Suleiman v M'Kiunga (Environment and Land Case 358 of 2009)
[2025] KEELC 6108 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6108 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE 358 OF 2009

LL NAIKUNI, J

SEPTEMBER 19, 2025

BETWEEN

KHADIJA ABDALLA SULEIMAN ..... PLAINTIFF

AND

THEESA M'KIUNGA ..... RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the civil suit instituted by Khadija Abdalla Suleiman the Plaintiff herein by way of an Amended Plaint dated 19th January, 2024. It was against Theresa M'kiunga, the Defendant herein.

2. Upon the summons to enter appearance being served, the Defendant entered appearance. Subsequently, she filed a Statement of Defence dated 19th November, 2009 and later on with leave of Court granted on 30th May, 2013, an Amended Defence and Counter - Claim dated 10th June, 2013 thereof.

II. Description of parties

3. The Plaintiff was described as an adult of female of sound mind and understanding. She was a citizen of Kenya holding a national identity card bearing all the particulars as shown to Court and residing in Mombasa. While the Defendant was described as an adult male of sound mind and understanding. She was a citizen of Kenya holding a national identity card bearing all the particulars as shown to Court. She was residing and working for gain in Mombasa.

III. Court directions before the hearing

4. Nonetheless, on 15th July, 2024, the Honourable Court fixed the hearing dated on 16th October, 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 witnessed (PW - 1 and PW - 2) testifying in Court on 16th October, 2024 at 12.00 noon after which they marked their case closed and the Defendant called DW - 1 on 17th October, 2024.

IV. The Plaintiff's case

5. The Plaintiff's claim as the Amended Plaint that she is and was the registered owner and/or proprietor of land sub - division numbers 12860/I/MN, 12863/I/MN and 12861/I/MN. The Defendant had initially constructed his house on the parcel of land known as Plot. No.MN/1/176 which was adjacent to the Plaintiff's Plot No.12860/I/MN. The Defendant thereafter sought to expand the said storey house on the neighboring Plot No. MN/I/12860 without the consent of the Plaintiff and under the misguided belief that the said Portion of land belonged to the Mombasa Municipality.

6. The Plaintiff protested the encroachment made by the Defendant since the Plot known as. Plot No.MN/I/12860 belonged to her. The Defendant later realized that he was mistaken and confirmed that the land upon, which he sought to expand his house on belonged to the Plaintiff. The Defendant requested the Plaintiff to sell the land to him which she protested but later agreed to sell to him the parcel known as Plot No. MN/I/12860 which was smaller than Plots numbers MN/I/12861 and MN/I/12863.

7. The Plaintiff was compelled to sell the said portion of land since the Defendant had already encroached thereon by expanding his house. The Defendant proposed that his lawyer does draft the sale agreement which the Plaintiff agreed in good faith and under the belief that her interests would be protected fairly. Both parties executed a sale agreement dated 9th September, 2003 where the subject matter was indicated as Plot No. 21 instead of Plot No. MN/I/12860. The sale agreement indicated that the Plaintiff was selling to the Defendant a portion of land measuring 0.0256 Ha but on the actual ground, the Defendant proceeded to take up more than what was contractually agreed.

8. The Defendant went ahead and extended his house over the parcels of land known as plot number MN/I/12860 and also on MN/I/12861 in total violation of their initial agreement. The agreement dated 9th September, 2003 was drafted in a manner that did not properly identify the portion of land that the Plaintiff sold to the Defendant which the Defendant tookto his advantage to deprive of the plaintiff of her other parcels of land.

9. The Defendant's house currently occupies 3 Plots of land being Plot No. MN/I/176, MN/I/12960 and MN/I/12861 in the total violation of the Plaintiff's proprietary rights. The plaintiff did not receive any formal learning and both the defendant and his then advocate took advantage and misrepresented the facts in the said agreement to the Plaintiff's detriment. The Plaintiff stated that the purchase price was a sum of Kenya Shillings Five Hundred and Twenty Thousand (Kshs. 520,000/=) and of the aforesaid consideration, the Defendant in breach of the said contract only paid the sum of Kenya Shillings Two Hundred and Twenty Thousand (Kshs. 220,000/=) leaving outstanding balance of a sum of Kenya Shillings Three Hundred Thousand (Kshs.300,000/=).

10. The Plaintiff thus claimed against the Defendant the sum of a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) being monies due and owing from the Defendant on account of the balance of the purchase price aforesaid, full particulars whereof are well within the Defendant's

knowledge. As a result of the Defendant's trespass the Plaintiff avers that she suffered loss and damage. The Plaintiff claimed damages against the Defendant.

11. The Plaintiff prayed that Judgment to be entered against the Defendant for: -

    a. A mandatory injunction compelling the Defendant to demolish and or remove the structures, illegally constructed on plot No. MN/I/12861 and MN/I/12860.

    b. An order for compensation at the current market value for the parcels of land known as Plot No.MN/1/12861 and MN/I/12860.

    c. General damages for trespass and breach of contract.

    d. An order for specific performance.

12. The Learned Counsel for the Plaintiff, Mr. Gitahi made the following opening remarks. He stated that the case was rather straightforward. The Plaintiff was the owner of the land but the Defendant was a neighbor. He had constructed a house and encroached onto the land for Plaintiff. Plaintiff agreed to sell the encroached land, but he proceeded to encroach further onto the Plaintiff's land. She complained but the Defendant would not bulge. Plaintiff sought redress from court.

13. The Plaintiff called her first witness PW - 1 on 16th October, 2024 at 12.00Noon who testified as follows: -

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

14. PW - 1 was sworn and testified in Swahili language. She identified herself as KHADIJA ABDALLA SULEIMAN, a Citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. She was in court to claim her right to the suit property which was from Mr. Stephen Michuki M'Kiunga. She recorded a witness statement dated 16th May, 2024 and filed a list of documents dated 20th May, 2024. They were 8 documents which she relied on in support of her case herein. She told the court that she was the registered owner to the suit property No. 12861 and the mother title deed – No. 633 the Plot belonged to their father – Seif. He had 2 daughters. The land was sub - divided into Land Reference No. 12860, 12863 and 12861 respectively.

15. PW - 1 told the court that on 9th November, 2003 entered into a sale agreement with the Defendant and she agreed to sell the portion parcel No. 12861/I/MN for a sum of Kenya Shillings Five Hundred and Twenty Thousand (Kshs. 520,000/-). He paid a sum of Two Twenty Thousand (Kshs. 220,000/-) and Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) was outstanding balance.The Defendant had since put up a structure on parcels Land Reference No. 12860/I/MN and 12863/I/MN without her permission or consent. There were structures on her land which he had not bought. It was illegal when she asked him he said it belonged to the municipality and it was not hers. PW - 1 had the title deed to the said parcel.

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

16. PW - 1 confirmed that the land was sub – divided severally. She did not know whether it was 37 times. She sold the land No. 633, she did not know whether it was plot No. 21. The sale agreement dated 9th September, 2003 which she signed. She did not know about the title deed. The land surveyor designed the parcels No. 633 into small portion. She was not aware that the plots design was registered at the Municipality, Kiunga was to pay her a sum of Kenya Shillings Five Fifty Thousand (Kshs. 550,000/-).

17. PW 1 testified that she was not aware that the balance was to be made after issuing of the title. She did not know that her plot was taken to lands office if he gave her the balance she would have given him

the title deed. She was not aware of the drawing plan attached to the sale agreement. She did not know how to read. With reference to the witness statement, the witness told the court that when she would go to him he would chase her away until the neighbors would request her to sell the land to hum from being despaired. She only wanted to be given back her land and not compensation.

C. Re - Examination of PW - 1 by Mr. Gitahi Advocate.

18. PW - 1 confirmed that she did not know the said plot no. 21 she was only selling him the Plot No. 633 and the small portion.

19. The Plaintiff called PW 2 on the same day who testified as follows: -

A. Examination in Chief of PW - 2 by Mr. Gitahi Advocate.

20. PW - 2 was sworn and testified in English language. He was called Bartholomew Chakuri Mwanyungu. He was a registered Land Surveyor and had started practicing in the year 2005. With reference to the land survey, the witness told the court that the same was dated 7th December, 2023. He got the authority from the law firm of Messrs. Gitahi Gitau & Company Advocates. He produced the same in court. He told the court that he used the Survey Plan F/R No. 32/92 sourced from the Director of Survey. It was for parcel No. 12860 and 12861 – in Kisauni. The ground survey was done to confirm the datum plan. They were to get the position they found development on the parcel No. 12860 and 12861 it was house No. 3 on the attached diagram. The existing development in and around the subject parcels were surveyed and plotted to form the Topo-Cadastral Survey for Plot MN/I/12860 and 12861. The following observations were made:-All boundary beacons fell under the buildings or boundary wall and therefore could not be accessed.The Plots were developed with story residential buildings and wall fence;House marked HSE – 3 occupied Plots No. MN/I/12860 and; MN/I/12861 and MN/I/176;House marked HSE 4 partially enriched on Plot No. MN/I/12860 limiting its access to the main road;The encroached area was clearly shown on the drawings and structure.

B. Cross Examination of PW - 2 by Mr. Attancha Advocate.

21. PW - 2 told the court that he never saw any title for Plot No. MN/I/12860 and MN/I/12861. On being referred to the title deeds "CR" meant Coastal Register in Mombasa. The No. 21 was a serial of the plot. The original number was MN/I/633 there were several numbers on the plan sub-division (original No. 633/21) on the title deed, the No. "21" would emanate from the Director of the Survey. On being referred to the approved Part Development Plan (PDP) approved by the Municipality, the witness told the court that the director could adopt the said number. The title deed was Issued on 25th June, 2021 for 12861(Org No. 633/21) measuring 0.0318) HA of MN.

C. Re - Examination of PW - 2 by Mr. Gitahi Advocate.

22. PW - 2 stated that the Survey Plan FR/321/92 dated 6th April, 2004 was attached to the mother title and the PDP was the parcel No. 21. When preparing his report he relied on the said Survey Plansourced from the Director of Survey. House No. 3 occupies parcels No. MN/I/12861 and MN/I/12860. The witness told the court that he would say that parcel No. 21 was the same and according to the survey plan and PDP was a land reference No. 12861. The parcel measures 0.0256 on the agreement is on different parcel. There was no title. The diagram attached to the sale agreement was the Survey Plan and not the PDP the survey plan was not approved but it corresponds to the approved.

23. The Plaintiff through her Legal Counsel Mr. Gitahi Advocate marked her case closed on 16th October, 2024.

V. The Defendant's case

24. The Defendant filed an Amended Statement of Defence and Counter - Claim. In the Amended Statement of Defence she contended that:-

    a. The Defendant was a stranger to the contents of paragraph 3 of the Plaint.

    b. The Defendant denied the contents of paragraph 4 of the Plaint and more specifically denied having entered into any agreement dated 9th November, 2003 hence the contents thereunder were strange to the Defendant.

    c. Having denied the agreement dated 9th November, 2003, the Defendant denied the liability and the Plaintiff's claim at Paragraph 5 of the Plaint.

    d. The Defendant denied the contents of Paragraph 6 of the Plaint and more specifically that he had encroached and trespassed on the Plaintiff's sub - division numbers MN/1/12860 and MN /1/12863 respectively.

    e. The Defendant denied the contents of paragraph of the Plaint.

    f. The Defendant denied the Plaintiff's claim of loss and damage as pleased at paragraph 8.

    g. The Defendant denied the Plaintiff's contents of Paragraph 9 of the Plaint.

    h. Paragraph 10 of the Plaint was admitted.

    i. The Defendant denied the contents of paragraph 11 of the Plaint.

    j. The Defendant denied admitting the jurisdiction of this Court.

25. On the Counter claim the Defendant contended that paragraph 1 to 12 of the Amended Statement of Defence were reiterated. The Defendant averred that on the 9th day of September, 2003 he purchased from the Plaintiff the land then known as sub - division number 21 as shown on the Notification of Approval of Development Permission Drawings number MSA – 004 – 2002 – 8 – 23. After the Defendant had purchased the sub division the Plaintiff went ahead and sub – divided/ surveyed the sub division 21 into 2 parts/ lands known as sub division numbers 12860/I/MN and 12861/I/MN.

26. After the survey into 2 lands the Plaintiff claimed in this suit and in a demand letter that she was the owner of the part of known as sub - division numbers 12860/I/MN and 12861/I/MN has since ignored to transfer either or both of the lands to the Defendant. The Defendant's Counter - Claim against the Plaintiff was for an order and declaration that the Defendant is the true owner of the lands known as sub - division numbers 12860/I/MN and 12861/I/MN for reason that the same arose from Plot Number 21 which had been purchased by the Defendant and an order directing the Plaintiff to transfer to the defendant the all lands known as sub - division numbers MN/I/12860 and MN/I/12861.

27. The Defendant prayed that Plaintiff's suit be dismissed with costs and that this Honourable Court make Judgment and order in favour of the Counter - Claim that: -

    a. A declaration that the defendant is the true owner of the land known as sub - division numbers 12860/1/MN and 12861/1/MN.

    b. An order directing the Plaintiff to transfer to the Defendant the all lands known as sub - division numbers 12860/1/MN and'12861/1/MN.

c. Costs of the suit

28. On 17th October, 2024 the Defendant called DW - 1 who told the Court that: -

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

29. DW - 1 under oath testified in Swahili language. She identified Theresa Stephen Kiunga, a citizen of Kenya bearing all the particulars as indicated in the national identity card shown to Court. She was the proprietor of the suit property. She was the duly appointed Legal Administrator of the Estate of the late Stephen Michuki Kiunga. She had grant letters of administration "DW-1 – Exhibit – 1". She recorded a statement dated 31st March, 2023; she also filed list of documents dated 31st March, 2023 - six (6) documentsas Defendant Exhibits 1 to 6.

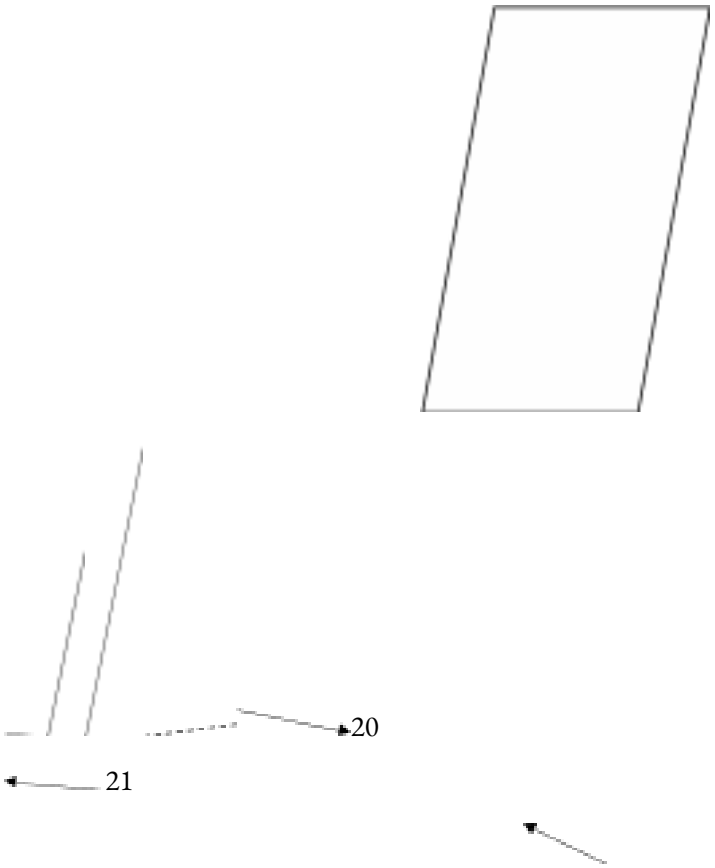
30. DW - 1 stated that the suit property was known parcel No. 21. Her husband bought it from the Plaintiff. They entered into a sale agreement dated 9th September, 2003. The purchase price was for a sum of Kenya Shillings Five Hundred and Twenty Thousand (Kshs. 520,000/-). His husband paid a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) leaving an outstanding balance of Kenya Shillings Three Hundred and Twenty Thousand (Kshs. 320,000/-). DW - 1 told the Court that to identify the plot, they used the PDP drawing Number MSA 0004/202/803. The mother title was 633/I/MN. The original title was sub - divided into 37 parcels with serial Nos. 1 to 37. It was these that they bought Plot No. 21. There was Legend with all the numbers – No. 21 – measures 0.448 HA but on the agreement it was 0.0256HA which to the witness was typographical error.

31. DW - 1 told the court that they were buying the whole plot i.e. 21, but as they were waiting for the issuance of the title deed to enable her pay the outstanding balance this civil suit was instituted. Later on Plot No. 21 was further sub - divided into 2 parcels. She did not know who did it. Hence, they emerged into LR. No. MN/I/12860 and MN/I/12861 as per the Survey Plan attached to the Sale Agreement. Since these plots emanated from Plot No. 21, they were supposed to be her plots – i.e. both of them. With reference to the witness statement of PW - 1 last paragraph, she stated that there was a mistake. The plot No. 12861 – title deed came out on June 2021. She objected to the prayer for the demolition of the houses on Plot No. 12861. They had already finalized on purchase of the land as per the terms of the sale agreement. She did not owe her any damages as she had not trespassed; she build on the plot from the consent and knowledge of PW-1 onto the plot No. 21 the whole of it. She was praying for the whole plot no. 21 or the two (2) parcels, plot 176 was for the family.

B. Cross Examination of DW - 1 by Mr. Gitahi Advocates.

32. DW - 1 told the court that historically before the execution of the sale agreement – 9th September, 2003 they had a family house. Khadija was the owner of Plot 633. She wanted to have the plot No. 633 to be sub-divided. Hence a PDP was prepared by the Municipality for 37 portions as shown from the LEGEND and the drawing dated 23rd March, 2002 it had the old Mombasa-Malindi road. It had structures in form of houses. There was Plot No. 176 on the Southern Part and it hears houses – from the drawings it showed the houses on Plot No. 176 have slightly permeated on to Plot No. 21 which belonged to Khadija hence when they were demarcating the land, the drawing was slightly hived off (see the shape changes). As a result, the Khadija was compelled to sell the portion trespassed.

33. DW - 1 told the court that the PDP was approved by the Town Clerk on 20th January, 2003. Later on the Survey prepared the Survey Plan as per the final PDP – (See the shape of the Survey Plan) the house on the Plot No. 21 is just a portion, as the rest of it was on Plot No. 176. The Plot No. 21 was only on the PDP but on the Survey Plan. The PDP did not bear the land Reference Number on the portion No. 21 and



34. She told the court that she understood the PDP more than the Survey Plan which was attached to the sale agreement. She confirmed that the houses on Plot No. 176 had slightly encroached onto the Plot No. 21. She told the court that she would not agree with what Mama Khadija stated that she only sold the portion the house encroached her land and not the plot No. 21 and that she did not want to demolish the house for the Defendant.

35. DW - 1 told the Court that as far as she was concerned it may have been a fence and not a house. With reference to the sale agreement dated 9th September, 2003 - Plot No. 21 measures 0.0256 HA. It was a typing error and it need to be rectified. The Advocate who prepared the agreement was by Mr. C.K. Areba Advocate for her husband both of the vendor and Purchasers signed the sale agreement and they witnessed both, PDP has against – Plot 21 was 0.448 HA. The agreement was genuine.

36. The Sale Agreement had the Survey Plan and not the PDP attached on it. The Survey Plan does not have the Plot No. 21. The agreement pre-supposed that the balance shall be paid after the issuing of the title. She had been told processing of title deed was a process from the Drawing Plan to Survey Plan to Deed Plan to Title Issuance. To date they had not paid the balance of a sum of Kenya Shillings Three Hundred Thousand and Twenty Hundred (Kshs. 320,000/-). Ms. Khadija engaged an Advocate to demand for her balance. The witness' Advocate responded through letter dated 24th July, 2009 stating that they had not refused to pay.

37. On being referred to the letter by Mr. Edward Kiguru Land Surveyor dated 16th April, 2012 to C.K. Areba Advocates, she stated the same was responding to his letter dated 13th April, 2012. He explained where the 2 plots – MN/I/12860 and MN/I/12861. From Plot No. 21 he said the reason for splitting Plot No. 21 was to cater for encroachment of a building/structure located in MN/I/176 into Plot

21. The resultant situation Plot MN/I/12860 was vacant, whereas MN/I/12861 catered for this encroachment.

38. With reference to the land surveyor's report dated 7th December, 2003 by Mr. Mwanyunyu, the witness told the court that according to it their houses had encroached onto the two (2) plots.

C. Re - Examination of DW - 1 by Mr. Attancha Advocate.

39. DW - 1 told the court that they used the PDP to draw the sale agreement. Later on Plot No. 21 was divided into the two parcels.

40. The Defendant through her legal representative Mr. Attancha Advocate closed her case on 17th October, 2024.

VI. Submissions

41. On 17th October, 2024 after the Plaintiff and Defendant closed their cases, the Honourable Court directed that the parties file their written submissions within stringent timeframe thereof on. Pursuant to that on 9th December, 2024 during a mention to ascertain filing of the submissions, it realized that none of the parties had not complied. Thus, it directed to deliver its Judgement on Notice.

42. Nonetheless, by the time of penning down this Judgement, the Honourable Court was only able to access the submissions from the Plaintiff. Thus, it has proceeded to deliver the decision on its own merit accordingly.

A. The Written Submissions of the Plaintiff

43. The Plaintiff through the Law firm of Messrs. Gitahi Gathu & Co. Advocates filed her written submissions dated 21st November, 2024. Mr. Gitahi Advocate submitted that before the Honourable Court was the Plaintiff's Amended Plaint amended on 19th January, 2024 seeking the above stated reliefs.

44. Further, the Learned Counsel informed Court that the Defendant filed her Amended Defence and Counter - Claim amended on the 10th June 2013 where she claimed the above stated prayers against the Plaintiff.

45. On the background of the suit, the Learned Counsel recounted that the cause of action leading to the suit before the Honourable Court arose between the parties way back before the late 1990s. The Defendant's family owned the parcel of land known as MN/I/176 while the Plaintiff together with her sister and her late mother were the registered owners of the parcel of land known as MN/I/633 having inherited the same from their late father and husband respectively. The two parcels of land were adjacent to each other and shared a common boundary. That way back in the late 1990s, the defendant had a storey house constructed on the parcel of land known as MN/I/176 but the said house had encroached into the Plaintiff's land, MN/1/633. The Plaintiff made several attempts to stop him from constructing, including seeking the intervention of the then Municipal authority but he blatantly proceeded.

46. The Counsel asserted that subsequent to their mother's death sometime around the year 1997, the Plaintiff and her sister commenced the process of distributing the estate inherited from their parents and by the year 2002, the Plaintiff and her sister had gotten to the stage where they wanted to formally subdivide the land among themselves in order to have clear demarcations of their shares. A Proposed Sub - division Scheme (PDP) was drawn in 2002 where the parcel known as MN/I/633 was sub - divided into 37 plots. It was after drawing the PDP that it became evident to what extent the

Defendant's house on MN/I/176 had encroached into the Plaintiff's land. Thereafter, the Plaintiff carved out a portion of their land out of the 37 sub - division plots due to the existing encroachment such that the encroached portion did not form part of the 37 plots.

47. Sometime in the year 2003, the PDP was approved by the then municipal council and it was at this time that after a prolonged dispute, the parties entered into a sale agreement for purposes of the defendant buying the portion of land where their house had encroached into the Plaintiff's property and to settle the dispute. The said portion lied adjacent to the plot known as Plot 21. Later, a Survey Plan was drawn and subsequently registered in the year 2004 and the relevant Deed Plan was Issued. On the Survey Plan for plot MN/I/633, all the parcels of land including the one left out on the PDP due to encroachment, were Issued with survey numbers. The portion known as Plot No. 21 on the PDP was now known as MN/I/12861 while the one encroached by the Defendant and adjacent to it became MN/I/12860.

48. After a prolonged dispute between the Plaintiff and the Defendant, the Plaintiff was persuaded through mediation by the neighbours to sell the encroached portion to the Defendant. This was what resulted into the subject matter sale agreement. In the sale agreement dated 9th September 2003, the subject matter was referred to as Plot 21 measuring 0.0256 Ha while in actual sense, the Plaintiff intended to sell the encroached portion which measured 0.0149 Ha though unnumbered on the PDP. That the consideration was indicated as being a sum of Kenya Shillings Five Hundred and Twenty Thousand (Kshs. 520,000/=) where a deposit of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) was paid leaving an outstanding balance of Kenya Shillings Three Hundred and Twenty Thousand (Kshs. 320,000/-) to be paid upon issuance of a Title Deed. The said agreement was drawn by the Defendant's Advocate who left out critical terms of contract and created ambiguity to the detriment of the Plaintiff.

49. After the sale agreement, the Defendant not only failed to pay the balance but proceeded with expansion of their house and encroached further into the Plaintiff's land effectively occupying the parcels known as MN/I/12860 and MN/1/12861 (formerly Plot 21). This was what caused the Plaintiff to approach court for redress in 2009.

50. The Learned Counsel relied on the following four (4) Issues for determination by this Honourable Court.

51. Firstly, on whether the Defendant had encroached on the Plaintiff's property. The Learned Counsel submitted that the Defendant initially encroached onto her property way back before the year 2002 by forcefully constructing her storey house on the Plaintiff's portion of land without her consent or approval. It was evident that the defendant upon realizing that he had encroached onto the Plaintiff's land, he sought the Plaintiff to sell him the encroached portion instead of demolishing the encroachment. The Plaintiff was kind enough to indulge him in the spirit of good neighborliness and agreed to sell to him the strip of land upon which his house had encroached.

52. According to the Learned Counsel, it was evident from both the PDP produced in Court and the Deed Plan that the portion of land initially encroached was MN/I/12860 while the adjacent one to it is MN/I/12861 known as Plot No. 21 on the PDP. It was evident that currently the Defendant's storey house occupies 3 portions of land being MN/I/176, MN/I/12860 and MN/I/12861. The Survey report dated 7th December 2023 by B.C. Mwanyungu, a Licensed Surveyor revealed these facts on the observation part and on the sketch map contained in pages 2 and 3 of the report respectively.

53. The Defendant according to the Learned Counsel had continued to occupy both Plots MN/I/12860 and MN/1/12861, deriving rental income from these properties. This act not only deprives the Plaintiff of her legal rights to the use and enjoyment of her land but also constitutes an unlawful enrichment on the Defendant's part. By capitalizing on the Plaintiff's property without consent or legal

basis, the Defendant's actions had inflicted both psychological, emotional, financial and proprietary losses upon the Plaintiff.

54. The provision of Section 3 (1) of the *Trespass Act*, Cap. 294 clearly defines trespass as follows: -

> " Any person who 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, private land without the consent of the occupier thereof shall be guilty of an offence."

55. The Defendant's actions unequivocally meet this definition since he has constructed and maintained buildings on the Plaintiff's land without her consent. In order to establish the offence of trespass, the following essential ingredients must be demonstrated: -

a. The Defendant must have wrongfully entered the Plaintiff's physical property.

b. The Defendant's actions constitute an unjustifiable intrusion upon the land in possession of the Plaintiff.

c. The Plaintiff must prove that the Defendant invaded her land or interfered with her possession without justification.

56. From the evidence tendered in court, it was undisputed that the Defendant constructed structures that extended onto the Plaintiff's land without her consent and that the encroachment occurred prior to the sale agreement and subdivision of the land which was in total disregard of the Plaintiff's proprietary rights. As such, it was only prudent for this honorable court to find in favor of the Plaintiff against the Defendant.

57. The Learned Counsel asserted that the provision Article 40 of *the Constitution* safeguards the proprietary rights thereby reinforcing the Plaintiff's right to own, use, benefit from, and control her property. The Defendant's occupation and exploitation of the Plaintiff's land is a total violation of the Plaintiff's constitutional rights. It was for this reason that this Honorable Court had been called upon to recognize these violations and Issue a mandatory injunction in favor of the Plaintiff.

58. Secondly, on the Issue of which portion the Plaintiff intended to sell to the Defendant. The Learned Counsel submitted that she intended to sell the portion of land that had been initially encroached by the Defendant and not Plot 21 as indicated on the sale agreement dated 9th September 2003. The Defendant initially encroached the Plaintiff's land and it was against this backdrop that the Plaintiff agreed to sell to the Defendant the encroached portion as opposed to ordering him to demolish the house.

59. It was evident from the Plaintiff's testimony that she intended to sell to the Defendant the small portion of land that was left out during the sub division on the PDP. It was this portion of land that she intended to Issue a title deed to the Defendant upon payment of the entire purchase price. This portion of land came to be known as MN/I/12860 and measuring 0.0149 Ha. However, the Plaintiff was misled by both the Defendant and his then Advocate, C.K. Areba to believe that the subject matter of the sale agreement was MN/I/12860 whereas the subject matter was indicated as Plot No. 21 and measuring 0.0256 Ha. This was extremely dishonest and fraudulent and it created ambiguity in the transaction. The plot known as Plot No. 21 (MN/T/12861) measured 0.0318 Ha and therefore, the property referred to in the agreement could not be ascertained. This ambiguity was created by the Defendant in collusion with his Advocate in an attempt to disenfranchise the Plaintiff of her property.

60. The Learned Counsel submitted that it was comical that the Defendant even sought clarity on which portion of land he had bought when, through his Advocate, C.K. Areba, he wrote a letter dated 13th

April 2012 to the Surveyor who handled the sub - division process, Mr. Edward Kiguru which was replied vide the letter dated 16th April 2012 which the Plaintiff produced as evidence before court. In the said letter, the surveyor clarified that Plot No. 21 on the PDP was surveyed as MN/I/12860 and MN/I/12861 due to the encroachment by a building located on MN/I/176. It therefore followed that the portion intended for sale was the already encroached part, MN/I/12860.

61. Plot No. MN/I/12860 shares a common boundary with MN/I/176 and this was the portion that the Plaintiff intended to sell to the Defendant. Instead, the Defendant colluded with his then Advocate and indicated the subject matter as Plot No. 21 to include MN/I/12860 and MN/I/12861 which was contrary to the Plaintiff's intentions.

62. Thirdly, on whether the sale agreement dated 9th September, 2003 was valid and enforceable. The Learned Counsel averred that the sale agreement dated 9th September, 2003 was ambiguous, invalid and could not be enforced whatsoever. The agreement was drawn by the Defendant's Advocate in favour of the Defendant but to the detriment.

63. The Learned Counsel relied on the case of "Nelson Kivuvani – Versus – Yuda Komora & Another (Nairobi HCCC No. 956 of 1991)" is illustrative of the contents of an agreement where the court opined that for an agreement for sale of land to be considered valid, "..... it should contain the names of the parties, the reference number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each ofthe parties and signed and witnessed by two witnesses who signed against their names". In the present case, the sale agreement fails to provide clear obligations for both parties, particularly concerning completion terms and the Defendant's responsibility for the encroachment. The agreement also fails to properly identify the subject matter. While the sale agreement references Plot 21 with an area of 0.0256 ha, the resultant plots being 12860 and 12861 measure 0.0149 Ha and 0.0318 Ha respectively. The inconsistency between the subject property's identity and the subdivided parcels demonstrates the lack of mutual understanding and clarity in the agreement's terms, further compromising its enforceability.

64. The Plaintiff's testimony according to the Learned Counsel was that she only intended to sell the encroached portion but was misled into selling Plot No. 21 revealed a fundamental conflict between her intent and the contractual terms documented by the Defendant's Advocate. This ambiguity demonstrates failure by the Defendant's advocate, who represented both parties, to uphold his professional duty to maintain neutrality and fairness in drafting the agreement where the vendor was clearly unrepresented.

65. Further, the Defendant's failure to pay the full purchase price, leaving an unpaid balance of Kenya Shillings Three Twenty Thousand (Kshs.320,000/=), constituted a material breach. In the case of "Sagoo – Versus - Sagoo (1983) KLR 365" the Court of Appeal held that:-

> " The Law Society Conditions of Sale provides that it is only upon the payment of the purchase price that the vendor could be required to execute a conveyance and deliver to a purchaser.....the Appellants never became entitled to ask the Respondents to execute the conveyance because they never proffered to the Respondents the balance of the purchase money....".

66. Further, the Learned Counsel submitted that in this case, the Court emphasized that full payment of the purchase price was a pre - requisite to compel a vendor to execute conveyance documents. Failure on the Defendant's part to fulfill such a basic contractual obligation constitutes a significant breach of contract. The Law Society Conditions of Sale 1989, which were in force by then, provided a standardized framework for sale of land transactions such as having a clear completion date,

completion documents, a dispute resolution clause among others. Failure to have such critical details in the Sale Agreement was designed to work in favor of the defendant to the detriment of the Plaintiff. In an instance where an Advocate represents both parties, the Vendor and Purchaser, it was important that they exercise fairness and impartiality such that they would protect the interests of both parties without compromising either.

67. According to the Learned Counsel in this transaction, it was evident that the said Advocate failed to protect both parties equally by creating an ambiguity in the contract to the detriment of the plaintiff. It was further evident that the Defendant's Advocates were conflicted since they still went ahead to represent the Defendant in this matter even after having been the ones who created the ambiguity. Ideally, the said Advocates ought to have been witnesses in the matter but that never happened which gave the Defendant an upper hand in exploiting the plaintiff. The letter dated 24th July, 2009 from the Law firm of Messrs. C.K. Areba & Co. Advocates was signed by one A.N. Atancha Advocate who was an associate in the said firm even at the time the sale agreement was executed and who later took over the matter from the said law firm upon the demise of C.K.Areba.

68. It was further submitted that Rule 8 of the Advocates (Practice) Rules provides as follows:-

> No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears. It was evident that there existed a conflict of interest on the part of the law firm that drafted the agreement and later purported to represent one of the parties in this suit which resulted from the subject matter agreement.

69. The Learned Counsel made reference to the case of "Serve In Love Africa (Sila)Trust – Versus - David Kipsang Kipyego & 7 others [2017] eKLR" the court held that:-

> " An Advocate will be deemed to be acting in conflict of interest when serving or attempting to serve two or more interests which aren't compatible or serves or attempts to serve two or more interests which are not able to be served consistently or honors or attempts to honor two or more duties which cannot be honored compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients. Conflict of interest can arise broadly where an advocate acts for both parties in a matters such as more parties to a conveyancing or commercial transaction; for two parties on the same side ofthe record in litigation; or for insured and insurer; an advocate acts against a former client having previously acted for that party in a related matter where his own interest is involved, for example where an advocate acts in a transaction in which his company or a company in which he is an associate is involved or has an interest; or where for some other reason his own interests or an associate's may conflict with his client's, such as where he maybe a material witness in his client's matter. A conflict of Interest may be described also as a conflict of duties or a conflict between interests or as a conflict between Interest and duty."

70. For these reasons, the Learned Counsel submitted that the sale agreement was unenforceable due to the ambiguity contained therein coupled with the discrepancies and breach of terms by the Defendants and as such this Honourable Court was invited to declare the sale agreement dated 9th September 2003 as invalid and unforeceable.

71. Fourthly, on whether the Plaintiff was entitled to the prayers sought in the suit. The Learned Counsel submitted that the Plaintiff had sought several remedies among them; a mandatory injunction for the demolition of structures on Plots MN/1/12860 and MN/1/12861 or in the alternative compensation of the property at the current market value plus general damages for continued trespass, and costs of this suit. It was the Plaintiff's submission that due to the longstanding violation of her proprietary rights coupled with the psychological, financial and emotional hardship occasioned upon her due to the Defendant's actions warrants issuance of the remedies sought.

72. The Plaintiff being the registered owner of Plots MN/1/12860 and MN/1/12861 is entitled to absolute ownership rights as outlined in Section 24(a) of the *Land Registration Act* which provides that,

> " Interest conferred by registration Subject to this Act-(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ..."

73. This provision establishes that a registered owner has exclusive possession and the right to use the land without interference from others. In the case of "John Sebastian Mbaya & Another – Versus - Samuel Koskei Too [2018] eKLR", the court held that:

> " Registered proprietors are entitled to full possession and exclusive use of their property, underscoring that any encroachment amounts to an actionable Infringement of these rights."

74. The Learned Counsel submitted that the Plaintiff had been unlawfully deprived of her property for over three decades due to the Defendant's unlawful occupation. Under the provision of Section 103 (2) of the *Land Registration Act*, it is an offence to unlawfully occupy another person's land where it states that,

> " A person who unlawfully occupies land commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings, and in the case of a continuing offence to an additional fine not exceeding one hundred shillings for every day during which the offence continues."

75. The Defendant's admitted that the encroachment began earlier than 2003 and the same continues to date thereby causing a prolonged deprivation and hardship for the Plaintiff. Currently, the plaintiff is advanced in age and facing mobility challenges which has limited her ability to address this matter. On the other hand, the Defendant's house remains on the plaintiff's land and the defendant has not only been enjoying exclusive occupation and use of the property but has also been collecting rent and profits from the same house to the detriment of the plaintiff.

76. According to the Learned Counsel, it was for these reasons that the plaintiff prays for both a mandatory injunction and demolition of the structures plus general damages against the defendant. In the case of "Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014) eKLR", where the Court held that,

> " ...I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case."

77. Failure by the Defendant to perform his contractual obligation to pay the agreed balance of a sum of Kenya Shillings Three Thousand and Twenty Thousand (Kshs. 320,000/=), coupled with collection of rental income therefrom demonstrates the unjust enrichment achieved by the Defendant at the Plaintiff's expense. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass: -

a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.

b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.

d) ..

78. The Learned Counsel submitted that since the encroachment act involved loss of proprietary rights which affected the Plaintiff's quality of life over an extended period and the emotional and psychological hardships an award for aggravated damages is justified. In the case of "John Sebastian Mbaya (supra)", the court awarded general damages of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) to the Plaintiffs due to the prolonged trespass and refusal by the Defendant to vacate the property, which deprived the Plaintiffs of their rightful possession and enjoyment of the land.

79. The Plaintiff had also requested compensation at current market rates for Plots No. MN/1/12860 and MN/1/12861. This prayer was made in the alternative of the prayer for demolition such that, if the court finds it unwise to order the Defendant to demolish, then the Defendant should compensate the Plaintiff of her property at the current market value. However, during the hearing of the Plaintiff's suit, she categorically stated that she was not interested in the money any more but wishes to haveall her land back. As such, the prayer for compensation at current market rates and specific performance were abandoned.

80. Additionally, the Plaintiff sought a mandatory injunction to compel the Defendant to demolish and remove all unauthorized structures on her property. The Court in the case of:- "John Sebastian Mbaya (supra)", ruled in favor of demolition where the defendants were in clear violation of the plaintiffs' rights. Similarly, in the present case, the Plaintiff has been forced to endure the Defendant's continued encroachment and presence on her land for over two decades, necessitating court intervention to protect her property rights.

81. Finally, the Learned Counsel held that the Plaintiff's claim to costs was also justified. The Defendant's actions had forced the Plaintiff to pursue litigation to secure her right to quiet enjoyment of her property. In line with the provision of Section 27 of the *Civil Procedure Act*, Cap. 21 the Court had discretion to award costs to the successful party and as such, the Plaintiff prayed for costs of the suit.

82. In conclusion, the Learned Counsel contended that the Plaintiff had endured significant loss, hardship, and deprivation of her property over a lengthy period due to the Defendant's encroachment and breach of contract. In light of the above submissions, we respectfully request that this Honourable Court grants the Plaintiff the prayers sought. That is a mandatory injunction for demolition of the Defendant's structures, general damages for trespass and breach of contract and costs of this suit.

VII. Analysis and Determination

83. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

84. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (4) Issues for its determination. These are: -

    a. Whether there was a valid legal agreement between the parties?

    b. Whether there was a breach of the said agreement by either of the parties?

    c. Whether the parties are entitled to the orders sought in the Amended Plaint and Amended Counter – Claim respectively?

    d. Who bears the costs of the suit and the Counter - Claim?

Issue No. A). Whether there was a valid legal agreement between the parties.

85. Under this sub - title the main substratum of the case is the breach of contract and the consequences thereof. It follows, therefore, that the Honourable Court shall examine whether the parties had entered into a legal agreement – its terms and conditions and then what took place thereafter. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The question would be then what constitutes a valid agreement?

86. Fundamentally, it is the Plaintiff's claim that she entered into a sale of land agreement with the Defendant's husband on 9th September, 2003 for the land then known as sub division number 21 as shown on the Notification of Approval of Development Permission Drawings number MSA – 004 – 2002 – 8 – 23. For clarity sake, the Honourable Court feels it imperative to reproduce the said Sale Agreement herein verbatim:

    Agreement of Sale

    I, Khadija Abdalla Suleiman of Post office Box Numbers 82027, Mombasa of the cost province of the Republic of Kenya (Hereinafter called "The Vendor") and Stephen Michuki M'kiunga of Post Office Box Number 88777, Mombasa of the Coast Province of the Republic of Kenya (Hereinafter called the "The Purchaser).

    Whereas:

    i. The Vender is the owner of Plot No. 633/I/MN

    ii. The Vendor has caused her plot to be subdivided and has agreed to sell portion number 21 reflected on Drawing Number MLSA004-2002-8-03 comprising an area of Nought point Nought Two Five Six (0.0256) of a hectare or thereabouts to the Purchaser.

    iii. The agree purchase price is Shillings Five Hundred and Twenty (Shs. 520,000/=).

    iv. The mode of payment is a sum of Shillings One Hundred and Fifty Thousand (Shs. 150,000/=) shall be paid on or before signing of this Agreement. Thereafter a sum of Shillings Fifty Thousand (Shs. 50,000/=) shall be paid on 5th day of October, 2003. Thereafter the final balance shall be paid after the issuing of the Title.

    Dated this.....9th .....day of.....September.....2003"

87. From the afore stated contract, the terms and conditions are graphically clear. Upon the Defendant purchased the said land, the same was sub – divided/surveyed into two portions – MN/I/12860 and 12861 respectively. In the agreements the parties agreed to have the Defendant completes paying up the purchase price after he had received the Certificate of Title to the suit property.

88. Legally speaking, disposition of Land is based on contract. At this juncture, it's instructive to note that whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract and Section 38 (1) and (2) of the *Land Act*, No. 6 of 2012. Both of these provisions of the Law which are materially and in nature identical are based on the validity of contract. The provision of Section 3 (3) of the Law of Contract reads as follows: -

> "(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) The contract upon which the suit is founded:
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust"

89. While the provision of Section 38 (1) and (2) which are more specific on the validity of contract in sale of land reads as follows: -

1. Other than as provided by this Act or any other write law no suit shall be brought upon a contract for the disposition of an interest in land: -

(a) The contract upon which the suit is founded:

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

90. Evidently, the Sale Agreement dated 9th November, 2003 was entered into by the parties. Both parties signed the said agreement in the presence of a qualified licensed Advocate of the High Court of Kenya – C.K Areba Advocate.The Court has carefully perused the sale agreement produced as evidence by the Plaintiff and noted that it is in writing and has been signed by the parties. Thus, it meet the requirements of Section 3(3) of the Contract Act as well as Section 38 of the *Land Act*.Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that it is a valid sale agreement which is enforceable by the parties.

91. I wish to rely on the case of "Nelson Kivuvani – Versus - Yuda Komora & Another, Nairobi HCCC No.956 of 1991", where the Court held that:-

> " The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract."

92. It is commonly agreed that the agreement of sale was entered into by the parties. It is not in dispute that the parties entered into an agreement what the Plaintiff contests that it was not a valid contract merely as it was done by the Advocate for the Defendant and not her own. Indeed, the Learned Counsel for the Plaintiffs submitted that:- "The agreement was drawn by the Defendant's Advocate in favour of the Defendant but to the detriment of the Plaintiff in that it failed to capture very important terms that are mandatory in sale of land contract".

93. With reference to the sale agreement dated 9th September, 2003 Plot No. 21 measures 0.0256 HA for the purchase price of a sum of Kenya Shillings Five Hundred and Twenty Thousand (Kshs. 520,000/-). DW - 1 averred that the size of the suit property was a typo which needed to be rectified. The agreement pre-supposed that the balance of a sum of Kenya Shillings Three Hundred and Twenty Thousand (Kshs. 320,000/-) should be paid after the issuing of the title.

94. Therefore, on whether the Sale agreement had met all the requirements between the Plaintiff and the Defendant, the answer is in affirmative. Indeed, I discern that the sale agreement between the two is valid having met all the requirements of Section 3 (3) of Contract Act Cap. 23 and Section 38 of the *Land Act*, No. 6 of 2012.It then follows that the Court must further interrogate whether there was breach/ frustration of the said Contract.

Issue No. b). Whether there was a breach of the said agreement by either of the parties

95. It is the case of the Plaintiff that the Defendant has failed to complete the transaction. This Issue has been vigorously contested. The Defendant on the hand contended the agreement pre-supposed that the outstanding balance of a sum of Kenya Shillings Three Hundred and Twenty Thousand (Kshs. 320,000/-) should be paid after them being Issued with a Certificate of title. Whether the sub - division subsequently undertaken is contrary to what was agreed did not change the breach which had already occurred. In the case of "Jackline Njeri Kariuki – Versus - Moses Njung'e Njau [2021] eKLR", Justice Ngenye-Macharia (as she then was) stated thus: -

> " 45. In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing."

96. The Plaintiff contended that the Defendant had initially constructed his house on the parcel of land known as Plot. No.MN/1/176 which was adjacent to the Plaintiff's Plot No.12860/I/MN. The Defendant thereafter sought to expand the said storey house on the neighboring Plot No. MN/I/12860 without the consent of the Plaintiff and under the misguided belief that the said Portion of land belonged to the Mombasa Municipality. The Plaintiff protested the encroachment made by the Defendant since the Plot known as. Plot No. MN/I/12860 belonged to her. The Defendant later realized that she was mistaken and confirmed that the land upon, which she sought to expand her house on belonged to the Plaintiff. The Defendant requested the Plaintiff to sell the land to him which she

protested but later agreed to sell to her the parcel known as Plot No. MN/I/12860 which was smaller than Plots numbers MN/I/12861 and MN/I/12863.

97. The Defendant on the other hand contended that after the Defendant had purchased the sub division the Plaintiff went ahead and sub – divided/ surveyed the sub division 21 into 2 parts/ lands known as sub division numbers 12860/I/MN and 12861/I/MN. After the survey into 2 lands the Plaintiff claimed in this suit and in a demand letter that she was the owner of the part of known as subdivision numbers 12860/I/MN and 12861/I/MN has since ignored to transfer either or both of the lands to the Defendant. The Defendant's Counter - Claim against the Plaintiff was for an order and declaration that the Defendant is the true owner of the lands known as sub - division numbers 12860/I/MN and 12861/I/MN for reason that the same arose from Plot Number 21 which had been purchased by the Defendant and an order directing the Plaintiff to transfer to the defendant the all lands known as sub - division numbers 12860/I/MN and 12861/I/MN.

98. It is clear that the agreement entered into by the parties was one which indicated that the Defendant would finish the payment of the of the purchase price after the title has been Issued to Defendant and delivered to the Defendant. Therefore, the Plaintiff cannot come back and claim that there was a breach of contract whereas there was a term which expressed as much. She must be estopped from running away from the terms of the agreement. This explains why the Defendant did not make payments of the remainder of the purchase price.

99. On the breach by the Plaintiff on sub - dividing the said suit property knowing very well she had sold it to the Defendant. The Defendant contended that immediately after her husband had bought the land the said land was sub - divided and sold to other people. It is clear from the agreement and the correspondences that the Plaintiff did not comply with the terms of the agreement as prescribed. Similar situations as the ones in this case have been graphically explained by our Courts on several occasions. There will be no need to re – invent the wheel. For instance, in the case of "Ngere Tea Factory Co. Limited – Versus - Alice Wambui Ndome [2018] eKLR" the court stated thus:-

> " .....A party cannot run away from the terms of its agreement. It has often been stated that the court's function are to enforce contracts that the parties enter into. The Court cannot rewrite the party's agreements".

100. Also in the case of "National Bank of Kenya Ltd – Versus - Pipeplastic Samkolit Ltd & Another [2001] eKLR" it was held thus:-

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge".

101. It is trite law that where parties voluntarily enter into a contract they are bound by the terms stipulated therein and that a court of law has no mandate to rewrite a contract for parties who in law are bound by such a contract unless on account of coercion, fraud or undue influence which must be pleaded and proved. See the case of: "LN Gitonga Mwaniki & another – Versus - Anastacia Waithira Kibiru (2013) eKLR", "Action Homes Ltd & another – Versus - David Nathan Chelogoi & 2 others (2015) eKLR".

102. Further contracting parties are at liberty to make time to be of essence in a contract voluntarily entered as between them and where this is not provided, the contract may be altered subsequently to make time to be of essence. Similarly, where a party has been subjected to an unreasonable delay he has liberty to

give notice to the defaulting party making time to be of essence through the doctrine of repudiation. See "David Muturi Mwangi – Versus - Kiiru (1987) eKLR".

103. In the absence of any evidence from the Plaintiff, it is my considered view that, it is the Plaintiff who was in breach of the sale agreement dated 9th September, 2003, terms and conditions stipulated thereof. On the contrary, the Defendant had the right to have the agreement executed as was agreed. The Defendant had a right to give a notice of breach in line with the *Land Act*, No. 6 of 2012 and after whose no-compliance, he was entitled to move to court for redress.

Issue No. c). Whether the parties are entitled to the orders sought in the Amended Plaint and Amended Counter – Claim respectively

104. Under this sub - title we shall discuss whether the Plaintiff or Defendant is entitled to any of the prayers sought. The provisions of Sections 40 & 42 of the *Land Act*, No. 6 of 2012 provides the redress for breach of a contract for sale of land to both the Vendor and the Purchaser and grants the court powers to Issue reliefs on such terms as it may consider appropriate including reliefs for breach of any term or condition of the contract that is not capable of being remedied.

105. As I have already concluded above, the Plaintiff was in breach of the contract entered between her and the Defendant when she failed to provide the title deed as stipulated in the agreement and went ahead to cause a sub - division of the suit property knowing full well she had an agreement with the Defendant. Therefore, the Plaintiff through the filed Plaint has as failed to establish its case and the prayers sought therein fail.

106. On the part of the Defendant in the Counter - Claim; the Defendant sought from the court: -

a. A declaration that the Defendant is the true owner of the land known as sub - division numbers 12860/1/MN and 12861/1/MN.

b. An order directing the Plaintiff to transfer to the Defendant the all lands known as sub - division numbers 12860/1/MN and 12861/1/MN.

c. Costs of the suit

107. The provision of Section 80 of the *Land Registration Act*, No. 3 of 2012 provides that: -

> "(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
>
> (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

108. Having found that the Plaintiff voluntarily entered into an agreement with the Defendant and later on breach it by not fulling the expressed terms in the agreement the Plaintiff cannot be allowed to keep the deposit, sub - divide and continue benefiting from a property they had already disposed of for a valuable consideration which the Plaintiff acknowledged. The Plaintiff has to honor her obligation to transfer the land to the Defendant.

109. The Court in the preceding paragraphs has opined that the Defendant made out her case when it came to the agreement and a court of law cannot interfere with a contract entered between two parties out

of their own will. Therefore, I grant the Defendant the prayers sought in the Counter – Claim and allow the same.

Issue No. d). Who bears the costs of the suit and the Counter - Claim?

110. The Issue of Costs is the discretion of Court. Costs is the award that is granted to a party at the conclusion of any legal action or proceedings of any litigation. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

111. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. It is trite law that the Issue of Costs is the discretion of Courts. In the case of: "Reids Heweet & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate Issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular Issue should go to the party who succeeds upon it....."

112. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the Plaintiff in Counter - Claim herein has successfully established her case. Thus, the Defendant is entitled to Costs for the dismissed Amended Plaint and the Amended Counter - Claim thereof to be paid by the Plaintiff/ Defendant in Counter claim

VIII. Conclusion and Disposition

113. In the end, having caused such an in-depth analysis to the framed Issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has not established her case against the Defendant as the Court has found that she was in breach of the agreement between herself and the later husband of the Defendant. The Plaintiff in Counter Claim herein has successfully established its case against the Plaintiff/Defendant in Counter claim herein. Thus, the Court proceeds to make the following specific orders:-

a. That Judgment be and is hereby entered in favour of the Defendant, the Plaintiff in the Counter - Claim in respect to the Amended Defence and Counter - claim dated 10th June, 2013 in its entirety with costs.

b. That the Plaintiff, the Defendant in Counter - Claim's case as per the suit instituted through the Amended Plaint dated 19th January, 2024 against the Defendant/Plaintiff in Counter - Claim be and is hereby found to lack merit and the same is dismissed with costs to the Defendant/Plaintiff in the Counter - Claim.

c. That a declaration be and is hereby made that the Defendant is the true owner of the land known as sub - division numbers MN/I/12860 and MN/I/12861.

d. That an order be and is hereby made directing the Plaintiff/ Defendant in the Counter - Claim to transfer to the Defendant/ Plaintiff in the Counter - Claim all that land known as sub division numbers MN/I/12860 and MN/I/12861.

e. That the Defendant/Plaintiff in the Counter - Claim shall have the costs of the Amended Plaint dated 19th January, 2024 and the Amended Statement of Defence and Counter - Claim dated 10th June, 2013.

It is so ordered acordingly.

JUDGMENT DELIVERED THROUGH MISCROFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2025.

.....

HON. JUSTICE MR. L. L. NAIKUNI

ENVIROMNENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of:-

M/s. Firdaus Mbula – the Court Assistant

Mr. Gitahi Advocate for the Plaintiff/Defendant in Counter - Claim.

No appearance for the Defendant/Plaintiff in Counter - Claim