



REPUBLIC OF KENYA



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**Karisa & 12 others (Suing thro. the Estate of Charo Karisa who died Intestate) v Rimba
(Environment and Land Case E002 of 2023) [2025] KEELC 5168 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E002 OF 2023**

LL NAIKUNI, J

JULY 4, 2025

BETWEEN

MICHAEL CHARO KARISA 1ST PLAINTIFF
NYEVU CHARO KARISA 2ND PLAINTIFF
BOSCO SAFARI CHARO 3RD PLAINTIFF
SAMMY CHARO KARISA 4TH PLAINTIFF
ESTHER KADZO CHARO 5TH PLAINTIFF
JAPHET MAITHA CHARO 6TH PLAINTIFF
PHILISTER KACHE CHARO 7TH PLAINTIFF
HELLEN TSETSE CHARO 8TH PLAINTIFF
JUMA KOMBO CHARO 9TH PLAINTIFF
SHEBANI CHARO KARISA 10TH PLAINTIFF
VINCENT MRAMBA CHARO 11TH PLAINTIFF
GEORGE IHA CHARO 12TH PLAINTIFF
REHEMA KAZUNGU BAYA 13TH PLAINTIFF
SUING THRO. THE ESTATE OF CHARO KARISA WHO DIED INTESTATE

AND

CHARO RUCHU RIMBA DEFENDANT



JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit instituted through a Complaint dated 24th July, 2023 by Michael Charo Karisa, Nyevu Charo Karisa, Bosco Safari Charo, Sammy Charo Karisa, Esther Kadzo Charo, Japhet Maitha Charo, Philister Kache Charo, Hellen Tsetse Charo, Juma Kombo Charo, Shebani Charo Karisa, Vincent Mramba Charo, George Iha Charo and Rehema Kazungu Baya (Suing thro. the estate of CHARO KARISA who died intestate) the Plaintiffs herein. It was against Charo Ruchu Rimba, the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance through a memorandum appearance filed a statement of defence dated 5th September, 2023.

II. Description of the parties

3. The Plaintiffs were described as adults individual of sound mind and disposition residing and working for gain at Bamburi within Mombasa County in the Republic of Kenya and have presented this suit on behalf of the estate of the late CHARO KARISA now deceased.
4. The Defendant was described as a male adult of sound mind residing and working for gain at Bamburi within Mombasa County within the Republic of Kenya.

III. Court directions before the hearing

5. Nonetheless, on 4th April, 2024, the Honourable Court fixed the hearing dated on 22nd May, 2024 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010. On 24th October, 2024, the Plaintiffs through their counsel Mr. Ileri closed their case without calling any witnesses. Eventually, on 9th December, 2024, the Defendant's case matter proceeded for hearing by way of adducing "viva voce" evidence with their witnesses - DW – 1 & 2 testifying in Court. After which they closed their case thereof.

IV. The Plaintiffs' case

6. From the filed pleadings, the defendant sold to their late father one CHARO KARISA now deceased six (6) acres of land situated at Kashani, Bamburi Mombasa in the year 2002 and entered into an agreement to that effect and consideration thereof paid to him. The Defendant was residing in total disregard of the agreement between him and the Plaintiffs' father had threatened to sell and/or invaded four (4) of the six (6) acres sold to the Plaintiffs' father and was offered the same for sale again to other parties.
7. The Plaintiffs further stated that the Defendant had no legal interest on the suit portion of land having sold it to the Plaintiffs' father now deceased and further that the Defendant was not a beneficiary of the estate of their late father. In the premises the plaintiffs claim against the defendant was an order compelling the defendant to vacate ownership of the premises and for an injunction restraining the Defendant, his agent, servant and /or any other person acting in the name of the defendant or deriving any purported title from the defendant from entering upon, selling, developing, occupying alienating, committing any act of waste or in any manner dealing with the said portion of land measuring six (6) acres situated at Kashani Bamburi.



8. The Plaintiffs averred that they were the lawful beneficiaries of the estate of the deceased have a duty to defend and protect it from any invasion from Defendant. Despite intention to sue intimidated, the Defendant had failed to vacate rendering this suit necessary. There was neither suit pending nor had there been any previous proceedings involving the suit property and the parties hereto. The Cause of action arose at Bamburi within the jurisdiction of this Honourable Court.
9. The Plaintiffs prayed for Judgment to be entered against the Defendant in the following terms:-
 - a. A declaration that the plaintiffs are the jointly the lawful beneficial owners of all that piece of land measuring six (6) acres situated at Kashani, Mombasa.
 - b. A permanent injunction restraining the Defendant, either by Himself, through his agent's, servants or any one claiming interest from entering, remaining and/ or selling any portion or subdivision on that land fairly demarcated and measuring six (6) acres situated at Kashani, Bamburi within Mombasa County.
 - c. An order to issue directing the Land Registrar and district land surveyor Mombasa to survey and issue title deed in respect of the suit land measuring six (6) to the plaintiffs.
 - d. Costs of and incidentals to this suit.
 - e. Any further or other relief as the Honorable Court may deem necessary to grant.

V. The Defendant's case

10. The Defendant opposed the contents of the Plaintiff in his written statement of defence dated 5th September, 2023 where he admitted paragraphs 1 and 2 of the Plaintiff the same being merely descriptive of the parties herein. The Defendant denied each and every allegation contained in the plaintiff filed herein and particularly denies allegation by the plaintiffs in Paragraph 3 of the plaintiff that, he sold to the Plaintiffs' deceased father one CHARO KARISA Six (6) acres piece of land at Kashani - Bamburi, within Mombasa County, that the Defendant therefore took issues with any documents that maybe held by the Plaintiffs' herein as such must be products of fraud.
11. In response to paragraph 4 of the Plaintiff, the Defendant averred that as far as he was concerned the Plaintiffs' deceased father bought a portion/part of land approximately measuring Two and Half (21/2) Acres only from him and sale agreement to that effect was written between the parties by then Plaintiffs' deceased father's boss and the remaining portion of the suit parcel of land the defendant sold to willing buyer, willing seller during the same period i.e. 2002, hence Plaintiffs allegations are farfetched.
12. According to the Defendant in Paragraph 5 of the Plaintiff, the Defendant wished to categorically state that, he indeed had no legal interest on the portion/part of the land he had sold to the Plaintiffs' deceased father one Mzee CHARO KARISA, which portion was approximately measuring Two and Half (21/2) Acres and not Six (6) Acres as claimed by the Plaintiffs and the Plaintiffs were put to strict proof thereof. In Paragraph 6 of the plaintiff the Defendant wished to state that, the Plaintiffs were only out to misuse the Honorable court to issue them with orders which are not realistic and further stated that, the plaintiffs were not in any position whatsoever to restrict, obstruct and/or deny the defendant the use his land as he deemed fit.
13. The Defendant also averred that, since he acquired the said parcel of land and even after selling part/portion of the same to the late CHARO KARISA, the Plaintiffs' husband and/or father he had not had any interference from anybody until the year 2012 when two(2) sons of the deceased started encroaching into the Defendant's portion/part of land and when I reported the matter to the late



- i.e. Plaintiffs father, the sons were told to remain within their portion by their father but they were adamant. The Defendant then again reported the matter to the Area Chief who went to the ground and the deceased's sons (Plaintiffs herein) were found on the wrong and were ordered to then Plaintiffs and the Defendant have lived peacefully until the demise of their father.
14. According to the Defendant this suit was frivolous and an afterthought by the Plaintiffs and it was only meant to deprive the defendant his rightfully acquired parcel of land by trying to fraudulently acquire what is not rightfully theirs. The plaintiffs were therefore estopped from any claim having come to court with dirty hands. The Defendant averred that the Plaintiffs were therefore guilty of their acts and were only trying to acquire that was not rightfully theirs, fact the Plaintiff were well aware of. The defendant denied allegations contained in paragraph 8 of the plaint that, there was no meaningful service of notice served as alleged and that the defendant has not invaded any of the plaintiffs' parcel of land to warrant vacation on the part of the defendant, hence the plaintiffs are put to strict proof thereof.
 15. The Defendant admitted that there was no other suit pending between them pertaining to this cause of action. The Defendant averred that, this suit was an afterthought brought by the plaintiffs specifically to sanitize their fraudulent acquisition of any document of the suit property, knowing very well that, the defendant was the legitimate owner. The Defendant admitted the jurisdiction of this Honourable Court. For reasons whereof, the Defendant prayed that the Plaintiffs' suit be dismissed with costs to the Defendant.
 16. On 24th October, 2024, the Learned Counsel M/s Ogoti gave the following remarks that it was a matter concerning land. The Defendant sold land to the Plaintiff in year 2003 terms and conditions were agreed. But on visiting the ground they found the acreage was smaller – from unknown acreage but when they visited land they found it was 2 acres. They executed a sale agreement. The terms of the sale is disputed by the beneficiaries of the Estate of the deceased. The Plaintiff was deceased.
 17. The Defendant called their witnesses who testified as follows: -

A. Examination in chief of DW - 1 by M/s. Ogoti Advocate.

18. DW - 1 was sworn and he testified in Swahili language. He was called CHARO KUCHU RIMBA, a Citizen of Kenya holding the national identity card bearing all the particulars as indicated. He resided in Mombasa, Kashani Area and was born there in the 1966. At the time of his testimony he was 59 years old. He recorded a witness statement dated 22nd August, 2023 and also filed a list of documents dated 5th September, 2024 of four (4) documents. The Defendants Exhibit 1 to 4 admitted in that order. He knew the Plaintiffs and he had sold the land to their father – CHARO KARISA who had died a while ago. Before his death he had no problem with him. But later on his children trespassed onto his land. He informed the deceased and the problem was solved. They stayed together peacefully until the year 2023 when they came and claimed that their father had bought 6 acres of land. The witness only sold the deceased 2 ½ acres.
19. DW - 1 told that he entered into a sale agreement. First was in May, 2002. The 2nd agreement was 5th June, 2002, it was for 2 ½ acres. But later on in 2012 their problem started with Mr. Michael Charo Karisa. They sought for assistance from the Chief but they could not agree. Hence they decided to go to court. The witness was not being owed anything by the Plaintiff and neither did he owe them anything. The deceased and the witness had no problem over the land. To him everyone knew their place on the land. The land had no title deed. He was the one who welcomed them on the land. Hence their claim for 6 acres was not correct.



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

20. DW - 1 confirmed that he did not know the exact acreage of the suit land. He had never caused it to be measured. The sale agreement for 31st May, 2002 – purchase price was a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) for 6 acres. It had witnesses – Mzee Ngala Ndani and William Kalama. The vendor was deceased. Out of the two (2) witnesses will be testifying. The 1st Sale Agreement was terminated/revoked/annulled. The witnesses were not present when it was being cancelled. They were only 3 people – vendor, himself and another person – Bosi. He did not have any document on the termination sale agreement they had one document for that purpose dated 5th October, 2002. It had a witness Saidi Omar Kuchu – he was deceased now. They were written “CANCELLED” by himself as the acreage was less than what they had agreed from 6 acres to 2 ½ acres. When they executed the agreement by any expert e.g. surveyor.
21. They had an agreement for 5th October, 2002 for 2 ½ acres Ngala Ngani was a witness. He did not have any paper showing Bosi was a witness. When selling land part of it was bushy. He refuted the fact that he sold 6 acres to the deceased and that he wanted to swindle him by selling him 2 ½ acres. The witness welcomed him on the land. He could have it surveyed as the land belonged to the Government.

C. Re - examination of DW - 1 by M/s. Ogoti Advocate.

22. DW - 1 reiterated that they wrote an agreement he was buying 2 ½ acres and not 6 acres. Charo Karis (deceased) was brought by Ngala Ngani and William Kalama; so they recorded an agreement for 2 ½ acres but had seen the land for 6 acres. But when came on land with a man Bosi stated that the land was less than 6 acres 2 ½ acres for a sum of Kenya Shillings Thirty Two Thousand Five Hundred (Kshs. 32,500/-). The agreement for 5th October, 2002 was signed by Charo Karisa and Said Omar and himself.
23. The witness told the court that Ngala was still alive. The land had life, trees as beacon for land. The land belonged to the Government it was never surveyed. Had it been between the two of them – Charo and himself there would have been no problem at all.

A. Examination - in - Chief of DW - 2 by M/s. Ogoti Advocate: -

24. DW - 2 took an oath and testified in Swahili language. She was called NURU GIBLERT SAIDI. She was born in the year 1974 and she recorded a witness statement dated 22nd August, 2021 and wished to rely on it as her evidence in chief in this case. She understood the case well and she knew the Plaintiffs; they were their neighbours. They were on the land and it is them who welcomed the Plaintiffs. The Plaintiffs were welcomed by her husband – Mr. Charo Ruchu Rumba (DW - 1). DW - 1 indicated they entered into the sale agreement. She was aware of this process but she never witnesses them executing the agreement. She only knew that he would be going for money. On the acreage they never surveyed but there were trees planted to mark as beacon. They did not know the exact acreages. They just estimated, his husband came with his boss – he went round the land and stated that the alleged measured land could not go for 6 acres but only 2 ½ acres. It moved from a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) to a sum of Kenya Shillings Thirty Two Thousand Five Hundred (Kshs. 32,500/-).
25. According to DW - 2 the dispute started when the Plaintiff started moving from the boundary they had shown them – they started moving from where they were shown. They moved to the chief and it could not be resolved and they decided to go to court.



B. Cross examination of DW - 2 by Mr. Ireri Advocate.

26. DW - 2 told the court that he said chief came over and he confirmed the boundary. There were witnesses. The chief decided they all stayed on their parcels. There were no documents. She was not a witness on the sale agreement. But all this information was not what she was told by her husband. She was there when the sale agreement for 2 ½ acres was signed. She said Saidi Omar Kuchi resided at Bamburi. She was never there when the money was being paid but she knew she saw the money being brought. She confirmed the evidence which she was told.

C. Re - examination of DW - 2 by M/s. Ogoti Advocate.

27. DW - 2 told the court that she knew the money was for 2 ½ acres, but she was not present when the payment was being made.
28. On 24th October, 2024, the Defendant marked his case close through his Counsel M/s Ogoti Advocate.

VI. Submissions

29. On 24th October, 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 the Honourable Court was penning down the Judgement, it could not access any of the submission of the parties herein. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 13th June, 2025. Eventually, it was delivered on 4th July, 2025 accordingly.

VII. Analysis and Determination

30. 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.
31. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are:
- a. Whether the Plaintiff is the beneficial owner of the suit property and thus established its case
 - b. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff
 - c. Who bears the costs of the suit?

ISSUE No. A). Whether the Plaintiff is the beneficial owner of the suit property and thus established its case.

32. 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 right to own and acquire property in Kenya is a Constitutional right under Article 40 (1) & (2) of *the Constitution* of Kenya, 2010. It is to be enjoyed by all persons. In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the



delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in the case of:- “Sen – Versus - Headley [1991] Ch 425 at 437”. It is hinged on Article 40 of the Constitution of Kenya, 2010 which provides as follows;

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (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....”
33. Further, the effect of registration and acquisition of land as indefeasible rights, interest and title to land are founded under the provision of Section 24, 25 and 26 (1) (b) of the Land Registration Act, No. 3 of 2012 which provides: -
- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
34. This Court is therefore to protect the proprietary rights of a land owner. Land acquisition by purchase is one of the process of acquiring land in Kenya, and equally, it is a requirement under the provision of Section 3(3) of the Law Contract Act and Section 38 of the Land Act, No. 6 of 2012 that any



- transactions touching on land must be reduced into writing. The Plaintiffs did not produced a sale agreement to prove the requisite tenements of a good contract in the sense that it contains the names of the contracting parties; it clearly sets out the terms and conditions and the same is dully executed.
35. An execution of a sale agreement shows the intentions of the contracting parties to be bound by the terms therein. In this case the Plaintiffs did not show or produce anything before court to show that there was a covenant of sale and purchase of the suit land. t cannot be gainsaid, when the title of a party is under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title.
36. The Plaintiffs were thus duty bound to lead evidence as to the purchase of the land by their deceased father. The main issue between the antagonists herein is the sort that consistently emerges in cases involving unregistered land.It concerns proof of ownership. Unlike in the case of registered land where the register easily and on a prima facie basis reveals the owner, the burden and task is always heavier for the court to carry when the court has to trace the true owner of the unregistered parcel of land. The parties are never co-proprietors and neither do they so will. The court has to perform the rather delicate task of sorting out a muddle which has potentially long-term serious consequences as only one party is to be determined as having the better title. It was the burden of the plaintiff to prove on a balance of probabilities that he owned the suit property.
37. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiff on the one hand and the Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.
38. To begin with, I note that the Plaintiffs failed to come to court to prosecute their case when it was set down for hearing. Legally speaking, this alone has severe consequences. Simply, it means that the claim of the party is unchallenged and unsubstantiated. Their pleadings remain as mere statements and allegations without any legal weight. In saying so, I refer to Odunga J. in the case of “Linus Nganga Kiongo & 3 Others – Versus - Town Council of Kikuyu [2012] eKLR”, stated as follows on the consequences of failure by a party to call evidence: -

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC no 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and another – Versus - Raju Govindji, HCCC no 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counter - Claim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter - Claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”



39. Again, the learned Judge in the case of “Trust Bank Ltd & 2 others – Versus - Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001” stated that:-

“It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

40. There is no reason to belabour the point here. Evidently, the Plaintiff did not adduce any contrary evidence as to how they obtained the suit property. Where a party fails to adduce evidence and has had opportunity to test and verify the same through cross examination, the court may properly rely on the evidence adduced subject to the usual rules as to relevance and probative value.

41. In the case of:- “Mursal & Another – Versus - Manesa (suing as legal representative of the state of Dalphine Kaninini Manesa [2022] eKLR” Mativo J stated as follows and I concur that:

“...The Respondent opted not to adduce evidence despite filing a defense denying liability. It is established position that where a party fails to adduce evidence, his pleadings remain mere allegations which are not proved.

20. In *Interchemie EA Limited – Versus - Nakuru Veterinary Centre Limited* it was held that where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted. A similar position was held in *Trust Bank Limited – Versus - Paramount Universal Bank Limited & 2 Others* where it was held: - “it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

21. The appellant’s counsel did not adduce evidence in the lower court, but cross-examined the Respondent. The purpose of cross-examination is three-fold. First, to elicit evidence in support of the party cross-examining. Second, to cast doubts on, or undermine the witness’s evidence to weaken the opponent’s case. Three, to undermine the witness’s credibility. Fourth, to put the party’s case and challenge disputed evidence. However, once a party cross-examines an opponent’s witness, he can only rebut the issues raised during cross-examination by calling witnesses. Accordingly, the assault on the argument casting doubts on the findings on liability fails.

22. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the appellants were required to do much more in the lower court. By opting not to adduce evidence to rebut the Respondent’s evidence, they took the risk of leaving the Respondent’s evidence unchallenged...”



42. Accordingly there is nothing to persuade this Court, despite the very strongly worded plaint; the same cannot amount to evidence. I wish to echo the sentiments in the case of “Mary Njeri Murigi – Versus - Peter Macharia & Another [2016] eKLR”, where Justice R. E. Aburili opined that:-

“In addition, pleadings, answers, in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well-choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence.”

43. It is trite law that the standard of proof in civil matters which include land matters is on a balance of probabilities. In the case of:- “Hon. Daniel Torotich Arap Moi – Versus - Mwangi Stephen Muriithi [2014] eKLR” the court stated that: -

“ Even where the Defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the Defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

44. The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

45. The totality of the foregoing is that the Plaintiffs have failed to sufficiently demonstrate that they have acquired prescriptive rights over the portion of the suit parcel. Thus, the Plaintiffs’ case must fail.

ISSUE No. B). Whether the Plaintiffs are entitled to the orders sought in the Plaint.

46. Under this sub - title, the Honourable Court shall examine if the Plaintiffs have proved his case. The Plaintiff prayed for Judgment against the Defendants in the following terms:-

- a. A declaration that the Plaintiffs are the jointly the lawful beneficial owners of all that piece of land measuring six (6) acres situated at Kashani, Mombasa.
- b. A permanent injunction restraining the Defendant, either by Himself, through his agent’s, servants or any one claiming interest from entering, remaining and/ or selling any portion or subdivision on that land fairly demarcated and measuring six (6) acres situated at Kashani, Bamburi within Mombasa County.
- c. An order to issue directing the Land Registrar and district land surveyor Mombasa to survey and issue title deed in respect of the suit land measuring six (6) to the plaintiffs.
- d. Costs of and incidentals to this suit.
- e. Any further or other relief as the Honorable Court may deem necessary to grant.

47. Therefore, based on the afore stated reasoning, it is the finding of this Honorable Court that the Plaintiffs have failed to prove their claim on a balance of probabilities to warrant the reliefs sought.



ISSUE No. C). Who bears the costs of the suit

48. 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 – 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.
49. 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.”
50. In the present case, for the fact that the Plaintiffs have not proved his claim, the Defendant shall be entitled to have the costs of the suit for participating in the suit.

VIII. Conclusion and Disposition

51. 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 Defendant. For avoidance of doubt, the Court proceeds to make the following specific orders:
- a.** That Judgment be and is hereby entered in favour of the Defendant as the Plaintiffs have failed to prove their case in respect to the Plaint dated 24th July, 2023 with costs to the Defendant.
- b.** That cost of the suit to be awarded to the Defendant to be borne by Plaintiff.

It Is So Ordered Accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS4TH DAY OFJULY.....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. Ileri Advocate for the Plaintiffs.
- c. M/s. Ogoti Advocate for the Defendant.

