respondent that it was the registered owner of the land and ordered him to vacate it, to the filing of the suit. As regards the present proceedings, the date of the Respondent’s entry on the land is immaterial, since it was before the Appellant company had any interest in it, but if the Appellant company is correct in its submission that the Respondent entered as a trespasser, he continued to be such, since it is not suggested that he acquired any lawful title or right to the land... I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor



his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has taken physical possession.”

65. For a richer and vibrant contextualization of the elements of trespass, a few prototypes can suffice. The tort of trespassing to land is actionable per se (meaning that it is actionable notwithstanding absence of actual loss or damage or harm). In support of this averment, the Plaintiff adduced oral evidence to the effect that the Defendants have without colour of right or reasonable or justifiable cause, illegally entered the suit property, erected dwelling houses where their families live and that they till the suit property and that they so remain to the present day. The Defendants did not deny this fact and in fact, confirmed that their dwelling houses indeed stand on the suit property and their families till and live on the suit property.
66. Thus, this Honourable Court concludes that the Plaintiff has proved - on a preponderance of probabilities - that the Defendants have trespassed to the suit property.

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

67. Under this sub - title, the court shall examine if the Plaintiff has proved his case. The Plaintiff prayed for judgment against the Defendants in the following terms:-
- a. A mandatory injunction compelling the Defendants whether by themselves, their agents, servants, employees or representatives to remove and/ or demolish structures be it permanent or temporal in any nature constructed on all that parcel of land known as L.R. No. MN/ III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company.
  - b. A mandatory injunction restraining the Defendants whether by themselves, their agents, servants, employees or representatives from trespassing, erecting structures be it permanent or temporal and/ or in any other manner interfering with, selling, sub-dividing and/ or dealing with in any manner of all that parcel of land known as LR. No.MN/III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company.
  - c. Costs of the suit.
68. I further refer to the provision of Section 26(1) of the *Land Registration Act*, No. 3 of 2012. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
69. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
70. On permanent injunction, it was held in the case of “Mburu – Versus - Kibara & 2 others (Environment & Land Case 237 of 2021) [2022] KEELC 3226 (KLR) (28 July 2022) (Ruling)” that: -
- “... permanent injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the



Permanent Injunction under sections 1A, 3 & 3 A of the Civil Procedure Code if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances ...”

71. Further, in the case of “Malier Unissa Karim – Versus - Edward Oluoch Odumbe (2015) eKLR”, the court set out circumstances under which mandatory injunction can be granted 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 the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 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 ought to be decided at once or if the act done is simple and 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”.

72. The Plaintiff having proved that it is the absolute and legal owner of the suit property is hereby granted prayers numbers 1 and 2 of the Plaint as it is entitled to be protected under law for any injustices on their rights with regards to the suit property.

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

73. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Act* Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR* and “*Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR*, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “*Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR*, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
74. In “*Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR*” quoted the case of “*Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR)* at 227” the Court held:-

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (*Fripp vs Gibbon & Co., 1913 AD D 354*). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to



the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

75. In the present case, for the fact that the Plaintiff has proved its claim, the Defendants shall bear the costs of the suit which follow the cause.

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

76. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has established its case against the Defendants. Thus, the Court proceeds to make the following specific orders:
- a. That Judgment be and is hereby entered in favour of the Plaintiff in terms of the Plaint 3<sup>rd</sup> April, 2019 filed on the same day by Bajaber Limited the Plaintiff herein in its entirety.
  - b. That this Honourable Court do and hereby issues an order of mandatory injunction compelling the Defendants whether by themselves, their agents, servants, employees or representatives to remove and/ or demolish structures be it permanent or temporal in any nature constructed on all that parcel of land known as L.R. No. MN/III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company in accordance with the provision of Section 152E of the Land Act, No. 6 of 2012
  - c. That this Honourable Court do and hereby issues an order of mandatory injunction restraining the Defendants whether by themselves, their agents, servants, employees or representatives from trespassing, erecting structures be it permanent or temporal and/ or in any other manner interfering with, selling, sub-dividing and/ or dealing with in any manner of all that parcel of land known as LR. No.MN/III/1883 registered as entry No. CR. 21996/2 which property belongs to the Plaintiff Company.
  - d. That the Plaintiff shall have the costs of the suit as per the Plaint dated 3<sup>rd</sup> April, 2019 to be borne by the Defendants jointly and severally.

It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 11<sup>TH</sup> DAY OF JULY 2025.**

.....

**HON. MR. JUSTICE L.L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Otieno Advocate for the Plaintiff.
- c. Mr. Mohammed Advocate holding brief for Mr. Malombo Advocate for the Defendants.

