



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kanyana v Ndunyu & 2 others (Environment and Land Case Civil Suit
182 of 2018) [2024] KEELC 6715 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 182 OF 2018
LL NAIKUNI, J
OCTOBER 8, 2024**

BETWEEN

VENASIO MURIUKI KANYANA PLAINTIFF

AND

TABITHA WARUGURU NDUNYU 1ST DEFENDANT

MARTIN MITHAMO NDUNYU 2ND DEFENDANT

LYDIAH KABUCHI NDUNYU 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the suit in form of an Amended Plaint dated 19th September, 2022 filed on 6th October, 2022 by Venasio Muriuki Kanyana, the Plaintiff herein against Tabitha Waruguru Ndunyu, Martin Mithamo Ndunyu and Lydiah Kabuchi Ndunyu the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, while opposing the suit, the Defendants filed a Memorandum of Appearance and Statement of Defence dated 14th August, 2019.
3. It is instructive to note that upon the consensus by the parties, the Honourable Court conducted a site visit (“Locus in Quo”). The report was prepared and which forms part of this Judgement for ease of reference.

II. Description of the Parties in the suit

4. The Plaintiff was described as a Kenyan male adult of sound mind, residing and carrying out business in Mombasa County within the Republic of Kenya.



5. The 1st Defendant was described as a female adult of sound mind residing and working for gain in County of Mombasa within the Republic of Kenya. The 2nd Defendant was described as a Kenyan male adult, residing and working for gain within the United State of America but has a place of abode with Mombasa County. The 3rd Defendant was described as a female adult of sound mind residing and working for gain in Mombasa County within the Republic of Kenya.

III. Court directions before the hearing

6. Nonetheless, with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing on 9th November, 2022 by way of adducing “viva voce” evidence. Indeed, the Plaintiff did testified on examination – chief and partially cross examined. However, it was during the Cross – Examination that parties and Court noted that the witness was no longer coherent nor concise. Clearly, he was suffering from dementia. As result, by consensus of all parties it was agreed that the Plaintiff be substituted by another witness. Accordingly, the Honourable Court granted the Plaintiff’s Advocate leave cause the substitution.
7. Thus, on 9th February, 2023, the Honourable Court fixed the hearing dated on 22nd February, 2023 22nd February, 2023 with the Plaintiff’s witness (PW - 1) who substituted the Plaintiff testifying in Court on 22nd February, 2023 at 1.45 pm.

IV. The Plaintiff’s case

8. From the filed pleadings, at all times, material to this suit the Plaintiff was the beneficial owner of -a house-without land standing on the property known as Plot number 281/I/MN having purchased the same interest for value since 2006 from Gabriel Mithamo-Ndunyu (now deceased) (Herein referred to as “Suit – Property”). The 1st Defendant was the divorced wife of Gabriel Mithamo, vide divorce cause No. 5 of 1991 and with whom she shared 3 children, the 2nd,3rd Defendant and another by the name Andrew Thuku Ndunyu.
9. On 20th May, 2018, the Defendants together sent a joint notice to the Plaintiff’s tenants claiming that it is their late father’s property and that they have taken control of running the commercial units and rent should then be paid to them through an bank account belonging to the 2nd Defendant. The Plaintiff’s agent, Richard Nguru Ndunyu undertook to send a notice to the Plaintiff’s tenants, which actions the Plaintiff has since ratified advising them to keep to their tenancy agreements with the Plaintiff which they have since done.
10. The Defendants on their part kept sending the Plaintiff’s tenants unlawful notices ordering them to cease from dealing with the Plaintiff’s agent and the Plaintiff and threatening to distress rent from them in particular on 8th July, 2018. The Defendants had undertaken to threats and intimidation in trying to gain access through the Property in Particular by sending letters to the Plaintiff’s agent, advocates and tenants by themselves and sometimes by their advocates, which notices the Plaintiff has responded to at all times.
11. Sometimes in June 2018, the Plaintiff’s agent who ran the commercial rental units on the Suit Premises on behalf of the Plaintiff informed the Plaintiff that the 1st Defendant had entered into the premises and had taken up shop number B6 without his consent or the Plaintiff’s and that she had refused to vacate the same premises. The Plaintiff was informed by his agent that the 1st and 3rd Defendant, without invitation, appeared on the suit premises on 12th July, 2018 and engaged him in a verbal altercation then by sheer falsehood got the agent arrested, which to this day he stands trial in Court. The acts of



the Defendants constituted unlawful interference on the Plaintiff's properly acquired property which acts also amount to trespass against the Plaintiff's property.

12. The Plaintiff relied on the following particulars of trespass, illegal works and loss:-
 - a. The 1st Defendant had forcefully, illegally, unlawfully and unjustifiably entered upon the Suit Property rightfully belonging to the Plaintiff;
 - b. The 2nd Defendant on authority of the 1st and 3rd Defendant wrote notices to the Plaintiff's tenants interfering with the Plaintiff's running of his own Property;
 - c. The Defendants had threatened the Plaintiff's continual use of the Suit Property and have physically threatened the Plaintiff's agent on site
13. Further the Plaintiff relied on the following particulars of damage:-
 - i. As a result of the Defendants' continuous unlawful and illegal trespass on the Property the Plaintiff has suffered financial damage, losses and harm by the act of trespass of his Property perpetuated by the Defendants jointly and severally.
 - ii. As a result of the Defendants' continuous unlawful and illegal trespass on the Property the Plaintiff's rights to Property and economic right to development has been gravely infringed and violated.
14. The Plaintiff stated that there was no suit pending and that there have been no previous proceedings in any Court between the Plaintiff and the Defendants over the subject property. Despite of demand made and notice of intention to sue having been issued, the Defendants had refused, neglected and failed to admit liability rendering this suit necessary. The suit property was situated in Mombasa County therefore the Plaintiff submitted to the jurisdiction of the court.
15. The Plaintiff stated that in the circumstance, the Plaintiff's claim against the Defendants was therefore for;
 - a. That a permanent injunction be issued stopping the defendants jointly and severally from interfering with the Plaintiff's peaceful possession and occupation of a house without land standing on plot No. 281/I/MN Bombolulu Mombasa county and operations of his Property and the 1st Defendant be evicted from the shop known as shop number 6.
 - b. An order of eviction and/ or ejection of the 1st defendant from shop known as shop No.6.
 - c. A declaration that the plaintiff is true and lawful owner of a house without land standing on property known as plot number 281/I/MN located at Bombolulu, Mombasa county.
 - d. General Damages
 - e. Costs of this suit.
 - f. Any other relief and prayers that this Honourable court may deem just.

16. The Plaintiff called their witness PW - 1 on 22nd February, 2023 at 1.45 pm where he averred that: -

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

17. PW - 1 testified in Swahili and under oath. He identified himself as Richard Nguru Ndunyu. He was born on 4th April, 1962 and lived in Bombolulu Mombasa. He was a business man. He was a substitute of the Plaintiff with the leave of Court. He had recorded a witness statement dated 20th February, 2023



and filed on 21st February, 2023 and filed a list of documents dated 23rd September, 2019 and filed on 24th September, 2019 which he produced as his exhibits as Plaintiff Exhibit 1 to 11 and a further list of the documents dated 14th October, 2022 which he produced as Plaintiff Exhibits numbers 12 to 19.

18. According to the witness the plot belonged to his uncle Mr. Venasio Muriuki Kanyana who at the time of his testimony had a medical problem by the name of dementia. With referred to the Doctor's report. PW – 1 was a caretaker of the property. The Plaintiff asked him to represent him pursuant to the court order by this Court. His brother Mr. Gabriel Muthamo Ndunyu was a businessman. He got into financial difficulties with a debt which he owed a financial institution – Fidelity Insurance Company. He approached his uncle and they agreed that he would be assisted. His uncle offered to pay the debt in exchange of the plot.
19. PW - 1 stated that it was in the year 2006. The transaction was done by an advocate; a sale agreement was executed and the property was transferred to the Plaintiff. The tenants were informed of the development. PW – 1 was appointed as a Caretaker of the Plot. His brother Gabriel Muthamo Ndunyu died in year 2017; by that time the property was registered in the names of the Plaintiff – Mr. Venasio Muriuki Kanyana. Upto the time of the testimony, the suit property was owned by Mr. Kanyana. From the document produced there was none that showed he was involved.

B. Cross examination of PW - 1 by M/s. Nzamsa Advocate.

20. PW - 1 confirmed his name was Mr. Richard Nguru Ndunyu. That the 1st Defendant was the former wife of the late Mr. Gabriel Muthamo Ndunyu. The 2nd and 3rd Defendants were the children of the Late Mr. Ndunyu. The property was a house without land. From his statement, the land belonged to the late Ndunyu before year the year 2006. Later on the Plaintiff took over the house from Mr. Ndunyu; From the 19 documents produced it was only a transfer of the land dated 5th December, 2006 that existed. There was no a sale agreement for the property.
21. On being referred to the transfer form, the witness stated that the property referred there was Plot No. 281/MN/2. While, on being referred to the Plaintiff under Paragraph 5 the Plot indicated was Plot No. 281/1/MN. He stated that his brother had two properties in Bombolulu. He may not know how much the purchase price was. From the transfer, reference was made to a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). The Property was initially for Bakari K. Shambi; Shambi Ali Shambi and Hamisi Shambi. It was dated on 5th December, 2006. But from his statement paragraph 2 – Gabriel Ndunyu was holding it since the year 2006. His brother appointed him to be collecting rent for him since the year 2002. The bank statements were for the year 2006 showed he collected rent through Mwaru Investments Limited.
22. PW - 1 reiterated that with reference to the 1st Defendant's document filed on rent collection in the year 2017 and remitted, his brother died in year 2017. He had not produced an power of attorney in court. he had documents to show that his brother had debt with the finances; to Mombasa Maize Millers. He told the court that he did not have any documents to show that Mr. Venasio Muriuki Kanyana paid up the debt for Gabriel Muthamo Ndunyu apart from the court documents. He confirmed the transfer referred to Plot No. 281/MN/2.

C. Re - examination of PW - 1 by Mr. Anangwe Advocate.

23. PW - 1 confirmed that his brother had two houses. It was the suit property that had a problem. He did not know whether the other plot had issues too. He was the caretaker of both houses after being appointed by his late brother and later on he continued executing the same role for Mr. Kanyana. He did not have the Power of the Attorney in Court but he had seen it in the list of documents by the



Defendants. His brother owed a lot of people. With reference to the Plaintiff's document – pleadings. The Plaintiff had been joined as an objector.

24. On 22nd February, 2024 the Plaintiff marked his case closed through his Counsel Mr. Anangwe Advocate.

V. The Defendants' case

25. From the filed Statement of Defence by the 1st, 2nd and 3rd Defendants filed, they took issue with the contents of Paragraph 5 of the Plaintiff. They stated that the Plaintiff was not the beneficial owner of the subject matter property. According to them, instead he only held a Power of Attorney dated 22nd April, 2002 issued by the now deceased Gabriel Mithamo Ndunyu (Hereinafter referred to as "The Deceased").
26. The deceased was the beneficial owner of the suit property and used to receive rent through his appointed agent, Bretty Logistics. Upon the demise of the now deceased, Gabriel Mithamo Ndunyu, the caretaker Richard Nguru Ndunyu illegally diverted the rental income to another bank account held by one of the deceased's sister, Alice Lubisia instead of channelling it to the deceased's account. Further, upon realizing that the rental income had been diverted, the Defendants sent notices to the tenants informing them to continue paying rent to the deceased's account and wished to put the Plaintiff to strict proof of the allegations contained in Paragraphs 6, 7, 8 and 9 of the Plaintiff.
27. The 1st Defendant admitted occupation of one of the commercial units in the suit property and further wished to state that she is in occupation of the same as a matter of right and not by force as alleged by the Plaintiff and the Plaintiff was put to strict proof thereof.
28. The 1st and 3rd Defendants took issue with the contents of Paragraph 11 of the Plaintiff and wish to state that they visited the suit property on the alleged date to inspect the property and inform the tenants where rent should be paid. It was during this time that Richard Nguru, the caretaker alleged to be the Plaintiff's agent, attacked them and threatened them with violence thus culminating to the alleged criminal case which was still pending determination.
29. The Defendant's position was that they had not trespassed on the Plaintiff's property and wished to put the Plaintiff to strict proof thereof. The Defendants further deny having caused the Plaintiff any injury that would warrant him an award of damages and put the Plaintiff to strict proof thereof.
30. The Defendants wished to state further that, the Plaintiff has colluded with his agent, Mr. Richard Nguru who had been appointed as a caretaker by the now deceased, Mr. Gabriel Mithamo Ndunyu to vandalize and demolish the houses on the suit property with an intent to deny the Defendants their right to property.
31. The Defendants stated that the demolitions by the Plaintiff in collusion with his alleged agent were wasting the property and depreciating its value and should therefore be stopped. The Defendants therefore prayed this Honourable Court to dismiss the Plaintiff's suit in its entirety and award the Defendants damages for the injury caused on the suit property together with costs.
32. On 21st June, 2023, the Defendants called DW - 1 who testified as follows:-

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

33. DW - 1 testified under oath and in English language. She identified herself as Lydia Kabuchi Ndunyu. She informed Court that she was a nurse at Tononoka Police Dispensary and lived in Nyali, Mombasa. The 1st Defendant - Tabitha Waruguru Ndunyu was her mother while the 2nd Defendant was her



brother. The Plaintiff was a brother to her grandmother. Hence, he was her grandfather. Mr. Richard Ndunyu was her uncle. She told the court that she recorded a statement on 14th August, 2019 and had filed a list of documents which she produced as Defendants exhibits 1 to 6 which were dated 21st February, 2023. She knew the property; which was a house without land. It was on Mombasa – Malindi highway at Bombolulu – Boma area. The property belonged to his father. In that area, her father had owned four houses which were houses without land. She was brought up in suit property. There was a bus stage called Sports. He had a sports billboard by her father. The place was called Githima. The whole area knew the property was theirs.

34. According to DW - 1 she could distinguish the house which was cream in color. Inside the house there were seats and a bed and were rented houses all for rental. But after her father died on 20th February, 2017; around June 2017 her uncle Richard demolished the house and all the shops. As at the time of her testimony there were only four houses remaining. On the transfer dated 5th December, 2006 – produced by the Plaintiff. She did not agree with it. Their father never told them about the transfer. She noted that the property was allegedly transferred to Mr. Venasio Muriuki Kanyana in the year 2006 at a sum of Kenya Shillings Thirty Thousand (Kshs. 30, 000.00/=) and his father was collecting rent through an appointed agent called Bretty Logistics. He would be making invoices. The rent would be deposited with Equity Bank and the agent did that even after her father's death.
35. DW - 1 told the court that he further disagreed with the transfer as it referred to Plot No. 281/MN/2 but the actual property was 281/I/MN. She was referred to the Power of Attorney dated 22nd April, 2002 which referred to Plot No. 281/MN/63 which varied with the suit property. She knew there were tenants. The children of their father were appointed as the legal administrators:- Martin Muthamo Ndunyu, Lydia Kabuchi Ndunyu and Andrew Thuku Ndunyu as per the Grant Letters of Administration dated 14th December, 2022. They were not collecting rent; it was M/s. Alice Libusia, her father's sister through the same agents – Bretty Logistics who were collecting rent. He prayer she told the court was for the grant of their relied. They needed costs and damages caused to the house.

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

36. DW - 1 reiterated that they never prayed nor filed a Counter - Claim; the Plaintiff had never collected rent. The 1st Defendant was her mother. They were claiming the house jointly. It was true that her father and mother divorced with reference to the judgment delivered on 12th July, 1993 – HCCC No. 5 of 1991 Divorce Cause. She was the last born; her mother was granted custody of her after the divorce, her father never remarried.
37. According to her the signatures on the transfer were forged. They lodged a complaint. The had not relied on the complaint. Her father had appointed an agent and they had an Equity Bank account but she had not provided the account number in court. It was the house agent who diverted the rent and paid it to Alice Lubusia. It was strange that even after his death, the rent would still be collected by the agent. After her father's death they met and agreed that the money be collected by the agent. This was the house without land meaning they had been paying ground rent and had produced the land. The insurance for the house was being paid by Ushango. With reference to the Plaintiff Ex 2 dated 15th May, 2015, the witness told the court that the two were before her father's death.

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

38. DW - 1 confirmed that it was her father's house; it did not matter that her parents were divorced or not. With reference to the Insurance document, she told the court that there were no policy documents



nor receipts shown. There was a demand for a sum of Kenya Shillings Twenty Five Thousand (Kshs. 25,000/-) but no prove of payment.

39. The Defendants called their second witness DW - 2 on 21st June, 2023 and he testified as follows:-

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

40. DW - 2 testified under oath and in English language. He identified himself as Martin Ndinyu Muthamo. He was born on 5th October, 1975. He lived in Arizona, USA and he was a duly appointed Legal Administrator of the estate of the deceased. The 1st Defendant was his mother and Lydia was his sister. The Plaintiff was a brother to his grandmother. Richard was a young brother to his father. Hence their Uncle. He told the court that he recorded his witness statement on 14th August, 2019 which he adopted as his evidence in chief. He also produced the further list of documents as Defendants' exhibits 7 to 10. The suit property was at Bombolulu plot no. 281/MN/I. The property was owned by his father.

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

41. DW - 2 confirmed that his parents - Mr. Gabriel Mithamo and Tabitha Waruguru got married 9th August, 1975. The document he was shown was not a decree for divorce. His parents were not divorced. What he was being asked to read was a typed document which was not signed. He went to the USA from the year 2004 but came to Kenya. Even when away he was in constant communication with his father. With reference to the witness statement, he stated that it had no bank account details.

42. According to him the transfer documents had fake/forged signatures. They reported the matter to the Dogs Section Police. He knew Bretty Logistics was appointed agent; they charged from the rental money to Alice. He reported the conspiracy by these people. They redirected the funds after the demise of their father. With reference to the Defendants Exhibit No. 3. They did not bear the names of Alice Lubusia. On one side was demolition while on the other side was commercial and tenants. He assumed that the money was collected by Bretty Logistics. They were following up on the matter after obtaining letters of administration.

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

43. DW - 2 confirmed that his father died on 20th August, 2016. The invoices were dated 14th March, 2017. They discovered the money was being diverted by Bretty Logistics Agents. The typed document from Court he was 17 years and he was in Form 4.

44. The Defendants marked their case closed on 21st June, 2023 through their counsel on record M/s Nzamsa Advocate.

VI. Submissions

45. On 21st June, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that on 16th July, 2024 the Honourable court reserved a date to deliver its Judgement on 23rd September, 2024.

A. The Written Submissions by the Plaintiffs

46. The Plaintiff through the Law firm of Messrs. J.S. Kaburu & Company Advocates filed their written submissions dated 1st July, 2024. Mr. Anangwe Advocate commenced the submissions by stating that this was a property dispute case for a house without land where the Plaintiff had filed a claim against



the 1st, 2nd and 3rd Defendants against harassment on a baseless accusation that the property belonged to their late father. Granted, the property at one point belonged to the Defendants father but there is no evidence that many years after his death, there were any succession proceedings to pass down the property to the Defendants. The Plaintiff indeed demonstrated during trial that one of the Defendant is an ex-wife to the to the deceased father to the two other defendants. There was in fact a matrimonial cause that effectively extinguished any right or claim that she may ever had to her late husband's estate. Evidence also shows that on dissolution of the marriage, the two defendant were of such tender age and were alienated with their late father as to know of his affairs in life. They only resurfaced many years after his death, quite oblivious of the transactions he had made in his lifetime and started laying false claims to the people he had transacted with in his lifetime.

47. On the issues for the determination, the Learned Counsel submitted that indeed the Plaintiff had demonstrated on a balance of probability his acquisition of the property through the following ways:
48. On the issue of acquisition of property through redemption from auction and sale agreement, the Learned Counsel submitted that the Plaintiff had presented unchallenged evidence that he acquired the property by redeeming it from a Court sanctioned auction. This process was lawfully conducted, and the Plaintiff subsequently entered into a sale agreement with the previous owners. The authenticity and validity of this sale agreement have not been disputed by the Defendant. The Plaintiff's acquisition of the property was, therefore, firmly rooted in legally binding transactions. The Defendant have not mounted any evidence to demonstrate how the property that had been attached through a Court decree was ever redeemed.
49. On occupancy and payment of ground rent, the Learned Counsel argued that the Plaintiff had also proved his continuous occupation of the property. He had been residing on the property and maintaining it as his own. Additionally, the Plaintiff had provided evidence of regular payments of ground rent. These payments were clear indicators of his acknowledgment of and responsibility towards the property, further solidifying his claim of ownership. The Defendant on the other hand failed to produce evidence of consent from the owner of the property. But payment of ground rent as to entitle them to lay a solid claim to the property. They relied on the case of "Kalyan Karsan Patel – Versus - Mohamed Hashim Amhed & another [2022] eKLR" where the Court emphasized the importance of consent from land owner to the legality of ownership of owner of house without land in the following terms:-

“If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.”
50. On the lack of Counter - Claim by the Defendant, the Learned Counsel submitted that it was pertinent to highlight that the Defendant has not filed a Counter - Claim for the ownership of the property. This absence of a counterclaim strongly suggested that the Defendant never had a legitimate or competing interest in the property. The Defendant's failure to assert a Counter - Claim effectively concedes the Plaintiff's rightful ownership.
51. According to the Learned Counsel on the legal precedents and statutory provisions, the Plaintiff's case was further reinforced by relevant legal precedents and statutory provisions that support the validity of property acquisition through lawful redemption and sale agreements. The law was clear that a purchaser who acquired property through a legitimate process and fulfills all necessary obligations, such as the payment of ground rent, was entitled to ownership and protection of their property rights.



52. On equity and fairness, the Learned Counsel submitted that the principles of equity and fairness also favor the Plaintiff. He had acted in good faith, fulfilling all legal requirements to secure ownership of the property. Conversely, the Defendant had neither demonstrated any right to the property nor challenged the Plaintiff's ownership in a meaningful way. It would be unjust to deprive the Plaintiff of his rightful ownership based on unsubstantiated claims by the Defendant.
53. In conclusion, the Learned Counsel submitted that in light of the evidence presented, it was abundantly clear that the Plaintiff has proved his case for ownership of the disputed property on a balance of preponderance. The Plaintiff acquired the property through lawful means, has maintained continuous occupation, and fulfilled all requisite obligations, including the payment of ground rent. The Defendant's lack of a Counter - Claim further strengthened the Plaintiff's position. They therefore respectfully requested this Honourable Court to grant judgment in favour of the Plaintiff, confirming his ownership of the property and awarding him any other relief that the court deemed just and equitable under this circumstances.

B. The Written Submissions by the Defendants

54. The Defendants through the Law firm of Messrs. E.M. Mvoi & Company Advocates filed their written submissions dated 29th July, 2024. M/s. Nzamsa Advocate commenced the submissions by stating that the background was that vide an Amended Plaint filed on the 6th October, 2022 the Plaintiff herein filed the matter before this Court as against the Defendants. The essence of the Pleading therein is that the Plaintiff, in his pleadings was seeking for a declaration that he is the rightful owner of a house without land standing on property known as Plot Number 281/I/MN located at Bombolulu within Mombasa County.
55. It was not contested that the property in question at some point belonged to one Gabriel Mithamo Ndunyu who was the biological father to the 2nd and 3rd Defendants and husband to the 1st Defendant. The Defendants would be therefore submitting on whether the said property was actually transferred to the Plaintiff at some point as the Plaintiff alleged.
56. On the legal issues, the Learned Counsel relied on the following:-
- a. Whether the suit property was sold and transferred to the Plaintiff
 - b. Whether the Plaintiff has proven ownership of the property
 - c. What are the orders as to costs?
57. On whether the suit property was sold and transferred to the Plaintiff. The Learned Counsel argued that it was not disputed that the suit property did initially belong to the late Gabriel Mithamo Ndunyu. The Plaintiff's allegation was that the Late Gabriel Mithamo Ndunyu sold the property to him and hence the property changed hands from one owner to the other.
58. It was noted during trial that the only document the Plaintiff had in regards to the said sale was the Transfer document dated 5th December, 2006 produced as Plaintiff's Exhibit 1. The said document was not an actual transfer but a document signed by the custodians (sic) of the suit property allegedly authorizing the transfer of the suit property from the Vendor to the Purchaser. It went on to state that the Transfer was subject to payment of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000.00/=) and monthly ground rent of a sum of Kenya Shillings Four Hundred (Kshs.400.00/=) per month.
59. The Plaintiff never produced any further evidence to show that any purchase price was paid to the Vendor and hence the Defendants respectfully submit that no such transfer was ever signed by their



late father and neither was any purchase price paid and hence the ownership of the property never passed from the Vendor to the Purchaser

60. According to the Learned Counsel, the purported transfer was also defective and without the proper evidence of sale supporting it. The Defendants submitted that the Plaintiff had failed to produce enough evidence in support of their case to the required standard. During trial the 3rd Defendant testified that her late father died on 20th February, 2017. It was after his death that the Plaintiff decided to take over the said property. It was also her evidence that her late father was collecting rent before his death. The question therefore arises why the Plaintiff waited from the year 2006 when he allegedly acquired the suit property to come and take over possession in 2017? 11 years later?!!
61. According to the Learned Counsel, the Law on the purchase of any property was clear on the boxes that should be ticked for a proper transaction and transfer to be effected on the new owner. However, the phenomena of “a house without land” was different but still, there are important things that the alleged purchaser must prove to show that they indeed purchased the property from the Vendor such as; payment of the purchase price, payment of ground rent and acquisition of the suit property.
62. Additionally, the Learned Counsel averred that there was no sale agreement and the Plaintiff did not produce any documents to show the intention between the parties to sell and transfer the suit property. There was no proof of consideration paid to the Owner and the terms and conditions have not been set forth anywhere as per the provision of Section 3 (3) of the Laws of Contract, Cap. 23.
63. The Learned Counsel submitted that what the Defendant produced was a transfer dated 5th December, 2006 but the Defendants herein submit that the said document was invalid and could not be relied on to show that the property was transferred. For instance, the property referenced in the Transfer was different from the suit property secondly, the document reads that “the transfer is subject to the payment of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-) with monthly ground rent of Kenya Shillings Four Hundred (Kshs. 400.00) per month.”
64. The Learned Counsel further submitted that the Plaintiff had not shown that this clause was complied with. Regardless of the fact that the property referenced therein was not the suit property, the Plaintiff in the very least should have shown that they complied with the above provision for the transfer to be effective. The amount of Kenya Shillings Thirty Thousand (Kshs. 30,000.00/-) was never paid and hence no transfer was effected. The Plaintiff had also not shown that he has been paying the ground rent while the Defendants had provided evidence to show that they kept paying for ground rent even after the death of the deceased and hence the Plaintiff's claim for transfer fails.
65. On whether the Plaintiff had proven ownership of the property, the Learned Counsel submitted that it was admitted that the Plaintiff herein was in occupation of the suit premises. However, the said occupation has been challenged by the Defendants in their evidence and testimony. The Defendants averred and testified that the PW - 1, who was their father's brother forcefully occupied their late father's house after the demise of their father taking advantage of the fact that he was the caretaker while their father was alive. This evidence was not controverted by the Plaintiffs. In light of the foregoing submissions in respect to the defective transfer, they respectfully submitted that the Plaintiff then could not claim ownership just because he forcefully occupied the suit property. Since the Plaintiff herein had failed to establish that he purchased the suit property from the Late owner, the Defendants' submissions was that the Plaintiff had failed to prove its claim of ownership. On the other hand, the Defendants had shown that they continued paying ground rent even after the death of their father.
66. On costs, the Learned Counsel submitted that they ought to follow the event and with the dismissal of the Plaintiff's case, they prayed for costs to be awarded to the Defendants.



VII. Analysis and Determination

67. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
68. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
- a. Whether the Plaintiff's suit has merit to wit – whether he has proved that the suit property being a house without land belonged to him?
 - b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff?
 - c. Who bears the costs of the suit?

Issue No. a). Whether the Plaintiff's suit has merit to wit – whether he has proved that the suit property being a house without land belonged to him

69. The Site Visit report.

Prior to embarking into an indepth analysis of this Sub – heading, the Honourable Court wishes to share the site visit report herein.

Republic Of Kenya

In The Environment And Land Court

At Mombasa

Site Visit Report At Gathima Area In Bombolulu On 23Rd February, 2024 At 10.30 A.M.

I. Introduction

1. The Site property is situated along the Mombasa – Malindi highway at a place known as Gathima area in Bombolulu of the County of Mombasa. It is approximately 15 Kilometers from the main Mombasa trading centre. The team arrived on site at 10.00am and the Judge provided the brief of the exercise accordingly.

II. Coram

1. Justice Hon. Mr. L.L. Naikuni (ELC Judge).
2. M/s. Firdaus Mbula – the Court Assistant.
3. Mr. George Omondi – The Usher.
4. Mr. John Mwaniki – An Assistant.

III. Plaintiffs

1. Mr. Anangwe - Advocate
2. Mr. Richard Ndunyu
3. Mr. Martin Ndunyu – Son to Mr. Richard Ndunyu.
4. Mr. James Gikundi – Assistant from the office.



IV. Defendants

1. Ms. Nzamsa, Advocate.
 2. Mr. Martin Ndunyu.
 3. M/s. Lydia Ndunyu.
 4. M/s. Tabitha Ndunyu.
 5. Mr. Wilson – Driver
 6. M/s. Emily Chemusoi, a neighbor.
 7. M/s. Lyne Njeri, a neighbor.
- (Hereinafter referred to as “The Team”)

V. Security Operatives

1. APC. Stanslawce Muyonga.
2. OCS. Kazandani – Daniel Njoroge.
3. Mr. Joseph Wamalwa – Operations Manager Sprint Security.
4. PC. Martin Gitonga Kazandani Police station.
5. Mr. Felix Sum.

VI. The Purpose of the Site Visit (“Locus in Quo”).

2. It was explained that the site visit was being conducted pursuant to the court order issued on in accordance with the provision of Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -

Power to court to inspect;

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

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

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

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.
3. The Honourable 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.
4. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned



due to the likely hood of being abused particularly through social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

VII. The Procedure

5. By consensus the team agreed that Mr. Richard Ndunyu, the Plaintiff herein and M/s. Lydia Ndunyu, the Defendant provide the team with the leadership during the site visit.

VIII. Observations.

6. The team made the following observations.
 - a. The site property mainly comprised of a huge rectangular shaped Permeant structure. The boundary of the property was a metallic barrier and bump estimated distance which was 50 meters on one side. While at the end of it was an electric post. It was estimated to measure a distance of 45 Metres or thereabout.
 - b. The team was informed that the site property had no Letter of Allotment.
 - c. The Mother title was as stated under Paragraph 4 of the filed Plaint.
 - d. On the outer part of the structure it bore several stalls. These were of a salon, a Tailor shop, 2 vacant stalls all measuring 1 by 3 ½ Meters.
 - e. Adjacent to the structure there was a Semi-permanent iron sheet (old) not well kept stall supposedly sometimes back used for selling of soft drinks such as sodas, drinking water and milk. There were several milk boxes and 50 cartons of water already with dusts accumulated an indication of not being used anymore. There were old and rusty iron sheet not well kept and untidy; presence of old basins and boards which were equally so dusty. The team was informed that it was trading in the names and style of Gathima Stores which used to be operated by the deceased. The place was unhygienic and may be of health hazard against the Public Health standards taking that there were human beings still living within the said premises.
 - f. Outrightly, the team recommended and the Court directed that there be intense clean up of the place by removal of all the dirt from the enclosure immediately.
 - g. The team saw an underground Water tank.
 - h. On the inner part of the permanent structure, there exists 6 Residential houses – 1 bedroom houses (currently with 4 residents and 2 which were vacant). 1 bedroom with running water, clean rooms, electricity present and fresh air Sanitation.
 - i. That the court confirmed that room 1 was well kept.
 - j. That Tamaaly Enterprise was the late dad’s office, customer care office.
 - k. That the office was the 4th shop
 - l. There was a raised 2500 litres water tank and a huge Electric pole
 - m. Visibly, there were modifications done on the old building.
 - n. These cell phone numbers were inscribed on the wall - 0721-213807 and +16237073865.



- o. On the opposite side of the site property was a huge Go down for selling sodas. There was an in-between road separating these plots. We learnt that the premises belonged to Mr. Richard Ndunyu.

(See the sketch map here below)

Thereafter, the two appointed leaders informed court as follows:-

- a. Lydia
 - i. That there was an office that no longer existed. Before their father died the house was different. There were 6 units of 1 bedroom each numbered 1-6 and 2 Bed sitters at the rare end. Months after their father died Richard demolished the 2 bedsitters. She took pictures a few days and later she was denied access.
 - ii. That the Front office has an exit that now the exit isn't there.
 - iii. That house No. 1 was the resting place when he was at Gathima stores.
- b. Richard
 - i. That from the disputed part was no access and the houses were of the same size.
 - ii. That there were 9 doors and 4 doors on the other side.
 - iii. That the Shop 1 and 2 were the same size
 - iv. That by consensus the building was modified.
 - v. That there were vacant rooms available.
 - vi. That garbage would be cleared from the vacant rooms.

IX. Conclusion

- 6. Towards the conclusion of the site visit, the following directions were made accordingly.
 - a. That the Honourable Court prepares and shares the draft Site Visit report with all parties in due course.
 - b. That the parties to be at liberty to make any amendments to the draft report in order to attain a consensus document in the long run.
 - c. That there be a mention on 14th May, 2024 to ascertain full compliance and for further direction on the delivery of Judgement on this matter whatsoever.

There being no other business, the site visit ended at 12.00 noon

Site Visit Report Signed And Dated This.....4Thday Ofapril, 2024 At Mombasa.

.....

Hon. Mr. Justice L. L. Naikuni

Environment And Land Court At

Mombasa



Sketch Map

Two Shop 5 shop 4 Shop 3 Shop 2 Shop 1 Entry

bedsitters



70. Under this sub – title, the Honourable Court decipheres that the main substratum in this matter is whether the Plaintiff has proved ownership of the suit property being house without land. Before indulging into whether the Plaintiff’s case has merit, the Court shall discuss the concept of “house without land” (Nyumba Bila Shamba). In coastal Kenya, a land tenure known as house without land is a common parlance. The concept is only unique in the Coastal region of Kenya. It has picked great credence in the legal sphere which cannot be ignored. It is where a person can own a house without owning the land which the house stands. (See COA Civil No. 18 of 2017 - in “Addalhrzak Khalifa Salimu – Vs – Harun Rashid Khator & Others (2018), In HCCC (Malindi) No. 34 of 2005 – Famau Mwenye & 19 others Versus - Mariam Binti Said” W. Ouko J describes it as:-

“The dispute arises from land tenure unique to Mombasa which has baffled scholars, practineers and even jurist. The Land system is only referred to as “House without Land”. That is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin Maxim – “Cujus est Salum ejus est Usque ad coelum (meaning ‘Whose is the soil, his is also that which is above it’). This issue arose when one wanted to terminate of the tenancy and interpretation of the provision of Sections 3, 8, 51 and 106 of the Transfer of property Act – incidence of the absence of contract or local law or usage to the contrary of a Lease.

Many have build traditional permanent or semi permanent (Swahili) structures , grown perennial crops and shared fruits of their labour with the owners creating a perennial relationship. .

71. In the case of “Christopher Baya and 2 Ors. – Versus - Philip Kiluko and Another Mombasa HC Civil Appeal No. 64 of 2004”, Khaminwa, J. correctly understood the concept as follows:

“This arrangement is known as “House Without Land” meaning the right to build on another’s land under agreement which does not pass title to the land.”

72. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is



applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan law and the Land Titles Act, Cap 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent. The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants (Control) (Mombasa) Ordinance Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December 1969. The provision of Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection. As can be gleaned from the above authority, the question of ownership of the house-without land was wholly a question of physical possession of the subject house.

73. Having expounded on the concept of house without a land; I shall proceed to examine whether the Plaintiff's suit discloses any cause of action against the Defendants. From the amended plaint and the documents produced by the Plaintiff his claim arises from the transfer dated 5th December, 2006 which purports that the deceased Mr. Gabriel Mithimo Ndunyu transferred Plot no. 281/MN/2 to the Plaintiff. Further there was production of a special power of attorney dated 22nd April, 2002 appointing the Plaintiff as donee for Plot Number 281/MN/63.
74. It is important to note that the suit property according to the Plaintiff was Plot Number 281/I/MN which was confirmed by the Defendants' DW - 1 and DW - 2 in their testimonies. Clearly the two legal documents produced before Court refer to another property and not the suit property. Further the Defendants have contended the validity of the transfer as they claimed that they were in constant communication with their father and if he had planned to make any land transfers he would have let them know.
75. In this instant case we must note that by the arrangement of the concept of 'house without land', there would be no title deeds issued for the houses in question. The evidence of ownership of the house was two-fold:
 - a. Actual physical possession of the house-without-land.
 - b. Recognition of the physical possession by the true owner of the ground upon which the house stood.
76. From the filed pleadings and the testimony adduced in Court, it will noted that this a matter involving family members. The property was initially owned by Mr. Gabriel Mithimo Kanyana (now deceased), who was married to the 1st Defendant. The 2nd and 3rd Defendants were their children. The Plaintiff is stated to have been the grandfather of the 1st and 2nd Defendant while the PW – 1 the ostensible appointed Caretaker of the property was the brother to Mr. Kanyana thus an Uncle to the 2nd and 3rd Defendants.
77. Applying the two-fold test to this case shows that the 2nd and 3rd Defendants were raised in the property. The 2nd Defendant intimately described the suit property and the design. The Court also notes that at the time of this case, the Plaintiff was not in actually possession of the land he only collected rent on it.



Therefore, by the first test, the Court finds that the owners of the building were the Defendants being the legal administrators of the Estate of Gabriel Mithamo Ndunyu.

78. On the second aspect of the test, the recognition of the physical possession by the owner of the ground showed Bretty Logistics the appointed agents of the suit property who collected rent on behalf of the deceased recognized the Deceased – Gabriel Mithamo as the owner of the suit property even in their receipts.

79. Section 108 of the *Evidence Act* provides:

“

“ 108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence is given on either side.”

80. The provision of Section 3(3) of the Law of Contract provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit founded is: -

- a. In writing
- b. It is signed by all the parties thereto; and
- c. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party

81. While the provision of Section 38 of the *Land Act*, No. 3 of 2012 provides as follows on disposition of an interest in land:

38. (1) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

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

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

(2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.

82. In the provision of Section 2 of the same Act, disposition is defined as follows:

“disposition” means any sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the disclaimer or the creation of an easement, a usufructuary right, or other servitude or any other interest in a land or a lease and any other act by the owner of land or under a lease where the owner’s rights over that land or lease are affected or an agreement to undertake any of the dispositions;

83. The basis of any suit in contract performance or non-performance is as per requirements in Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya). The Plaintiffs is therefore expected to proof on a balance of probabilities the following essential elements of the sale agreement with the Defendant:



- a. An offer.
 - b. An acceptance.
 - c. Any consideration.
 - d. Any intention to create legal relations
84. The essential components of a contract as was observed by “Harris JA in *Garvey – Versus - Richards* {2011} JMCA 16” ought to ordinarily reflect the following principles: -

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

The Learned Counsel relied on the Court of Appeal case of “*Jane Catherine Karani – Versus - Daniel Mureithi Wachira*”, where it was observed that:-

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

85. By failing to discharge this specific evidential burden, the court finds that the Plaintiff could not prove that their now deceased father was the owner to this extent. PW – 1 and hence the Plaintiff failed to produce any Sale Agreement terms and conditions stipulated thereof demonstrating that they bought the suit land from the public auction as alleged. The transfer that the Plaintiff placed heavy reliance on, the court found that the said document had serious and glaring deficiencies and short – comings on the face of it to the detriment of the Plaintiff’s case. Firstly, apart from the “Transfer” there has been no other empirical documentary proof of ownership pf the land. Transfer forms or documents never confer ownership nor proprietary rights to the land as envisaged under the provision of Article 40 of *the Constitution* of Kenya, 2010 or other land statures. Secondly, be that as it may and giving the Plaintiff some benefit of doubt. The reference numbers of the land on the Transfer was “Plot No. 282/MN/2” yet from the pleadings under Paragraph 5, Prayers numbers 1 (a) and (c) of the Amended Plaint it referred the suit land as being “Plot No. 281/I/MN”. Certainly these parcels of land are distinct and separate from face value. Indeed, PW – 1 testified by informing Court to the effect that the Plaintiff had two plots on the same parcel of land. The Honourable Court would never which particular land was transferred nor being adjudicated for in this matter. Certainly, this is not a typographical error nor a procedural technicalities envisaged under the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010.
86. Thirdly, the document has a purported signature of the now deceased father yet neither the Defendants recognized the purported signature belonging to their father and conveniently, the alleged legal custodians of the said Plot No. 281/MN/2 were not called as witness and the only other parties to that transfer were the Plaintiff who suffers from dementia and Mr. Gabriel Mithamo Ndunyu who was since deceased.



87. Fourthly, in order for the Plaintiff to have convinced any court of law that the “Transfer” was a genuine document, he ought to have first complied with the mandatory requirements of Section 70 of the Evidence Act requiring the production of the report of a document examiner to prove the genuineness of the signature on the document. Section 70 makes the following provisions: -

“

“70. Proof of allegation that persons signed or wrote a document
If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”

88. The Plaintiff did not provide a document examiner’s report to confirm that indeed, the transfer had been signed by the now deceased nephew Gabriel if at all he ever signed it. By that failure, the court rejects the “Transfer” as a suspicious document probably manufactured to obfuscate issues and twist the case into the Plaintiff’s favour. The effect of the rejection is that there is not evidence to show that the deceased transferred the suit property to the Plaintiff. The failure to comply with the provisions of section 70 of the Evidence Act was fatal to the Plaintiff’s contention that the “Transfer” was genuine and that owned the property.

89. Fifthly, the proof of the genuineness of the signature by the document examiner would have been followed up by a comparison by the court of the said signatures with other known signatures of the now deceased Gabriel Mithamo as is stipulated by section 76 of the Evidence Act providing thus:

“76. Comparison of signatures, seals, etc.

1. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.”

90. In conclusion on this issue, the court finds no material or evidence to prove that the house in question was owned by the Plaintiff on the strength of the transfer. It was claimed that this happened when Mr. Gabriel Mithimo Kanyana got into some financial conundrum. A meal was also made from the fact that the deceased and the 1st Defendant were divorced. To me this was neither here nor there in as far as depriving the Defendants their rightful family and matrimonial property being the suit property. The Court must not act in vain; if it was to order for the Plaintiff it will be keeping the children of the deceased from a property that rightfully belonged to the estate of their late father which at the end of the day defeats justice. By all means, the Plaintiff has failed to establish its case within the required legal standards.

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

91. Under this Sub - heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaintiff, herein. In law, this mischief cannot not be allowed to stand because as an equitable relief, the permanent injunction sought demanded of the plaintiff to come to court with clean hands and not seek to benefit from his own wrongdoing.



92. At page 193 of *The Broom's Maxims of Law - A Selection of legal Maxims : Classified and Illustrated (1864)* by Herbert Broom there is a chapter on "Fundamental Legal Principles" discussing this legal maxim : *Nullus commodum capere potest de injuria sua propria* : No man shall take advantage of his own wrong.

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong, and this maxim which is based on elementary principles, is full recognised in Courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law – *frustra legis auxilium quaerit qui in legem committit*"

93. Having concluded that the Plaintiff has not proved his case; it is further the finding of this Honourable Court that he is not entitled to the reliefs sought in the amended plaint.

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

94. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

95. In the case of "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp – Versus - Gibbon & Co., 1913 ADD 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."

96. In the present case, I reiterate that the Plaintiff has failed to establish his case as pleaded against the 1st, 2nd and 3rd Defendants therefore, I proceed to award the Defendants the costs of this suit.

VIII. Conclusion and Disposition

97. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff through



the Amended Plaintiff dated 19th September, 2022 as the Plaintiff has failed to establish his case hence has failed to established his case against the Defendants herein.

98. Thus, and for avoidance of any doubt, the Court proceeds to make the following specific orders:
- a. That the suit instituted through the Amended Plaintiff dated 19th September, 2022 by the Plaintiff be and is hereby found to lack any merit and thus it is dismissed with costs
 - b. That the Court vacates all interlocutory orders, injunctions and any restraining orders that had been issued against the Defendants in relation to the property in question.
 - c. That an order made herein to have the Plaintiff, its agents and or servants immediately vacate the suit property pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012 and henceforth have the 1st, 2nd and 3rd Defendants take full possession and legal authority to proceed to deal with their property as they deemed fit and just.
 - d. That costs of the suit to be awarded to the 1st, 2nd & 3rd Defendants jointly and severally.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF OCTOBER 2024.

HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.

Mr. Anangwe Advocate for the Plaintiff.

M/s. Nzamsa Advocate for the Defendants.

