



Mboi (Suing as a legal representative of the Estate of Abiud Macharia Chege - Deceased) v Mae (Environment & Land Case E069 of 2022) [2024] KEELC 5241 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E069 OF 2022**

LL NAIKUNI, J

JULY 2, 2024

BETWEEN

**MARY MBOI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF
ABIUD MACHARIA CHEGE - DECEASED) PLAINTIFF**

AND

CECIL MAE DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a Civil Suit instituted through a Plaint dated 23rd June, 2022 and filed in Court on 27th June, 2022. It was by MARY MBOI (Suing as a legal representative of the estate of ABIUD MACHARIA CHEGE deceased), the Plaintiff herein against Najmudin Noorali Mohamedali, the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance and Defence dated 5th July, 2022 filed in court on the same day. However, apart from filing of these pleadings, the Defendant never participated at all in the proceedings at all whatsoever.
3. It is instructive to note that vide a Chamber Summons application dated 8th May, 2024, the Advocates for the Defendant applied to cease acting for him for lack of firm instructions. On 17th May, 2024, the Honourable Court being satisfied that there was proper service of the said application upon the Defendants, the application was allowed accordingly.

II. Description of the Parties in the suit

4. The Plaintiff was described as a Kenyan female adult of sound mind and understanding. She brought this suit in her own capacity as a duly appointed Legal representative of the estate of Abiud Macharia Chege (Hereinafter referred to as “The Deceased”). The deceased was her late husband. She resided at



the County of Mombasa. As fate would have it, unfortunately and in accordance with the a copy of the Certificate of death, on 15th April, 2015, the deceased passed away Intestate.

5. From the filed pleadings, the Defendant was described as a Kenyan male adult presumed to be of sound mind residing in Mombasa County within the Republic of Kenya.

III. Court directions before the hearing

6. Nonetheless, on 31st January, 2024, the Honourable Court fixed the hearing dated on 24th April, 2024 with all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 with the Court proceeding for the same that afternoon at 2.00 pm and the Plaintiff called her witnesses on 24th April, 2024.
7. The matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witnesses (PW - 1 to 3) testifying in Court on 24th April, 2024. After which the Plaintiff closed her case. As indicated above, the Defendant never called any witness to controvert or support his case whatsoever.

IV. The Plaintiff’s case

8. From the filed pleadings, the Plaintiff averred that her late husband, Abiud Macharia Chege together with one David Nguti Gitau (also deceased) were, prior to their demise, the registered joint owners of lease interest in all that parcel of land known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County (Hereinafter referred to as “the Suit Land”). By grant of representation issued and confirmed in Mombasa High Court Succession Cause No. 308 of 2015 she was appointed the Legal representative of the estate of the late Abiud Macharia Chege.
9. On the other hand, by grant of representation issued and confirmed in Mombasa High Court Succession Cause No. 395 of 2012, one Lucy Karimi Njeru was appointed the Legal representative of the estate of the late David Nguti Gitau, the Co – joint owner to the suit land.
10. According to the Plaintiff, the estate of the two deceased persons was yet to be administered as by law required. The Plaintiff had all along been possession of the suit property. Indeed before his demise, the late Abiud Macharia Chege had developed a homestead on the property comprising a house, toilet, a shallow well and a farm for subsistence crops - fruits and vegetables. Further, upon his demise, the late Abiud Macharia Chege was buried on the suit property and his grave still remained there to date. Furthermore, the Plaintiff stated that following the demise of the late Abiud Chege Macharia, together with her children and a farm worker continued residing on the land, carrying out activities therein for their sustenance. The Plaintiff had also secured the land by fencing the same. A few days ago, the Defendant while assisted by persons armed with machetes (pangas) and other crude weapons, forcefully entered the suit property and for no apparent good reason nor justifiable cause whatsoever violently chased away the Plaintiff and her family before demolishing the Plaintiff’s family house and other structures in the compound. They pulled down the fence erected around the property and stealing all valuables belonging to the Plaintiff.
11. Following the illegal, violent and forceful entry into the suit property, the Defendant began rapidly putting up illegal structures scattered all over the property. He started bringing to the property, persons meant to take occupation of the structures illegally erected by the Defendant. Prior to this, there were various attempts by the Defendant to forcefully invade the suit property which attempts were thwarted by the Plaintiff one way or another but the Plaintiff was shocked when the Defendant recently came back emboldened and forcefully took over the property as stated above. The Defendants unlawful



actions had been variously reported to the Police and various Occurrence Book (OB) Numbers issued as including OB NO. 45 of 12th May, 2022, OB NO. 31 of 19th May, 2022 and others that got lost during the forceful entry by the Defendant. The police had not been of much assistance for want of court order. As a result of the Defendant's unlawful actions, the Plaintiff served upon the Defendant, a notice under the provision of Section 152E of the Land Act, No. 6 of 2012 but due to the urgent nature of the matter herein, it is not possible to await service of the notice upon the Deputy County Commissioner and the Officer Commanding Police Division before bringing the proceedings herein. Despite of all her best efforts, the Defendant continued undeterred in his unlawful actions and as a result thereof, the Plaintiff's proprietary rights had not only been violated but the property of her late husband is at the risk of being wasted. She was compelled to institute this suit hereof.

12. The Plaintiff herein prayed that Judgement be entered against the Defendant in terms of:
 - a. A declaration that the Defendant and all persons acting under him or at his behest have no interest whatsoever in land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County.
 - b. Subject to prove of compliance with Section 152E of the Land Act, No.6 of 2012, by the Plaintiff at the time of hearing of the suit herein, an order of eviction does issue against the Defendant and all persons acting under him or at his behest to vacate the parcel of land known as Sub-division No.11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County and the Defendant to remove all structures erected thereon.
 - c. In default of voluntary compliance with prayer (ii) above by the Defendant or any persons acting under the said Defendant, the Plaintiff be at liberty to forcefully evict the said persons with the assistance of the Inspector General of Police through the Officer Commanding Bamburi Police Station or any other officer under his command.
 - d. An order of permanent injunction prohibiting the Defendant and all persons whomsoever acting under him or at his behest from forcefully entering or erecting any structures on the parcel of land known as Sub - division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County or portion thereof.
 - e. An order that the Officer Commanding Bamburi Police Station does ensure compliance with the orders of this Court.
 - f. Any other/further order/relief(s) as the Honourable Court may deem fit to grant.
 - g. Costs of this suit.
13. The Plaintiff called three (3) witnesses – PW – 1, PW – 2 and PW – 3 respectively. PW - 1 on 24th April, 2024 at 11.00 am where he averred that:-

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

14. PW – 1 testified on oath in the Kiswahili language. She identified herself as M/s. Mary Mboi and provided all the particulars as found in her national identity card. PW - 1 told the court that she lived in Mombasa at Bamburi. She was the Plaintiff and had sued the Defendant. She recorded the witness statement dated 23rd July, 2022 which she adopted as her evidence in chief. In the year 2000, she and her husband had bought the suit land. They used to cultivate it together. As fate would have it, on



15th April, 2015 her husband passed on and was buried on the suit property. They were left with the staff. They had constructed a two roomed house, a toilet and kitchen. They drilled a shallow well and piped tank. They used to cultivate bananas, fruits and vegetables. It was from the year 2018 that the Defendant started bothering her with threats of evicting her. The Defendant would tell her that a title was paper, can change the name on the grave and would demolish her structures.

15. PW - 1 stated that the Defendant would harass her by uprooting the Plantation. She reported the incident to the police and record on OB No. 45 of 12th May, 2022, OB No. 31 of 19th May, 202. They would ran away but come back and continue harassing her. The Defendant came with goons and chased her away from the land which was 2 acres. They uprooted everything, she was evicted and thrown out of the land. There was an order of Court on July 2022 from the Defendant interfering with the suit land, that is an injunction order but they continued to interfere with the property.
16. She told the court that she had a list of documents dated 23rd July, 2022. They were six documents. These were:-
- a. A Copy of the Certificate of Lease for the suit land;
 - b. A copy of the Sale agreement dated February, 2000 duly executed between Marian Kavingi Bryant and David Nguti Gitau & Abiud Macharia Chege.
 - c. Instrument of transfer dated 3rd July, 2000 in respect of the suit land.
 - d. A copy of the certificate of death of the deceased.
 - e. A Certificate of Confirmation of Grant for the estate of the deceased dated 20th December, 2018.
 - f. A bundle of a set of photographs.

She produced the said documents as her evidence in support of the case. She prayed that the prayer be granted as in the Plaint.

B. Examination in Chief of PW - 2 by Mr. Muumbi Advocate.

17. PW – 2, testified on oath in English language. He identified himself as being Mr. Simon Fundi Macharia. The witness told the court that he lived with his Mother at Utange. He was the son to the Plaintiff and the deceased. The suit property was Co – Jointly owned between his father and another person. His father had secured the suit property by fencing it. He recorded a statement on 23rd July, 2022 which he adopted as his evidence in chief in support of the case. In addition to what he stated, they would like to reclaim the land as they were now destitute. He had knowledge of the fact that Mr. Cecil Mae would come to them and state that since they were of the Kikuyu ethnic background they were not entitled to be having land at the Coast and hence they showed vacate. They had been threatening to kill them. The Defendant had demolished and took away the livestock. They had never gone back to the land since they were chased away. He had seen Mr. Mae and there had been some construction on the suit land.
18. PW - 2 was aware of an order issued in July, 2022 but the Defendant had been disobeying the order.

C. Examination in chief of PW - 3 by Mr. Muumbi Advocate.

19. PW - 3 testified on oath in the Kiswahili language. He identified himself as Mr. Kenga Charo and provided all the details on his national identify card. He confirmed that he was from Utange. According to him on 20th February, 2022 she was an employee for the Plaintiff for 6 years. He recorded a statement



dated 23rd July, 2022 and he adopted the same. He stated that in a nutshell, he knew the case on land, he knew a young man called Mae and threatened the Plaintiff. He would come with other people armed with crude weapons including machetes (pangas) and clubs – they would threaten her to be evicted/ more out. Eventually, the Plaintiff moved out of the suit land driven by fear. The Defendant demolished the existing structures and constructed theirs. They pulled down the fence and rapidly erected scattered houses on the property. Prior to that, there were no persons apart from the Plaintiff and her family who were living on the suit property. The Plaintiff had not gone back to the suit property thereafter

V. Submissions

20. On 22nd April, 2024 after the Plaintiff and Defendant marked the close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that, it was only the Plaintiff who complied accordingly and the Honourable court reserved a date to deliver its Judgement on Notice.

A. The Written Submissions by the Plaintiff.

21. The Plaintiff through the Law firm of Messrs. Muumbi & Company Advocates filed her written Submissions dated 16th May, 2024. Mr. Muumbi Advocate commenced his submissions by providing Court with the background of the matter. He stated that the Plaintiff, suing on behalf of Abiud Macharia Chege, instituted this suit by way of filing a Plaint dated 23rd July, 2022. She brought it against the Defendant seeking for the aforesated prayers herein. The Learned Counsel averred that despite being served and even entering appearance, the Defendant never filed a Statement of defence. Hence, the matter proceeded undefended. Accordingly, three witness testified for the Plaintiff by adopting their witness statements. The Plaintiff as PW – 1 testified by adopting her witness statement dated 23rd July, 2022. The witness's testimony was that the late Abiud Macharia Chege who was her husband together with one David Nguti Gitau (also deceased) were, prior to their demise, the registered joint owners of lease interest in land parcel known as Sub-division No.11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub - County, Mombasa County. That by a grant of representation issued and confirmed in Mombasa High Court Succession Cause No. 308 of 2015, (see Plaintiff Exhibit 5) the Plaintiff was appointed the Legal representative of the estate of her late husband Abiud Macharia Chege. That she was also aware that one Lucy Karimi Njeru was appointed the Legal representative of the estate of the late David Nguti Gitau. That the suit property was still in the joint names of the said deceased Abiud Macharia Chege and David Nguti Gitau as the administrators were yet to administer the estates of their deceased husbands. That in the year 2013, the Plaintiff's late husband secured the property using a fence, developed a homestead on the property comprising a two bedroomed house, toilet, a shallow well and a farm for fruits and vegetables. Upon his demise in the year 2015, the Plaintiff's late husband was buried on the suit property and his grave still remains there todate.
22. After the demise of the Plaintiff's husband, the Plaintiff, together with her children and a farm worker, continued living on the land and carrying out activities therein for their sustenance. However, a few days before instituting the suit, the Defendant, assisted by persons armed with machetes/pangas and other crude weapons, forcefully entered the suit property and violently chased the Plaintiff and her family away after which they demolished the Plaintiff's house and other structures in the compound, pulled down the fence erected around the property and stole all valuables on the property. Immediately on the same day, the Defendant began rapidly putting up illegal structures scattered all over the property and started bringing to the property, persons intended to occupy the illegal structures developed on the property by the Defendant. Prior to this, there were no persons other



- than the Plaintiff's family living on the property and no structures existed on the property apart from those belonging to the Plaintiff's family. Prior to this invasion; there had been few attempts by the Defendant to forcefully enter the suit property which attempts we thwarted, one way or another. That the Defendant's unlawful activities had been variously reported to the Police under OB Nos. 45 of 12th May, 2022, 31 of 19th May, 2022 and others that got lost during the violent entry by the Defendant yet the police have not been of much assistance for want of court order.
23. Owing to the Defendant's unlawful actions, the Plaintiff and her family were rendered destitute and were forced to seek shelter from a friend. Despite a court order issued on 07th July, 2022, the Defendant continued erecting the illegal structures on the Plaintiff's property.
 24. PW – 2, Simon Fundi Macharia testified by adopting his witness statement dated 23rd July, 2022 and his testimony was that he was a son to the late Abiud Macharia Chege and Mary Mboi, the Plaintiff in the case. Prior to his demise in the year 2015, his father together with one David Nguti Gitau (also deceased) registered as the joint owners of land parcel number Subdivision 11285/1/MN (Original number 274/3) Section 1, Mainland North, Mombasa County situated in Utange area of, Kisauni Sub-county, Mombasa County. In the year 2013, his late father, Abiud Macharia Chege, secured the property using a fence, developed family home on the property comprising a two bedroomed house, toilet, a shallow well and a farm for fruits and vegetables. Upon his demise in the year 2015, the PW - 2's father was buried on the property and his grave still remains there todate.
 25. After the demise of his father, PW - 2 and his family members and a farm worker and, carrying out activities on the land for the family's sustenance. However, a short while before institution of the suit in question, the Defendant, assisted by persons armed with machetes/pangas and other crude weapons, forcefully entered the suit property and violently chased PW - 2 and his family away after which the said persons demolished the developments on the property. Immediately on the same day, the Defendant began rapidly putting up illegal structures scattered all over the property and started bringing to the property, persons to occupy the structures he had developed on the property. Before this, there were no structures or other persons living on the property except PW - 2's family. Also, prior to this, there were few attempts by the Defendant to forcefully enter the suit property which attempts we thwarted, one way or another. As a result, PW - 2 and his family had been rendered homeless and without any source of income.
 26. PW – 3, Mr. Kenga Charo, adopted his witness statement. He testified that in the year 2013, he was employed by the family of the late Abiud Macharia Chege to work on his farm at Utange area of Mombasa County. At the farm, there was a home, where the family of the Late Abiud Macharia Chege lived. In the year 2015, when the said Abiud Macharia Chege died, he was buried on the farm. PW - 3 lived on the farm with his boss's family)since the year 2013 until sometimes in the year 2022 when the Defendant violently chased them away assisted by other persons armed with crude weapons including pangas and rungas. After entering the property, the Defendant quickly demolished his boss's developments and started erecting his structures. Prior to this invasion, there were no persons other than his boss's family living on the property and the only structures existing on the property were those belonging to his boss. There has been, previous at attempts by the Defendant to forcefully enter the property. The Plaintiff also produced documents contained in the Plaintiff's list of witnesses dated 23rd July, 2022 which were marked as Plaintiff's Exhibits 1 to 7.
 27. According to the Learned Counsel, there were four (4) issues for determination. These were firstly, whether the late Abiud Macharia Chege and David Nguti Gitau were prior to their demise, the registered owners of land parcel Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North Mombasa? From the account of the evidence by PW - 1 and PW - 2, the suit property belonged to the late Abiud Macharia Chege who co-owned the same with the late David Ngugi Gitau.



The Plaintiff produced as Plaintiff's Exhibit 1, a Certificate of lease dated 25th September, 2000 showing that David Nguti Gitau and Abiud Macharia Chege were the leasehold proprietors of the suit property for a term of 999 years (read 99 years) from 01st July, 1924. The plaintiff also produced as Plaintiff - Exhibit No. 2, an agreement dated the year 2000 for the sale of the said parcel of land by one Marian Kavingi Bryant to David Nguti Gitau and Abiud Macharia Chege whereby the property was sold by the said Marian Kavingi Bryant to David Nguti Gitau and Abiud Macharia Chege for a sum of Kenya Shillings Eight Thirty Thousand Two Hundred (Kshs. 830,200/=). The Plaintiff further produced as Plaintiff Exhibit 3, an instrument of transfer dated 3rd July, 2000 in respect of the suit property, from Marian Kavingi Bryant to David Nguti Gitau and Abiud Macharia Chege. To buttress his point, the Learned Counsel relied on the provisions of Sections 24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012 on the ownership of the property. He further cited the case of:- "Elijah Makeri Nyangw'ra – Versus - Stephen Mungai Njuguna & Another [2013]eKLR where the court held that:-

“ the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

28. His contention was that the ownership of the suit property had not been in any way challenged by the Defendants. Therefore, he submitted that the Plaintiff had not only proven that her late husband jointly with David Gitau Nguti were the registered owners of the suit property but also that the estates of the said persons are entitled to proprietary rights therein to the exclusion of the Defendants whose activities in the suit property are unlawful and illegal.
29. Secondly, was on whether the Plaintiff has Locus to bring the suit. The Plaintiff brought the instant suit in her capacity as the Legal representative of the estate of the late Abiud Macharia Chege. The Plaintiff produced as Plaintiff Exhibit 5, a certificate of confirmation of grant showing that a grant of representation in respect of the estate of the late Abiud Macharia - Chege, the Plaintiff's, husband was issued to the Plaintiff on 17th December, 2018. The Plaintiff however testified that the deceased estate was yet to be administered and as a result the property remained in the name of the deceased. Therefore, the Learned Counsel humbly submitted that the Plaintiff had locus to bring the suit on behalf of her deceased husband.
30. Thirdly, was whether the Defendant had unlawfully invaded the suit property. It is trite law that he who alleges must prove. Section 107(i) of the [Evidence Act](#) provides that:-

“ Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”.

31. The Plaintiff testified that a few days before instituting the instant suit, the Defendant, assisted by persons armed with pangas, machetes and other crude weapons invaded the suit property and chased away the Plaintiff together with his family. The Defendant then proceeded to destroy the Plaintiffs developments on the property which included a two bedroomed house, toilet, a shallow well, farm and other valuables. The Defendant then embarked on-the unpermitted construction of structures on the suit land which he continued with even after the Court issued an order on 07th July, 2022 stopping the from carrying on with constructing of the illegal structures. That as a-result, the Plaintiff and her family were forced to borrow shelter from a friend and they have never been able to return to the suit land. The Plaintiff also produced, as exhibit 6, a bundle of photographs showing both the damage caused by the Defendant and his goons as well as others showing the illegal structures the Defendant was erecting on the suit property. With the Plaintiff's testimony having not been refuted by the Defendant, it is



our humble submissions that the Plaintiff had proven, to the required standard that the Defendant not only unlawfully invaded the Plaintiff's late husband's property, but also damaged developments therein and proceeded to erect illegal structures.

32. Finally, was on whether an order of injunction and eviction ought to issue against the Defendant. It is trite that a registered proprietor of land is entitled to the enjoyment of the rights conferred both under *the constitution* and the statutes. This right includes the protection of the rightful owner, from any unlawful interference on the use of the property by persons on the land unlawfully. It was not discounted that the Plaintiff's late husband (and by extension his family) owned the suit property. It's also not discounted that the Defendant and his proxies' activities on the land are without the permission of the lawful owners. The same is also not with the sanction of any law. Therefore, our humble submissions that the Defendant's presence on the suit property is not only unlawful but the Defendant ought to be evicted and a permanent injunction issued against the Defendant.
33. The conditions for grant of an injunction (both temporary and permanent) are well settled in our jurisdiction. In the case of:- "Nguruman Limited – Versus – Jan Bonde Nielsen & 2 others [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only of a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

34. In the case of "Mrao Limited – Versus - First American Bank of Kenya Limited & 2 others [2003] eKLR(cited with approval in Nguruman Limited (Supra), the court fashioned a definition for "prima facie case", in civil cases in the following words:

"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

35. The Learned Counsel asserted that in the case of Nguruman Limited (Supra) the court in adopting the above holding went on to state:

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion".



He humbly submitted that it was clear from the Plaintiff's case that her family's proprietary rights have been interfered with by the Defendant who had forcefully entered the Plaintiff's property and erected illegal structures.

36. On the second limb, the court in the case of: "Nguruman Limited (supra) went on to hold:-

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

37. The Learned Counsel further submitted that failure to grant the above order, will occasion the Plaintiff and her family to suffer irreparable harm that cannot be compensated by way of damages.

(i) Whether balance of convenience tilts in favour of the Applicant

The Learned Counsel averred that incase the Court was in doubt on the first two considerations; it must arrive at the inevitable conclusion that the balance of convenience must tilt in favour of stopping the Defendant's unlawful activities. He further submitted that orders of eviction must issue against the Defendant who was illegally in the suit property.

VI. Analysis and Determination

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

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

- a. Whether the Plaintiff is the bona fide owner of the suit property?
- b. Whether the Plaintiff is entitled to the orders sought in the Plaint
- c. Who bears the costs of the suit?

ISSUE No. a). Whether Plaintiff is the bona fide owner of the suit property

40. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter whether the Plaintiff is the bona fide owner of the suit property. The Plaintiff's claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. She has produced documentary evidence in form of a Certificate of title deed issued under the Registration of Titles Act, Cap. 281 (Now repealed) over the suit land in her name as proof of ownership. However, considering that the Registration of Title Act, Cap. 281 Act has now been repealed, based on the saving Clause under the provision of Section 107 of the *Land Registration Act*, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the *Land Act*, No. 6 of 2012 and which I will be dealing with



in a more elaborate manner later on. This Legal position finds grounding in the provisions Section 23 (3)(c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

The said legal position was upheld in the cases of “Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR” .

Having stated that, the Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

S. 7 Title to land may be acquired through:-

Allocations;

Land Adjudication process;

Compulsory acquisition;

Prescription;

Settlement programs;

Transmissions;

Transfers;

Long term leases exceeding Twenty one years created out private land; or

Any other manner prescribed in the Act of Parliament.

41. In the instant case, the deceased and another person jointly acquired the title from purchase for value from one Marian Kavingi Byrant where all the due process was followed to the letter and eventually a Certificate of Title was issued in their names on 3rd July, 2000. There are two (2) grounds upon which the ownership of the suit land which is the pith and substance of the dispute here whereby the Plaintiff and the Defendant from their pleadings are claiming the Suit Land.
42. The provision of Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.
43. The provision of Section 26 of the *Land Registration Act*, 2012 provides;
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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

44. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff shows that the suit land is registered in the name of her husband and as the legal representative of his estate she had beneficial proprietorship to it. That position was not challenged by the Defendant as he failed to adduce any evidence or challenge the Plaintiff's evidence. The Plaintiff as proof of ownership provided or adduced into evidence an agreement of sale dated February 2000 between Marian Kavingi Byrant, David Nguti Gitau and Abiud Macharia Chege; a transfer dated 3rd July, 2000 signed by the vendor and the purchasers who one happened to be the Plaintiff's husband. She also produced a death certificate dated 14th May, 2015 for the deceased and a certificate of confirmation of grant dated in Mombasa on 20th December, 2018 for one Abiud Macharia Chege and Mary Mboi was appointed the legal representative for his estate.
45. Among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land. The Plaintiff conducted evidence that shows that the Defendant has illegally taken possession of the suit land and is utilizing it for his own benefit, those actions of the defendant amount to violation of the Plaintiff's right as guaranteed in Article 40 of *the constitution* and must be stopped. It is the Plaintiff's case that the Defendant's occupation of her land is without her consent or legal basis. The Defendant though represented by Counsel on record failed to rebut the claim. I therefore find and hold that the Plaintiff is the absolute and legally registered and bona fide owner of the suit property with all the indefeasible rights, title and interest vested in her by law.

ISSUE No. b). Whether the Plaintiff is entitled to the orders sought in the Plaintiff

46. Under this Sub heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaintiff, herein. On whether the Plaintiff is entitled to be granted the Permanent and mandatory injunction sought in the plaintiff, there is no doubt that the Defendant continued stay upon the suit property and his actions interfered with the Plaintiff use and occupation of the suit property. The Plaintiff seeks a permanent injunction, prohibiting the Defendant and all persons whomsoever acting under him or at his behest from forcefully entering or erecting any structures on the parcel of land known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County or portion thereof.
47. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provision of Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
48. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an



application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case. Certainly, that would not be equity, fair and just at all to the other party.

49. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the “Locus Classicus” case of “Giella – Versus - Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was “Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case” in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

50. With all due respect and arising from the surrounding facts and inferences, the Honourable Court has already opined and determined in the previous issue that the Defendant has indeed trespassed the suit property and therefore the prayers are granted as prayed. The Defendant has no legal mandate to remain or use the suit property in any manner. As such this prayer is meritorious.
51. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiff in the Plaint filed herein is for eviction orders to issue against the Defendant herein .These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. Having found that the Plaintiff has proven his claim on a balance of probability and established that the Defendant has no legal right to remain on the suit land based on the evidence placed before this court.
52. On prayer a, b, c and e being that the Court has opined that the Plaintiff is the bona fide legal proprietor of the suit property then the same are granted with accordance to Section 24, 25 and 26 of the [Land Registration Act](#).

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

53. 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.



54. In the case of: “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) Limited 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 – Versus - 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.”

55. In the present case, the Plaintiff has been able to establish its case as pleaded from the filed pleadings therefore, I proceed to award her the costs of this suit.

VII. Conclusion and Disposition

56. 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 established her case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Plaintiff as pleaded in Plaint dated 23rd June, 2022.
- b. That a declaration be and is hereby issued that the Defendant and all persons acting under him or at his behest have no interest whatsoever in land parcel known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County.
- c. That an order of eviction do and is hereby issued pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012 against the Defendant and all persons acting under him or at his behest to vacate the parcel of land known as Sub-division No.11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County and the Defendant to remove all structures erected thereon. This should be done within 30 days of this judgment.
- d. That in default of voluntary compliance with prayer (c) above by the Defendant or any persons acting under the said Defendant, the Plaintiff be at liberty to forcefully evict the said persons with the assistance of the Inspector General of Police through the Officer Commanding Bamburi Police Station or any other officer under his command.
- e. That a permanent injunction be and is hereby issued, prohibiting the Defendant and all persons whomsoever acting under him or at his behest from forcefully entering or erecting any structures on the parcel of land known as Sub-division No. 11285/1/MN (original No. 274/3) Section 1, Mainland North, Mombasa, situated in Utange area of Kisauni Sub-county, Mombasa County or portion thereof.
- f. That an order do and is hereby issued to the Officer Commanding Bamburi Police Station does ensure compliance with the orders of this Court.
- g. That the costs of this suit vide the plaint dated 23rd June, 2022 are awarded to the Plaintiff.

IT IS ORDERED ACCORDINGLY



**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT MOMBASA THIS2NDDAY OFJULY.....2024.**

.....

**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. Waiyaki Advocate holding brief for Mr. Muumbi Advocate for the Plaintiff.
- c. No appearance for the Defendant.

