



Dena & another (Suing on behalf of 111 Members of the Mtwapa Land Tenants Associations) v Kalume & 6 others (Civil Suit 299 of 2013) [2025] KEELC 5240 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 299 OF 2013
LL NAIKUNI, J
JULY 11, 2025**

BETWEEN

MASHA BIRYA DENA 1ST PLAINTIFF

GEOFREY MUTINDA NZOU 2ND PLAINTIFF

SUING ON BEHALF OF 111 MEMBERS OF THE MTWAPA LAND TENANTS ASSOCIATIONS

AND

FRANCIS KAHINDI KALUME 1ST DEFENDANT

POLA KALUME KITSAUMBI 2ND DEFENDANT

BILLY KALUME 3RD DEFENDANT

KADZO KALUME 4TH DEFENDANT

ESTHER NZINGO KALUME 5TH DEFENDANT

LUGO KALUME -LUGHO 6TH DEFENDANT

DANIEL MBOGHO KALUME 7TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains the Further further Amended Plaint dated 4th August, 2017 filed on 2nd November, 2017 by Masha Biry Dena and Geoffrey Mutinda Nzou [suing on behalf of 11 Members of the Mtwapa Land Tenants Association] the Plaintiffs herein against Francis Kahindi Kalume, Pola Kalume Kitsaumbi, Billy Kalume, Kadzo Kalume, Esther Nzingo Kalume, Lugo Kalume – Lugho and Daniel Mbogho Kalume, the Defendants herein.



2. Upon service of the pleading and summons to enter appearance, the 6th Defendant entered appearance through a memorandum appearance dated 21st May, 2014 and filed on the same day.
3. It is instructive to note that upon the request by the parties, on 22nd September, 2023 the Honourable Court conducted a Site Visit [“Locus in Quo”]. Thereafter it prepared and shared a report which forms part of this Judgement for ease of reference thereof. While at site, the parties indicate the need for them to attempt an out of Court negotiation with a view to attain a settlement. However, despite of that, to date nothing tangible has come out of that process.

II. Description of the parties

4. The Plaintiffs were described as male adults of sound mind residing and working in Mombasa within the Republic of Kenya. The 1st Defendant was described as a male adult of sound mind residing and working for gain at Mtwapa, the 2nd Defendant a female adult of sound mind residing in Mtwapa, the 3rd Defendant a male adult of sound mind residing in Mtwapa. The 4th Defendant a male adult of sound mind residing in Mtwapa. The 6th Defendant was described as a female adult of sound mind; the 8th and 9th Defendants were described as male adults of sound mind all of them residing in Mtwapa.

III. Court directions before the hearing

5. Nonetheless, on 18th October, 2021, the Honourable Court fixed the hearing dated on 9th November, 2021 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 Plaintiffs’ witness PW1 testifying in Court on 9th November, 2021 after which closed the case and the Defendants called their witnesses on 28th February, 2023.

IV. The Plaintiff’s case

6. From the filed pleadings, at all material times relevant to the suit Plaintiffs were tenants paying ground rent to the Defendants at plot No.742/III/MN situated in Mtwapa. Wherein it was agreed that:
 - a. The Landlord should permit the Tenants to build a dwelling house on the said plot in a plan to be specifically approved by relevant County or Municipal Council.
 - b. The Tenant should have quiet enjoyment of the said plot provided that the Tenant never engaged in business that is illegal or unauthorized by the law or be wasteful on the plot.
 - c. It was hereby mutually agreed that, the Tenants shall not sell, sublet or part with the possession of the part of the Plot rented without the consent of the Landlord which consent should not be unreasonably withheld.
7. On or about November, 2013, the Defendants commenced carrying out survey on the Plot of Land without notice to the Tenants/ Occupants for purposes for alienating. The Plaintiff had been occupying the parcel of land for over 20 years and have invested heavily on the parcels each individual occupies by constructing residential and commercial premises. The Defendants intended to evict them from the Plot No. 742/III/MN as they were made aware that once titles are obtained, The Plaintiffs should pay a sum of Kenya Shillings one Million [KShs.1,000,000/-] each failure to which Land would be sold to willing buyers.
8. The Registration of titles emanating from subdivision from the Plot No. MN/III/ numbers 742, 743, 744, 745, 746 and 747 was obtained through fraud. On the particulars of fraud, the Plaintiffs relied on the following: -



- a. Plot No.742/III/MN was originally known as Plot 308/3/III/MN allocated and registered to Mahendraral Kavishanker Pandya and later surveyed and subdivided to parcel 491/III/MN and sold to Kalume Kitsau Mbi, where a transfer and register were made in the coast registry as CR. 7898/6 to change the property to Agricultural Finance Corporation on 26th November, 1970 and the same discharged on 28th September 1981.
 - b. Upon discharge, the managers of Agricultural Finance Corporation confirmed that the title deed was lost and misplaced and applied to the Land registrar for purposes in lieu of the lost Certificate of the title. On 25th December, 1980 Kalume Kitsaumbi passed on to leave the parcel under the Administration of the Public Trustees.
 - c. It was not clear how parcel 491/III/MN was subdivided to create 742/III/MN C.R. 18287 from “Provincial Certificate” with an area of 33.61 Ha which was registered to Kalume Kitsaumbi and administration being Billy Kalume Kitesaumbi and Jumwa Kalume Kitesaumbi.
 - d. Probate and Administration Succession Case No. 33 of 1993 used to succeed Billy Kalume and Jumwa Kalume as the administrators was same, tampered from succession grant to public trustee from one Fatuma A. Binti Salim Mohammed [deceased] of Kisauni Mombasa which was used to succeed the granddaughter Fasila Mohamed Ahmed as the administrator of the Estate of Fatuma Binti Salim Mohamed.
9. According to the Plaintiffs, their claim against the Defendants was title emanating from Plot No. MN/III/742, 743, 744, 745, 746 and 747 be rectified by canceling or amending the titles and a permanent injunction restraining them from alienating and evicting the Plaintiffs from Plot No.742/III/MN situated within Mtwapa and further be restrained from subdividing the same. The Plaintiffs averred that there was no suit pending and that there have been no previous proceedings in any court between the Plaintiff and the defendant on the same subject matter. And despite demand and notice of intention to sue, the Defendants had interfered with the proprietary right of the Plaintiffs. The matter arose and was within the jurisdiction of the Honourable Court.
10. The Plaintiffs prayed for Judgment to be entered against the Defendants jointly and severally in the following terms:-
- a. An order that the Defendants Title deeds pertaining to Plot No. MN/III/742, 743, 744, 745, 746, and 747 be rectified by being cancelled or amended as the Court deems fit and to the benefit of the Plaintiffs who have permanent residential buildings since the Defendants had knowledge of the fraud herein.
 - b. A declaration that the Plaintiffs who have permanent residential buildings be granted ownership upon proper assessment of the land to confirm value and set off with amount paid.
 - c. A permanent injunction restraining the Defendants by themselves, servants and/or agents from evicting the plaintiffs from Plot No. 742/III/MN situated within Mtwapa and further restrained from sub-dividing the same upon confirmation after rectification of the same by cancellation and/or amendment.
 - d. Costs of the suit and interest.
 - e. Any other relief the Honourable court may deem fit.
11. The Plaintiff called their witnesses on 9th November, 2021 at 1.45 pm who testified as follows:-



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

12. PW - 1 testified under oath and in Swahili language. He identified himself as GEOFFREY MURINDA NZEU, a citizen of Kenya bearing all the particulars as indicated on the national identity card shown to court at the commencement of his testimony. He resided in Mtwapa. He produced his identification as his Plaintiff Exhibit No. 1A. He told the court he had the knowledge of the case and had been brought to Court as the 2nd Plaintiff. The case was about the land where he had built a house in year 1990. Mr. Shaban Kalume, the 7th Defendant sold him plot 308/III/MN 50 X 80. The witness agreed that he would pay a sum of Kenya Shillings One Hundred Thousand [Kshs. 100,000/-]. He recorded a witness statement dated 1st September, 2016 which he relied on as his evidence in chief. On the 14 list of documents attached to the statements he asked the same to be adopted as evidence and marked as "1A to 1M". PW - 1 told the court that he urged them to assist him reside there as he is being told to leave the land.

B. Cross examination of PW - 1 by Mr. Omollo Advocate.

13. PW - 1 confirmed that he bought the land from Shaban Kalume. he had sued the other Defendant as he knew that he was deceased. It had been many other who were legal administration. He did not have any agreements with the other Defendants. On Plot No. 742/III/MN the witness told the court that he had not conducted an official search on the land. He did not know whether Plot 742/III/MN was subdivided. On whether the other Plots o. MN/III/743, 744, 745, 746 and 747 were sold he did not know. He did not have a file for Plots Nos. 743, 744, 745, 746 and 747 but did not have anything else.
14. PW - 1 told the court that he had a document which was in relation with the purchase of the land dated 25th May, 1990. He did not have anything to show whether the other Defendants were registered as owners.

C. Cross Examination by Mr. Kongere Advocate.

15. PW - 1 reiterated that with reference to Plaintiffs Exhibit numbers 1B dated 5th July, 1990, he did not have any paper or document with ESTHER KALUME. The witness did not have a title deed for Plot Numbers 743, 744, 745, 7465 and 747. On being referred to the further supplementary list of documents, the witness told the court that the documents were typed. He saw the transferee's details which were cancelled on page 1 – was the Transfer to Juma Kalume. There was some cancellation. On page 6 at the bottom he had a stamp cancelled; page 9 he could see the subdivision number 491; at page 64 he could see members of Mtwapa Land Association did a search and at page 67 the 5th line from the bottom, there was a name Kiraune Kalume and Daniel Mbhogo Kisauni.

D. Re – examination of PW - 1 by M/s. Mukanya Advocate.

16. PW - 1 reiterated that with reference to Exhibit 1B, the land was sold to him and not leased. The other Defendant were in the case, on the basis that they were Legal Administrator to the Estate of the deceased. When he bought land he was never given a title but from the agreement – Plaintiff Exhibit Number 1B – the parcel he bought was 308/MN/III "IF 742 – 1G – 742. He was never given any title. The land belonged to Shaban Kalume and Billy became Administrator for the said estate. The others were legal administrators.
17. The Plaintiffs called PW - 2 who testified as follows: -



A. Examination in Chief of PW - 2 by M/s. Mukanya Advocate.

18. PW - 2 was sworn and testified in Swahili language. He identified himself as BAKARI SALIM MWANDAZA, a Citizen of Kenya and holder of the national identity card bearing all the details as shown to Court at the start of the hearing. He resided in Mtwapa. He had recorded a witness statement dated 1st September, 2016 which he adopted as his evidence. From the statement he had 4 documents Exhibit numbers “2A – 2D” which he produced as his evidence. He bought the land in the year 2002. They were later on told to pay a sum of Kenya Shillings One Thousand Five [Kshs. 1,500,000/-] but he never had a title deed. He had brought the case on his own behalf and for the community. He had already bought the land.

B. Cross examination by Mr. Omollo Advocate.

19. PW - 2 reiterated that he bought the land; he had seen the receipt – Exhibit 2. It was for the land rent. He insisted that he was a purchaser and not a tenant. All the people were paying rent. The witness had no knowledge for Plot 472.

C. Cross examination by Mr. Kongere Advocate.

20. PW - 2 confirmed that he had no relationship with Esther Kalume. He bought the plot for a sum of Kenya Shillings Two Thousand [Kshs. 2,000/-]. He did not have a receipt for the year 1982. But he had one year 1984.

D. Re - Examination by M/s. Mokaya Advocate.

21. The receipts were for paying for land rent for each year. It moved to a Kenya Shillings Three Thousand Six Hundred [Kshs. 3,600/-].
22. The Plaintiffs called PW - 3 on 27th February, 2023 at 2.30 pm where she testified that: -

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

23. PW - 3 was sworn and testified in Swahili language. She was called BEATRICE ISAAC NJAGE, a citizen of Kenya and holder of the national identity card bearing all the details as shown to Court. She resided in Mtwapa. She was retired. She signed a witness statement on 1st September, 2016 which she wished to rely on as her evidence in chief. She produced a list of 11 documents as Plaintiff Exhibit Numbers 3 “A to K”. She prayed to be given the title deed as produced. The witness paid a sum Kenya Shillings Seven Thousand Hundred [Kshs. 700,000/-] as per document Plaintiff Exhibit Number “3K”. Mr. Kalume kept giving excuses.

B. Cross Examination of PW - 3 by Mr. Omollo Advocate.

24. PW - 3 confirmed that she knew what brought her to Court. She never asked to be given the title deed. They filed one case. She did not know the title deed was for which plot. The witness was claiming Plot No. 742/III/MN from the Plaintiff. She executed agreement with Justin Sughu Ngombo. She had not sued him. The agreement was between Justin and herself. She used to pay a sum Kshs. 200/- per month. She bought from Justin but she would be paying to Francis Kalundi Kalume – she was a tenant. But later on Mr. Kalundi approached her and asked that she paid a sum of Kenya Shillings Four Thousand [Kshs. 400,000/-] as per the advised by him so he paid. She demanded for title.



C. Re - examination of PW - 3 by Mr. Tindi Advocate.

25. PW - 3 confirmed that she paid a sum Kenya Shillings Four Thousand [Kshs .400,000/-] to Kahindi. But later they were asked to pay a sum of Kenya Shillings One Thousand Five Hundred [Kshs. 1,500,000/-] for the ground rent or they left and hence they decided to come to court.
26. The Plaintiffs called PW - 4 who told the court that: -

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

27. PW - 4 was sworn and testified in Swahili language. He was known as YUSUF MUMOBA MUTIU, a citizen of Kenya and holder of the national identity bearing the detail as shown to Court. He signed a witness statement dated 1st September, 2016 which he wished to rely on as evidence in chief. He averred that they entered into an agreement for a sum Kenya Shillings Four Hundred Thousand [Kshs. 400,000/-] lease agreement for land – with Rachel Kalume. He had building plans for the house. Plaintiff Exhibit Number – 4 [A] to [E] produced. They had come to court asking to be given title to the suit property. He approached Rachel Kalume and they agreed they would pay a sum of Kenya Four Hundred and Seventy Thousand [Kshs. 470,000/-] so as to get the title deed. He had sued the Defendants as they were part of the family. He payed ground rent, but when they asked they used to pay a sum of Kenya Shillings One Thousand Five Hundred [Kshs. 1,500,000/-]. It was Mr. Kaikai who picked up after the death of Rachel. He never brought the any receipt to Court.

B. Cross Examination of PW -4 by Mr. Kongere Advocate.

28. PW - 4 told the court that they entered in agreement with Rachel in year 1992. On reference to the 2nd Clause, the witness told the Court that they agreed that they built permanent house and not a dwelling house. They agreed that he would not transfer the house to anyone else. On the ground he had built a house with 2 rooms each. They agreed with Rachel on the house to be built. He did not have the agreement in court. Although he used to pay ground rent, the witness had no receipt or any proof to that effect. They had agreed with Rachel if he paid a sum of Kenya Shillings Four Hundred and Seventy Thousand [Kshs. 470,000/-], the witness would get the house. The witness never paid it he had started paying a sum of Kenya Shillings Seventeen Thousand [Kshs. 17,000/-].

C. Re - Examination of PW - 4 by Mr. Tindi Advocate.

29. PW - 4 reiterated that he never got to pay the sum of Kenya Shillings Four Hundred and Seventy Thousand [Kshs. 470,000/-] after he paid a sum of Kenya Shillings Seventeen Thousand [Kshs. 17,000/-] Mama Rachel died. But Kaikai asked them to pay a sum of Kenya Shillings One Thousand Seven Hundred [Kshs. 1,700,000/-] and failed to which he would be evicted and as a result they came to Court and filed the case.
30. The Plaintiffs called PW - 5 on the same day who testified as follows:

A. Examination in Chief of PW - 5 by Mr. Tindi Advocate.

31. PW - 5 was sworn and testified in Swahili language. She was called ELIZABETH ZARINA MSAFIRI, a citizen of Kenya and hold of the national identity card bearing the details as shown to Court. She signed a witness statement dated 18th December, 2013 which she wished to rely on in evidence in his case. She testified that she was born in year 1952 and she resided at Mtwapa. She bought and built a house on the suit land i.e. Swahili house. She had an agreement between a salon and she bought a



Swahili House without land. The land belonged to the Kalume Family - Plaintiff Exhibit Number 5 “A” and “B”.

B. Cross Examination of PW - 5 by Mr. Omollo Advocate.

32. PW - 5 confirmed that she bought a house without land from Mr. Salim Bin Baraka. She never got authority from the Land Owner. She paid land rent to Francis Kaikai Kalume. She did not have any receipts in Court.
33. The Plaintiffs called PW - 6 who told the court that: -

A. Examination - in - Chief of PW - 6 by Mr. Tindi Advocate.

34. PW - 6 was sworn and testified in the English language. He was called ISAAC FRANCIS KIMOTHO, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court. He was a retiree and an Accountant born on 10th January, 1955. He had 4 documents “Plaintiff Exhibit Number 6 “A to E”. He had building plans to his residential/family and rental houses.

B. Cross Examination of PW - 6 by Mr. Omollo Advocate.

35. According to PW - 6, in 1989, he entered into an agreement with Francis Kalume. He did not have the agreement in Court. He went in the land as a Tenant. He used to pay Ground rent. But he stopped paying ground rent in the year 2006; they had an agreement to be paying the ground rent but he stopped paying. Later he demanded for the title deed; they mutually made this agreement as friends. They asked to be given the title deed. But when they asked for payment for a sum of Kenya Shillings One Million Five Hundred Thousand [Kshs. 1,500,000/-]; he would be given the title deed.
36. The witness told the court that he entered into the land on tenancy basis paying ground rent, but later on the Kalume proposed that they gave them an option of a sum of Kenya Shillings One Million Five Hundred Thousand [Kshs. 1,500,000/-] they would be given the land/ title deed. All of a sudden they saw surveyors come into the land and they asked them to vacate. They were trying to sub – divide the land and told them that the land had been bought; this was in 2013. They told them the land was sold off to other people. He could not afford the sum of Kenya Shillings One Million Five Hundred Thousand [Kshs. 1,500,000/-].
37. On 28th February, 2023, the Plaintiffs called PW - 7 who told the Court that: -

A. Examination - in - Chief of PW - 7 by Mr. Tindi Advocate.

38. PW - 7 under oath and in Swahili language. He was called MASHA BIRYA DENA, a citizen of Kenya and holder of the national identity card with all the particulars as shown to Court. He told the court that he was born in the year 1962. He had filed a witness statement dated 28th February, 2023. He was unemployed. He also filed affidavit attached to his statement. He filed on 3rd April, 2014 – Supplementary List of Documents i.e. 23 documents – Plaintiff Exhibit Number 7 “A to U”. There were additional supplementary list of documents [4] – Plaintiff Exhibit Number “7V to Y”. They occupied the land as they were paying ground rent. But after a while surveyor commenced surveying under the instructions of the land owner. They were offered to buy by paying a sum of Kenya Shillings One Million Seven Hundred Thousand [Kshs. 1,700,000/-] they approached chief. He advised them to file suit.



B. Cross Examination of PW - 7 by Mr. Omollo Advocate.

39. PW - 7 stated that he resided on Plot No. 742/III/MN. He did not have any document as they were stolen. He had never paid ground rent to the Defendants. On being referred to his statements, PW - 7 told the court that to state that they were paying ground rents. He had filed the case urging Court to have Plots No. 742 to 747 III/MN to be cancelled from the filed Plaintiff. On further reference to Def. Exhibit – 7 [Y], the witness stated that the report on administration of the family of Estate of the Late Kalume Kitsaumbi deceased] dated 28th August, 1998 by Public Trustee showed plots No. 743, 744, 745, 746 and 747 which showed they were sold to other people and which he wanted them to be cancelled – for instance Plot No. 742 was sub-divided and sold to Stephen Kahindi Thoya for a sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000/-] but who were not a party to this case.
40. On being referred to the letter dated 16th February, 2018, by the Public Trustee addressed to the Chairman NLC, PW - 7 told the court that the same read as follows: -
- “In a nutshell the only remaining Plot [No. 742/III/MN] measuring 33.61HA was sub - divided into 28 portions and the title deed issued to the widows and children of the deceased – “Kalume Kitasumbi”.
41. From the Judgment by Judge Ogola, their suit was dismissed on 22nd May, 2017. With reference to the letter dated 7th May, 2018, the witness told the court that he wrote the letter as the secretary of Mtwapa Self Help Group. He was in Court as an individual; they were called as both parties – NLC and themselves to resolve the matter NLC never assisted them.

C. Cross Examination of PW - 7 by Mr. Kongere Advocate.

42. PW - 7 reiterated that his evidence was what was in the affidavit in ELC; Billy Kalume and Kalume Kisaumbi tampered with the documents of the estate of Fatuma Binti Salim Mohamed. Its drawn by the Public Trustee and not individuals Page 27, Page 35 documents was by Principal Registrar, High Court of Kenya at Nairobi – Certificate of Principal Registrar that no grant has been made or applied for. According to him at Page 38, the documents by Public Trustee dated 3rd February, 1993 Cause No. 216 of 1991 – Page 39 the confirmed these were documents from the Public Trustee and Court.
43. With reference to the documents – 7X, the witness told the court that the letter dated 5th December, 2016, the last paragraph NLC seemed to agree that these people used fraudulent documents to acquire the title. With reference to a Court order of 165 of 1981. The witness told the court that he bought the land from a person in the year 1991. He did not have any documents to support that he bought the land from the Family.

D. Re - Examination of PW - 7 by Mr. Tindi Advocate.

44. On reference to the Plaintiff Exhibit 7 “A” from Chairman NLC. They tried to come and sit with the NLC and the family of Kalume for them to agree but they declined. With reference to the ruling by Justice Ang’awa of 13th March, 1997 she resolved the Grant and there was an order to that effect.
45. On 28th February, 2023, the Plaintiffs through their counsel Mr. Tindi closed their case.

V. The 1st, 2nd, 3rd and 5th Defendants’ case

46. The Defendants filed their defences twice with the other Defendants filing their defence on 21st March, 2014 dated the same day. In the Defence by the other Defendants, they averred that they denied the



entire contents of paragraph 6 of the Plaintiff; they were strangers to the entire contents of Paragraph 7 of the Plaintiff and made no admission thereof. The Defendants denied that they intended to evict the Plaintiffs from No.742/III/M.N. as alleged in Paragraph 8 of the Plaintiff at all and put the Plaintiff to strict proof thereof.

47. The Defendants further denied of having received any demand or Notice of Intention to Sue as alleged in Paragraph 11 of the Plaintiff or at all. The Defendants averred that the Plaintiffs' suit against them was misconceived, incompetent, incurably defective and an abuse of the Court process and that they shall crave for Leave of this Honourable Court to have the same struck out.
48. The Defendants averred that they were not the Registered owners of Plot No.742/III/M.N. and that they are strangers to the "Plaintiffs" claim herein against them. The Defendants further averred that the Plaintiffs' Suit against them was Non Suited against them and that the same should be dismissed. The Defendants admitted the jurisdiction of the Court.
49. On 6th June, 2023, the 1st, 2nd, 3rd, and 5th Defendant testified as DW - 1 as follows: -

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

50. DW - 1 was sworn and testified in Swahili language. He identified himself as Francis Kahindi Kalume, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. He testified that he had a witness statement dated 25th October, 2021 and filed on 4th November, 2021; the list of documents – 2 Defence Exhibit 1 and 2 which he relied on as his evidence in chief. He adopted the statement.

B. Cross Examination by DW - 1 by Mr. Tindi Advocate.

51. DW - 1 confirmed that they duly executed a sale agreement with Beatrice Isaac Njange [PW - 3]. He knew of the agreement; he witnessed it. He also witnessed the transfer. He agreed that the sale took place. He consented that she bought the land and he had no problem. She paid the Advocate called Mr. Mburu Kariuki. They agreed for her to get the land and only thing remaining was the transfer to her name but she came to Court.

C. Re - examination of DW - 1 by Mr. Omollo Advocate.

52. DW - 1 reiterated that he had been shown court the transfer. It was from Justice Kongo to Beatrice Isaac Njange. He agreed to it and he gave consent. It did not mean she was buying from his mother.
53. The 1st, 2nd, 3rd, 5th and 9th Defendants through their Counsel Mr. Omollo marked the close of their case on 6th June, 2023.

VI. The 6th Defendant's case

54. The 6th Defendant filed her defence on 11th April, 2018 dated the same where she contended that:-
 - a. The 6th Defendant denied that either of the two Plaintiffs were tenants on Plot Number 742/III/MN, if at all it exists, or on any of the 6th Defendant's property. The 1st and 2nd Plaintiffs therefore lacked locus standi to bring the suit as against the 6th Defendant.
 - b. In response to Paragraphs 12 the 6th Defendant denied and put the 1st and 2nd Plaintiffs to strict proof on the following facts: -
 - i]. Plot Number 742/III/MN existed in law or on the ground.



- ii]. The existence of the alleged tenancy agreements and that they provided for any of the terms listed at Paragraph 12[i], [ii] & [iii] of the Plaintiff.
- c. Paragraph 13 of the Plaintiff was denied and the 6th Defendant averred that:-
 - a. she commenced and concluded the survey process of Plot Number 742/III/MN also known as Subdivision Number 3843 [Original No.3839/4] Section III Mainland North in the year 2010.
 - b. A total of forty six [46] sub - divisions with independent title documents for each sub - division resulted from the process.
 - c. Some of the sub - divided properties have already been sold to willing purchasers which in some cases had been the tenant in occupation.
 - d. Paragraph 14 of the Plaintiff was denied and the 1st and 2nd Plaintiffs put to strict proof thereof.
 - e. Paragraph 15 was denied and the 6th Defendant reiterated paragraph 3 and 5[3] hereinabove.
 - f. In response to Paragraphs 16 and 17 of the Plaintiff, the 6th Defendant averred as follows:-
 - a. She was a stranger to Plot Numbers 743, 744, 745, 746 and 747 and could not respond meaningfully.
 - b. She denied each and every particulars of fraud, if they qualify as such, enumerated in paragraph 16[i], [ii], [iii] & [iv] of the Plaintiff and put the 1st and 2nd Plaintiffs to strict proof.
 - c. In light of paragraph 12 of the Plaintiff, the 1st and 2nd Plaintiffs were estopped by Section 121 of the Evidence Act, Cap. 80 from pleading the issues in paragraphs 16 and 17 of the Plaintiff.
 - g. In light of Paragraphs 3 to 8 hereinabove, the 6th Defendant averred that there was no reasonable cause of action disclosed by the suit and none of the reliefs sought are available to the 1st and 2nd Plaintiffs, or to any one of them, as against the 6th Defendant. She denied being served with the demand and notice of intention to sue but the same according to the 6th Defendant was irrelevant in light of the facts pleaded in Paragraphs 3 to 8 hereinabove. Paragraphs 18 and 20 of the Plaintiff were admitted.

55. The 6th Defendant prayed that the 1st and 2nd Plaintiffs' suit be dismissed with costs to the 6th Defendant. The 6th Defendant testified as DW - 2 on 6th June, 2023 where she told the court that:-

A. Examination - in - Chief of DW - 2 by Mr. Kongere Advocate.

56. DW - 2 was sworn and testified in Swahili language. She was called ESTHER NZINGO KALUME, a citizen of Kenya a holder of national card bearing all the particulars as shown to Court. He was born in 1961. She recorded a witness statement on 11th April, 2018 and which she wished to rely on in evidence in chief support of her case. She also gave documents which she produced as 6th Defendant's Exhibit numbers 1 to 5.



B. Cross Examination of DW - 6 by Mr. Tindi Advocate.

57. DW - 2 testified that she did the sub - division of the land. She never informed the Plaintiffs. She did not know who had sued her. She said that the people who were on her land, they were not there in Court. She only saw Mr. Yusuf Mumbo who testified in Court. The sub-division was done in day broad light and openly. It was not secretive. Rachel was her mother, Yusuf Mumbo was leasing and used to pay ground rent every month, she did not know about Yusuf paying a sum of Kenya Shillings Four Thousand [Kshs. 400,000/-]. She did not know of any agreement between Rachel and Mr. Yusuf. She knew many people who had leased the land who included Yusuf, Edward Blaz, Saumu Mwanaidi, Abel Amor Zakaria Kamani, Kalume Taabu, Mary Madime and Rosey Nyange. All these people had leases and some who had bought e.g. Edward Blaz who had a title.
58. The 6th Defendant marked her case closed through her counsel Mr. Kongere on 6th June, 2023.

VII. Submissions

59. On 16th September, 2024 after the Plaintiffs 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 the Court was penning down its Judgement it had not been able to access the written submissions from neither the electronic version at the Judiciary CTS Portal nor the hard copy from ELC Registry. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 27th June, 2025. Eventually, the Judgement was delivered on 11th July, 2025 accordingly.

VIII. Analysis and Determination

60. 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.
61. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three [3] salient issues for its determination. These are: -
- a. Whether there was a legal agreement between the Plaintiffs and the Defendants?
 - b. Whether the Plaintiffs are entitled to the orders sought in the Plaint
 - c. Who bears the costs of the suit?

IssueNo. A]. Whether there was a legal agreement between the Plaintiffs and the Defendants

The Site Visit Report

62. As indicated above, the Honourable Court did conduct a Site Visit [“Locus in Quo”] upon the request and presence of all the parties. Consequently, it prepared a report as it is re - produced verbatim herein below.

Republic Of Kenya

In The Environment & Land Court

At Mombasa

Elc No. 299 Of 2013

Masha Biry Dena & 111 Others Plaintiffs

V



Francis Kahindi Kalume Defendant

The Site Visit [“Locus in Quo”] report held on 22th September, 2023

I. Introduction

1. The Site visit was conducted at Mtwapa within the County of Mombasa. All the parties assembled at the site at 11.00am. The session was commenced through a word of prayer led by Mr. Omar Masumbuko. The Judge explained the purpose of the visit and guided the team on how it was to be conducted.

II. The parties present

A. The Court.

1. Hon. Justice L.L. Naikuni, the Judge ELC no. 3 Mombasa.
2. M/s Yumna, the Court Assistant.
3. John Ngari, the Driver to the Judge.

B. The Plaintiff

- a. M/s. Mokaya Advocate for the Plaintiff.
- b. Daniel Mbogo Kalume; Rebecca Mbogo Mataza & the other Plaintiffs and Over 50 members of the Public

C. The Defendant

- a. Mr. Vincent Omollo for 1st, 2nd, 3rd, 5th and 9th Defendants.
- b. Mr. Omollo holding brief for Mr. Kongere with 5 clients.
- c. Mr. Omar Masumbuko [Mheshimiwa]; other Defendants and over 50 members of the Public. [Hereinafter referred to as “The Team”]

D. The Security operatives

- a. Senior Sergeant Mwachizi Mbuya – at Mtwapa Police Station.
- b. Sergeant Meshack Gitonga.
- c. PC. Simon Ekamise.
- d. PC. Vivian Ngome.
- e. PC. Edward Muraya.
- f. PC. Caleb Mutai.

III. The Purpose of the Site Visit

2. The Court explained that the purpose of the site visit and held that it was in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -



Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 [1] [a] provided to wit: -

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

3. The Court explained that the site visit was to assist Court in arriving at informed decision. It was not meant to gather any new evidence nor adducing of evidence. Parties were advised to sustain high dignity, decorum and decency. For instance exchanges, taking of photography or video shooting were not allowed.

IV. The Procedure

4. The visit entail conducting physical walk around part of the suit land. It was agreed by team that M/ s. Rebeca Mbogo Mataza and Mr. Daniel Mbogo Kalume – the representatives of the Plaintiffs and Defendants respectively and who had a lot of information on the subject matter provide the lead. They were to use the following documents:-Map 742 of all the submissions – R/M F. 37/IVC9/1986Parcel No. MN/11/3840 – 3865Map dated 13/5/2199 [Registration No. CR/271/43/149Map prepared by a Private surveyor Edward Kiguru

V. Observations made

5. The team went round part of the suit land and made the following observations.
 - a. The location is north of Mtwapa Creek Kwa Nyambura along Chief Road.
 - b. The parcel of land is extremely vast. Thus, the team was not able to go round all of it.
 - c. It was habited with a dense population and a huge human settlement consisting of numerous both semi – permanent Swahili and permanent residential houses, commercial – shops, mini markets, clubs, churches, mosques and access road in between.
 - d. It was encouraging to note that the , the parties lived amicably – in peace and tranquility. Indeed, at the resident of Mr. Masumbuko [Mheshimiwa] the team found huge cooking pots and several people preparing a lot of meals which we learnt was meant for the local communities. Mr. Masumbuko informed the team that this happened every Friday after the prayers. It was his benevolent gesture from his own personal resources. The team highly recommended and encouraged him to continue with the generous gesture for the community.
 - e. There were a few plantations of Mango and coconut trees at a particular location of the parcel of the land.

Kwa Goa

Chief's Road A

[kwa Nyambura]

The whole plot is approximately 105 acres



- f. The Plot 308/III/MN as per the mother title 38.11 Hectares which is 94.16 acres
- g. The Map was for the proposed Mtwapa Settlement Upgrading Scheme for physical Planning for the whole of Mtwapa dated 14th December, 2020 [produced by the Plaintiffs]

VI. Conclusion and directions.

6. In the long run, both Mr. Kalume and Mr. Omar Masumbuko who basically were the leaders for both the Plaintiffs and the Defendants expressed their gratitude to the Honourable Court for conducting the site visit. They indicated they had looked forward for it for many years. They both agreed the need to embrace the suggested Alternative Justice Solution [AJS]. They agreed on holding meeting to initiate the out of Court talks. The advocates also agreed on the AJS and they will meet to talk.

Thus, the Honourable Court directed that parties to undertake the following:-

- a. That the parties were encouraged to embrace the Alternative Judicial System to amicably resolve the land dispute.
- b. That in the mean time, each party to engage their own independent surveyor to do a report.
- c. That a Government Surveyor [read the Coast Regional Surveyor] also directed to prepare and serve a report.
- d. That all these reports should be filed and served within the next 60 days from today.
- e. That all the above Land Surveyors to provide a detailed and comprehensive information.
- f. That the matter to be mentioned on 22ND January, 2024 to ascertain compliance and further direction.

There being no further business, the Site visit ended at 11.00 A.M. with a word of Prayer by Mr. Kalume

Site Visit Report Presented On This26thday Of.....february.....2024.

.....

Hon. Justice L.I. Naikuni,
 Environment & Land Court At
 Mombasa

63. Under this sub - title the Court shall examine the purported agreement between the Plaintiffs and the Defendants. As indicated, the brief facts of this suit are that at all material times relevant to the suit Plaintiffs were tenants paying ground rent to the Defendants at plot No.742/III/MN situated in Mtwapa. According to the Plaintiffs, they had entered into an agreement that: -

- a. The Landlord should permit the Tenants to build a dwelling house on the said plot in a plan to be specifically approved by relevant County or Municipal Council.
- b. The Tenant should have quite enjoyment of the said plot provided that the Tenant does not engage in business that is illegal or unauthorized by the law or be wasteful on the plot.
- c. It was hereby mutually agreed that, the Tenants shall not sell, sublet or part with the possession of the part of the Plot rented without the consent of the Landlord which consent should not be unreasonably withheld.



64. In the Defence by the other Defendants, they averred that they denied the entire contents of Paragraph 6 of the Plaintiff; they were strangers to the entire contents of Paragraph 7 of the Plaintiff and made no admission thereof. The Defendants denied that they intended to evict the Plaintiffs from No.742/III/M.N. as alleged in Paragraph 8 of the Plaintiff at all and put the Plaintiffs to strict proof thereof. The 6th Defendant denied that either of the two Plaintiffs were tenants on Plot Number 742/III/MN, if at all it exists, or on any of the 6th Defendant's property. The 1st and 2nd Plaintiffs therefore lacked "locus standi" to bring the suit as against the 6th Defendant.
65. In response to Paragraph 12 the 6th Defendant denied and put the 1st and 2nd Plaintiffs to strict proof on the following facts: -
- a. Plot Number 742/III/MN existed in law or on the ground.
 - b. The existence of the alleged tenancy agreements and that they provided for any of the terms listed at paragraph 12[i], [ii] & [iii] of the Plaintiff.
66. Paragraph 13 of the Plaintiff was denied and the 6th Defendant averred that;
- a. she commenced and concluded the survey process of Plot Number 742/III/MN also known as Subdivision Number 3843 [Original No.3839/4] Section III Mainland North in the year 2010.
 - b. A total of forty six [46] subdivisions with independent title documents for each subdivision resulted from the process.
 - c. Some of the subdivided properties have already been sold to willing purchasers which in some cases has been the tenant in occupation.
67. In response to Paragraphs 16 and 17 of the Plaintiff, the 6th Defendant averred as follows:-
- a. She was a stranger to Plot Numbers 743, 744, 745, 746 and 747 and could not respond meaningfully.
 - b. She denies each and every particulars of fraud, if they qualify as such, enumerated in Paragraph 16[i], [ii], [iii] & [iv] of the Plaintiff and put the 1st and 2nd Plaintiffs to strict proof.
 - c. In light of Paragraph 12 of the Plaintiff, the 1st and 2nd Plaintiffs were estopped by section 121 of the Evidence Act Cap 80 from pleading the issues in Paragraphs 16 and 17 of the Plaintiff.
68. It is trite law that a contract over land that does not satisfy the requirements of Section 3[3] of the Law of Contract, Cap. 23 and Section 38 of the Land Act, No. 6 of 2012 are unenforceable. Section 3[3] of the Law of Contract provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit founded is:-
- a. In writing;
 - b. It is signed by all the parties thereto; and
 - c. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
69. Similarly, the provision of Section 38 [1] of the Land Act stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and signed by all the parties.



70. The Court of Appeal in the case of “Jane Catherine Karani v Daniel Mureithi Wachira” held/observed that;

“It is clear from the reading of section 3[3] of the *Law of Contract act* that the signature of each party is required to be attested by a witness who was present during the execution of the agreement. We have perused the agreement and we find that it is only the appellants signature that was attested by her husband. This was clearly contrary to section 3[3] of the law of contract.”

71. The wording of the above provisions is mandatory. PW - 1 in his testimony told the court that he bought the land from Shaban Kalume but he had sued the other Defendants as he knew that Shaban Kalume was deceased. He did not have any agreements with the other Defendants. PW - 1 reiterated that with reference to Exhibit numbers 1B dated 5th July, 1990, he did not have any paper or document with ESTHER KALUME. PW - 2 in his testimony confirmed that he had no relationship with Esther Kalume; he bought the plot for a sum of Kenya Shillings Two Thousand [Kshs. 2,000/-] he did not have a receipt for the year 1982. But he had one in the year 1984.

72. PW - 3 confirmed that she knew what brought her to Court; she never asked to be given the title deed. They filed one case. She did not know the title deed was for which plot. The witness was claiming Plot No. 742/III/MN from the Plaintiff. She executed agreement with Justin Sughi Ngombo. She had not sued him. The agreement was between Justin and herself. She used to pay a sum Kshs. 200/- per month. She bought from Justin but she would be paying to Francis Kalundi Kalume – she was a tenant. But later on Mr. Kalundi approached her and asked that she paid a sum of Kenya Shillings Four Hundred Thousand [Kshs. 400,000/-] as per the advised by him so he paid. She demanded for title. PW - 4 also confirmed that he did not have the agreement he purported to have entered into with Rachel in the year 1992 which was also the case with PW - 6 who told the court that he did not have an agreement.

73. It is a requirement under law that even where a contract/ agreement is oral, for it to be enforceable by law, it should be proved. The said agreements herein are therefore untenable as they offend the provisions of the Section 38 of *Land Act* of 2012 and Section 3[3] of the Law of Contract, Cap. 23. In relying on the legal provisions above, I strongly discern that there was no valid contract between the parties. Certainly, on this front, the Plaintiffs have failed to demonstrate their case.

IssueNo. B]. Whether the Plaintiff are entitled to the orders sought in the Plaintiff.

74. Under this sub - title, the Honourable Court shall examine if the Plaintiffs have proved their case. In this area of Kenya, the concept of a house without land is common particularly along the Coastal region. This is where a person can own a house without owning the land upon which the house stands. In the case of:- “Mwenye & 19 others v Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005” [Ouko, J.] [as he then was] described the concept of house without land as follows: -

“The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”



75. In the case of “Murtahar Ahamed Dahman & Another v Athuman Sudi [2013] eKLR” Angote J, had the following to say regarding the concept of a house without land: -

“The land question within the coastal region is complex due to its peculiar historical and legal origins. The region is in a very unique position because of its geographical positioning and with it the peculiar historical ties unlike the other part of the country. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan law and the Land Titles Act, Cap 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent.”

76. The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants [Control] [Mombasa] Ordinance Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December 1969. The provision of Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection.
77. Similarly, in the case of:- “Arif v Jadunath Majdma [1930] Vol. VII Indian Appeal, 91, QC” the Privy Council construing the provision of Sections 107 and 108 of the Indian Transfer of Property Act, 1882 held as follows: -

“An enforceable verbal agreement to enter upon another’s land and erect a house which is not registered as required under Section 107 and 108 of the Transfer of Property Act of India 1882 does not give rise to equity capable of protection by a Court, and the land owner would be entitled to possession through the order of ejection after a month’s notice to remove his structures and restore the land to its original state.”

78. The Plaintiffs through its witnesses had produced any evidence to show that they continued paying rent after the deceased passed on. PW - 6 told the court that he used to pay Ground rent. But he stopped paying ground rent in the year 2006; they had an agreement to be paying the ground rent but he stopped paying. Later he demanded for the title deed; they mutually made this agreement as friends. They asked to be given the title deed. But when they asked for payment for a sum of Kenya Shillings One Million Five Hundred Thousand [Kshs. 1,500,000/-].
79. I take judicial notice that under the Land Titles Act [repealed] the peculiar phenomenon of “houses without land” were recognized that the properties would have belonged to the Defendants; if the Plaintiffs paid their rent which they had stopped paying the rent. Accordingly the owners of the land had the right to rescind the purported agreement of house without land. I am satisfied on the evidence



placed before me that the Plaintiffs have not proved their case against the Defendants on the Principles of Preponderance of Probabilities and a balance of probabilities. Thus, I hold that the Plaintiffs are not entitled to the prayers sought in the Plaintiff.

Issue No. C]. Who bears the costs of the suit

80. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 [1] of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
81. In “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products v Alexander Films [SA] [PTY] 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.”
82. In the present case, for the fact that the Plaintiffs have not proved their claim; the Defendants shall have the costs of the suit for participating in the suit.

IX. Conclusion and Disposition

83. 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 Plaintiffs have not established his case against the Defendants. For avoidance of doubt, the Honourable Court proceeds to make the following specific orders:
- a. That Judgment be and is hereby entered in favour of the Defendants as the Plaintiffs have failed to prove their case in respect to the Further further Amended Plaintiff dated 4th August, 2017 filed on 2nd November, 2017 with costs to the Defendants.
 - b. That the Defendants have the costs of the suit.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11TH DAY OF JULY 2025.

.....

HON. 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. No appearance for the Plaintiffs.
- c. Mr. Kongere Advocate for the 6th Defendant.
- d. Mr. Kongere holding brief for Mr. Omolo Advocate for the 1st, 2nd, 3rd and 5th Defendants.

