



Jumaa & another (Suing as the personal representative of the Estate of Patrick Kwesha Dzombo - Deceased) v Sanga & 2 others (Environment and Land Case Civil Suit 166 of 2014) [2024] KEELC 7285 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 166 OF 2014
LL NAIKUNI, J
OCTOBER 16, 2024**

BETWEEN

MATHIAS DZOMBO JUMAA 1ST PLAINTIFF

BABU PATRICK DZOMBO 2ND PLAINTIFF

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
PATRICK KWESHA DZOMBO - DECEASED**

AND

CRISPIN MWANGOLO SANGA 1ST DEFENDANT

LAND REGISTRAR KILIFI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit through the Plaint dated 28th February, 2022 filed on the same day instituted by Mathias Dzombo Jumaa and Babu Patrick Dzombo (Suing as the personal representative of the estate of Patrick Kwesha Dzombo (Hereinafter referred as “The Deceased”), the Plaintiffs herein against Crispin Mwangolo Sanga, Land Registrar Kilifi and the Attorney General, the 1st, 2nd and 3rd Defendants herein.
2. Upon service of the pleading and Summons to Enter appearance, the 1st Defendant herein entered appearance through a memorandum of appearance dated 21st October, 2014 and filed a Statement of Defence dated 12th November, 2014.



3. It is instructive to note that during the pendency of the proceedings and upon the request of the parties, the Honourable Court conducted a Site Visit (“Locus in Quo”) on the suit land. Subsequently, a site visit report was prepared and shared among the parties. Indeed, a copy of the said report is attached herein as apart of this Judgement for ease of reference hereof.

II. Description of the Parties in the suit

4. The Plaintiffs were described in the Plaint as male adults of sound mind residing and working for gain in Mombasa. They bring this suit on their own behalf and on behalf of the estate of the late PATRICK KWESHA DZOMBO and on behalf of the families residing on land registered as Plot No. Kilifi / Bandarasalama/125 (Hereinafter referred to as “The Suit Land”).
5. The 1st Defendant was described in the Plaint as a male adult of sound mind residing and working for gains in Kilifi County within the Coast Province. He was sued as the duly appointed Legal Administrator of the estate of the late SANGA DZOMBO JUMAA (Hereinafter referred to as “the Deceased”).
6. The 2nd Defendant was described in the Plaint as a Government Lands Officer Kilifi County charged with the responsibility of registering land conveyance transactions.
7. The 3rd Defendant was described in the Plaint as the Chief Government Legal Advisor and through whom the 2nd Defendant was normally sued.

III. Court directions before the hearing

8. Nonetheless, on 24th September, 2019, the Honourable Court fixed the hearing dated on 27th January, 2020 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 and the Plaintiffs called their first witness on 27th January 2020 a witness who was stood down to 7th July, 2020 for cross examination. The witness proceeded with his cross examination on 28th October, 2021 after which the Plaintiffs called PW 2 on the same day. The Plaintiffs called their cases to a close on the same day. The Defendants called their 1st and 2nd witnesses on 22nd February, 2022. On 27th June, 2022 the 1st Defendant called the Defence 3rd witness and marked their case closed.
9. This matter proceeded on for hearing by way of adducing “viva voce” evidence with witnesses testifying as herein under.

IV. The Plaintiffs’ case

10. The Plaintiffs averred that at all material times the land known as Kilifi/Bandarasalama/125 belonged to one Dzombo Jumaa Mwakai who was the grandfather to both the plaintiffs and 1st defendant and all the 6 families of the said Dzombo Jumaa Mwakai. The said Dzombo Jumaa Mwakai had six (6) sons and a brother namely as follows:-
 - a. Jumaa Dzombo(deceased)-son.
 - b. Mbura Dzombo(deceased)-son.
 - c. Sanga Dzombo-(deceased)-son.
 - d. Mwaje Dzombo(deceased)-son.
 - e. Patrick Kwesha Dzombo (deceased)-son.



- f. Mwafondo Dzombo(alive)-son.
 - g. Kiti Jumaa Mwakai(Mwalolo)-Brother.
11. According to the Plaintiff the said Dzombo Jumaa Mwakai during his lifetime sub - divided the suit land amongst his sons and his brother. All the six (6) sons and his brother had their portions which were demarcated and boundaries were put in place. These sons and their families have ever since lived in these parcels of land to date and those boundaries have been maintained to date.
 12. The Plaintiffs further stated that the said Dzombo Jumaa Mwakai died in 1948. At the time of his death he did not possess the title deed to the suit land since the land demarcation and adjudication had not yet commenced. In 1972 when land demarcation and adjudication commenced Sanga Dzombo Jumaa (3rd son) rushed to have his name registered as the sole owner without consulting with the family and without their consent. The plaintiffs further averred that Sanga Dzombo Jumaa was to take out a Title Deed in 1982 for the suit land without the families' knowledge or approval. The title deed was issued under his name in exclusion of the rest of the family.
 13. The action taken by the Sanga Dzombo could not have been carried out without the involvement and/or sanction of the 2nd and 3rd defendants and thus necessitating their involvement in this case. The six sons of Dzombo Jumaa Mwakai and the family of Kiti Jumaa Mwakai have lived in the suit land in harmony and peace oblivious of the existence of the title deed until the year 2000 when the 12 sons of Sanga Dzombo started occasioning violence upon the children of the other 6 families on the pretext that the title deed of the suit land was under the sole name of their father and hence claiming and asserting to be the sole and rightful inheritors.
 14. The registration of Sanga Dzombo as the sole owner proprietor of that land known as the suit land was illegal, irregular, null and void and was also irregular for the following reasons
 15. The Plaintiff relied on the following particulars of fraud:-
 - a. The suit land is family land
 - b. The land is divided into portions each with clearly marked boundaries.
 - c. The family did not consent to either registration of Sanga Dzombo as proprietor or owner of the suit land.
 - d. The registration and subsequent issuance of the title deed has culminated into discord among the family and enhanced violence by sons of Sanga Dzombo.
 - e. The said Sanga Dzombo failed to recognize that the suit land being ancestral, everyone in the family had rights to the land.
 - f. The title as issued fails to reflect the interests of the other family members to the suit land.
 16. The Plaintiffs therefore pray that the court declared that the suit land was family land, held in trust by the Plaintiff (as the legal representative of the estate of Sanga Dzombo) on behalf of the heirs of the late Dzombo Jumaa Mwakai. The Plaintiffs further prayed that the court directed that the title deed to the suit land currently under the names of Sanga Dzombo be cancelled and new titles be issued according to the boundaries in the suit land and in respect of the seven families living in their portions in the suit land.



17. According to the Plaintiffs except Judicial Review No. 26 of 2011, there have been no other proceedings between the parties herein on the same subject matter other than other proceedings before the Land Disputes Tribunal. The Plaintiffs submitted to the jurisdiction of the court.
18. The Plaintiffs prayed for judgment against the 1st, 2nd & 3rd Defendants jointly and severally for:-
- a. A declaration that SANGA DZOMBO(deceased) and CRISPIN MWANGOLO SANGA (legal representative) holds the title No. Kilifi/ Bandarasalama/125 in trust for himself and the entire family.
 - b. An order directed to the 2nd and 3rd Defendants to recall the Title Deed for Plot No. Kilifi / Bandarasalama/125 and cancel the same.
 - c. An order directed to the 2nd and 3rd Defendants to issue new Title Deeds to the 7 families residing on Plot No. Kilifi /Bandarasalama/125.
 - d. Costs of this suit.
19. The Plaintiffs called their first witness on 27th January, 2020, PW - 1 testified as follows:

A. Examination in Chief of PW - 1 by Mutugi Advocate.

20. PW – 1 was sworn and testified in Swahili language. He identified himself as MATHIAS DZOMBO JUMA. He was a citizen of Kenya with all the particulars as contained in his national identity card. He lived at a place called Chonyi in Kilifi South within the County of Mombasa. He was a farmer and the 1st Plaintiff herein. He had filed a witness statement on 26th August, 2014, which he adopted as his evidence in chief. They also filed a list of documents on 11th July, 2014 which he relied on as his exhibits. The case was over Parcel Kilifi/Bandarasalama/125. The land belonged to their grandfather the late Nzombo Jumaa Mwakai (deceased). The land was about 30 acres. His later grandfather purchased the land from one Thomas Ngoti. He bought for 100 rupee. His later grandfather had 6 sons:
- a. Jumaa Dzombo.
 - b. Mbura Dzombo.
 - c. Sanga Dzombo.
 - d. Mwaje Dzombo.
 - e. Patrick Kwesha Dzombo.
 - f. Mwafondo Dzombo.
21. PW - 1 testified that the people were staying on the land. He also had his younger brother by names, Kiti Jumaa Mwakai who he gave a portion of the land. The deceased sub - divided the land in the year 1940. He died in the year 1948. He left some heads of cattle which he had not divided to his sons. In 1950 Mbura Dzombo and Jumaa Dzombo were instructed by a family meeting to go and divide the heads of cattle. The cows were divided. Later, Mbura Dzombo passed on in or about the year 1960. Upon his demise, Sanga Dzombo inherited the wives of Mbura Dzombo. They lived in harmony for some time.
22. Later, some outsiders came claiming the land. The first to lay claim was Chilango Bosa and the second Mzungu Mwachogo. By then, he was aged about 12 years. In his identity card, it is indicated that he was born in year 1945. Their fathers met and resolved on how to safeguard their land from the outsiders. By then, his father Jumaa Dzombo (deceased) was paralyzed and was unable to pursue the case because



- of his health condition. The family appointed Sanga Dzombo to represent the entire family, that is to represent his brothers.
23. He won the case against Chilango Bosa and Chilango Bosa was evicted and was ordered to pay costs. Then came another outsider by name Musungu Mwachoyo claiming the land. Sanga Dzombo returned to court in Kaloleni. Sanga Dzombo won the case and the outsider was ordered to pay costs which he paid. The witness told the court that they lived in harmony as Dzombo family. Later Sanga Dzombo claimed the land and evicted Jumaa Dzombo and Mwaje Dzombo claiming that they were not his genuine brothers. He retained Patrick Kwesha Dzombo and Mwagondo Dzombo claiming that these were his biological brothers.
 24. He stated that elders were called to come and reconcile them. Sanga Dzombo refused. His father then went to the area chief, Jonathan Mbura who summoned Sanga Dzombo vide a letter dated 11th March, 1963. Sanga Dzombo refused to comply with the chief's letter. The chief then gave his father, Jumaa Dzombo referring him to Kaloleni court. Land case No. 8 of 1966 was filed. He produced the proceedings and judgment in Land Case No. 8 of 1966 as P. Exhibit 2 and 3 and the Limited Grant of letters of Administration as P. Exhibit 1. Judgment was entered in favour of his father against Sanga Dzombo. The proceedings are clear the land belonged to Dzombo Jumaa Mwakai (deceased) Sanga Dzombo was ordered to pay costs. Sanga Dzombo was dissatisfied with the judgment and he appealed Appeal No. 23 of 1968 in R.M. Mombasa. The Appeal court upheld the decision of Kaloleni court. He produced the judgment as Plaintiff Exhibit 4. Sanga Dzombo paid the costs. Jumaa Dzombo returned to his portion of the land.
 25. The witness told the court that the demarcation began in 1972 and reached Chonyi in the year 1973. They were not aware that demarcation was ongoing. The land was demarcated secretly and Sanga Dzombo caused the land to be registered in his name. He took the number without his brothers knowing. He registered the land as his, not family land. He took his father to the survey office and showed them the decision in the cases referred to above. They advised them to file an objection. The objection was dated 16th December, 1978, was produced as Plaintiff Exhibit 5. They advised them to file a case in Kilifi. They paid for the case and obtained a receipt. Sanga Dzombo did not attend the objection proceedings. The surveyors said they would come to the land.
 26. PW 1 told the court that later over uncle Patrick Kwesha Dzombo filed case No. 2 of 2001, against Chrispin Sanga, the 1st Defendant. Chrispin Mwangolo Sanga with his brothers was ordered to vacate the claimed parcels and release it to the owners. He produced the proceeding and order as P. Exhibit 6. The Tribunal Award was filed in Kilifi Land Case No. 20 of 2001 and was adopted as an order of the court. Order in Kilifi Land Case No. 20 of 2001 produced as Plaintiff Exhibit 7. Chrispin Sanga filed an appeal at the Provincial Land Appeals Committee Coast Appeal No. 185 of 2002 and the same was produced as Plaintiff Exhibit No. 8.
 27. The Appeal was dismissed and the Appeals Committee found that the land was the property of the late Dzombo Jumaa Mwakai and which after his death became property of his seven sons. The Appeals Committee ordered the revocation of the title deed and fresh ones issued. While the Appeal was pending, Patrick Kwesha Dzombo filed a case before Mbari Committee, Land case No. 2 of 2005, which decided every son of the deceased to return to their respective portions. He produced the proceedings and decision in Case No. 2 of 2005 as Plaintiff Exhibit 9. The 1st Defendant filed Judicial Review Misc. No. 26 of 2011. The High Court quashed the decision of the Provincial Land Appeals Committee but added that the interested party was at liberty to move the ELC for a determination of his interest, in the suit property. The Ruling was in Defendant's documents.



28. According to PW - 1, he then filed notice of intention to sue the Attorney General the same was produced as Plaintiff Exhibit 10. The reply by the Attorney General was dated 24th March, 2014 and produced as Plaintiff Exhibit 11. Sanga Dzombo unlawfully caused himself to be registered as owner of the suit property. Sanga Dzombo is the 5th child of Jumaa Mwakai out of his six (6) uncles only Mwafondo Dzombo was still alive. He lived on the suit land and even buried his late wife on the land. They were all living on the land with clear boundaries. They had planted various crops. The court had visited severally since 1966.
29. The witness prayed to the court to visit the site. He wanted the court to recall the title deed in name of the 1st Defendant and cancelled the same and issue new titles to the 7 families.
30. The witness was stood down and on 28th October, 2021 recalled for cross examination. He testified as follows:-

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

31. After the witness was reminded of his testimony on 27th January, 2020 he told the court that they were brothers i.e. step brothers – i.e. Juma Dzombo and Sanga Dzombo. Juma Dzombo died 2007. He was buried at his home – at Kandini. He was not buried at the suit property – Sanga Dzombo was buried on suit land. His father had a land dispute in the year 1966 i.e. Juma Dzombo in 1966. Sanga was defeated. He appealed still defeated. It was taken home. The land had been registered/adjudicated and had number.
32. Land No. 125 was adjudicated in 1973, his father was alive. The father for 1st Defendant was alive, his father Jumaa Dzombo lodged a complaint/objection – he was disabled on 27th November, 1978 on the land adjudication, when they went to the District Land Adjudication Tribunal there were already title deed in the names of Chrispin Sanga. Sanga stole land out of fraud. They had done many cases – almost four (4) courts Kaloleni, Kilifi.
33. PW - 1 confirmed that this was over 5 cases, he was in court on behalf of his father. The land was for Jumaa Dzombo. He died in the year 1948. He was following the rights of the family. These were cases for their fore fathers, his grandfathers. He asked the court for the land for his family.

C. Cross examination of PW - 1 by Mr. Makuto Advocate.

34. PW - 1 confirmed that he was 76 years old.

D. Re - examination of PW - 1 by Mr. Mutugi Advocate.

35. PW 1 reiterated that the land belonged before demarcation Dzombo Juma their grandfather. Dzombo Mwakai had over 6 males 1st Sanga was the 5th Defendant the 1st born was his father. Sanga Dzombo never involved others and that is why there was objection. It was filed by Nzuma Nzomo. With reference to the order of the Tribunal he was dissatisfied and filed/preferred the matter to the Provincial Appeal Tribunal on 23rd February, 2011. It decided that the title deed be revoked so that each family to maintain the parcel. Chrispin Sanga was dissatisfied and decided to file a Judicial Review and a decision was made by Justice Edward Muriithi 24th June, 2016 and the parties had the liberty to institute a case before the ELC and that was the case. When the officers of the Government came after an objection had been raised it was secretive. On the land the family of Sanga Dzombo and they were cultivating the land and had buried people there.
36. On 28th October, 2021, the Plaintiffs called PW - 2 who told the court that:-



A. Examination in chief of PW - 2 by Mr. Mutugi Advocate.

37. PW - 2 testified under oath and Kiswahili language. He identified himself as RABU PATRICK DZOMBO. He was a citizen of Kenya with all the particulars as contained in his national identity card. He was a teacher and the 2nd Plaintiff herein. He recorded statement on 26th June, 2014 and filed on 26th August, 2014 which he adopted as his evidence in chief. According to him the land was No. Kilifi/ Bandarasalama/125. The land belongs to their grandfather Dzombo Jumaa Mwakai. The Children – 7 Jumaa Dzombo, Mbura Dzombo, Sanga Dzombo, Patrick. He gave to his 7 children. He was from the family of Patrick Kwesha Dzombo. His Grandfather was polygamous with 3 wives – called:-
- i. Nyazuna.
 - ii. Munyazi Wanjegi Mathas.
 - iii. Ngazua Sanga – Chrispin Sagwa.
38. By then the land had been demarcated. It was demarcated in the year 1973. By then it was family land. He had 6 sons and one brother. There was one who was alive – Mwafondo Dzombo. He was about 95 years therefore could not come to court.
- a. Jumaa Dzombo – 2nd Household.
 - b. Sanga, Patrick and Mbura - 1st Household.
 - c. Mwanje – 2nd Household.
 - d. Mwafondo – 1st household.
 - e. Kiti Jumaa – brother to grandfather.
39. PW - 2 told the court that in the year 1972 when the demarcation came Sanga registered land in his name. They trusted him as we thought he was doing it on the family sake but things changed. When he died, people were now being evicted. Their fathers approached Crispin Sanga refused to hear. It was established that the land was not for one person, but for the entire family, Sanga had no right to evict others if one goes to the land one would see the Plantations and boundaries done by their fore fathers, to destroy.

B. Cross examination of PW - 2 by Mr. Mutubia Advocate.

40. PW - 2 confirmed that he was a teacher at Mazaoni Primary; they had land with a title in his father's name. They lived at the Mwaweche Shimba Hills at Mzambweni – Kwale County. He was born on 1962 at Kilifi. He was the 4th born in his family. The land was acquired by his father in the year 1966 and it was where they called home. When the demarcation was going on his father was not there. He was at Nairobi. He considered his home at Kwale. He had no home at Kilifi – Chonyi – in the year 1972. The house had been demolished.
41. The witness further stated that he was not there during the demarcation. Also Mr. Mwafondo did not have a home nor title. He was on a different parcel. It had a title deed but he needed to confirm from his sons. At the Kilifi Tribunal it was Patrick Dzombo but Mwafondo never sued Crispin Sanga. His name was not there but he was alive with partial hearing ability. It was common practice among the Mijikenda to host brothers and relatives on the land. From the record, he could not point on any place where the grandfather had given land.



42. Before, the year 1945, his grandfather distributed the land to the sons. He had never met his grandfather. The suit land was about 36 acres. He was not aware that he owned massive land. My grandfather bought the land. He never inherited the land. The land was registered in the name of Sanga Dzombo which by agreement between the brothers it was around 1973. The title deed was issued in 1982 – 10 years thereafter. He did not know why it took so long.

C. Cross examination of PW - 2 by Mr. Makuto Advocate.

43. The witness reiterated that he came from the Buta Clan, from Chonyi Kilifi. His grandfather never claimed any of the ancestral land.

D. Re - examination of PW - 2 by Mr. Mutugi Advocate.

44. PW - 2 confirmed as per Plaintiff Exhibit 8, was a site visit the Mwafondo's land – the distribution of the plantation so he had a contestation. It was nit true that his father had no interest in Kilifi. He had buildings at Kilifi which later on were demolished. His grandfather shared land with the sons. There were boundaries. There were many of his relatives/cousins on the land. The issue of dermacation and adjudication; he was not there he was very young. The registration of land in the name of Sanga to hold as a trust. There were no instruments on the holding the land in trust of the family.

45. The Plaintiffs marked their case closed through their legal counsel Mr. Mutugi on 28th October, 2021.

V. The 1st Defendant's case

46. The 1st Defendant entered appearance through a memorandum of appearance dated 21st October, 2014 and filed his statement of defence dated 12th November, 2014 where he averred that the 1st Defendant categorically denied that the land known as Kilifi/Bandarasalama/125 belonged to One Late Dzombo Jumaa Mwakai. The 1st Defendant denied that the Late JUMAA MWAKAI sub - divided the suit land amongst his Sons or Brothers as alleged under Paragraph 7 of the Plaint or at all as alleged or at all.

47. The alleged Sons or their families have lived on the parcels of land as alleged or at all. The 1st Defendant further denied that SANGA DZOMBO registered the land or obtained the title deed in respect of the suit land without the alleged families knowledge or approval or consent as alleged or at all and shall aver that the land in question solely belonged to and was exclusively owned and/or occupied by the Late SANGA DZOMBO and his Children.

48. The 1st Defendant denied the contents of paragraph 13 of the Plaint and shall aver that the Plaintiffs and their alleged families are trespassers who forcefully and illegally entered upon a portion of the suit land with the intention of unlawfully retaining the said portions of land to the detriment of the lawful owner. The 1st Defendant denied the allegations in paragraph 14 of the Plaint and specifically denied the allegations of irregularities or fraud set out thereunder. The Plaintiff's father never claimed the suit land or any part thereof during his lifetime and the Plaintiffs had no basis to claim for the suit land over Thirty 30 years after the death of the Late SANGA DZOMBO.

49. The Plaintiffs had no right to the Orders sought in Paragraph 15 and 16 of the Plaint and that the claim herein is against the Provisions of the Registered *Land Act* Cap. 300 (now repealed) and in particular the protection of the right to a first registration of title. According to the Plaintiffs, the registration of the Suit land is absolute and indefeasible and cannot be challenged in the manner sought by the Plaintiffs.



50. The 1st Defendant denied the creation or existence of any trust on the Land as alleged or at all. The present suit was fatally defective and is misconceived to the extent that it raises similar and/or the same issues that are before Court in Miscellaneous Application No. JR 26 of 2011 which is still pending before this Honourable Court. The The 1st Defendant further averred that the Suit herein is time barred by dint of the Provision of Section 22 of the *Limitation of Actions Act*. The 1st Defendant shall seek to raise a Preliminary Objection to the entire Suit and seek to have the same struck out on the as being time barred. The 1st Defendant denied receipt of any demand or notice to sue as alleged or at all.
51. On 22nd February, 2022 the 1st Defendant called his first witness who told the court that:-

A. Examination in Chief of DW - 1 of Mr. Mutubia Advocate.

52. DW – 1 testified under oath and in Swahili language. He identified himself as ALPHONCE KITTI SANGA. He was a citizen of Kenya with all the particulars as contained in his national identity card. He told the court that he was born on 1958; he produced his identification card as Defence exhibit 1. He lived in Chonyi and was 63 years off at the time of his testimony. The 1st Defendant was their eldest brother. After the death of their father Sanga Dzombo the case in court was bought by their father it was his witness statement was dated 8th May, 2015 filed on 15th May, 2013. He knew Mathias Dzombo Juma who was their grandfather and their grandfathers were brothers. Babu Patrick Dzomno was his cousin. Their father was called Patrick Kwesha Dzombo. The land belonged to his father and not theirs; his father gave their father cash to buy the land. In 1973 the Government officials came and they were issued with the title deed which was written in his names. He was told that his uncle was given money by his father.

B. Cross examination of DW - 1 by Mr. Mutugi Advocate.

53. DW - 1 told the court that his grandfather was Dzombo Juma Kithi; he did not know Jumaa Mwakai. His male children were four and not six. The first was called Mbura Dzombo, Sanga Dzombo, Patrick Kwesha and Mwafondo Dzombo. Its Mwafondo Dzombo who was still alive at the time of his testimony. He was aware of his Jumaa Dzombo, a cousin to his grandfather. He had a second wife through he had never met her, she had two male children one of them was Jumaa Dzombo and Mwaje Dzombo. His father was Sanga Dzombo. The eldest was Mbura Dzombo – Jumaa Dzombo was the eldest but he was – Jumaa Dzombo was the eldest but he was handcuffed / disabled person/ bodily challenged. The order was:-
- a. Jumaa.
 - b. Mbura.
 - c. Sanga.
 - d. Mwanje.
 - e. Patrick Kwesha.
 - f. Mwafondo.
 - g. Kiti Jumaa (brother).
54. DW - 1 confirmed that his father bought land. He was told, the land Kilifi/Bandaralalama/125 – measures 12.2HA (30.1 acres). He did not have a sale agreement, he had no evidence to this effect as he was young. It was because. It was his father who was employed. He was a tapper. It was not true that the others had no shares on the suit land. With reference to the statements of Chrispin Mwangolo



Sanga. He did not agree with the statement. The land dispute started from the year 1968. There had been several cases on the land and objections by Jumaa, Land Kilifi 2001 Exhibits No. 4 to 6 2/2005 Plaintiff Exhibit 7 and 8 and recently No. High Court Misc. JR 26/ 2011 by Judge Edward Mureithi. The witness agreed that the case had been in court for long.

55. He told the court that he tried suggesting mediation but in vain; the parties had rejected the proposal. These two families for Sanga and the son of Mbura, Mwafondo lived elsewhere. Chrispin was his brother but he did not live elsewhere while cultivating on the land. He had not read the court proceedings or any other disputes related. Some of the tribunals had had the occasion to visit the land. He did remember the writing by elders – Kilifi District Land Committee” and others decided the land belonged to the family. He held that they had no right over the land as the land belonged to his father.

C. Cross examination of DW - 1 by Ms. Kiti Advocate.

56. DW 1 confirmed that when he went to register he was alone. He did not know whether informed the officials he had brothers.

D. Re – Examination of DW - 1 by Mr. Mutubia Advocate.

57. DW - 1 reiterated that there was none of his fathers who were in occupation. When the land adjudication officials came and they found his father. The Plaintiffs were cousins to his father and his cousins; they therefore could not inherit the land for their grandfather. He had never seen any documents indicating that they left their fathers land.
58. On 22nd February, 2022 the Defendants called DW - 2 who told the court that:-

A. Examination in chief of DW - 2 by Mr. Mutubia Advocates.

59. The witness under oath and in Swahili. He was identified as MARTIN NYATI SANGA. He was a citizen of Kenya with all the particulars as contained in his national identity card. He told the court that he lived at Kikambala. He retired as a metrological officer. He knew Mathias Dzombo Jumaa was the son of his uncle therefore his cousin. (the son to Jumaa Kiti – father Kiti – Mathias Dzombo Jumaa is the son of Kiti). They were from Dzombo his father who was Sanga Dzombo. He signed the statement on 8th May, 2015 and filed in court on 15th May, 2015 the same he admitted as his evidence in chief. They were from Dzombo his father was Sanga Dzombo. He signed the statement on 8th May, 2015.
60. DW - 2 stated that they were still in this court today after many years from the time of his childhood he never saw Mr. Mathias. He was a stranger. As for Mr. Babu they moved to Shimba Hills and their father was buried there. None was buried in this land. His father was buried on the subject land.
61. The witness insisted that they did not have shares, it was only his father who fought for the land. In the years 1972 to 1973 they never came to be considered for the land adjudication. His father sent his brothers twice to come for he land but they never came back. They knew the truth Mathias father had a sister who was married before the land was bought when there was dispute they demanded for the money collected for dowry. His father paid back and they left the homestead.

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

62. DW - 2 confirmed that he presumed that Juma was the brother to his father. He had two wives known as Nyanzwa (4) male:-
- a. Mbura.
 - b. Sanga.



- c. Kwesha.
 - d. Mwafondo.
63. The second household (Mwachonga) had Chonga. The witness did not know Jumaa Dzombo brother called Kiti. He knew of Mwanje. The brother to his father was Mwafondo, he lived at Shimba Hills but now at home on another land for his father. His father had 6 parcels – 125 and 5 other parcels. None of them were registered on the land. All of them were registered in his father. He was Tapper and Administrator. He was an Administrator/ very influential.
64. DW - 2 told the court that he was born in 1959, he was 61 years. He was class 2 in 1972. His father would sent for his brother verbally. His father got his money to his grandfather to buy the land. He was young, he was informed. He bought land from Mr. Zaoro. He used his own finances and the dowry for the sister of Mathias to purchase the land. I know there has been many cases to do with land from 1966. His father acquired title in 1982 i.e. 14th December, 1982. There was no court order directing Sanga be given the land.
65. He told the court that his brother Crispin had stated in paragraph 2 and he agreed with his brother. There were boundaries on the land for each of them. They cultivated on the land. It was their father's when the Tribunal visited, he saw them at the District Officers's office. Crispin Mwangolo Sanga lived at Kololongolo. He lived at his place and had a claim on the land. But for them they were chased away. Because the dowry was returned then broke all the relationship between their families.

C. Re - examination of DW - 2 by Mr. Mutubia Advocate.

66. There was no court order authorizing his father's land; he had six parcels. From 125 they had no share. They went to Shimba Hills. They were called to participate in the land adjudication but they refused to come thus they missed out any allocation. If they came they would have been considered somewhere else.
67. On 27th June, 2022, the 1st Defendant called DW - 3 who told the court that:

A. Examination of chief of DW - 3 by Mutubia Advocate:-

68. DW – 3 testified under oath and in Swahili language. He identified himself as CRISPIN MWANGALO SANGA. He was a citizen of Kenya with all the particulars as contained in his national identity card. told the court that he he was born on 1st January, 1946 at the time of the testimony he was 76 years old and lived at Salama at Kilifi. He told the court that he was the 1st Defendant. The case was about land No. 125 (12.2HA). On 8th May, 2015, he recorded his statement which he adopted as his evidence in chief. There were trees planted by Sanga Dzombo Jumaa. His uncle had never lived on the land. The title was in the name of his father - Sanga Dzombo Jumaa. They had not yet completed the succession process. He produced the list of documents dated 8th May, 2015 with 6 documents as 1st Defendant's Exhibits 1 to 6 as his exhibits.
69. He told the court that on the award, for the Land Tribunal/ Elders Patrick K. Dzombo had filed the case. From the case Patrick won, but the witness appealed and he won the principal appeal, he further filed a case at the High Court where all the judgments by the tribunals were set aside. The land belonged to his father.



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

70. DW - 2 told the court that there were several cases in relation to the suit land. They were there even before the year 1966. The last decision was the judgment of High Court. With reference to the judgment by the High Court, the witness told the court that the court granted the prerogative writs of Certiorari, injunction and prohibition orders but not on the forcible evictions and the interest of land.
71. According to DW - 2 his father was directed to pay the expenses for the site visit – decision of 1966. In Case No. 23 of 1968 – Sanga Dzombo Jumaa – he was dissatisfied and the appeal was dismissed. Land Civil Case No. 2 of 2001 and its decision was given on 2nd July 2001; Land dispute Case No. 20 of 2001 and Land Case No. 2 of 2005 Kamati ya Mbari – Gandini and Appeal Case No. 185 of 2002 which decision was delivered on 23rd February, 2011 but he was not involved and he was never informed that the Court had visited the suit property. His grandfather was called Dzombo Jumaa Mwakai who had three wives one of who was called Luvuno Nyamai. From these wives he had 6 male children. He has explained the family tree.
72. According to the witness, his father bought the land from Thomas Mgoti but did not have proof of the same. His grandfather was a farmer and his father involved his grandfather on the purchase of the lands. All these cases by the tribunals was that the land belonged to his grandfather and hence the need for the distributions among all the heirs and/or beneficiaries, he was present when land adjudication in year 1972 took place. There were two objections by Chilanga Tinga and his father.
73. With reference to an objection dated 16th December, 1978, they were to be given 20% of the land. It was not to be equally distributed. He lived at Kolongolo. He just cultivate on the land at it was mine. Others were not cultivating. His father was a tapper (Mgema) wine maker. He had money to buy land. It was his father who died first before Patrick Dzombo. There were three who were buried on the suit land, but the others were buried elsewhere i.e. Mburu Dzombo, Mafondo Dzombo and Sanga Dzombo. His grandfather was buried there. His 1st grandmother, but the 2nd grandmother who he inherited from the brother was not buried there and the 3rd grandmother was buried there too.

C. Re - examination of DW - 2 by Mr. Mutubia Advocate

74. The witness confirmed to the court that the Plaintiff - 1st Plaintiff was the son of Kiti Jumaa and 2nd Plaintiff was the son of Patrick Kwesha. Mathias was the cousin of his father, Mathias Dzombo Jumaa who was the son of Kiti Jumaa. Kiti Jumaa was a brother to his grandfather. The wife of Kiti Jumaa was Nyanzwa who was inherited. Mathias Dzombo Jumaa was not the son of Patrick Dzombo but was a co-Administrator to the estate of Patrick Dzombo. The land was adjudicated in 1972, there were two objections – Chilanga Tinga and Mathias and Jumaa – in year 1978 to 1979. The 1st and 2nd Objection his father won and hence he was given a title deed 1982.
75. According to the witness from the beginning, the land belonged to his father. His grandfather had land elsewhere. His grandfather was just a guarantor.
76. On 27th June, 2022, the 1st Defendant through his counsel Mr. Mutubia marked his case closed.

VI. The 2nd and 3rd Defendant's case

77. The 2nd and 3rd Defendant's case was that the Defendants were strangers to the contents of paragraphs 6, 7, 8 and 10 of the Plaint. The 2nd and 3rd Defendants denied contents of paragraph 9 but aver that the said Dzombo Jumaa Mwakai did not possess a Title Deed to the parcel of Land No. Kilifi/



- Bandarasama/125. The 2nd and 3rd Defendants denied being aware of and or part of any or any fraudulent exercise as alleged under 14 of the Plaintiff.
78. Further and without prejudice to the foregoing, the 2nd and 3rd Defendants averred that they are not privy to the particulars of the relation to the dispute between the Plaintiff and the 1st Defendant and ought not be wrongly accused and that the claim against them is misconceived to that extent. Further, the 2nd and 3rd Defendants averred that if there was any fraudulent exercise that occurred, then they were not party to, neither had they the knowledge of the same.
79. According to the Defendants, the actions of the 2nd and 3rd Defendants in the claim was limited to registration and issuance of the title, which was done diligently, and according to lawful procedure. The 2nd and 3rd Defendants vehemently denied the contents of paragraph 11 of the plaintiff save for the fact that the said Sanga Dzombo Jumaa acquired a Title Deed in 1982 to the parcel of Land No. Kilifi/Bandarasama/125. The 2nd and 3rd Defendants denied contents of paragraph 12, 13,15,16,17, and 19 of the Plaintiff.
80. The 2nd and 3rd Defendants denied paragraph 17 of the Plaintiff and averred that the suit hereby was res judicata as there was a pending case being JR 26/2011 before the Judicial Review Division. The 2nd and 3rd Defendants intended to apply that the suit herein be struck off. The Defendants admitted to the jurisdiction of this Honourable Court.
81. The 2nd Defendant through the Learned counsel sought to produce the list of documents filed as 2nd Defendants exhibit 1 to 5 stating that they shall rely on the defence and list of documents as their evidence.

VII. Submissions

82. On 21st May, 2024, upon the closure of the Plaintiffs and Defendants case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 30th July, 2024.

VIII. Submissions

83. On 21st May, 2024 after the Plaintiffs and Defendants marked the close of this case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 30th July, 2024.

A. The Written Submissions by the Plaintiffs

84. The Plaintiffs through Law firm of Messrs. Munyithya, Mutugi, Umara & Muzna Co. Advocates, filed their written submissions dated 21st June, 2024. Mr. Mutugi Advocate submitted that the Plaintiffs' case was instituted vide a Plaintiff dated 26th June 2014 and filed in court on 7th July 2014. The Plaintiff is accompanied by the witness statements dated 26th June 2014 and List of documents dated 19th June 2014. The main prayers set out above.
85. The 1st Defendant filed his memorandum of appearance on 22nd October, 2014 and his defence on 11th November, 2014. He filed his witness statement and list of documents on 12th May, 2015. The 1st Defendant filed a further list of documents on 27th July, 2016. The 2nd and 3rd Defendants filed their Memorandum of Appearance through the Attorney General on 16th October, 2014. They however failed to file defence and documents even after being afforded time to do so. This led to the filing of chamber summons dated 9th February, 2016 seeking interlocutory Judgement against the 2nd and 3rd defendant. However, the chamber summons was abandoned upon the 2nd and 3rd Defendant filing



their defence on 30th May, 2016 thus paving the way for the eventual hearing of this suit. The 2nd and 3rd defendant also filed their list of documents on 5th July, 2017. The plaintiff's case was heard on 27th January, 2020 and 28th October, 2021. The defence case was heard on 22nd February, 2022, 27th June, 2022 and this marked the close of both the Plaintiff and Defendants' cases. The 2nd and 3rd Defendants had no witnesses. The court set a date for the site visit which was finally conducted on 8th March 2024.

86. According to the Learned Counsel, the suit land was known as Kilifi/ Bandarasalama/125. The Plaintiffs and the first defendant share a common grandfather by name Dzombo Jumaa Mwakai. The suit land belonged to the Plaintiffs' and the 1st Defendant's grandfather the late Dzombo Jumaa Mwakai who is the grandfather to the plaintiffs and 1st Defendant, Dzombo Jumaa Mwakai, his 6 sons and his younger brother Kiti Jumaa Mwakai lived on the suit land. The names of the sons are as follows:-
- a. Jumaa Dzombo – son.
 - b. Mbura Dzombo – son.
 - c. Sanga Dzombo - son.
 - d. Mwaje Dzombo – son.
 - e. Patrick Dzombo - son.
 - f. Mwafondo Dzombo – son.
 - g. Kiti Jumaa Mwakai-brother to Dzombo Jumaa Mwakai
87. The said Dzombo Jumaa Mwakai bought the land before land adjudication and demarcation started at Banadarasalama area. He lived on the land with his 3 wives, his 6 sons and his brother Kiti Jumaa Mwakai. The said Dzombo Jumaa Mwakai subdivided the land among his six sons and his brother. By the time of land adjudication and demarcation in the year 1983, the said Dzombo Jumaa Mwakai was already deceased.
88. When land adjudication started the 1st Defendant's father Sanga Dzombo who was the 3rd born applied to be registered as the sole owner without the knowledge of the other brothers. This led to the filing of several cases which involved the land before and after this process of adjudication as follows;
- a. Kaloleni Court Land Case No. 8 of 1966 - Jumaa Dzombo – Versus - Sanga Dzombo.
 - b. Kilifi Resident Magistrate Civil Appeal No. 23 of 1968 - Sanga Dzombo – Versus - Jumaa Dzombo.
 - c. Objection Proceedings in the year 1978.
 - d. Kilifi Land Dispute Tribunal Case No 20 of 2001 - Patrick Kwesha Dzombo – Versus - Crispin Mwangolo Sanga.
 - e. SRMCC Land Dispute Case No. 20 of 2001 Adoption of the Award.
 - f. Mbari ya Abuta Case No. 2 of 2005 - Patrick Kwesha Dzombo vs Crispin Mwangolo Sanga.
 - g. Provincial Land Appeals Case No. 185 of 2002 Crispin Mwangolo Sanga – Versus - Patrick Kwesha Dzombo.
 - h. High court Misc. civil appl JR no 26 of 2011.
89. The Learned Counsel submitted that the 1st Plaintiff Mathias Dzombo Jumaa in his testimony in court on 27th January, 2021 adopted his written statement and testified as follows. He stated that their



grandfather Dzombo Jumaa Mwakai owned the suit land which measures approximately 30 acres. He stated that his great grandfather bought the land at one hundred rupees from one Thomas Ngoti. He further stated that:-

- a. Before his death Dzombo Jumaa Mwakai had sub divided his and amongst all his sons and his brother.
- b. At the time of his death, Dzombo Jumaa Mwakai did not possess a title to the land since land demarcation and adjudication had not yet commenced.
- c. Dzombo Jumaa Mwakai sub-divided the suit land Kilifi/Bandarasalama/125 amongst his sons and his younger brother and had all the portions and boundaries marked.
- d. In 1966, Sanga Dzombo demanded that the 1st plaintiff's father (Jumaa Dzombo) and his brother (Mwanje Dzombo) vacate from the suit land.
- e. Dzombo Jumaa took the dispute to the chief who directed him to file the case at Kaloleni Court, and which led to the filing of Kaloleni Case No.08 of 1966 against Sanga Dzombo. The case was heard and ruled in favor of Dzombo Jumaa. The proceedings and the judgement of the court were produced as Plaintiff Exhibit No. 2 & 3 respectively. The proceedings and the judgement shows that the land belonged to Juma Dzombo Mwakai. Sanga Dzombo appealed vide Resident Magistrate Court Civil Appeal No 23 of 1968. The judgement of this appeal was produced as P.EXH,4. This judgement confirmed that the contestants were brothers fighting over a parcel of land. The court heard the appeal and dismissed the same and upheld the judgement of the court below. This seemed to have cooled the parties a bit until when the process of land adjudication and demarcation commenced.
- f. In the year 1972 when land demarcation and adjudication commenced, Sanga Dzombo Jumaa (3rd son) secretly registered the suit land in his name.
- g. The Plaintiffs in their respective statements both stated that, an objection letter dated 16th December 1978 was filed at the land adjudication department against the registration before Kilifi land adjudication panel. This letter was produced as Plaintiff Exhibit Number 5. This objection was filed by Jumaa Dzombo the father of the 1st Plaintiff Mathias Jumaa Dzombo. The panel ruled in favour of Sanga Dzombo the 1st Defendant's father and the land was registered in his name and title issued in his name in 1982. However, it was of note that he said Sanga Dzombo was so registered as a trustee for himself and the other brothers. This information is clearly captured in the proceedings in the subsequent case being Kilifi District Land Civil Case no.2 of 2001.
- h. The Plaintiffs stated that in the year 2000, the twelve sons of Sanga Dzombo started causing violence upon the other six families. They claimed that the land was registered in their father's name and therefore they were the sole inheritors of the suit land.
- i. The 2nd Plaintiff's father Patrick Kwesha Dzombo, (the father of the 2nd Plaintiff Rabu Patrick Dzombo) filed Kilifi District Land Civil Case no.2 of 2001(see Plaintiff Exhibit 6). The case was heard and there was a site visit by the court to establish the occupation by each of the brother's family. The testimony of Crispin Mwangolo Sanga at page 5 of the proceedings is very clear that all the brothers occupied portions of the land and all planted their coconut trees for their use. He says that 3 of the brothers left to buy land at Shimba Hills. However, this cannot be said to mean that they had ceded their shares of their inheritance to him or to any other person. His evidence that his father struggled alone doing the cases does not justify the claim



for ownership. He clearly admits when being cross examined by the tribunal members at page 8 answer 2 that at the time he came of age each family line member was cultivating in his own parcel from the big land. He admitted they all planted coconut trees on their portions. This is irrefutable evidence. The panel of elders ruled in his favor and the other brothers and ordered that Crispin Mwangolo Sanga to vacate the portions belonging to the other family members and hand them over to them. The verdict of the panel of elders is in page 15 of the proceeding P.EXH.6. The panel of elders also held that the title deed be subdivided and each family to have separate title. This has never been done to date due to cases. This was adopted by the SRMCC court case no. 20 OF 2001 by the Honourable P.M. Mutani SRM Kilifi. See Plaintiff Exhibit 7.

- j. The defendant being dissatisfied filed an appeal to the Provincial Land Appeals committee being appeal case numbers 185 of 2002. This appeal was heard and again the appeal tribunal ruled in favour of the brothers and directed that the land be subdivided and separate titles be issued to each family. See Plaintiff Exhibit No. 8 at page 4 thereof.
- k. The Defendant thereafter filed the Judicial Review Case Number 26 of 2011 challenging the pronouncement by the Appeal Tribunal that the title deed should be sub divided and each family be given a separate title deed. The court Justice Edward MJ .Muriithi in his decision appearing in page 12 of the Judgement stated as follows:-

“accordingly,from the reasons set out above, the notice of motion dated 14/3/2011 is granted as prayed with costs to the ex parte applicant. “for avoidance of doubt, as there was indication-in the decision of the provincial appeals committee upon site visit-of occupation of portions of the parcel of land by the interested parties, this Judgement does not authorize the forcible eviction or removal of any person who may be in occupation of the parcel of land by virtue of the orders of the tribunal or the appeals committee or otherwise, and the ex parte applicant must bring appropriate proceedings in that behalf with notice to any such persons.” the interested party is, of course, at liberty to move the environment and land court for a determination of his interest, if any, in the suit property”.

- 90. According to the Learned Counsel, the Plaintiffs’ case was first heard on 27th January 2020. The 1st Plaintiff testified in court in support of his case. He adopted and produced his witness statement dated 26th June 2014 and the List of documents dated 19th June 2014 as Plaintiff Exhibit No. 1 to 11. He was cross - examined by the 1st defendant’s advocate and re-examined by his advocate. A further hearing was held on 28th October 2021 where 1st Plaintiff was further cross examined by the 1st Defendant’s advocate. The 2nd Plaintiff Rabu Patrick Kwesha, son to Patrick Kwesha Dzombo also testified. He stated that his grandfather distributed the land before he died in the year 1948. He also confirmed that the land belonged to his grandfather and not the 1st Defendant’s father as claimed. This marked the close of Plaintiff’s case.
- 91. The Learned Counsel submitted that the Defendant’s case commenced on 22nd February 2022 when DW - 1, Alphonse Kiti Sanga, the 1st Defendant’s brother was called to testify. He stated that the 1st Defendant is his brother. He said that the 1st Plaintiff and the 2nd Plaintiff were his cousins. He adopted his statement dated 8th May 2015 and filed on 10th May 2015. He stated that the suit land was his father’s, he also said that his father gave the 2nd Plaintiff’s father money to buy the land. However, he did not produce evidence to prove. He confirmed that the land was adjudicated in the year 1972 or thereabout and title deed was registered in his father’s name because his father’s brothers refused to come during the adjudication process. The 2nd defence witness Martin Sanga Nyati testified the same day. He stated that the 1st Plaintiff was his step brother and that the 2nd Plaintiff was his cousin.



- He adopted his statement dated 8th May, 2015. He said that the 1st Plaintiff has never come for any ceremony at the land and that the 2nd Plaintiff lives at Shimba Hills. He said that the Plaintiff's fathers never came during land adjudication and therefore do not deserve any land. In being cross - examined, he admitted that he did not see a sale agreement over the suit land. He confirmed that the 1st Plaintiff's father farmed on the suit land.
92. The 3rd defence witness, Crispin Mwangolo Sanga the 1st Defendant in this case testified on 27th June 2022. He adopted on his witness statement dated 8th May 2015. He produced his list of documents dated 8th May, 2015 as Defendant Exhibit 1 to 6 to be relied upon. He stated that the Plaintiff's fathers did not come for adjudication in year 1973 and therefore did not deserve any land. However, never proved that the brothers were notified of an ongoing adjudication. He agreed that the land belongs to the family and should be distributed.
93. The 2nd and 3rd Defendants both denied being aware of the dispute between the Plaintiffs and the 1st Defendants and any fraudulent exercise by the 1st Defendant neither were they a party to the same. This court conducted a site visit on 7th March, 2024 in order to see for itself the situation on the ground.
94. The Learned Counsel relied on the following issued for determination: -
- a. Whether the suit land Kilifi/Bandarasalama/125 belong to the family of Dzombo Jumaa Mwakai and Sanga Dzombo (deceased) and Crispin Mwangolo Sanga hold the Tittle Deed No Kilifi/Bandarasalama/125 for himself and the entire familyof Dzombo Jumaa Mwakai
 - b. Whether this court has discretion to direct the 2nd and 3rd defendants to recall the Tittle Deed for land No Kilifi/Bandarasalama/125 and cancel the same.
 - c. Whether the court has the discretion to give directions that the 2nd and 3rd defendants issue new Tittle deeds to the seven families of Dzombo Jumaa Mwakai
95. The Learned Counsel submitted that the evidence brought before this court clearly shows that the suit land Kilifi/Bandarasalama/125 originally belonged to the patriarch of the family being Dzombo Jumaa Mwakai. This had not been disputed by any party whatsoever. The Defendant tried to bring a theory that his father is the one who gave money to his grandfather to purchase the land. There is no evidence to prove this whatsoever. The provision Sections 107 and 108 of the *Evidence Act*, Cap. 80 is clear that he who asserts or pleads must support the same by way of evidence. This was also made clear in the case of: "Grace Nzula Mutunga – Versus - Joyce Wanza Musila [2017] eKLR" where the Court cited with approval the case of "Janet Kaphiphe Ouma & Another – Versus - Marie Stopes International (Kenya)Kisumu HCCC No. 68 of 2007".
96. As at the time when the patriarch was alive, he subdivided the land into portions each for the sons and his younger brother. These people resided together in harmony until his demise. Upon his demise came the process of land adjudication. As it were due to the enlargement of the family, so of the brother had moved out to fend form their extended families hence buying land elsewhere. Therefore, as the process of adjudication was ongoing, its only normal to say that some of the sons were not physically at home.
97. The father of the 1st Defendant took advantage of their absence to register himself as the owner. The brothers continued tiling their land. When the sons of Sanga Dzombo came of age they tried to assert themselves on the land claiming sole ownership and therefore trying to evict others. This inevitably led to various cases filed against Sanga Dzombo and later against his son Crispin Mwangolo Sanga. The various tribunals and court decisions have consistently held that the land is family land and therefore the registration of Sanga Dzombo was as a trustee to all the brothers' families and that the title deed should be sub divided and each family be given a separate title.



98. The Court in case of:- “Gathua – Versus - Wainaina (Environment & Land Case E011 of 2023) [2024]KEELC 4082 (KLR) (9 May 2024) (Judgment)” relied authoritatively on the Supreme Court decision, where the issue of Customary trust was well explained in Supreme Court in the case of “Isack Kieba M’inanga – Versus - Isaaya Theuri M’Lintari & another [2018]eKLR”, held as follows:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land.

Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group

99. All the tribunals made site visits which clearly confirmed that the land was cultivated by the seven brothers' families and each family has coconut trees on the land. There was clear evidence of familial graves which clearly confirms occupation by the various brothers' families. The tribunals were able to reach a decision that the land is family land and that each brother's families was entitled to their shares. Crispin Mwangolo Sanga, the 1st Defendant, confirmed that the brothers were cultivating the land and had actually planted coconut trees on their respective portion.

100. Crispin Mwangolo Sanga, the 1st Defendant herein, gravamen was that since his father was the one struggling with cases as and when the same were filed by various protagonists, then he alone deserved the land. This was no a sound argument for a party to use to deny others their inheritance. His other argument is that the brothers who were away during the adjudication process did not come and thus they do not deserve the land. This was a spurious argument to use to deny a party his right to inheritance.

101. It was humble submission that the registration of Sanga Dzombo as the owner of the land was so done in order to safeguard the interest of the entire family. This therefore means that a trust was created and by the conduct of Sanga Dzombo himself in allowing the brothers' families to continue using the land is a clear indication that he considered himself and rightly so that he was a trustee. The chaos only came about after the demise of Sanga Dzombo and his sons thereof coming of age.

102. The Learned Counsel relied on the case of “Peter Ndungu Njenga – Versus - Sophia Watiri Ndungu [2000] eKLR”, the Court held: -

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily.



The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

103. The Learned Counsel took reliance on the decisions rendered by the tribunals which heard this dispute earlier in that the tribunals rightly held that the land was family land. The tribunals had a chance to visit the land at that early stage before anyone had the presence of mind to try to obliterate evidence. The evidence was seen pointing to an attempt by the Defendants trying to evict the Plaintiffs from the land in order to give credence to their claim of sole ownership. Justice Edward Muriithi was alive to this possibility when he ordered that no eviction should be done without giving notice and filing proceedings to that effect. Further, the Honourable Judge went ahead to let parties file suit in the Environment and Land Court to stake their claim to the land.
104. They therefore submitted the land is family land and that the Sanga family hold the same in trust for themselves and the entire wide family of Dzombo Jumaa Mwakai.
105. On whether this court had discretion to direct the 2nd and 3rd Defendants to recall the Title Deed for land No Kilifi/Bandaralalama/125 and cancel the same, the Learned Counsel submitted that this Court was empowered by the law to direct and order the Land Registrar Kilifi and the Attorney General to call for the title deed for Kilifi/Bandaralalama/125, have the same cancelled and order for the subdivision of the land so that each of the family members to get their rightful share.
106. The provision of Section 28 of the [Land Registration Act](#), 2012 provided for overriding interests. The section provided that;
- “unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may be for the time being subsist and affect the same, without their being noted on the register –
- a) Spousal rights over matrimonial property;
 - b) Trusts including customary trusts;
 - c) ...
107. The Learned Counsel submitted that having demonstrated that the land in issue was family land and held by one of the brothers as a trustee to the others, they submitted that it was only fair that this Honourable Court orders that the same be sub - divided in order for the land to be given to each respective family. The provision of Section 80 of the [Land Registration Act](#) empowered this court to rectify any registration which was done by fraud or mistake. It read:-
- “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.”
108. The Court in Kisumu of case:- “Misc No. 80 of 2008 - Republic – Versus - Kisumu District Lands Officer & another [2010] eKLR” held that: -
- “it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration.”



109. Similarly, in the case:- “Court of Appeal in Mombasa Appeal No. 98 of 2016-Super Nova Properties Limited & another – Versus - District Land Registrar Mombasa & 2 others: Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR” agreed with the trial Court that

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law.”

110. The Learned Counsel asserted that the Plaintiffs had produced cogent, coherent and believable evidence to warrant Judgement being issued in their favour. The Plaintiff’s witnesses were truthful and unshaken. To the contrary the evidence by the defence was wanting in that not a single prove of their allegations was availed to court. Further, even during the site visit, it was clear that all members of both side have bought land elsewhere and also some reside away from the land. Therefore, the fact that some members of the Plaintiff have bought land elsewhere should not be used as a reason to deny them their rightful inheritance, whereas the Defendants are allowed to have and utilise their shares.

111. On whether the Court had the discretion to give directions that the 2nd and 3rd Defendants issued new Title deeds to the seven families of Dzombo Jumaa Mwakai, the Learned Counsel submitted that this Court was well empowered to exercise discretion to order the Land Registrar and the Attorney General to issue new title deeds to the seven families of Dzombo Jumaa Mwakai. The evidence brought to this Honourable Court clearly has proved that the land was family land and that Sanga Dzombo held the title as a trustee for the entire family. In order that each family accesses their share of the land, then the title has to be cancelled and fresh titles issues in the names of the various families.

112. The Court visited the locus in quo on the 8th March, 2024 in order to have a clear picture of the subject matter. The court in its report has rightly observed that the participants in this case are all members of the same family. Further, the court was able to observe that the said family members were either residing therein or had previously worked the land therefore confirming that they had entitlement to the land. The court was also able to observe the family graveyard where the deceased members of the family were laid to rest. This graveyard is used by all the family members irrespective of the side in which they fall in this suit. The court saw the patriarch's grave which confirmed the Plaintiff’s assertion that the land is family land.

113. The Learned Counsel averred the Purpose of a site visit was majorly to receive evidence that would assist the court to come to a just decision as was held in the case of “Beatrice Ngonyo Ndungu & another – Versus - Samuel K. Kanyoro & 2 others [2017] eKLR” where the court held as follows: -

“If the court visits a site, it can only befor purposes of receiving evidence which will assist it make a just decision...”

114. The Learned Counsel opined that the provision of Section 27 of the *Civil Procedure Act*, Cap. 21 requires that costs to follow event but the Court have the discretion to rule otherwise. The Court in Machakos “ELC Pet No.6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY Ltd 1957 (4) SA 225 (SR) at 227” held: -

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



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

115. It was clear that due to the disturbance of the Defendants, the plaintiffs have had to claim their rightful shares in Court and thus incurred costs. This Court should therefore award costs to the plaintiffs.
116. In conclusion, the Learned Counsel submitted that the Plaintiffs herein had proved their case to the required standard of balance of probabilities. The Court should therefore enter Judgement for the Plaintiff against the Defendants herein Jointly and Severally as prayed in the Plaint in terms of Prayers No.(a), (b), (c) & (d).

B. The Written Submissions by the 1st Defendant

117. The 1st Defendant through the firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed their submissions dated 14th August, 2024. Mr. Mutubia Advocate commenced the submissions by stating that the Plaintiffs failed to prove their case against the 1st Defendant on a balance of probability and as such it ought to be dismissed. The Plaintiffs sued the 1st Defendant in his capacity as the Administrator of the Estate of the Late SANGA DZOMBO and the registered owner of all that piece or parcel of land known as KILIFI/BANDARASALAMA/125 ('the suit property') and sought orders that the land belongs to the family of the late Dzombo Jumaa Mwakai who allegedly died in the year 1948.
118. The Plaintiffs in Paragraph 1 of the Plaint dated 26th June, 2014 described themselves as having brought the suit on their own behalf and behalf of the Estate of the Late PATRICK KWESHA DZOMBO who died on 26th November, 2008. They relied on the limited Grant of Letters of Administration Ad Colligenda Bona issued on 28th November, 2012.
119. The said Grant issued on 28th November, 2012 was limited to filing of suit while the Plaintiffs sought to have the Title to the suit property cancelled and new Titles issued without filing or obtaining a full Grant. It was trite that a limited grant for purposes of filing suit cannot form the basis for prayers for cancellation of Title in the absence of a full Grant. Further, a Grant issued under the provision Section 67 (1) of the Succession Act could only be used to file suit within Six (6) Months of its issuance and where the suit was not filed within Six (6) months such a Grant expired and could not form the basis of a lawful or valid suit.
120. On the background, the 1st Defendant was the son to Sanga Dzombo Jumaa (deceased) and the administrator of the estate of the deceased by the dint of which he was the registered owner of the suit property on behalf of the estate. The 1st Plaintiff was the son to JUMAA KITI who was a Brother to SANGA DZOMBO JUMAA while the 2nd Plaintiff is the son to PATRICK KWESHA DZOMBO who was also a brother to SANGA DZOMBO JUMAA. In essence the Plaintiffs are first cousins to the 1st Defendant by dint of the fact that their fathers were Brother's and Sons of the Late DZOMBO SANGA JUMAA (Grandfather).
121. The Plaintiffs allegedly obtained a Grant of Letters of Administration to the Estate of the Late PATRICK KWESHA DZOMBO who was not the owner of the suit property but was a son to DZOMBO JUMAA. The Plaintiffs' allegation and basis of their suit was that the suit property belonged to Dzombo Jumaa Mwakai who died in the year 1948 and that the Plaintiffs were entitled to inherit the land in their capacity as Grand Children. No Grant of Representation was produced before Court to allow the Plaintiffs to litigate or claim any property belonging to Dzombo Jumaa Mwakai, which property the Plaintiffs fathers who were the Heirs never claimed or sought to occupy. In the absence of any evidence that the Plaintiffs' fathers who were the direct Heirs and Beneficiaries to the



- Estate of the Late Dzombo Jumaa Mwakai, had any claim over the suit land, the Plaintiffs had no right to claim the suit property as part of their inheritance.
122. It was the Plaintiffs' claim that at the time of his death, Dzombo Jumaa Mwakai had no Title to the suit property and no demarcation or registration had been done. Whereas the Late Dzombo Jumaa Mwakai was said to have died in year 1948, adjudication and demarcation of the suit property was said to have commenced in the year 1972 and the Plaintiffs failed to prove or establish that the unregistered land allegedly owned by their Grandfather is the same as the suit property which was demarcated and registered in the year 1982, 34 years after the death of DZOMBO JUMAA MWAKAL.
 123. It was also not disputed that the registration of the title in the name of the 1st Defendant was a first registration emanating from an adjudication process and that no or no valid appeal was ever filed against the adjudication process and decision to register the land in the name of the late SANGA DZOMBO in year 1982 and the Plaintiffs attempt to challenge the said registration through this suit which was filed 32 years after issuance of the title deed is an unlawful and irregular attempt to circumvent the mandatory provisions of Sections 29 and 30 of the Land Adjudication Act Cap 284 of the laws of Kenya on the question of finality of the Adjudication Register and the decision of the Adjudication Officer on the issues of ownership of such land.
 124. The Plaintiffs' suit therefore was an attempt to appeal against the decision of the Adjudication officer through the back door and the allegation that the land was registered in the name of SANGA DZOMBO in trust for the other children of Dzombo Jumaa Mwakai was baseless and was not presented to neither was it noted by the Adjudication officer during the Adjudication officer during the adjudication process.
 125. The Plaintiffs case was that they called PW - 1 MATHIAS DZOMBO JUMAA who testified on 27th January, 2020 and adopted his witness statement dated 26th June, 2014 in which he alleged that the suit land belonged to his Grandfather who had Six (6) Sons. He alleged that his Grandfather bought the land for 100 Rupees but no Agreement was produced to support the allegation. He further stated that his Grandfather subdivided the Land among his said sons and that he (Grandfather) died in 1948. He confirmed that the land was adjudicated sometime in years 1972 - 1973 and that his father (PATRICK KWESHA DZOMBO) and his brothers were away in Shimba Hills in Kwale they were allocated parcels of land and settled there in the late sixties and early 1990's.
 126. He alleged that while in Kwale they were not aware of the adjudication process over the suit land and that adjudication by the Department of land Adjudication was done 'secretly', an allegation that cannot be taken serious since the Plaintiffs later alleged that they challenged the Adjudication Officer's decision after adjudication.
 127. PW - 1 who stated that he was born in year 1945 alleged that his Uncle SANGA JUMAA chased away his brothers from the land on an unknown date and that there was a case in year 1966 which was won by his father (PATRICK KWESHA DZOMBO) which was set aside by the High Court in Mombasa High Court Misc. Application No. 26 of 2011 on 23rd February, 2011. PW - 1 testified that on 16th December, 1978 they filed an objection against the Adjudication Officer's decision but were advised to go to court which they refused. In year 2001, the late PATRICK KWESHA DZOMBO filed another case in Kilifi which was quashed by the High Court forcing the Plaintiffs to file the present case seeking cancellation of the title deed and subdivision of the land.
 128. In Cross-Examination PW - 1 confirmed that his father JUMA DZOMBO died in year 1987 and was buried on his land in Kwale while SANGA DZOMBO died in year 1983 and was buried on the suit land. He further alleged that there were objection proceedings lodged against the decision by the Adjudication officer where after he registered the land in the name of SANGA DZOMBO JUMAA.



129. PW - 2 MBARU PATICK DZOMBO testified on 28th October, 2021 and adopted his statement dated 26th August, 2014 and stated that he is the son of PATRICK KWESHA. He stated that he stays in his father's land in Shimba Hills and that his father acquired the land in 1966. PW - 2 stated that he was not present when adjudication was carried out on the suit property and there was nothing in writing to confirm that the land was registered in the name of SANGA DZOMBO in trust for his alleged Brothers. PW - 2 closed the Plaintiffs' case by alleging that there was a verbal agreement by members of the family without providing any particulars.
130. The 1st Defendant's case according to the Learned Counsel submitted that he opened his Defence on 22nd February, 2022 and called DW-1 ALPHONCE KITI SANGA who adopted his witness statement dated 8th May, 2015. He stated that his Grandfather DZOMBO JUMAA had 4 sons among them MWAFONDO DZOMBO who was still alive and is not a party to these proceedings. He stated that his father was a palm wine tapper who got money from his business and purchased the land and that the land was not ancestral land as alleged by the Plaintiffs.
131. DW - 2 MARTIN NYATI SANGA adopted his witness statement and highlighted that his father purchased the land and his Brothers (Uncles to DW - 2) moved from their ancestral land nearby and acquired their own parcels in Kwale and never challenged his father's ownership, registration or occupation of the suit land. DW - 3 CHRISPIN MWONGOLO SANGA testified on 27th June, 2022 that his father purchased the land from THOMAS MGODTI and that SANGA DZOMBO only involved his father out of respect and that PATRICK KWESHA was not buried on the suit land. The 1st Defendant closed his Defence on 27th June, 2022 which allowed the 2nd and 3rd Defendant's to close their respective cases without calling any witnesses.
132. On the visit at Locus in quo, the Learned Counsel submitted that the Honourable Court conducted a site visit on the suit property on 8th March, 2024 in the company of the parties and their respective Advocates on record and after touring the land and observing the residents, activities and features on the land prepared its report dated 24th May, 2024 where it noted as follows:-
133. The suit land is 30 Acres in size Mr. Pancras Deche and Mbaru Dickson did not live on the land Cosmos Dzombo lives in Shimba Hills Alphonce Sanga, Simon Kiti Mbura and Martin Sanga live on the land. Mathias Dzombo and Chrispus Dzombo live in the neighbourhood and not on the land. There was a well-constructed and existing church known as 'Jerusalem Healing Church' which was built by the Dzombo Family. There was minimal subsistence farming on the land, which had maize, coconut mango, trees, bananas and cashew nuts. No serious or substantive farming on the land. There was a cowshed and 3 heads of cattle. There was a family graveyard/cemetery with 21 visible graves allegedly for the Mwofondo Family which were not labelled.
134. On the analysis, the Learned Counsel averred that the suit was filed by the Plaintiffs on behalf of the Estate of PATRICK KWESHA DZOMBO who never resided on the land and none of his children were found on the land during the site visit by the Court. It therefore followed that the Plaintiffs could only claim for what was ascertained as belonging to the Estate of the Late PATRICK KWESHA DZOMBO at the time of his death. The suit land was alleged to have belonged to the Late Dzombo Jumaa Mwakai who was the father to PATRICK KWESHA DZOMBO and as such the Plaintiffs had no locus standi or the capacity to purport to litigate or claim for or on behalf of the Estate of the Dzombo Jumaa Mwakai who was, according to the Plaintiffs, the owner of the suit land
135. On the limitation of action, the Learned Counsel submitted that the Plaintiffs claim that the 1st Defendant's Father SANGA DZOMBO fraudulently presented his name as the owner of the land in year 1972 and was issued with the Title Deed in year 1982, which title the Plaintiffs seek to have



declared as null and void. No evidence of fraud was particularly pleaded and/or specifically proven to warrant this court's interference with a first registration of title. Such allegations were supposed to have formed the basis of an appeal against the adjudication officer's decision as provided by the law and the Plaintiffs and their uncles or fathers lost the opportunity to challenge the registration of the land in the name of SANGA DZOMBO when they failed to lodge any or any valid Appeal against the publication of the Register within the Sixty (60) Days period. Any Appeal against such registration would include a claim for fraud thereby effectively ousting this Court's jurisdiction from purporting to investigate the propriety of the Adjudication register, 40 years after the publication of the same.

136. The decision by the adjudication officer having been made in year 1973 and the title having been issued in 1982, the Plaintiffs are time barred from filing any such suit since any cause of action arising therefrom was extinguished Twelve (12) years after 1973 or even Twelve (12) years after 1982 and the plaint herein having been filed in 2014 is fatally defective and ought to be struck out in limine. Section 7 of the *Limitation of Actions Act*, Cap. 22 provides as follows: -

an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims to that person

137. Under the provision of Section 9 (2) of the Act: -

“where a person brings an action to recover land of a deceased person whether under will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of the death.”

138. On the Plaintiffs' submissions, the Learned Counsel contend that the Plaintiffs alleged that their Grandfather Dzombo Jumaa Mwakai had Six (6) Sons and that he (DZOMBO JUMAA) bought the land and subdivided it among his Six (6) Sons. No such evidence was led during the trial to support this submission. The Plaintiffs submitted and admitted that there were numerous other cases regarding the dispute which confirms that the suit herein was Res -Judicata and ought to be struck out in limine for being a gross abuse of the court process.

139. The Plaintiffs further submitted that on 16th December 1978 there was an appeal by way of a letter against the Adjudication Officer's decision, which objection was dismissed and the matter concluded. In 2000, which was over 22 years after the said decision, the Plaintiffs filed another case before the Resident Magistrates Court seeking to challenge the 1st Defendant's Title which case and the resultant decision were struck out by the High Court in Mombasa in Misc. Application No. 26 of 2001 (J.R.) and the proceedings therein cannot therefore be used in support of the Plaintiff's case herein.

140. During the site visit by the Court there was no iota of evidence on the ground to suggest that the land was ever subdivided as submitted by the Plaintiffs. There was no evidence to enable the Court make any inference or presumption of the existence of a customary Trust particularly where the Plaintiffs failed to prove that the land was purchased or acquired by their Grandfather. The evidence that none of the Grandfather's children other than SANGA DZOMBO lived on the land particularly during adjudication clearly demonstrates that the land was not and was never customary or clan land as alleged. The Plaintiffs evidence and submissions are contradictory since they allege that the land was clan land but later state that the same was bought or purchased by their Grandfather.

141. The 1st Defendant concurred with the Judgment in the case of:- “Peter Ndungu Njenga – Versus – Sophia Watin Ndungu (2000) eKLR”, as sought to be received on by the Plaintiffs to the effect that the



intention of the parties to create a trust must be clearly determined before a trust was implied. None of the Plaintiffs and/or their witnesses were present or witnessed any discussions or agreement that would lead to the presumption of trust considering that SANGA DZOMBO died in 1982 while Dzombo Jumaa Mwakai died in 1948 before any of the Plaintiffs were born.

142. The question of cancellation of a duly registered title was not a matter of discretion and a party seeking such orders must strictly comply with the threshold set out under Section 28 of the Registered [Land Act](#) Cap 300 (now repealed) which was reflected in section 24, 25 and 26 of the [Land Registration Act](#) 2012 on the question of indefeasibility of title and sanctity of our registration process.
143. The Customary rights over any land must be proved and noted at the time of registration, which should have been done during adjudication. The Court have no powers to jurisdiction to impute or presume customary Trust over land that was registered upon adjudication, particularly where such alleged customary rights were not demonstrated during adjudication and no proof was presented that the land was clan land.
144. The test for rectification of the register by the Court under Section 79 of the [Land Registration Act](#) 2012 was based on the existence of the following matters:-
 - a. Rectification of formal errors:
 - b. Where there is consent from registered owner
 - c. Correction of dimension subject to notice in writing to all persons with interest
 - d. Fraud
 - e. Change of name
145. The Plaintiffs failed to establish or prove the existence of any of the above conditions or factors. The Learned Counsel relied on the following authorities. In the case:- “Obiero - Versus- Obiero (1972) EA 227” and “Esiroyo -Versus- Esiroyo (1973) EA 388” it was held that rights under customary law are not overriding interests. In case of “Kanyi – Versus – Muthiora (1984) KLR 712” and “Mutsonya – Versus – Nyati(1984) KLR 425”, it was held that equitable doctrines of implied, constructive and resulting trust is applicable to registered land under common law of England as modified by equity, which required that the Plaintiffs should have established the existence of facts that would lead the Court to declare the existence of a trust including the name of the clan and proof by other clan members other than the family of DZOMBO JUMAA MWAKAL.
146. In case of:- “George Roine -Versus -Titus & Another”, the Court of Appeal held that in adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belong to them. And further that the reason why the claimant was not registered was because of some legal impediment which precluded the Claimant from taking the title immediately there by making it necessary for the suit to be registered in the proprietor in trust.
147. In case of:- “Muchunga – Versus - Muchungu,(1984) KLR 202” the Respondent sued the Appellant who was his elder brother, asking the High Court to order the Appellant to transfer to him a half share of a certain piece of land on the basis that it had been owned by their father and the Appellant had been registered as proprietor of it to hold for himself and the Respondent as trustee. The Appellant stated in his Defence that the land belonged to him and had never been owned by their father and produced a certificate of ownership in respect of a different piece of land which he said was the one owned by their father and which was the one to be shared. There was no evidence that the parties father owned the



land which the Respondents claimed or on what constituted the Appellant as trustee for Respondent in respect of it. The Court of Appeal held that there was no evidence to support a finding of trust held by the Appellant in favor of the Respondent.

148. In conclusion, the Learned Counsel submitted that the Plaintiffs had no capacity to file suit over the suit property on their own behalf or on behalf of the Estate of the Late Dzombo Jumaa Mwakai or his alleged children or Grandchildren. The Learned Counsel further submitted that there was no or no sufficient evidence to prove that the suit land was either clan land or belonged to the Late Dzombo Jumaa Mwakai as alleged or at all.
149. The Learned Counsel further submitted that the grant issued to the Plaintiffs expired after six months and the suit herein was fatally defective and could not be sustained. The cause of action, if any, arose either in year 1973 after Land Adjudication or in year 1982 after issuance of the Title Deed in favour of SANGA DZOMBO and the suit herein is time bared and could not be sustained. The Plaintiffs' suit was res judicata, the Plaintiffs having filed previous suits and lost. Further, there are no grounds for presumption of trust against the 1st Defendant or his late father since no proof was tendered of the suit land having been family property.
150. The site visit by the Court established that the Plaintiffs and their co-claimants did not reside on the land and there was no sign that the land was sub - divided as alleged. The Plaintiffs suit sought cancellation of title against the 1st Defendant's constitutional and statutory right to own land and the Plaintiffs failed to established or meet the thresh hold for cancellation of title arising from a first registration and the suit herein was filed against mandatory provisions of the [Land Adjudication Act](#).
151. Consequently, the 1st Defendant prayed that the Plaintiffs suit be dismissed with costs.

IX. Analysis and Determination

152. The Honourable Court has keenly assessed the filed pleadings by all the Plaintiffs and Defendants herein, the written submissions and the cited authorities, the relevant provisions of [the Constitution](#) of Kenya, 2010 and the statutes.
153. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
 - a. Whether the Plaintiffs are the bona fide owner of the suit property?
 - b. Whether land known as Kilifi/Bandarasalama/125 was fraudulently and illegally transferred to the Defendants and whether the Doctrines of Estoppel and/ or Equity are applicable in the circumstance
 - c. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff
 - d. Who bears the costs of the suit?

ISSUE No. a). Whether the Plaintiffs are the bona fide owner of the suit property.

154. 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. However, before embarking on the real issues under this sub heading, it is imperative to take cognizance that this is a matter on sharing the suit land which involves related family members. The integral part of it is the deceased.
155. The Plaintiffs' claim was based on proprietorship of the suit land and entitlement to the rights in respect of the ownership of the land. The Plaintiffs had documentary evidence in form of Limited



Grant of Letters of Administration, Judgment entered in favour of his father against Sanga Dzombo, the appeal that upheld the decision of the Kaloleni, Proceedings and Order in Kilifi Land Case No. 20 of 2001 and Appeal No. 185 of 2002 which was dismissed.

156. As indicated the Honourable Court conducted a site visit and here below is the report for ease of reference.

X. Site visit A

Republic Of Kenya

In The Environment And Land Court

At Mombasa

Site Visit Report At Gandani In Kilifi South On 8Th March, 2024 At 12.30 P.M.

I. Introduction.

1. The team arrived at the site at 10.45am. It was a distance of approximately 70 kilometres from Mombasa town within the County of Kilifi.
2. The session assembled and it started with a word of by one of the members. Introductions were conducted and the purpose of the visit was explained by the Judge. The visit commenced in earnest and several observations were made. Eventually, this reports was prepared. It appeared that all these were members from one family.

II. The Court

1. Hon. Mr. Justice L.L. Naikuni – ELC – 3;
2. M/s. Firdaus Mbula – The Court Assistant;
3. Mr. George Omondi – The Usher.
4. Mr. John Mwaniki – The Driver.

III. The Plaintiffs

1. Mr. Simon Mutugi – Advocate.
2. Mr. Mathias Dzombo.
3. Mr. Dzombo Patrick Kwesha.
4. Mr. Pancras Keche – Cousin to the Plaintiff.
5. Mr. Moses Mwayaya – Cousin/Brother to the Plaintiff.
6. Mr. Cosmus Dzombo – Cousin/Brother to the Plaintiff.
7. Mr. Crispus Dzombo – Cousin to the Plaintiff.
8. Mr. Nicholas Mbura Mwakaja – Nephew to Defendant.
9. Mr. Simon Kiti Mbura – Cousin to the Plaintiff.



10. Mr. Dickson Mbura Kiti.
11. Mr. Evan Okisai - Assistant to Mutugi Advocate.
12. Mr. Emanuel Otara – Assistant to Mutugi Advocate.
13. Mr. Dickson Mbura Kiti – Grandson to the deceased.

IV. The Defendants

1. Mr. Mutubia – Advocate for the 1st Defendant.
2. Mary Kiti – Advocate for the 2nd and 3rd Defendant.
3. Mr. Crispin Mwangolo Sanga – the 1st Defendant.
4. Mr. Steven Dzombo Sanga – Brother to the 1st Defendant.
5. Mr. Antony Mwadzombo Sanga - Brother to the 1st Defendant.
6. Mr. Alphonse Kiti Sanga – Brother to the 1st Defendant.
7. Mr. Martin Nyati Sanga – Brother to the 1st Defendant.
8. Mr. Mbura Dzombo Sanga – Son to Mr. Steven Dzombo.
9. M/s. Sophie Buguta – Assistant to Mr. Mutubia Advocate.
(Hereinafter referred to as “The Team”)

V. Security operatives from the Chasimba Police Station

1. Inspector Julius Kioko – Deputy OCS;
2. Police Constable - Naomi Baya.
3. Police Constable - Tajeur Apei.
4. Police Constable Kiplimo Koech.
5. Police Constable Omondi Marvelous.
6. Mr. Abubakar Athman.
7. Police Constable, Malyun Bishar.

The purpose for the Site Visit

The Court informed the team the purpose of the site visit (“Locus in Quo”). It indicated that this was pursuant to a Court made on 3rd October, 2023 in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

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



While Order 40 Rule 10 (1) (a) provided to wit:-

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

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.
1. By consensus of the parties, it was agreed that Site Visit be conducted led by the team itself and no experts. It was noted that the site visit was not with a view of gathering further evidence on the case but to make observation on matters on the ground so as in the long ran assist Court in its decision making functions and/or process. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.
2. Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

VI. The Procedure.

It was agreed by consensus that Mr. Mathias Dzombo and Mr. Martin Nyati Sanga being representatives from both sides of the team to be the appointed as team leaders for purposes of this Site Visit.

VII. Observations.

The team made the following observations: -The nature of the dispute in Court was one on the ownership of the suit land. The actual location and the boundaries of the suit land was not contested by both the the Plaintiffs and the Defendants. The suit land measures approximately 30 acres or thereabout. No beacon shown but it is agreed that there use to be Makonge Plants. The original Certificate of the Title Deed to the suit land was held by one person – Mr. Crispin Mwangolo Sanga, the 1st Defendant herein. He brought and showed it to Court during the hearing of the case. The land use & human settlements: -It was evident that the suit land was not fully utilized in any way such as cultivation or grazing with livestock. For instance, the human settlements occupied close to one approximately 4 acres. That meant that a larger portion of the land measuring approximately 26 acres or thereabout was not occupied nor fully utilized. There were presence of four (4) Semi Permanent swahili constructed houses (constructed using earth mad walls and either brownish/ rusty old iron sheets or coconut (makuti) thatched roof and 10 Permanent



(blocked walls and iron sheet roofs) houses which mainly belonged to the Sanga family. Indeed, from the face of it the houses or settlements were scattered sudden. A few of the structures were undergoing construction. We also were able to see a large permanent structured building which housed some commercial premises such as a well-stocked retail shop on mainly foodstuff. Also these structures were well connected with electricity. Mr. Pancras Deche and Mr. Mbura Dickson though had houses here claimed to living there but also informed us he lived in Malindi. Mr. Cosmus Dzombo lived in Likoni and Shimba hills. Mr. Moses Mwayaya and Mr. Dzombo lived in the County of Kwale. Mr. Alphonse Sanga, Mr. Simon Kiti Mbura and Mr. Martin Sanga lived in the said land. Mr. Mathias Dzombo lived in the neighborhood. Mr. Crispus Dzombo never lived in the land. Mr. Crispus lived in the neighborhood. Mr. Allan showed us a semi – permanent swahili house. It was evident that it was partially habited. It had several leaks on the iron sheet roofs. There were a few 1, 500 litres plastic water tanks. The team wondered the condition of the water harvested as the roofs were all corroded by fluorosis. The team notices a huge building under construction. It was not clear the purpose of the building. But taking that it was near a commercial area then it should be for that purpose. There was a well constructed rectangular shaped Church by the name – “Jerusalem Healing Church”. The team learnt that it was built by the Ndombo family for purposes of their scripture nourishment. The team had a short prayer in the shrine. The team noticed that there was very minimal subsistence farming carried out on the land. of Maize, Coconut, Mangoes trees planted in the year 1946, Bananas and Cashew nuts. There a few scattered and neglected Coconut plantations with traces of the tappers foot steps by their sides and Mango trees. Although at some portions there evidence of some plough having been done by a tractor, there were no evidence of any farming having taking place at all. It would be difficult to state what the inhabitants were surviving. Apparently, people appeared to be quite healthy and energetic. There exists a huge valley which may have been a season. The community were not in agreement over this issue. It cuts across the land into two though not in the middle of it. Unfortunately, due to time positivity was not able to cross the said valley to see through the other portion of the land. However, the team learnt that there was no activity nor settlement taking place on that part of the land.

- a. A Graveyard/Cemetery: The team was taken to a portion of land measuring approximately two acres or thereabout which was set aside for the family graveyard/Cemetery. There were 21 visible Grave yards for the Mwafondo Family. While some were not labelled and difficult to identify, most were well cemented with marble constructed plagues with inscriptions of names of the deceased and the date of death. Unfortunately, the cemetery was not fenced and the team felt this would have been necessary to separate it from the rest of the land for good order and security reasons. There was a Cow shed. We saw 3 cattle. There was a small mad shelter where a young man was making building bricks using clay soil and furnace compassion. There were a heap of the already made clay building bricks. (The sketch map of



the suit land as here below)Kwa Kina KalamaSame ClanKwa
MalungoRough Road - Chasimba - Mwarakaya 200 M

VIII. The directions by the Court

At the conclusion of the Site Visit, the Judge provided the following directions that: -

- a. The Honourable Court would prepare the Site Visit report and share it with parties for their further input should they deem it necessary.
- b. Being mainly family members, they were encouraged to attempt an out of Court negotiation on the dispute which mainly revolved around the ownership – occupation and use of the suit land.
- c. Thereafter, each of parties would prepare and exchange their written submissions.
- d. There be a mention on 21st May, 2024 to ascertain compliance of these directions and further orders on the delivery of the Judgement.
- e. There being no other business the site visit was concluded at 12.45pm .

Site Visit Report Dated At Mombasa On This.....24Thday
of.....may.....2024.

.....

Hon. Mr. Justice L. L. Naikuni

Environment And Land Court

Mombasa

88. Having stated the facts briefly, I would now like to commence on the critical analysis of the case. Let me turn to the issue under this sub - heading. This court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely. For this reason, thus any emerging land dispute has to be handled with vast caution and circumspect to avert creating any chaos or disarray situation arising therefrom. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:

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

- i. Allocations;
- ii. Land Adjudication process;



- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

In the instant case, the Plaintiff claims to have acquired and allocated the suit land onand was issued with a title on He claims by dint of law, he was the 1st Registered owner from the Government of Kenya with all the indefeasible title, interest and rights over it by law. Fundamentally, its significant to set out the relevant provisions of the law with regard to this land dispute as spelt out above. To begin with, the provisions of Section 107 of “The *Land Registration Act*” of 2012, as a saving and transitional provisions with respect to rights, actions, dispositions and so forth, provides that the law applicable to this matter here and for the title deeds that were issued in the years 1974 and 2003 respectively would be the Registered *Land Act*, Cap. 300 (Now Repealed) and the relevant Sections being 27, 28 and 143 of the RLA.

“Section 27 (a) “Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 28 of the Act provides that:-

“The rights of a proprietor, whether acquired on first registration or whether acquired 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...”

Section 143 (1) of the Act provides thus:

“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

- (2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default”

Nonetheless, the effect of the Registration of Lands is founded in the provisions of Section 24 of “The Registration [Land Act](#) (Repealed) which provides as follows:-

“Subject to this Act – 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 appurtenances thereto and;

80. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of “The [Land Registration Act](#)” No. 3 of 2012 provides as follows:-

“The right 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 interest and claims whatsoever.....”

This fact is strengthened by the following decisions - “ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moiyo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

157. The effect and efficacy of registration of land is critical. 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 indefeasible rights, title and interest and privileges belonging or appurtenant thereto. The provision of 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 the provision of Section 28 of the Act.

158. 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
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
159. 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.
160. In the instant case, while applying the above legal principles herein, the Plaintiffs brought documents to show that the instant suit belonged to their father and that they are the legal administrators of the estate of their deceased father. That position was not challenged by the pleadings filed by the Defendants.
161. 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 adduced 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 Plaintiffs right as guaranteed in *the constitution* and must be stopped. It is the Plaintiffs' case that Dzombo Jumaa Mwakai During his lifetime subdivided the suit land Kilifi /Bandarasalama/125 amongst his sons and his brother. All the six (6) sons and his brother had their portions which were demarcated and boundaries were put in place. These sons and their families have ever since lived in these parcels of land to date and those boundaries have been maintained to date.
162. The Plaintiffs further stated that the said Dzombo Jumaa Mwakai died in the year 1948. At the time of his death he did not possess the title deed to the suit land Kilifi/Bandarasalama/125 since land demarcation and adjudication had not yet commenced. In the year 1972 when land demarcation and adjudication commenced Sanga Dzombo Jumaa (3rd son) rushed to have his name registered as the sole owner without consulting with the family and without their consent. The Plaintiffs further averred that Sanga Dzombo Jumaa was to take out a Title Deed in 1982 for the suit land without the families' knowledge or approval. The title deed was issued under his name in exclusion of the rest of the family.
163. The action taken by the Sanga Dzombo could not have been carried out without the involvement and / or sanction of the 2nd and 3rd defendants and thus necessitating their involvement in this case. The six sons of Dzombo Jumaa Mwakai and the family of Kiti Jumaa Mwakai have lived in the suit land in harmony and peace oblivious of the existence of the title deed until the year 2000 when the 12 sons of Sanga Dzombo started occasioning violence upon the children of the other 6 families on the pretext that the title deed of the suit land was under the sole name of their father and hence claiming and asserting to be the sole and rightful inheritors.



164. It follows therefore, that the registration of Sanga Dzombo as the sole owner proprietor of that land known as Kilifi /Bandarasalama/125 was illegal, irregular, null and void and was also irregular. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiffs in the Complaint filed herein is for eviction orders to issue against the Defendants herein. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.
165. To this end, therefore, based on the legal principles enshrined above the Honourable Court is totally convinced that the property belonged to the Plaintiffs and thus ought to .

ISSUE No. b). Whether land known as Kilifi /Bandarasalama/125 was fraudulently and illegally transferred to the Defendants and whether the Doctrines of Estoppel and/ or Equity are applicable in the circumstance

166. Under this sub title the Plaintiffs' case is that they are the duly appointed Legal administrators of the estate of Patrick Kwesha Dzombo. The history behind the suit land from the pleadings and evidence is that at all material times the land known as Kilifi /Bandarasalama/125 belonged to one Dzombo Jumaa Mwakai who was the grandfather to both the plaintiffs and 1st defendant and all the 6 families of the said Dzombo Jumaa Mwakai. The said Dzombo Jumaa Mwakai had six (6) sons and a brother namely as follows:-
- a. Jumaa Dzombo(deceased)-son
 - b. Mbura Dzombo(deceased)-son
 - c. Sanga Dzombo-(deceased)-son
 - d. Mwaje Dzombo(deceased)-son
 - e. Patrick Kwesha Dzombo (deceased)-son
 - f. Mwafondo Dzombo(alive)-son
 - g. Kiti Jumaa Mwakai(Mwalolo)-Brother
167. According to the Plaintiff the said Dzombo Jumaa Mwakai during his lifetime subdivided the suit land Kilifi /Bandarasalama/125 amongst his sons and his brother. All the six (6) sons and his brother had their portions which were demarcated and boundaries were put in place. These sons and their families have ever since lived in these parcels of land to date and those boundaries have been maintained to date.
168. The Plaintiffs further stated that the said Dzombo Jumaa Mwakai died in the year 1948. At the time of his death he did not possess the title deed to the suit land Kilifi/Bandarasalama/125 since land demarcation and adjudication had not yet commenced. In 1972 when land demarcation and adjudication commenced Sanga Dzombo Jumaa (3rd son) rushed to have his name registered as the sole owner without consulting with the family and without their consent. The plaintiffs further averred that Sanga Dzombo Jumaa was to take out a Title Deed in 1982 for the plot No. Kilifi /Bandarasalama/125 without the families' knowledge or approval. The title deed was issued under his name in exclusion of the rest of the family.
169. It is clear that Patrick Kwesha Dzombo died on 26th November, 2008 wherein the Grand Letters of Administration were obtained on 28th November, 2012 wherein both the Plaintiffs were made



administrators of the deceased's estate. The Plaintiffs further stated that the said Dzombo Jumaa Mwakai died in 1948. At the time of his death he did not possess the title deed to the suit land since land demarcation and adjudication had not yet commenced. In 1972 when land demarcation and adjudication commenced Sanga Dzombo Jumaa (3rd son) rushed to have his name registered as the sole owner without consulting with the family and without their consent. The plaintiffs further averred that Sanga Dzombo Jumaa was to take out a Title Deed in 1982 for the suit land without the families' knowledge or approval. The title deed was issued under his name in exclusion of the rest of the family.

170. Thus, it is not necessary to belabor the point that both these titles were improperly acquired. The provision of Section 45 of the *Law of Succession Act*, Cap. 160 provides as follows:-

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

171. In the case of “Bahola Mkalindi – Versus - Michael Seth Kseme & 2 others [2012] eKLR” the court held that:-

“The *Law of Succession Act*, Cap. 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.’

172. The provision of Section 55 of the *Law of Succession Act*, Cap. 160 stipulates that:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”

173. The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the *Law of Succession Act*, Cap. 160 is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under the provision of Article 40(6) of *the Constitution*. See the claw-back provision of *the Constitution* that: -

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

174. Having considered the evidence before this Honourable Court as well as the exhibits herein produced, it clearly emerges that Section 55 of the *Law of Succession Act* was not complied with before these properties were transferred. Hence, I therefore strongly find that the said registration was a nullity as the



estate of deceased could only have been dealt with under the provisions of Law – being *the Constitution* of Kenya, 2010, the Laws of Succession Act, Cap. 160 and the *Land Registration Act*, No. 3 of 2012 among others after her death and not otherwise. In essence, therefore, it is this Honourable Court’s holding that the deceased PATRICK KWESHA DZOMBO was the absolute and legal registered proprietor of Plot number Kilifi /Bandarasalama/125 with all the indefeasible title, right and interested vested in him by law. That was never ousted by the fact that he died.

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

175. Under this Sub heading, the Plaintiffs has sought for various Reliefs as contained at the foot of the Plaint, herein. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiffs in the Plaint filed herein are declaratory and recalling of the title deed. The provisions of Section 26 of the *Land Registration Act, Act No.3 of 2012* provide as follows:

“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.

176. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

177. The import of Section 26 of the *Land Registration Act* was considered in the case of “Elijah Makeri Nyangwra – Versus - Stephen Mungai Njuguna & Another [2013] eKLR” where Munyao J, answered the question as to whether title is impeachable under the provision of Section 26 (1) (b) of the said Act as follows;

“First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

178. Section 80 (1) of the *Land Registration Act*, 2012 provides thus:-

80 (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.



179. Having found that the deceased Daniel Shem Mwagona was the legal and beneficial proprietor of Land Title Number Kwale/ Shimoni Adjudication/215 even after his death, it therefore follows that the title of the 1st Defendant was obtained by fraud and misrepresentation.
180. Although there was no evidence adduced that pointed out to the Defendants as being parties to the fraud or misrepresentation, I am satisfied that the conditions provided for impeachment of a title as per the provisions of Section 26 (1) (b) have been met. I find that the title of the defendant having been obtained illegally, unprocedurally and/or through a corrupt scheme, the same is liable to be cancelled. Regrettably, the doctrines of Estoppel and equity would not apply in the present instance to sanitize an illegality.
181. This court is however empowered under this section to order for rectification of the register by directing that any registration be cancelled or amended if it is satisfied that there was an error, mistake or fraud.
182. Section 80 of the *Land Act* empowers this court to order the rectification of a register of a suit property directing it be cancelled. Though, the plaintiffs have sought the relief that the suit property be restored in the name of the 7 families residing on Plot No. Kilifi /Bandarasalama/125 and they also sought a declaration that SANGA DZOMBO(deceased) and CRISPIN MWANGOLO SANGA (legal representative) holds the title No. Kilifi/ Bandarasalama/125 in trust for himself and the entire family in equal share. In this case, the Defendants had no right to be in possession and occupation of the Plaintiffs land.

ISSUE No. D. Who will bear the Costs of suit

183. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in 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”

184. The provision of Section 27 of the *Civil Procedure Act*, Cap.21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. It provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

185. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.



186. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
187. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
188. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the Defendants and therefore the Plaintiffs have the costs of the suit as per the amended Plaint dated 28th February, 2022 filed on the same day to be paid jointly by the Defendants.

XI. Conclusion and Disposition

189. 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 Plaintiffs has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-
- a. THAT Judgment be and is hereby entered in favour of the Plaintiffs as pleaded in Plaint dated 28th February, 2022.
 - b. THAT a declaration does and is hereby issued that Sanga Dzombo(deceased) And Crispin Mwangolo Sanga (legal representative) holds the title No. Kilifi/Bandarasalama/ 125 in trust for himself and the entire family.
 - c. THAT an order of and is hereby issued directed to the 2nd and 3rd Defendants to recall the Title Deed for Plot No. Kilifi /Bandarasalama/125, cancel the same and rectify the register entry pursuant to the provision of Section 79 (1) and 80 (1) of the *Land Registration Act*, No. 3 of 2012.
 - d. THAT an order of and is hereby issued directed to the 2nd and 3rd Defendants to forthwith issue new Title Deeds to be registered in the names of the duly appointed Legal Administrators of the deceased and in trust of the 7 families as the beneficiaries residing on Plot No. Kilifi / Bandarasalama/125.
 - e. THAT the costs of this suit vide the Plaint dated 28th February, 2022 be and hereby awarded to the Plaintiffs to be borne by the 1st, 2nd & 3rd Defendants jointly and severally.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF OCTOBER 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. Mutugi Advocate for the Plaintiffs.
- c. Mr. Mutubia Advocate for the 1st & 2nd Defendants.
- d. M/s. Kiti Advocate for the 3rd Defendant.

