



Ngilu & 3 others (Suing as the Personal Representatives of the Estate of the Late Michael Mwendwa Ngilu) v Kombo & 18 others (Environment & Land Case E095 of 2022) [2024] KEELC 7419 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7419 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E095 OF 2022
LL NAIKUNI, J
NOVEMBER 4, 2024**

BETWEEN

**CHARITY KALUKI NGILU 1ST PLAINTIFF
LUNDE JEMI MWENDWA 2ND PLAINTIFF
MWENDE KATETHIA MWENDWA 3RD PLAINTIFF
SYALO NGILU MWENDWA 4TH PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE
LATE MICHAEL MWENDWA NGILU**

AND

**MISHI KEAH KOMBO 1ST DEFENDANT
JACKSON MWAMBAJI KAILO 2ND DEFENDANT
REBECA MUIA 3RD DEFENDANT
SALMA MBEYU 4TH DEFENDANT
ABDALLA MWANGINGIT' 5TH DEFENDANT
MERCYLINE KWAMBOKA 6TH DEFENDANT
AMINA M MWANG'OMBE 7TH DEFENDANT
TSUMA TSUMA 8TH DEFENDANT
ROBERT K GOSHI 9TH DEFENDANT
ANDREW SIMIYU 10TH DEFENDANT
KARISA KENGA 11TH DEFENDANT
MWIJUMA MBWANA 12TH DEFENDANT**



NJIRA NGALA	13 TH DEFENDANT
DUNCUN OUKO	14 TH DEFENDANT
KADAMA TOYA	15 TH DEFENDANT
SOFIA RAMADHAN SALIM	16 TH DEFENDANT
ABEL KILONZO	17 TH DEFENDANT
MANGI KATANA CHENGO	18 TH DEFENDANT
OMAR KAI	19 TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the suit instituted through a Plaint dated 1st August, 2022 by Charity Kaluki Ngilu, Lunde Jemi Mwendwa, Mwendu Katethia Mwendwa and Syalo Ngilu Mwendwa (Suing as the personal representatives of the Estate of the late Michael Mwendwa Ngilu), the Plaintiffs herein. It is against Mishi Keah Kombo, Jackson Mwambaji Kailo, Rebeca Muia, Salma Mbeyu, Abdalla Mwachingit, Mercyline Kwamboka, Amina M.Mwang'ombe, Tsuma Tsuma, Robert K.Goshi, Andrew Simiyu, Karisa Kenga, Mwijuma Mbwana, Njira Ngala, Duncun Ouko, Kadama Toya, Sofia Ramadhan Salim, Abel Kilonzo, Mangi Katana Chengo and Omar Kai the 1st to 18th Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the Defendants entered appearance through a Memorandum of Appearance and subsequently filed their Statement of Defence and counter claim on 3rd December, 2022 and the Plaintiffs responded to the Statement of Defence and a Counter - Claim dated 28th December, 2022.
3. It is instructive to note that, like most land cases are concerned in Kenya, this particular one was extremely sensitive and emotive matter. By the consensus of the parties, the Honourable Court conducted a Site Visit ("Locus in Quo") and a comprehensive and detailed report was prepared and shared in advance among the parties. The said report forms part of this decision herein for ease of reference. Further to this, it imperative to note that this is matter the Court has on several opportune occasion tried to implore on the parties to embrace an Alternative Judicial System (AJS) in tandem with the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) & (2) of the Environment & Land Court *Act, No. 19 of 2011* but unfortunately all became a cropper.

II. Description of the Parties in the suit

4. The Plaintiffs were described as Kenyan adults and the personal representatives of the Estate of the late Michael Mwendwa Ngilu (Deceased).
5. The 1st to 20th Defendants were described as Kenyan adults residing and working for gain in Mombasa County.

III. Court directions before the hearing

6. Nonetheless, on 9th May, 2023, the Honourable Court fixed the hearing dated on 26th July, 2023 with the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 and



the matter proceed for hearing by way of adducing “viva voce” evidence with the four (4) Plaintiffs’ witness (PWs – 1, 2, 3 & 4) testifying in Court on 26th July, 2023 at 12.30 pm after which they marked their case closed and the Defendants calling their ten (10) witnesses (DW - 1 to DW - 10) on various dates after which they marked their cases closed

IV. The Plaintiffs’ case

7. From the filed pleadings, the Plaintiffs averred that they were the owners and/or beneficiaries of all that parcel of land situated at Changamwe area, Mombasa County and bordering the Kenyan Port being the suit property known as Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa (hereinafter referred to as “The Suit Land”) estimated at the market value of a sum of Kenya Shillings One Hundred & Fifty Thousand (Kshs.150,000,000/-). The Plaintiffs at all material times enjoyed peaceful, uninterrupted and exclusive occupation, and possession of the subject property from the registration date in the Certificate of Title and after being appointed the personal representatives of the Estate of the late Michael Mwendwa Ngilu (hereinafter referred to as “The Deceased”).
8. In the year 2020 they were informed that unknown persons had trespassed and were attempting to put up structures therein. The 2nd Plaintiff visited Chaani Police Station and the Offices of the District Officer in November 2020 and sought their assistance in having the trespassers vacate the premises. On or about November 2020 she visited the suit property wherein she found approximately 5 temporary structures that were yet to be completed. The persons therein informed the 2nd Plaintiff that they were willing to vacate the suit property after being paid money as compensation.
9. The 2nd Plaintiff held a meeting with the District Officer and the Area Chief Chaani Area and she requested them to accompany her to the suit property. She visited Chaani Police Station and sought the assistance of the Police Officers from Chaani Police Station for purposes of providing them with security during the visit to the suit property. On 24th February, 2021 at around 10:30 am the 2nd Plaintiff visited the suit property in the presence of the Plaintiffs’ appointed licensed surveyor being Seline Consultants Limited, their Advocates on record, the District Officer, Area Chief and Police officers from Chaani area. The Defendants had constructed more temporary structures while some of them were pending completion.
10. The persons therein stated according to the 2nd Plaintiff that they were willing to stop the constructions and unlawful trespass from the suit property in the event they were paid and admitted that they were fully aware that the suit property belonged to the 1st Plaintiff. The 2nd Plaintiff averred that the 1st to the 9th Defendants issued their names to the Area Chief which names they submitted on the belief that the same would be used to allocate them funds to enable vacate the suit Premises. The 2nd Plaintiff averred that the Defendants stated that they had shifted from the adjacent parcel of land after the owners of the said parcel of land compensated them to move from their property.
11. According to the Plaintiffs some of the unknown persons unlawfully trespassing and developing the suit property in an attempt to unlawfully occupy the suit property submitted their names to the Area Chief and started making demands for payment so as to cease their unlawful occupation and trespass the suit property. Their Appointed Surveyor, Seline Consultants Limited conducted a survey of the area for purposes of establishing the boundaries with respect to the suit property and proceeded to place the beacons for purposes of marking the boundaries of the suit property.
12. The Defendants indicated that they were willing to demolish the unlawful temporary structures that were within the boundaries of the suit property but demanded to be paid before they could demolish the same. The 2nd Plaintiff visited Chaani Police Station in the presence of her Advocates on record and



made a formal complaint with respect to the Defendants' acts of trespass and was issued with an OB NO.16/24/2/2021. On 9th April 2021 at around 2:00 p.m, the 2nd Plaintiff visited the suit property in the presence of the Officer In Charge of the Police Station (OCS) at Chaani Police Station, Police Officers from Chaani Police Station, the Chief Chaani Area, the Elder Chaani Area and the Plaintiffs' Advocates on record and served some of the Defendants with Demand Notices.

13. According to the Plaintiffs, the 10th to 17th Defendants submitted their names and telephone numbers to the Chief Chaani Area on the belief that the same would be used to allocate them funds. The Plaintiffs requested them to demolish the temporary structures and vacate the suit property but reiterated that they would only do so upon receiving payments from the Plaintiffs. On 16th April, 2021 her Advocates on record and the Chief, Chaani Area visited the suit property for purposes of serving some of the Defendants with the Demand Notices and further requesting the Defendants to demolish the illegal temporary structures and vacate the suit property.
14. The Defendants reiterated that they would only demolish the illegal temporary structures and vacate the suit property after being paid by the Plaintiffs. The 18th to the 20th Defendants submitted their names and telephone numbers to the Chief Chaani Area with the belief that the same would be used to contact them for purposes of effecting payment of the money demanded by them. The Defendants continue to be unlawfully in occupation of the suit property to the detriment of the Plaintiffs as the Plaintiffs are prevented from developing and/or benefiting from the suit property.
15. According to the Plaintiffs on or about 8th May 2021 their Advocates on record visited the suit property in the presence of the area chief and proceeded to serve the remaining Defendants with the demand notices. The 20th Defendant turned violent, harassed the plaintiffs' Advocate on record, threatened to beat him and attempted to vandalize the Advocate's Motor Vehicle for serving him with the Demand Notices. The aforesaid incident was reported at the Chaani Police Station under OB NO.14/07/5/2021.
16. The afore - stated acts of violence on the part of the Defendants stalled and curtailed any peaceful efforts to have the Defendants cease and desist from the acts of trespass and unlawful occupation hence necessitating the filing of the instant suit. The Defendants proceeded to complete the remaining illegal temporary structures in attempt to use the same as a basis for claiming for payments from the Plaintiffs. The said temporary structures were erected without any approvals from the relevant authorities and the same poses a risk against the Plaintiffs on account of any alleged claims with respect to an occupier's liability.
17. According to the Plaintiffs despite requesting the Defendants to peacefully vacate the suit Property and demolish the temporary structures, they had to date failed, ignored and/or neglected to demolish the same and/or vacate the suit property. The Defendant continued to be unlawfully in occupation of the suit property and had refused, ignored and/or neglected to honor the Plaintiffs' demands.
18. The Defendants activities had diminished the value of the suit property which borders the Kenya Ports Authority and is close to the Mombasa-Nairobi highway owing to the temporary illegal structures erected thereof hence diminishing the suit property's value. The Plaintiffs relied on the following particulars of forceful occupation on the part of the Defendants:-
 - a. Entering upon the suit property without the Plaintiffs' consent and/or notice;
 - b. Destroying and wasting the suit property;
 - c. Causing the erection and/or erecting illegal temporary structures on the suit property;



- d. Disentitling the Plaintiffs from any meaningful utility of the suit property due to their unlawful and forceful occupation of the suit property;
 - e. Disentitling the Plaintiffs from being in occupation and/or possession of the suit property;
 - f. Failing to vacate the suit property upon demand being issued; and
 - g. Failing, refusing and/or neglecting to demolish the illegal temporary structures erected on the suit property
19. According to the Plaintiffs, the Defendants' actions of dwelling or remaining on the suit property and erecting illegal temporary structures are tantamount to trespass. The Plaintiffs relied on the following particulars of trespass on the part of the Defendants:-
- a. Gaining entry into and upon the Plaintiffs property without the Plaintiffs' permission or consent.
 - b. Erecting structures on the Plaintiffs' property hence interfering and infringing upon the Plaintiffs' right to enjoy quiet and exclusive possession of the Plaintiffs' property.
 - c. Taking possession of the Plaintiffs' Property to the detriment of the Plaintiffs.
 - d. Failing to vacate and handover vacant possession of the property to the Plaintiffs, despite being served with Demand Notices.
20. The Plaintiffs averred that the Defendants' acts of demanding for payments is tantamount to mischief and fraud as the Defendants were attempting to extort funds from the 1st Plaintiff in exchange for vacant possession whilst in the full knowledge that they were trespassers. The Plaintiffs relied on the following particulars of fraud on the part of the Defendants:-
- a. Invading and/or trespassing on the Plaintiffs' parcel of land for purposes of unlawfully obtaining undeserving compensation.
 - b. Erecting illegal structures on the suit property.
 - c. Constructing illegal structures therein whilst knowing that they are not the registered proprietors of the suit property with the intention of claiming for compensation on account of the said structures.
 - d. Demanding for payments as a condition precedent for them to demolish the illegal structures and to vacate the suit property.
21. According to the Plaintiffs, the Defendants continue to deprive the Plaintiffs of their rights to access, enter, use and enjoy quiet possession of the Plaintiffs' property despite not having any legal rights over the suit property. As a consequence of the Defendants' actions the Plaintiffs have been deprived of their legal right to property and infringed on their Constitutional right to quiet and exclusive possession of their property and have been put into inconvenience and are thus entitled to general damages.
22. Further according to the Plaintiffs the said illegal activities by the Defendants traversed through the suit property thereby rendering the same economically unsuitable for any development for which it was intended. The Plaintiffs relied on the following particulars of general damages:-
- i. The Plaintiffs had by the Defendants' actions been deprived of their Constitutional right to access, remain upon and use its property – the suit land.



- ii. The Defendants have unlawfully taken up possession of and deprived the Plaintiffs from exercising their legal right to gain entry, remain upon, and use their property.
 - iii. The Defendants had without legal justification forcefully taken possession of the Plaintiffs' property.
 - iv. The Defendants have acted in an unjust manner without due regard for the law by unlawfully taking over possession and occupation of the Plaintiffs' property.
 - v. Despite demand the Defendants have blatantly refused, ignored and failed to vacate from the suit property, demolish the structures thereon and to return vacant possession and occupation of the Suit land to the Plaintiffs.
23. The Plaintiffs averred that despite demand and notice of intention to sue being issued, the Defendants have unlawfully continued to remain on the Plaintiffs' property and have failed, refused and/or ignored to vacate and demolish any structures on the Plaintiffs' property and to give access and possession of the suit property back to the Plaintiffs.
24. The Defendants' adamant refusal to demolish the temporary structures and to vacate the Plaintiffs' parcel of land to date have necessitated the Plaintiffs to seek legal redress through the Honourable Court. The Plaintiffs acknowledged the jurisdiction of the court and that there was no suit pending and there have been no previous proceedings in any Court between the Plaintiffs and the Defendants on this subject matter.
25. The Plaintiffs prayed that Judgment be entered against the 1st to the 18th Defendants jointly and severally for:-
- a. A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
 - b. A declaration that the Defendants, whether by themselves, or their servants or agents or otherwise howsoever, are wrongfully in occupation and possession of the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and are accordingly, trespassers on the same.
 - c. A declaration that the Defendants, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
 - d. A permanent injunction prohibiting, preventing or restraining the Defendants whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
 - e. A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and for the unconditional release handover and return of the parcel of land to the Plaintiffs.



- f. An order evicting the Defendants whether by themselves or their agents, employees servants or otherwise from the parcel of land being Subdivision Number 2427(Original Number 2402/5) Section VI Mainland North Mombasa.
 - g. An order granting vacant possession of the parcel of land being Sub division Number 2427 (Original Number 2402/5)Section VI Mainland North Mombasa to the Plaintiffs.
 - h. An order to the Officer Commanding Station (OCS) Chaani Police Station to enforce compliance of the order(s) granted.
 - i. General damages for trespass by the Defendants
 - j. Aggravated damages
 - k. Costs of this suit
 - l. Interest on (9), (10) and (11) above for such period as the court deems fit at court rates
 - m. Any such and further relief as this Honourable Court may deem fit to grant
26. The Plaintiffs responded to the Defendants' Statement of Defence and put in their Defence into the Counter - Claim dated 28th December, 2022 and filed on the same day; in their defence, the Plaintiffs in response to Paragraphs 3, 4, 5, 6, 7, 8,9 and 10 of the Statement Defence reiterated the contents of Paragraphs 3 and 4 of the Plaint.
27. On 26th July, 2023 at 12.30 pm, the Plaintiffs called their first witness PW 1 and the Advocate for the Plaintiffs had opening remarks before the witness testified. The Plaintiffs averred that no adverse orders had been issued challenging the ownership of the suit property. The Defendants had not substantiated their allegations with respect to their alleged particulars of fraud. The Plaintiffs averred that the Defendants lacked the locus-standi to raise allegations of fraud as they had no known, implied and/or real interest in the suit property.
28. In response to paragraph 11 of the Defence, the Plaintiffs reiterated the contents of Paragraph 4 of the Plaint. In response to the contents made out under Paragraphs 12, 13, 14, 15 and 16 of the Statement of Defence, the Plaintiffs reiterated the contents of Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24, of the Plaint. The Plaintiffs at all material times enjoyed vacant, uninterrupted and exclusive occupation and possession of the subject property from the registration date in the Certificate of Title and after being appointed the personal representatives of the Estate of the Deceased.
29. On or about 5th February, 2021 the Registrar of Titles, Mombasa issued a Certificate of Postal Search stating that the property was registered to Michael Mwendwa Ngilu and that there were nil encumbrances with respect to the property. On or about 5th February 2021 the Registrar of Titles, Mombasa issued a Certificate of Postal Search stating that the property was registered to Michael Mwendwa Ngilu and that there were nil encumbrances with respect to the property.
30. On or about 16th December 2013 the High Court in Nairobi Succession Cause No. 321/2012 issued a Certificate of Confirmation of Grant listing the Plaintiffs as the beneficiaries of the suit property. The Plaintiffs averred that they were notified of the Defendants' illegal occupation of the Property in the year 2020 and the 2nd Plaintiff visited Chaani Police Station and the Offices of the District Officer in November 2020 and sought their assistance in having the trespassers vacate the Premises. On or about November 2020 she visited the suit property wherein she found approximately 5 temporary structures that were yet to be completed.



31. The Plaintiffs averred that the Defendants allegations that some of the Defendants had been on the suit property for a period of 20 years was false; contrary to the Defendants other pleadings file in Court and the same was not substantiated. The 1st to 9th Defendants submitted their names to the Area Chief on 24th February 2021, the 10th to 17th Defendants submitted their names and telephone numbers to the Chief Chaani Area on 9th April 2021 and the 18th and 19th Defendants submitted their names on 16th April 2021 with the believe that the names and telephone numbers would be utilized towards compensating them so as to vacate the premises.
32. In response to Paragraph 17 of the Statement of Defence the Plaintiffs reiterated Paragraphs 5 to 43 of the Plaintiff. In response to Paragraphs 18 of the Statement of Defence the Plaintiffs reiterated Paragraphs 21, 24, 28 and 29 of the Plaintiff. The Plaintiffs further averred that the Defendants acknowledged receipt of the Demand Letters wherein some affixed there, names, signatures and dates while others received the same but declined to sign on the Advocates' copy of the Demand Letters.
33. According to the Plaintiffs, despite demand by its Advocates on record, the Defendants failed, ignored and/or refused to cease trespassing and constructing on the suit Premises hence necessitating the filing of the instant proceedings. The Plaintiffs denied the contents of Paragraphs 19, 20 and 21 of the Statement of Defence. The Plaintiffs averred that the Defendants had no known or real interest in the suit property as they were not the registered proprietors of the suit property.
34. The Plaintiffs further averred that their interest in the suit property had not been challenged nor has the Certificate of Title been cancelled. The Defendants illegal occupation of the suit property did not give rise to any prescriptive right over the suit property capable of defeating their interest in the suit property. The Plaintiffs denied the contents of paragraph 21 of the Statement of defence. The Plaintiffs denied the Defendants prayers and reiterated the entire contents of the Plaintiff. The Plaintiffs prayed that the Defendants Defence be struck out with costs and Judgment entered for the Plaintiffs as prayed in the Plaintiff.
35. On the Defence to the Counter - Claim the 1st to 4th Defendants to Counter - claim denied the contents of Paragraph 29 of the Counter - Claim. The 1st to 4th Defendants in the Counter - Claim denied the contents of Paragraphs 30 and 31 of the Counter - Claim and the alleged particulars of fraud.
36. The 1st to 4th Defendants in the Counter - Claim averred that no particulars of fraud can be inferred from the Certificate of Title as the entries therein with respect to the Charge, Caveat, Withdrawal of Caveat, Discharge of Charge and the Transfer to the previous owner one Michael Drury were consistent and are not tainted with any irregularities. The 1st to 4th Defendants in the Counter - Claim further averred that the allegations alleged by the Plaintiffs to the Counterclaim were with respect to proprietary issues that occurred prior to the purchase of the property by the deceased.
37. The 1st to 4th Defendants in the Counter - Claim averred that entry number 6 in the Certificate of Title evidences that the then Registrar was satisfied with the map or plan produced and/or availed by the Michael Drury and proceeded to register the Transfer dated 18th February 1981 under the provisions of Section 65 (1) (2) of the Registration of Titles Act and consequently issued the provisional certificate as per entry 7.
38. The 1st to 4th Defendants in the Counterclaim further averred that the Transfer dated 23rd July, 1985 was duly attested to by one David Tunshatt being the Consul General, British Embassy and who was legally allowed to attest documents by dint of the provision of Section 58 (1) (d) (i) of the Registration of Titles Act (repealed).



39. The 1st to 4th Defendants in the Counter - Claim averred that the Deceased was a bona fide purchaser for value and that he had held an absolute and indefensible title to the suit property since the year 1985. The Certificate of Title held by the estate of the Deceased was protected in law. The 1st to 4th Defendants in the Counter - Claim were strangers to the averments as contained under Paragraphs 32, 33 and 34 of the Counter - Claim.
40. The 1st to 4th Defendants in the Counter - Claim denied the entire contents of the Plaintiffs in the Counter - Claim's prayers. The 1st to 4th Defendants in the Counter - Claim averred that the Plaintiffs in the Counter - Claim had not pleaded and/or met the threshold with respect to the alleged claim for adverse possession.
41. The 1st to 4th Defendants in the Counter - Claim aver that the Plaintiffs in the Counter - Claim had not proved that they had been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The Plaintiffs in the Counter - Claim had denied being in possession of the suit property hence their alleged claim with respect to adverse possession failed on account of the denial that they were in occupation of the suit premises. The Plaintiffs in the Counter - Claim had pleaded and admitted that they entered into the suit Premises in the year 2015 hence the same did not qualify as a ground upon which to claim adverse possession.
42. The 1st to 4th Defendants in the Counter - Claim further averred that they had no knowledge of the Plaintiffs in the Counter - Claim's alleged occupation of the suit property prior to the year 2020. The 1st to 4th Defendants in the Counter - Claim averred that the photographs produced by the 1st to 4th Defendants in the Counter - Claim and the Plaintiffs in the Counter - Claim were with respect to newly constructed temporary structures.
43. Upon being notified of the same, the 1st to 4th Defendants in the Counter - Claim made efforts to have the Plaintiffs in the Counter - Claim vacate the suit premises, issued them with Demand Notices in the year 2021 and instituted the instant proceedings in the year 2022. The Plaintiffs in the Counter - Claim failed to vacate the suit property and now admitted to not being in occupation of the suit premises hence their claim with respect to adverse possession has collapsed as the 1st to 4th Defendants in the Counter - Claim were the sole occupants of the suit property in light of the admission by the Plaintiffs in the Counter - Claim.
44. The Plaintiffs in the Counter - Claim had always held the position that they were willing to vacate the Premises upon being compensated and they had not proved and/or shown any intention to hold the property adversely and their alleged claim is an afterthought. The estate of the deceased had a Certificate of Title number C.R 14492 registered in the name of Michael Mwendwa Ngilu to which the 1st to 4th Defendants in the Counter - Claim were legal beneficiaries.
45. The 1st to 4th Defendants in the Counter - Claim further averred that the said Certificate of Title had not been challenged in any Court of law. There was no investigation by the Lands Registrar and/or any other agency with respect to the subject Certificate of Title number C.R 14492 and/or the ownership of the suit property by the estate of the Deceased.
46. The 1st to 4th Defendants in the Counter - Claim prayed that the Plaintiffs' Counter - Claim be struck out with costs and Judgment be entered for the 1st to 4th Defendants in the Counter - claim as prayed in the Plaintiff.



A. Opening remarks by Mr. Gathi Advocate.

47. The Learned Counsel stated that the matter related to the Plaintiffs property. The Plaintiffs were the duly appointed legal Administrators of the estate of the deceased. The Property had been vacant. In year 2020 it was invaded by the Defendants and they had been increasing with time. The Plaintiffs' claim was for vacant possession and injunction orders. He told the court that he would be leading the evidence of experts and Plaintiffs and one who claims to have been sold the property. Whist, the Defendants were claiming title through Adverse possession as stated in their Counter – Claim.

B. Examination in Chief of PW - 1 by Mr. Gathu Advocate.

48. PW - 1 was sworn and testified in the English language. She identified herself as M/s. MWENDWA LUNDE JEMI. She was Citizen of Kenya with all her particulars as found in her Kenyan national identity card shown to Court. Her testimony was that she was the 2nd Plaintiff and a daughter to the deceased. She was a Co Legal Administratrix to the Estate of the deceased. They were issued with the Grant Letters of Administration. The deceased was the registered owner to the suit property. The property located at Port Reitz area in Changamwe. She recorded a witness statement. The property belonged to her father Michael Mwendwa Ngilu. The property was registered to the deceased as per the Certificate of Postal Search. All the four (4) Plaintiffs were in the Grant and the title deed. They were not in occupation of the property; It was occupied by the 1st to 19th Defendants, from the year 2020.
49. With reference to the google documents – for the year 2022, it showed there were some structures. In the year 2021, they engaged a Land surveyor to check the size of the Plot. Its dated 2nd March, 2022 and July 2022. The Land Surveyor's report showed the status of the land. As from the report of year 2020-21, 2021 showed the increase of upto (23) structures. In the year 2020 they were informed by a neighbor that there were invasions of the property and in November, 2020 she visited the property and in February, 2021 they visited it. They engaged the occupants and they indicated they would leave/vacate property but on condition that they be paid compensation. They decided to engage the Advocates. They got the Advocates to record the names of the occupants. Indeed, the actual names of the Defendants they recorded by the Chaani Location. They got the Advocates to issue the demand letter and they were served. But despite of this they failed to vacate.
50. PW - 1 stated that the Defendants were aware whose land it was. They would say land was for Mama i.e. Charity Kaluki Ngilu. After they declined to vacate they filed the suit. They were still coming to the land. With reference to a draft sale agreement dated 26th February, 2023 between Mwijuma and Mwasyyia/ Mwijuma Mbwana – 12th Defendant. The report confirmed that they were selling the Plot to other people. The sellers were the 12th and 19th Defendants.
51. PW - 1 confirmed that there were structures on the site land – temporary mud. They had wanted to construct houses – they were now unable to cause any development on it. They feared they may cause injuries. The estimated value of property was a sum of Kenya Shillings One Hundred and fifty Million (Kshs. 150, 000, 000.00/=) for the entire property. This value was based on the surrounding area. Further, there was sentimental value to the property. The witness was aware that the Court conducted a site visit. There were several semi-permanent structures. Some of the Defendants had constructed both permanent and semi – permanent structures on the suit. Some of the Defendants were leasing out to other tenants. PW - 1 prayers were as per the Plaint pleaded. The 21 documents that were filed: -
- a. The list of documents dated 1st August, 2023 – consisting of 13 documents.
 - b. The 2nd List of documents (1) documents.



- c. The 3rd List of documents – (4) documents.
- d. The 4th List of documents – (3) documents dated 25th July, 2023

The Plaintiffs Exhibits numbers 1 to 16 were produced. Wile, numbers 17 to 21 were marked for identification.

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

- 52. PW - 1 was referred to a document from the list of documents. It was a Provincial title. It was his father who applied for it. On page 2 there was no name for his father. She could not confirm the tenure of the land. According to PW - 1 Page 3 there were Entries numbers 2, 3, 4, 5 and 6 which were not clear. On entry No. 7 the Provincial Certificate of Title issued was on 17th February, 1981. From Entry No. 1 to 7 none were in the name of her father.
- 53. PW - 1 was referred to the transfer. It was dated 23rd July, 1985. She confirmed that this was after the Provincial Certificate of Title was issued. She would not answer the question of on what basis the Transfer was done – that was in terms of the title deed used. The transfer showed the name of Michael Mwendwa Ngilu. Her name did not appear on the Provincial Certificate
- 54. PW - 1 did not have a sale agreement duly executed between Michael Drury and Michael Mwendwa Ngilu. His father died in June, 2006. At no time had her father undertaken any development on the land nor physically occupied the land. They had wanted to build ware houses on the suit property. With reference to the Grant letters of Administration; they were obtained in Nairobi on 16th November, 2013 as the administrators resided in Nairobi. The administrators were the children of the deceased. They had not registered the property yet by the time of her testimony. The grant had some of the information concealed/ hidden as the same were not relevant to this court. The concealment never depicted a negative character of the Plaintiffs of wanting to conceal information from the court.
- 55. PW - 1 confirmed that they talked with the Chief and the police but there was no agreement. She did not force the Defendants to give information. She did this as she was a woman and she feared for her life. The Defendants were not intimidated. She was not present during the site visit and did not know the economic position of the people on the land. She was informed by her neighbours that there were invaders in their land and this information was in her statement although she was not specific.
- 56. With reference to the 3rd List of documents, the sale agreement PW 1 stated that information was correct, the purchaser was Daniel Muyasya, sold by the 12th and 19th Defendant – according to PW 1 he never colluded to making the agreement. They had not reported the matter to the police. The Defendants stated that the land belonged to Mama. They were the ones who said that. She had no proof of the payment for the sale of the land by Daniel Muyasya. They had not been able to prepare the design of the warehouse on the land as it had been occupied. PW - 1 did not have a land valuation report. The land had belonged to his father hence the sentimental value. The People on the land were tenants but she had no proof. She did not know whether they had land elsewhere. She did not know whether tenants (Defendants) had a right to the land.

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

- 57. On being referred to the national identity Card of the 12th and 19th Defendants. The witness told the Court that she was told by a neighbour there was encroachment. Indeed, upon visiting the land she actually found the invasion had taken place. The properties on Grant Letter of Administration were in Nairobi and Kitui. They only concentrated to the property in Mombasa. The last entry no. 7



was for the year 1981. They accompanied her because she was a woman and needed safety. There was no coercion or harassment.

58. According to PW - 1 they had not prepared any development plans for the construction of warehouse. She had no knowledge on the entry on title deed. The title was handed to them by their father. As from the search the only registered interest was that of her father. The transfer showed the land was by Michael Drury. The Plot No. on the Transfer was the same as the one in the provincial title.
59. On the same day the 26th July, 2023, the Plaintiffs called the 1st Plaintiff; who testified as follows:

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

60. PW - 2 was sworn and testified under oath IN THE English language. She identified herself as CHARITY KALUKI NGILU. She was a Kenyan Citizen with all the particulars as founded in her identity card shared with the Court. She was the 1st Plaintiff. She recorded a witness statement on 25th July, 2023. She was aware of the suit property. It belonged to her husband but it was now their. The property was known as Plot 2427. She was referred to the transfer form. She said that the number appeared in the grants, search and title.
61. The Defendants had encroached on the land. From the site visited by Court, she noted that the encroachers were strangers. She did not know them. Before the structures looked few but they kept on increasing – 20 - 40 structures. They were semi-permanent structures. There were fairly new. During the global Covid - 19 pandemic, there were no structures at all. When she got there, she heard them say the structures were for commercial purposes. Not all the structures were occupied. She was in possession of the original title deed and she stated that she would be able to produce it. She had not been able to develop the land, as it was for her husband. KPA wanted to purchase it. They did not want to sell as they had to develop it.
62. PW - 2 told the court that Mr. Daniel Munyasya was introduced to her. He came and told her that he was being sold out of the land by some third party. He took photographs. He gave her the names of Mwijuma Mbwana and Omar Kai – 12th and 19th Defendants as the people who were purported to sell the land. She had never given them any authority to sell the land. She had never been sued due to the land. From the time they visited the land, they never harassed them, one time they told her they would never leave the land and almost became hostile. Some of the structures were built from old iron sheets, mud – even inside they are sketchily furnished.
63. According to PW – 2, the people they sued were the ones occupying the houses. They bought the land from a former teacher – from St. Charles Luanga High School – Kitui, Michael Drury. Her husband was also a teacher at the same school. The land belonged to but when he left the country he sold the house to her husband. They had continued constructing despite them being served with Court order. She did not benefit from the rental income. She saw the photographs some constructions were still on going.

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

64. PW - 2 confirmed that she had not brought the Petition to the Grant Letters of Administration of her husband's estate to court. She had never stayed on the suit property. They had fenced off the land by the walling of the suit property but the Defendants removed. She did not have the photographs of the fence but there were some of the photos. She had reported the matter to the police that the Defendants were the ones who demolished the wall. She did not have evidence in court to show that any of the Defendants were arrested. From the set of the photographs she was not able identify the owners of houses to any Defendants.



65. PW - 2 further told the court that she confirmed there were people who lived on the land. From the 20 Defendants, she did not know who exactly was the tenant or not. Her husband bought land in the year 1985. By the time he died in the year 2006, he never occupied the land. They got the grant in the year 2013 which was 10 years ago at the time of her testimony. They had never occupied the land. They occupied it as they had been planning to develop the land and it called for finances. She was able to fence it.
66. The witness told the court that it was not true that the land had been occupied. They only occupied it after the insurgence of the global Covid – 19 pandemic. There were negotiations between the Kenya Ports Authority and themselves. There was a sale agreement to that effect. She never met Michael Drury but she knew that he and her husband were very good friends even before their marriage. She was not present when the property was being bought – by Daniel Munyasya. The alleged sale agreement was not in collusion between them. The 12th and 19th Defendants were reported to the police for trying to sell off land that was not theirs. PW – 2 knew that these two people were detained for trying to sell land that never belonged to them. The buyer even wanted to refund of the purchase price. She did not have evidence in court.
67. According to the witness, from the title deed in Court was not legible. She would not have been able to know whether it bore the name of her husband or not. With the permission of the Court, she would be able to produce the original title deed in the next session.

C. Re - examination of PW - 2 by Mr. Gathu Advocate.

68. PW - 2 reiterated that there were many people who had encroached on the suit land. The title bore the name of her husband. The Plot was commercial. They needed to look for finances. KPA did not want any development on the area. There were four (4) other land owners within the area. In this Country people would buy land for speculation. It was Mr. Daniel Munyasya who alerted her of the fraudster sellers. The Defendants had had any title documents showing ownership of the land. They had fenced the land but it was demolished by the Defendants. She lodged a complaint with the police against the Defendants.
69. On 14th February, 2024 at 3.00 pm the Plaintiffs called PW - 3 who testified as follows:-

A. Examination of PW - 3 by Mr. Gathu Advocate.

70. PW - 3 testified under oath in English language. He identified himself as EPHRAIM MAINA RWINGO. He stated being a Citizen of Kenya holding the national identity card bearing all the particulars shared with the Court. He told Court that he was a Land Surveyor. He held a Bachelor of Science from University of London and he was registered with the Institute of the Surveyors of Kenya. He worked with Government for 20 years and as a private Surveyor for 10 years. He was attached to a firm trading in the names and style of SELINE CONSULTANT LTD. According to him, he got instructions dated 22nd February, 2022 from M/s. Lunde Mwendu to undertake the land surveying exercise on the suit land. On 24th February, 2021, He visited the land and conducted the surveying exercise. While doing this, he was in the company of the District Officer of the area, the area chief and 4 police officers. PW – 3 stated that in so doing, he used the Survey Plan No. FR 89/95 which had been approved by the Director of Surveyor on 29th January, 1960. He looked for the old beacon and used it to plant the new beacon. He used G.T.S. and R.T.K. to get the coordinates. His findings were that all the beacons were on the correct place and corresponding to the Survey Plan.
71. He also noted all the buildings on the property. He planted the beacon in the middle in the land. He found some structures on the land as follows:-



- a. 4 completed Semi Permanent.
 - b. 10 unfinished semi permanent.
 - c. 9 bathrooms.
72. PW - 3 further conducted a forensic survey/investigation. The land was not on a road reserve. He checked the land on the Ndung'u Report and he confirmed that the plot was not a public land. He found the Plot was not restricted. On 25th July, 2023, he received further instructions to confirm whether all the beacons were in the same place and produce the report and if there was any encroachment. His finding was there were more houses – there were 31 new structures. They were all Semi-Permanent structures. They put all the maps on Google maps and the satellite images showed the level and rate of the encroachment by the intruders. Subsequently, he prepared a survey report dated 23rd March, 2021 and which he produced as exhibit and evidence in support of this case.

B. Cross examination of PW - 3 by Mr. Khamisi Salim Advocate.

73. PW - 3 confirmed that he was a Licensed Surveyor but he did not have his documents with him. He was an experienced surveyor for 30 years. He visited the site. He had shown the exact places where the houses were though it was coloured on the first survey. He confirmed that the black boxes – 19 of them – hence depicting the structures. From the map they could not identify which were permanent and Semi-Permanent structures. From the investigation he was not able to know the user of the property. Besides, that was never the task by Surveyors unless they have specific instructions to establish ownership of the property.
74. PW - 3 stated that he received verbal instructions from M/s. Lunde Mwende. He confirmed that was not a formal/ professional way of operation. He had attached the map and from the Google summit images undertaken – which was black and white, he was unable to tell the number of houses erected on the land. He had not attached a title to indicate the owner of the property.

C. Re - examination of PW - 3 by Mr. Gathu Advocates.

75. PW - 3 confirmed that he surveyed the suit land. He was not able to tell the user of the land - whether commercial or residential. It was normal practice to receive verbal instructions from clients/customers. His professional stand was not questionable. He had credibility. He produced the two land survey reports dated 25th February, 2021 and 25th July, 2023 respectively. He undertook to furnish the Court with the said report.

A. Examination in Chief of PW - 4 by Mr. Gathu Advocate.

76. PW - 4 was sworn and he testified in English language. He was named as DANIEL MUNYASIA NYOLU and Citizen of Kenya holding the national identity card bearing all the particulars shared with the Court. He recorded a statement on 25th July, 2021. He informed Court that he had wanted to purchase some property. He called a land agent/broker and they went to a place called to Port Reitz. They identified the sit land. While there they found two people called Mbwana Juma and Omar Kai Kaindi. These were the 12th and 20th Defendants herein. The two persons stated that they were the owners of the land. It was measuring 60 X 100. They were using tape measure. The purchase price was for a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-). They entered onto a sale agreement – dated 26th February, 2023, it bore his signature – he had seen one of the persons who tried to sell the land. Upon signing of a sale agreement, he paid a deposit of a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) though the Safaricom Mpesa services. He sent the cash through a cell –



phone number given by the ostensible sellers. The land was not fenced. He went there the second time to get a piece for his friend. They were arrested by police on allegations they were buying someone's land. PW - 4 had already produced the sale agreement. They did not complete the sale transaction.

B. Cross examination of PW - 4 by Mr. Khamisi Advocate.

77. PW - 4 told the court that before the purported purchase of the property he visited the land and found the people using the land. They convinced him they were the owners. They did not have a title deed or documents on the land with them. On being referred to the sale agreement, PW -4 stated that the sum of Kenya Shillings Five Thousand (Kshs 5,000/-) paid was a deposit as commitment to purchase of a 60 X 100 Ft. The property did not state the suit land. It showed – USALAMA MWINGO PROPERTY. The agreement stated that they were the owners through the words in the Kiswahili language:- “Tumekubali kumuuzia Daniel Shamba 60 X 100 ft plot at Usalama Mwingo village at a sum of kshs. 300, 000.00/=”.
78. PW - 4 told the court that the entire area was Port Reitz. He sent the sum of Kenya Shillings Five Thousand (Kshs 5,000/-) to cell phone numbers 0716466531. He had not indicated the owners of the cell phone. He had not presented a Safaricom Mpesa Statement to Court. From his witness statement, he stated that he recorded it together with his friend John. He was not aware whether any charges had been preferred against the two people and whether they were brought to court. According to PW – 4, Juma Mbwana told them he had no identity card.

C. Re – examination of PW - 4 by Mr. Gathu Advocate.

79. PW - 4 reiterated that he personally met Mr. Mbwana, the 12th Defendant herein. He visited the plot. The two (2) claimed to be the owners of the suit property.
80. On 14th February, 2024, the Plaintiffs closed their case through their counsel Mr. Gathu Advocate.

V. The 1st to 18th Defendants' case

81. As already stated above, the 1st to 18th Defendants filed a Statement of Defence and a Counter - Claim where the Defendants denied that the Plaintiffs were the legal and absolute owners and or beneficiary of the suit property as alleged in Paragraph 3 of the Plaint for the following reasons:
- i. Annexure marked as “LJM - 1” which was not clear, and they would demand to inspect the original on or before the hearing of this suit show that as at 2nd July, 1974 the suit property was registered in favour of PORT REITZ PROPERTIES LIMITED.
 - ii. On 25th September, 1974 Port Reitz Properties Limited charged the suit property to Falon Harilal Harjivoan Kathari for a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-).
 - iii. On 8th July, 1980 Micheal Drury registered a caveat against the suit property claiming purchasers' interest.
 - iv. On 17th February, 1981 Micheal Drury withdrew the caveat dated 13th February, 1981.
 - v. On the same date, that is 17th February, 1981 there was a withdrawal of charge dated 13th February, 1981.
 - vi. On the same date, that is, 17th February, 1981 a transfer dated 13th February, 1981 was registered in favour of Micheal Drury for a sum of Kenya Shillings One Hundred and Ten Thousand



(Kshs. 110,000/-) in terms of the provision of Section 55 (1) of the Registration of Titles Act, Cap. 281.

- vii. On the same day, that is, 17th February, 1981 a Provisional Certificate was issued
82. According to the Defendants it appeared that as at 17th February, 1981 the original title had been lost and no proof of an application for another title was tendered rendering the issuance of the Provisional Title illegal. The Provisional Certificate of Title ought to indicate the name of the company before transfer was made to the Purchaser. However, the annexed Provisional Certificate never showed in whose favour it was registered. The suit property showed it had been charged to an individual but the transfer to Micheal Drury show his registration was through a purchase by government after the registered owner failed to pay the government rent which was a contradiction of the facts. The original grant to the original owner was not disclosed to show the nature of the grant and the conditions thereof.
83. Annexure marked as “LJM - 2” showed a transfer from Micheal Drury to Micheal Mwendwa Ngilu dated 23rd July, 1985 which transfer was not attested by the advocate who allegedly prepared it or by any other advocate. Annexure as “LJM - 4” was not complete and was not signed by the Honourable Presiding Judge and thus the same was of no evidential value to this case. It was the Defendants’ belief that the title documents obtained in respect of this suit were obtained by fraud and or misrepresentation and therefore they are null and void. The Defendants denied the allegations made in Paragraph 4 of the Plaint and averred that the same were false and or misleading.
84. Further to the foregoing the 1st Defendant averred that sometime in January, 2015 she and her late husband Zani kalinga Kutoa being destitute and landless entered into the piece of land which they currently occupy and constructed thereon their residence of wattle and mud and they remember on the same year the 1st Defendant gave birth to her child Khadija Zani. The 1st Defendant found Mwijuma Mbwana and the other Defendants on the suit property who welcomed them. Mwijuma informed them that he was born and brought up on the suit property while the other Defendants have been on the suit property for over 20 years.
85. The 1st Defendant had peacefully lived on the said land until sometime in October, 2022 when the area chief assisted by police officers from Changamwe police station visited her residence with a process server to serve her with the court pleadings and took her details with them. The 1st Defendant knew when she moved into the suit property she found colleagues all of whom had semi-permanent houses being unable to rent out premises due to their destitute status, these include:-
- a. Jackson Kalua Mwambaji who had constructed a house partly with mud and wattle and partly with bricks where he resides with his family.
 - b. Tsuma Mwagutu Tsuma who had also constructed a house of mud and wattle with the pillars reinforced with a mixture of cement and pebbles.
 - c. Mwijuma Mbwana Mwijuma who had constructed a house of wattle covered with a mixture of cement and gravel.
 - d. Njira Ngala Mangale wvho had constructed a house of mud and wattle and the pillars reinforced with a mixture of cement and gravel.
 - e. Abel Ngala Kilonzo who like the others had constructed a house of mud and wattle with the pillars reinforced by a mixture of cement and gravel.
 - f. Mangi Katana Chengo who had constructed a house partly with bricks and partly wwith wattle covered a mixture of cement and gravel.



- g. And the rest who had also constructed houses on the suit property
86. From the time they entered into the said land to date they have never seen any of the Plaintiffs at the said land and their claim of possession and or occupation was an outright lie. The Defendants denied the allegations made in Paragraphs 5 to 43 of the Plaint. The Defendants denied that they were served with demand notices as alleged. The Defendants' occupation of the land on which they constructed their houses was open and known to the County Government of Mombasa which had promised them to allocate the land to them pursuant to its Constitutional duty or give them alternative land. The provisional administration was also aware of their occupation and had allowed them to continue with the occupation until they were allocated the land or were given alternative land.
87. The Defendants were advised by their Advocates on record which advice they honestly believe to be true that their interest in the land they occupy was protected by law. The said suit was without merit and should be dismissed with costs for:-
- i. There was no proof that the Defendants were actually in occupation of the suit property.
 - ii. If indeed, the Defendants were in occupation of the suit property, which was denied anyway, then the Plaintiffs illegally obtained the same and should be deprived of the said property.
 - iii. The Defendants were entitled to a fundamental right to shelter and unless the state provides them with alternative land they were not to be evicted from the suit property at all and in fact both the national and county governments were under a constitutional duty to acquire the said property for them.
 - iv. It was in the interest of Justice that the suit be dismissed with costs
88. The Defendants prayed for the dismissal of this suit against the Plaintiffs with costs.
89. On the Counter – Claim. The Plaintiffs in the Counter - Claim were the Defendants in the main suit and Plaintiffs in the main suit as the 1st to 4th Defendants in the Counter - Claim. It is imperative to note that, the Counter – Claim makes an additional of five (5) more parties in form of the 5th to the 9th Defendants who were not there in the main suit. The 5th Defendant was established under the provision of Article 6 (1) and 176 (1) of *the Constitution* and under Schedule four (4) part 11 clause 8 of *the Constitution* it has the duty to plan for the housing of its residents. The 6th Defendant was a member of the cabinet established under the provision of Article 152 of *the Constitution* and is tasked, among other duties to plan and provide shelter to the Kenyan citizens. The 7th Defendant was a constitutional commission established under the provision of Article 67 of *the constitution* tasked among other obligations to advise the state to acquire land for settlement of the landless. The 8th Defendant was the Land Registrar in charge of the land registry in Mombasa and the 9th Defendant was the principal Legal Adviser to the national government pursuant to the provision of Article 156 of *the Constitution*.
90. The Plaintiffs in the Counter - Claim reiterated the contents of Paragraphs 1 to 21 of their Defence and Counter - Claim against the Defendants as follows. The suit property was fraudulently and or illegally registered in the names of Michael Drury and the same should be revoked forthwith.
91. The Plaintiffs in the Counter - Claim relied on the following particulars of fraud:-
- a. Failure by Port Reitz Properties Limited to transfer the same to him.
 - b. Failure by the chargee Falon Harilal Harjivoan Kalthari to transfer the suit property to him.



- c. Failure by him to present proof that he purchased the suit property from an auction by the Government.
 - d. Failure to present an application for issuance of a Provisional Certificate of Title.
92. It followed therefore that the subsequent transfers were thus null and void. In addition, the alleged transfer to the late Micheal Mwendwa Ngilu was also fraudulent and or illegal as it was not attested to by the advocate who prepared it or any other advocate. The 5th, 6th and 7th Defendants had failed to set aside a settlement area to settle the Plaintiff as is required by law. The 8th Defendant had allowed a fraudulent transaction to be registered contrary to his legal mandate. The 9th Defendant had failed to advise the 6th and 7th Defendants to discharge their constitutional and or legal duty to settle the Plaintiffs.
93. For the reasons above the Plaintiffs in the Counter - Claim prayed for Judgement to be entered against the Defendants jointly and/or severally for:-
- a. A declaration that the registration of the suit property in the name of Micheal Drury was fraudulent and or illegal and hence null and void.
 - b. Upon grant of prayer 1 above, a declaration that all subsequent registration including that of Micheal Mwendwa Ngilu is also null and void.
 - c. In the alternative to prayers 1 and 2 above a declaration that the Plaintiffs have acquired the suit property by way of adverse possession.
 - d. In the further alternative to prayers 1, 2 and 3 above an order compelling the 5th, 6th and 9th Defendants to settle the Plaintiffs on the suit property or on an alternative property.
 - e. Costs of the counter-claim
94. The Defendants called their first witness on 29th April, 2024 at 11.45 am whereby DW - 1 testified that:-

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

95. DW - 1 was sworn and he testified in Swahili language. He identified himself as being OMAR KAI KAHINDI, as Citizen of Kenya and bearing all the particulars in the national identity card shown to the Court. He was the 19th Defendant herein. He lived at Port Reitz. He was a lorry/truck driver. He had a wife and 3 children. He recorded witness statement dated 4th March, 2024. He had filed a list of documents. He was born on the suit land and brought up there. He was married and got his children.
96. DW - 1 told the court that he got on the land through his parents, without force. There was no problem while living on it. It was peaceful until the year 2021. He had never met nor interacted with the Plaintiffs before. They would only hear of her. The Plaintiff claimed she served them with notices on 8th August, 2021. He had never seen the notices. He had never been arrested by the police, the Occurrence Book was for May, 2021. According to him he had never seen the title. He did not recognize them. He stated that maybe the title was illegally and irregularly obtained. He urged the Court to help them to continue living there as they had been there for long time or to get them an alternative place.

B. Cross examination of DW - 1 by Ms. Wamithi Advocate.

97. DW - 1 confirmed that he was the lorry driver. He had never seen the title deed and the transfer form of the land. He had nothing to say about them. He knew nothing about the said documents He was aware he was sued by M/s. Ngilu as she claimed to be the owner to the land. He had a house and



structure on the land which he showed the court during the site visit. He told court that the structure were demolished. On being referred to the to the Land Surveyors report the witness told he court, apart from some dotted spots, he could not see any houses on the Google Map from the Plaintiff's list of documents. It was black and white.

98. DW - 1 confirmed that he was not present when the private Land Surveyor undertook the Land Surveying exercise. He was born and brought up from there. His parents got there in the year 1970. They were never given any eviction notices to vacate the land. He had never seen the Chief, DCIO nor the OCS come to the land. Though he recalled there was a date 8th May, 2021 M/s Ngilu, Mr. Elijah Advocate and Chief they told them to await the orders by the Court.
99. DW - 1 confirmed that he was on the land as he had no alternative land. He had approached the County Government to give them the land land or allocate them an alternative land. He was aware that in the laws of Kenya there existed categories of land - private and public land. He could not force the individuals to give them the land. They wanted the Government to assist them. It was part of his structure that was demolished. He was aware of the official search which showed the status of the land. He did not know Daniel – PW - 3. However, there was a person who approached them with a view of wanting to buy the land from them.
100. On being referred to the sale agreement, the Witness admitted that both the identity card number and the cell phone number inscribed on the agreement were as his. However, he refuted the signature affixed on it being his. He never received the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-). He knew Kefa who was his uncle. He had never been reported to the police and had never been served with any court order. His advocate only served him with the witness statement.
101. DW - 1 told the court that he was present during the site visit – when the Court directed that there be no selling of land during the pendency of the case. With reference to the set of photographs filed by the Defendants, the witness confirmed that out of these photographs, none of them showed his structure nor his identity card nor his birth certificate. From the identity card, he was born at Mombasa and he took it from Kisauni and not Changamwe.

C. Re - examination of DW - 1 by Mr. Salim Khamis Advocate.

102. DW - 1 reiterated that he was born in the year 1987. He was born on the suit land. He got his wife and the three children while on the land. He lived there to date. But there was a time his house was burnt down. He reconstructed it. With reference to the Plaintiffs' list of documents – the google map, the witness told the court that the documents were not clear as they were black and while. The images on it looked like motor vehicles. He never coordinated with the land surveyor. He did not know the PW - 3.
103. With reference to the sale agreement, the witness told the court that he denied that the signature affixed on it to be his own. He never received any cash through M-Pesa or otherwise. He did not know about the title. He urged the court to assist them get alternative land, or they continue to be on the land, if the Plaintiffs case determined and declared to be for the Plaintiffs.
104. On 30th April, 2024 the Defendants called their second witness who testified as follows:-

A. Examination in Chief of DW - 2 by Mr. Salim Advocate:-

105. DW - 2 was sworn and testified in Swahili language. She identified herself as being (MISHI KEA KOMBO and a citizen of Kenya and a holder of the national identity card bearing the particulars shown on it. She lived at Port Reitz, Changamwex. She was born on 1st January, 1997 and was a mother of two children. She told the court that she worked as a casual labourer doing laundry work. She signed



a witness statement dated 4th March, 2024. She got on the land a long time ago peacefully. They knew it was public land. She was born at Port Reitz; they used to cultivate land. She got on the land in the year 2015. They used to cultivate on the land with her parents. When she was 8 years old, they started building a shelter for protection from the harsh hot weather. The Plaintiff claimed the land. She had never seen the documents. She started hearing the Plaintiffs' claim of the land in the year 2021. That was the time she started seeing the Plaintiffs. She had lived on the land and she would be going there. She urged the Court to allow them live on the land or get them an alternative land.

B. Cross examination in Chief of DW - 2 by M/s. Omondi Advocate.

106. With reference to her identity card, DW - 2 told the court that it indicated of her being born at Port Reitz. She had no document to that effect. Additionally, from the identification card she was born at Kwale, Matuga. With reference to the joint witness statement, she had no evidence that she got to the land in they year 2015. She stated that she knew the land was public land but she had no proof to that effect.
107. DW - 2 indicated that they used to cultivate land with her grandparents. She could not bring them to court. She had no prove that they would be cultivating. When they got there, there were snakes and wild reptiles. There was no fence around the land. She never knew the owner of the land and hence they had no permissions by the owner and even the shelter they constructed they had no permission by the Plaintiffs.
108. On being referred to the contents of Paragraph 3 of the witness statement, DW - 2 told the court that with regard to charge and transfer and Provisional Title Deed, she was not aware of these documents. She did not know where these information was obtained from. They had never received any notice of by the Plaintiffs to vacate from the land. With reference to the Notice letter dated 6th April, 2021; she confirmed the name on the letter was hers but refuted the signature on it being hers. She read her cell phone out being phone No. 0780158029.
109. With reference to the list of names by the Chief of Chaani, DW - 2 confirmed that her name and cell number were on the said list. The Chief would occasionally request for their particulars for instance to manage the distribution of charity donations made out by various well wishers to them. She met the Plaintiffs in the year 2022. She denied that they demanded money from the Plaintiffs to enable them vacate from the houses. She had no proof that there was a house on the land.

C. Re - examination of DW – 2 by Mr. Khamisi Salim Advocate.

110. DW - 2 reiterated that they started cultivating the suit land with her parents when she was 8 years old. There was no problem at all. She got on the land in the year 2015 and built a shelter. She was not aware of the title to the land if at all they were obtained illegally. She had not seen any eviction notice to vacate from the land. She denied the signature on it. She knew the Plaintiff in the year 2021. She was not present during the site visit. She had a house on it and that was where she lived. She prayed for Court to let them had the land or get them an alternative land.

A. Examination of Chief of DW – 3 by Mr. Khamisi Salim Advocate.

111. The witness was sworn and he testified in Swahili language. He identified himself as being JACKSON KAILO MWAMBAJI and Citizen of Kenya holding the national identity card bearing all the particulars shown on it. He was born in 1978 at Kilifi – Kaloleni. He got there in the year 2011. He was both a farmer and businessman. The land was vacant when he got there. He got a place and constructed a house. Since he got on the land, no one had ever asked him to vacate or made any claim. He had built a residential house. The Plaintiff had never shown him any title deed. He did not know the title deed.



On what was to happen to them, the court would decide. He had never seen any eviction notice to vacate from the land. He prayed that the Court to allow them to live there peacefully with their family.

B. Cross examination of DW - 3 by M/s. Omondi Advocate.

112. DW - 3 stated that he did not have any document to show he got there in the year 2011. He had not brought the evidence to show the house had been there from the said period. From the main tarmac road, there were several houses on the way to their land. There were yards for the storage of the metallic containers and the Ocean. He decided to get to the land as it was vacant. He resided on the land. With regards to the title deed, he had never been asked about the title deed. He had never received any eviction notice to vacate from the suit land. With reference to the demand letter dated 6th April, 2021 i.e. Notice and his name was there.
113. With regards to the google maps, DW - 3 confirmed that he was not seeking any structure. With reference to the Court conducting site visit. He was not present on that day. He denied that he had leased his house. He lived in that house. He knew was an offence to use someone's property without the owner's permission. It was offence to use the land without permissions of the owner. The chief did not warn them from doing anything on the land including cultivating and building until the matter is heard and determined.

C. Cross Examination of DW - 3 by Ms. Wamithi Advocate.

114. DW - 3 reiterated that he was present during the site visit. He had 7 roomed residential house. It semi – permanent made of was a mud and iron sheet. It was not written for leave. He did not have any documents for approval for the construction of his house. With reference to his identity card, the witness told the court that he was born in Kwale, Mtwapa. He had only heard of the title deed but he had never seen them.
115. According to the witness he knew the Plaintiff. He was told she was the owner of the land. On being referred to both the Provisional title No. 14492 CR. and the demand letter he told the court that he never seen nor got them. He knew Mr. Elijah Gathu, the Advocate. He was aware the Chief and police came and told them to leave but he was not present. This was in the year 2022. He was unable to comply as how could they leave a place where they had lived for many years. He was aware that they have prayed to be let to live on the land. With reference to the Google Map, he stated that they were dark and unclear. The witness told the court that he had built on the land and he had two rooms which were complete.

D. Re - examination of DW - 3 by Mr. Khamisi Salim Advocate.

116. DW - 3 confirmed that he had gotten onto the adjacent land as this was the only one which was vacant. The others had been taken by Somalis. With reference to the notice dated 6th April, 2021, he had never received it. He prayed for the Court to allow them to continue being on the land. They were poor people.

A. Examination in Chief of DW - 4 by Mr. Khamisi Salim Advocate.

117. DW - 4 testified under oath and in English language. He identified himself as being TSUMA MWUGUTU TSUMA, a citizen of Kenya and holding the national identify card bearing all the particulars shown to Court. He was born in in the year 1977. He was a casual worker. He lived there with his wife. He recorded a witness statement dated 4th March, 2024. He got into the land in the year 2013. By that time, the land was vacant. They were with his grandfather. The Plaintiff came in the year 2021. They all lived as a family there. He denied that the Plaintiffs had caused any development on the



land. He met the Plaintiff in the year 2021 for the first time. He had never received any eviction notices to vacate the land. He told the court that he was not literate.

118. According to DW - 4, he was there during the site visit and he showed the Court his house. He had always known the land was public land. But they had come to find out that the land was private land. Thus, they urged the Court to give them an alternative land. With reference to page 24 of the Plaintiffs' List of names recorded by the Chief of Chaani location, the witness told the court that his cell number was 0713334079 and the number there on the list was his. This would happen all the time in order to smoothly receive charitable donations made to them by the various well wishers. Chief knew him and he knew he lived on the land. They never asked for money in exchange to vacate the land.

B. Cross examination of DW - 4 by M/s. Omondi Advocate.

119. DW - 4 confirmed that he had a 7 roomed semi – permanent residential house on the land. He had never been asked for any documents by the County Government/ Municipality. He was born at Matuga, Kwale but brought up at Changamwe. He had never seen any title deed on the land. DW - 4 had never been asked by the Plaintiff on ownership. With reference to the list by chief, maybe he had his information as the chief gathered data for charitable assistance. He had never seen any eviction notices to vacate the land. DW - 4 had only heard this from people. From the Court, he prayed that he continued to live on the land as he did not know where to go to a place he had lived for a long time.
120. On 7th May, 2024 at 11.00 am, the Defendants called DW - 5 who testified as follows:-

A. Examination in Chief of DW - 5 by Mr. Khamisi Salim Advocate.

121. DW - 5 was sworn and testified in Swahili language. She identified himself as REBECCA MUNYIVA MUIA, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. She was the 3rd Defendant and was born in the year 1960. She recorded a statement dated 4th March, 2024 and list of documents. She lived at Port Reitz and had no work. Her daughter fend for her as she was a widow. She took care of the children. She got on the suit land in the year 2005 . During that time, she found people had already settled on the land. DW - 5 met the Village elders and made a request for space. She was shown a place to settle. She built a semi – permanent residential house. She got there peacefully. She only came to hear of the Plaintiffs from the year 2021/2022.
122. According to DW - 5, the Plaintiff had never lived nor settled on the land. Though the Plaintiff claimed to have a certificate of title deed to the land but she was not knowledgeable about it. She was never involved on it on the alleged eviction letter and had never seen nor received any such. From the case, she would ging to his house there. The chief normally had list of names of the people on need basis and settlers e.g. during the Red Cross on this case they never recorded any name. She prayed that the Court to allow them to settle on the land as she had nowhere else to go to.

B. Cross examination of DW - 5 by M/s. Wamithi Advocate.

123. DW - 5 confirmed that she was born at Makueni and not Mombasa. She had been on the land since the year 2005 but she did not have any documentary proof. The village elders who welcomed her on the land were Babu Mwikombo among others. They were not in the case. The said elder was the father to the 1st Defendant; he was the one who allowed her on the land. She got there when the land was vacant. On getting there, she built a two (2) roomed house. From collected pieces of stones and engaged a contractor. She did not have the approval of the authorities and could not show when the house was built although it was not recently built.



124. The Plaintiff came to the land and saw the structure. She was never there when she came with chief and police. She was present when the court came to the site and she saw the Advocate, Elijah, and heard there were documents brought to them. With reference to the letter, the witness told the court that it had her name but she never signed it. She did not know a person called Mercy. She told the court that she was present during the site visit and she showed the court her house.
125. According to DW - 5 from the photographs shown she may not recognize her house which was behind one of the photographs. Her house was not in the photos. The chief came and took the names of the Defendants for the sake of the suit, she could not refuse to have the land given to the Plaintiff. From the pleadings she had urged for the County Government assist them to move, the Plot was not public land, it belonged to the Plaintiff. There were no concrete posts nor Chain links, she never saw the surveyor placing beacons.
126. With reference to the google satellite aerial map, DW - 5 told the court that the coloured map was taken in the year 2002 and 2023. From the 2020 map there were no houses and from 2023 the map showed vacant parts and some stoned objects which she was not sure whether they were houses or not; they used to cultivate maize for subsistence use.

C. Re - examination of DW - 5 by Mr. Khamisi Salim Advocate.

127. Further the witness told the court that she got into the land in the year 2005. She found the elders there and she joined them. She had never seen the demand letter. It was received by one Mercy and not her. With reference to the photographs, the pit latrine was hers and hence her house was behind the houses on the photograph. She was present when the court conducted the site visit. She showed them her house. She was semi – literate. With reference to the aerial google map she stated that she was not sure she understood it. It showed that there was a vacant space and there was a road from the ocean, she was not able to recognize anything else. She urged court to let them continue living on the land.

A. Examination in Chief of DW - 6 by Mr. Khamisi Salim Advocate.

128. DW - 6 was sworn and testified in Swahili language. He identified himself as MWIJUMA MBWANA MWAJUMA, a citizen of Kenya and a holder of the national identity card bearing all the particulars shown to Court. He was born on 30th October, 1986. He lived at Port Reitz and had four children. He did casual jobs to earn a living. She adopted the joint witness statement. He told the court that he was born in the land in 1986 and she was 40 years old. He had lived there with her parents and they were in court. He had 3 houses from his grandparents, his parents and the one which he renovated.
129. DW - 6 further told the court that he did not know the Plaintiff as the owner of the land. He only came to know about her from the filing of the case. He had not seen anything on the Plaintiff. The certificate of title were mere papers and he was never involved. He was concerned on them being evicted forcefully and illegally. He had never received any demand letter. He urged the court to allow them to live on the land, they had no place to go as they were poor people with no place to go. His grandfather was buried there and hence he will also be buried there.

B. Cross examination of DW - 6 by M/s. Wamithi Advocate.

130. DW - 6 told the court that he had no document to prove of the family on the land such as photographs. During the site visit, he told court that his house was demolished, his grandfather died and he renovated it, and that is where he lived. He did not have any meaningful income generating activity. He had never sold land. He did not know Daniel Munyasia Munyulu. With reference to the sale agreement he stated that he disputed the Identity Card Number on it but confirmed the cell phone numbers as his.



131. He told the court that Daniel Munyasia Munyulu may have send the money – a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) to him which he did not know its purpose. Hee thought it was for political purposes. Omar Kai, was his brother. He did not know Daniel Munyasia Munyulu. He had never been arrested by the police, nor was he aware of any issues to do with the investigations by the police. He recalled the chief and the village elder from the area; they never informed him about the land belonging to the Plaintiff. He did not recognize the list by the Chief. He was shown the list and he confirmed his name and identification number. He denied that had never told the chief that they would vacate the land in exchange of being paid. He did not recognize Elijah Advocate as he only saw him in court but he knew he was the Plaintiffs' advocate.
132. With reference to the demand letter, DW - 6 refuted that the signature affixed on it was his. Ordinarily, he affixed a thumb print instead. According to the witness the plot did not belong to the Plaintiff; their grandfather had no title deed as they were ignorant. When she was born there was no bush there. When referred to the google map the witness stated that it was a map for the years 2020 and 2023. Being on the land for 40 years, there was no way it would miss showing houses. The witness could not have been on the land without a house. They never came from a different place. They were praying to be left to live on the land as they had nowhere to move to.
133. The Plaintiff sued DW - 6 after they destroyed his life. The witness recognized the Plaintiff as the Governor who never succeeded in the last general elections. But if the Plaintiff wanted to be given the land she may be given a portion of the land; the witness did not recognize her. The witness did not see the land surveyor nor the beacons. The witness only knew of the concrete posts for the fence and the chain link wires. He had never known of any of these matters having been reported to the police.

C. Re - examination of DW - 6 by Mr. Khamisi Salim Advocate.

134. DW - 6 told the court that he had 3 houses on the land but he was living in one of it which belonged to his grandfather. He was a casual labourer. He did not deal with the sale of land. The identification card ended with number 70 while the one referred in the sale agreement showed and identification card ending with a 71. The witness did not know DANIEL MUNYASIA. He didn't recognize the signature. DW - 6 did not know KEFA unless shown his face. With reference to the List of Chief, DW - 6 told the court that he should not know it was composed by chief it did not bear his stamp not signature.
135. The witness had never been reported for allegedly assaulting Elijah Advocate at the police station. He was illiterate to know and understand the Satellite Aerial Google maps. There were beacons by Government and had never been removed from the year 1952, she had never seen the beacons by the Plaintiff. She had never seen the land surveyor and never assisted him in planting the beacon. She had never seen the demand letter and did not recognize the signature appended on it.
136. The witness told the court that she knew the Chief of Chaani although he had never come to the land or convened a meeting. The country had never come to the land and stopped her for allegedly building illegal structure, she urged the court to let them live on the land as they had nowhere to go.

A. Examination of DW - 7 by Mr. Khamisi Salim Advocate.

137. DW - 7 gave a sworn testimony in Swahili language. He informed court his name was NJIRA NGALA MANGALE, a Citizen of Kenya holding the national identity card bearing all the particulars shown to Court. He was the -13th Defendant. He lived at Port Reitz and was a Casual labourer. He was born there. He had children and lived in a four (4) Semi- Permanent 4 bed roomed house. He got to know the Plaintiff in the year 2021. From the time of his adult hood, he had never seen any activities undertaken



by the Plaintiff. He had never seen nor received any demand letter issued by the Plaintiff. He had never recorded his names to the chief nor know the lists. He had never attended any meeting pertaining to this suit land whatsoever. He was never present during the site visit.

B. Cross examination of DW - 7 by M/s. Wamithi Advocate.

138. DW - 7 told the court that his identity card showed that he was born at Samburu, the County of Kwale. But according to himself, he knew having been born at Port Reitz which was his home. He did not have a certificate of birth. On being referred to the set of photographs he was able to clearly recognize his house. He was educated having studied up to Secondary school at Form 4. He attended Chaani Primary and Ramisi Secondary School at Kwale. He had never seen an official search of the suit land nor ever heard that the Plaintiff had a title deed. He knew she wanted the land for herself and have them be evicted. He prayed to be let by the court decide whether they should stay or be evicted.
139. DW - 7 testified that he was not present during the site visit and hence his house was never seen. He wanted the Court to give them the land. His name was on the list by the chief. The chief normally compile the list for many reasons e.g. charitable grounds e.t.c. on the 24th February, 2021, he was not there when the chief came to the land he only was told about the meeting. He knew the difference between the private and public land. DW - 7 told the court that he would not have know whether the Plaintiff had asked for her land, he would not deny her being given back her land but his only issue was that from the time he was born he had never known the Plaintiff and her claim of the land.
140. With reference to the satellite Aerial google map for the year 2020, DW - 7 confirmed that he was on the land and hence the map was not correct. He had never seen the demand letter and hence had never signed it. Despite of having been born on the land and lived there they had never made any efforts to get ownership of the suit land.

C.. Re - examination of DW - 7 by Mr. Khamisi Salim Advocate.

141. DW - 7 confirmed that his father was from Mariakani. He took his national identity card from Kwale. He schooled at Ramisi School which was at Msambweni within the County of Kwale. Since they lived there, it had been peaceful. The Defendants never demanded any payment in exchange from the Plaintiffs for them to leave the suit land. With reference to the list by the chief the witness told the court that it did not bear the official stamp or any proof by the Government. On the meeting by chief they never received any Notices on the meeting; with reference to the satellite Aerial google map – they never attended such session. They urged the Court to assist them get the land.

A. Examination of Chief - DW - 8 by Mr. Khamisi Salim Advocate.

142. DW - 8 testified under oath and in Swahili language. He identified himself as ABEL NGALA KILONZO a citizen of Kenya and a holder of the national identity card bearing all the particulars as stated out in Court. He lived in Port Reitz Changamwe. He had a wife and two (2) children. He was a undertook casual labour works. He relied on the witness statement dated 4th March, 2023. He got on the land in year 2011. From 15 years he was unemployed and would move from place to place until he got there and the elders allowed him to settle there. He cleared the field and constructed a house; he only got to know about the Plaintiff in year 2021. Though the Plaintiff claim to be having certificate of title he had never seen her nor seen her and it. He had never seen any activities carried out such as development – fencing nor anything undertaken by the Plaintiff. He was not aware of any demand letter nor any meeting convened by any Government Officials. He was aware of and attended the site visit. He even showed the Court his house. DW - 8 urged to be assisted having been on the land for a long time. He had nowhere to go.



B. Cross examination of DW - 8 by M/s. Wamithi Advocate.

143. DW - 8 confirmed that he was born at Mwingi. His father came to the land seeking employment at the Coast and the witness followed him. When his father died, he was buried at Mwingi. His mother was at Mwingi. He got to the land in year 2011. By then it was an open space and he approached some elders who told him to settle there. One of the elders was M/s. Rebecca Muia – 3rd Defendant was one of them. She used to live there with her family.
144. The witness told the court that his house had 2 rooms. He lived in the house with his family. He had never gotten approvals from the authorities such as the Country Municipality. He had never seen any poles. On 3rd March, 2021, he never saw the Land Surveyor. With reference to the set of photographs by the Defendants, he told the court that none of them showed his house. From the photographs he may not know where they were taken even from elsewhere.
145. Further with reference to the Satellite Aerial Google maps for the year 2020 and 2023. He knew the Plaintiff, he had never seen her and the daughter visit the land. He had never seen the chief and the police visit the land and whether they authorized them to leave the land. He never saw the demand letter by the Plaintiff; he was only aware of the case filed by the Plaintiff and she was demanding her land.
146. He told the court that he had nowhere to go hence he did not intend to leave the land. He had not brought any documents to prove he got on the land in year 2011. He was never chased by Elijah Advocate. He was aware of any police report made and the occurrence book details. DW - 8 was not aware of being told to move away. He knew the public and private land. Since he got onto the land he had never seen any of the certificate of title deed. Hence he would leave it to the Court to decide on what should happen on the issue of the ownership of the land. DW - 8 was not aware that he had stated that the County Government to assist them to get alternative land – paragraph 19 of the statement.
147. On 12th July, 2024 DW - 8 was called back for cross examination.

C.. Further cross examination of DW - 8 by M/s. Wamithi Advocate.

148. DW - 8 conformed that they brought the documents in court and there were those which included his identification card. He did not have a personal statement in his name. He was aware of the suit and that it was filed by Charity Ngilu. He told the court that he was not the owner of the plot. He recalled that on 24th February, 2021 when the D.O, Chief, Police and the Plaintiffs. He was not there on that day. He was not aware what the resolution for that day was. He was never given the demand letter and his cell numbers was 0717-920658. He never wrote his names on the list by the chief. With reference to page 54, the witness stated that his name was there. Occasionally the chief would gather out names for different purposes – e.g. benevolence and charity purposes.
149. DW - 8 further testified that he got onto the plot in year 2011 but he had no document. His house had two rooms. He did not now what a counter claim was when he stated that if the land would be found not to belong to the Plaintiff, then they considered to be given the land, he confirmed the land registrar, nor had he testified. They had not present to the court any documents from the Government.

D. Re - examination of DW - 8 by Mr. Khamisi Salim Advocate.

150. DW - 8 reiterated that he knew the Chief was a Government employee. When referred to the list on page 59 of the Defendant's documents there was no seal nor his signature. The demand letter by Mr. Gathu Advocate did not bear his signature. He never met him. He was not in the meeting of 24th



February, 2011. He had never been removed by the County. He had never seen the certificate of title by Charity Ngilu.

A. Examination of DW - 9 by Mr. Khamisi Salim Advocate.

151. DW - 9 was sworn and he testified in Swahili language. He was called ROBERT KAINGU GOSHI, a Citizen of Kenya holding the national identity card bearing all the particulars as shown to Court. He lived in Port Reitz with his family of wife and two children. He was a casual labourer. He recorded a witness statement dated 4th March, 2024. He adopted the same and the List of documents marked as Defendants Exhibits numbers 1 to 19 dated the same day. He got there in 2002. By then the land was bushy and nobody claimed it. It was until the year 2022 when they started hearing that there was a claimant to the land. They had never seen her nor had she fenced the land. He got there peacefully.

B. Cross examination of DW - 9 by M/s. Wamithi Advocate.

152. DW - 9 told the court that he did not have documents to demonstrate that they had lived there with her family nor that he got on the land and that by then it was bushy. With reference to the list of documents by the Plaintiff dated 25th July, 2023; the google map he stated only seeing some green patches on it. Hence he would not know whether they were trees and grass on the google map – 2. He was seeing some structures on it. He did not know what the Land Surveyor said and whether it was true or not.

153. According to the witness he was not present when the Court conducted the site visit. There was no fence when they got there. He had never seen any cemented posts/ poles. He did not know the measured of the land. He never removed the fence. He was knew the people who they found there - Mr. Mwajuma. He never gave him money. He never saw Mr. Elijah Gathu Advocate having come to serve them with the demand letter. The chief had never asked them to leave the land. He wanted to continue living on the land peacefully and he had not requested the County Government to give him an alternative land also the provisional administration. He was not aware whether this public or private land. He was waiting for the decision of the court on eviction from land.

C.. Re - examination of DW - 9 by Mr. Khamis Advocate.

154. DW - 9 told the court that he was not an expert on Satellite Google maps. He was not knowledgeable on survey matters. He never saw Mr. Gathu Advocate. There had never been any complaint lodge against him at any police station. If there was any signature allegedly belonging to him then it must have been a forgery. He got into the land when it was unoccupied and bare. He was received by Mr. Mwajuma. By the time they got on the land; he had no smart phone. Since he got there he had never been disturbed by any one including the County Government nor the Plaintiff.

A. Examination in Chief of DW - 10 by Mr. Khamisi Salim Advocate.

155. DW - 10 was sworn and testified in Swahili language. He was called MANGI KATANA CHENGO, a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court. He lived in Port Reitz with his family which included his five children. He had lived there for 16 years. Since he got there he had never been disturbed by anyone until the year 2022 when the Plaintiff came claiming the land. He signed the witness statement dated 4th March, 2024; he had never seen the Plaintiff before the Court.

B. Cross Examination of DW - 10 M/s Wamithi Advocate.

156. DW - 10 told the court that his identity card showed he was born in Kilifi but he was a Giriama - Mijikenda. He did not have any documents on his claim. He had no evidence to show that he had been



on the land for 16 years. He saw space and requested a Mzee called Matamu to show a space to settle on the land. He never asked him to show him whether he had any title document because he was not literate.

157. He told the court that he was present during the site visit. He showed the court his 8 roomed house. He lived there – it was not on lease. He occupied all the rooms with his 5 children, and was not aware it had aboard written Landlord. From the 8 rooms its only 4 rooms which were complete. They stopped construction by the Court – he would have continued to construct as he had resources. By the time there was no requirement to obtain approvals from the County Government. He was not knowledgeable on the County Government requirements.
158. The witness told the court that he had never seen the Plaintiff and her claim over the land. It was the chief who served them with the demand letter. He was not aware that the land belonged to the Plaintiff but if the court decided they leave the land, he would abide. He was never there when Mr. Elijah Gathu Advocate came to serve them with the letters. On the counter claim – they were claiming to be given the land, they had never met the Plaintiff and his claim, he was aware that the law allowed any person who had been there for 16 years to have the title be extinguished and be given to them. He knew there was a difference between the public, private and community land. He was informed that the land belonged to an individual. He left it to the court to decide. He never saw any fencing posts on it as it was never fenced. He had never sat with the Plaintiff and Chief nor demanded for any money.
159. With regard to the Satellite google map; DW - 10 told the court that he did not know it; On being shown, he stated that he saw some trees. He also saw some structures but they were not clear as he had a problem of sight and hence he could not confirm.

C.. Re - examination by DW - 10 by Mr. Khamisi Salim Advocate.

160. DW - 10 confirmed that he was a Casual labourer. He had constructed the semi – permanent house. It was a 4 roomed house which were for habitation with her family and the 5th was used as for toilet. He had not leased the house. He had been shown the photographs of his family and the certificate of birth of his children. He confirmed the Chief brought the demand letters,he never signed it as he was illiterate.
161. With reference to the google map, DW - 10 confirmed that he did not know them. His education level was up to Standard 2 of Primary School. He did not understand the surveyor’s report.
162. On 12th July, 2024 the Defendants marked their case closed through their Legal Counsel Mr. Khamisi Salim.

VI. Submissions

163. On 12th July, 2024, upon the closure of both the Plaintiffs and Defendants, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that on 18th September, 2024 the Honourable court reserved a date to deliver its Judgement on 24th October, 2024. However, from the request of the Counsel for the Defendants, the delivery of Judgement was deferred to 4th November, 2024 to enable them file and serve their submissions.
164. It is instructive to note that by the time of penning down and delivery of the Judgement, Court had not accessed the written submissions by the 1st to 18th Defendants. Hence, the Judgement was pronounced on its merit whatsoever.



A. The Written Submissions by the 1st, 2nd, 3rd & 4th Plaintiffs

165. The Plaintiffs through the Law firm of Messrs. Anne Wamithi & Company Advocates filed their written submissions dated 7th October, 2024. M/s Wamithi Advocate commenced her submissions by provision the detailed background of this case. She stated that the suit was commenced by the Plaintiffs filing the Plaint dated 1st August 2022 praying for judgment jointly and severally as against the Defendants for the above stated reliefs.
166. The Learned Counsel averred that the Plaintiffs were the owners and/or beneficiaries of the Suit premises and had at all material times relevant to the suit enjoyed its peaceful, uninterrupted, exclusive occupation and possession thereof. The Plaintiffs also held that the Suit premises was vacant up until November 2020 when they were informed by a neighbor that trespassers had encroached, destroyed the perimeter wall and illegally put-up structures thereon. This prompted a visit whereupon they found approximately 5 temporary incomplete structures. They reported the trespass to Chaani Police Station (vide OB NO./16/24/2/2021), Chaani Area Chief and the District Officer (hereinafter referred to as D.O), sought assistance to have the trespassers vacate the suit premises.
167. The trespassers indicated their willingness to vacate but only after receiving monetary compensation. Thereafter, the Plaintiffs sought legal advice from their Advocates on record, who accompanied the 2nd Plaintiff to the D.O's Offices on or about 24th February 2021. A meeting was held with the D.O and Chaani Area Chief, where the Plaintiffs requested their presence on her second visit to the suit premises. The visit happened on the same day in the company of the 2nd Plaintiff, their Advocates herein (represented by Elijah Gathu), their appointed licensed surveyor - Seline Consultants Limited, the D.O, Chaani Police Officers and Area Chief. They found more temporary structures built by the defendants with some nearing completion.
168. The Defendants revealed that they had moved from an adjacent parcel after the owners paid them to vacate. The Defendants reiterated their willingness to stop the trespass and unlawful construction upon payment by the Plaintiffs, whilst admitting that they were fully aware that the Suit premises belonged to the 1st Plaintiff. Believing that they would be paid, the 1st - 9th Defendants submitted their names and contacts to the Area Chief. The surveyor did a second survey to establish the boundaries and placed beacons thereon on 25th July 2023.
169. A third visit was to serve demand notices on 9th April 2021 and the same was conducted by the 2nd Plaintiff, her Advocates herein, the Area Chief, the Village Elder, the OCS and Police Officers from Chaani Police Station. They requested the Defendants to demolish the temporary structures and vacate the suit premises, but the Defendants maintained that they would comply once paid. The 10th -17th Defendants then also submitted their names and contacts to the Area Chief in the same belief that they would be paid by the Plaintiffs.
170. A fourth visit on 16th April 2021 by the Plaintiff's Advocates herein and the Area Chief was also to serve demand notices and further, to request the Defendants to demolish the illegal temporary structures and vacate the suit premises. The Defendants reiterated that they would only comply and vacate after being paid by the Plaintiffs. The 18th -20th Defendants as well submitted their names and contacts to the Area Chief also in the belief that they would be paid as demanded by them.
171. The fifth visit by the Plaintiffs' Advocates herein and the Area Chief on 8th May 2021 was conducted to serve the remaining Defendants with demand notices, however the said visit turned chaotic. The 20th Defendant turned violent, harassed the Plaintiff's Advocate on record (represented by Elijah Gathu) threatened to beat him and attempted to vandalize the Advocates Motor Vehicle for effecting the said



- service. This incident was reported to Chaani Police Station vide OB NO.14/07/5/2021. The incident also stalled and curtailed any peaceful efforts to have the Defendants cease and desist from their acts of trespass and unlawful occupation.
172. The Learned Counsel submitted that while the Defendants' structures were built without the necessary approvals from relevant authorities, the Plaintiffs were apprehensive that this poses a risk against them on account of any alleged claims with respect to occupier's liability. Further that the Defendants had yet to complete the structures and the intention is with a view of using them as a basis for fleecing money from the Plaintiffs. Additionally, noteworthy was the fact that the Defendants claim to be poor and jobless but somehow managed to illegally build the structures to the various stages the said structures lie. Despite the Plaintiffs' peaceful efforts to have the Defendants vacate, they harassed, threatened, persisted to ignore, neglect and/or willfully refused to demolish and vacate until an Order maintaining status quo was issued by this Honourable Court on 27th October 2022.
173. Upon Application by the Plaintiffs on 27th October 2022, the Court issued orders for maintenance of Status Quo. Despite these orders, the Defendants defiantly proceeded to continue with the illegal constructions. Further, the Defendants namely Omar Kai Kahindi and Mwijuma Mbwana proceeded to attempt to sell part of the suit property to PW - 3, one Daniel Munyasia Nyolu on 26th February 2023. That in light of the contemptuous conducts of continuing with the construction and the attempted sale, the Plaintiffs filed the said application of Contempt of Court dated 6th March 2023.
174. On the case of the Defendants, the Learned Counsel submitted that the Defendants filed their Defense and Counterclaim on 3rd November 2022 whereupon in their defense, they refuted the Plaintiff's averments whilst adducing only photographs which were not supported by any production of certificate of electronic evidence as provided by Section 106B of the *Evidence Act*. At the same time, they alleged that the property was not properly acquired and claimed entitlement to a fundamental right to property whilst praying for a declaration that they acquired the Suit premises by way of adverse possession. They however failed to prove how they merit for such an award. It is noteworthy that the Defendants objected to the Plaintiffs' production of Google images demonstrating that the Suit premise was vacant before 2020. Their objection mandated the Plaintiffs to file a Certificate of Production dated 9th February 2024.
175. Whilst adducing no evidence, the Defendants in their Counterclaim itemized four particulars of fraud on the part of the Registered Proprietor that; failure by Port Reitz Properties Limited to transfer the property to him; failure by the Chargee to transfer the suit property to him; failure by him to present proof that he purchased the suit property from an auction by the Government and; failure to present an application for issuance of a provisional Certificate of Title.
176. The Defendants in their Counter - claim sought; a declaration that the registration in the name of Michael Drury was fraudulent and/or illegal hence null and void; subsequent registration including that of Michael Mwendwa Ngilu was also null and void, in the alternative a declaration that the Defendants herein had acquired the suit property by way of adverse possession, costs of the counter-claim and an order compelling Government apparatus enjoined thereto to settle the Plaintiffs on the suit property or on an alternative property. These prayers whilst adverse in nature were not issuable since the Defendants have not adduced any evidence to back up their claims nor demonstrate how they are so entitled to the prayers sought.
177. Whilst the Defendants' Counter - Claim prayed for the Government to resettle them on the Plaintiffs' land or an alternative portion, they admitted in their testimonies that they know the property belongs to the 2nd Plaintiff herein. They admitted to knowing the difference between Public Land and Private Land. As such, should the Government be so desirous of settling the Defendants on the



- Plaintiff's property, it should follow the procedure outlined in law for the doctrine of eminent domain, compensate the Plaintiff monetarily as provided for under Sections 110 - 113 of the Land Act as read together with the Constitution.
178. The Learned Counsel submitted that it was noteworthy that the Defendants - come-Plaintiffs in the Counter - claim also instituted MOMBASA ELC (O.S) NO E.009 OF 2023. They sought registration as proprietors of the Suit premises in the place of the Registered Proprietor one MICHAEL MWENDWA NGILU, equally claiming entitlement by way of adverse possession. The Defendants had not adduced any evidence whatsoever in both suits to support their claims for adverse possession.
 179. Moreover, it was not only absurd but also flied in the face of logic/reason for the Defendants to attack the title herein as fraudulent and/or illegal in one breathe and in the other seek adverse possession against the same title. The Defendants were openly forum shopping and attempting to abuse the court process due to duplicity of suits, therefore seeking equitable remedies whist wielding unclean hands. Further, the due legal process for seeking adverse possession was vide originating summons and hence the Defendants prayers and claim in this suit is void ab initio.
 180. On the issue of the site visit, the Learned Counsel submitted that on 18th May 2023 and 13th June 2023, the Court suo moto made a site visit (Locus in Quo) in accordance with the provisions of Section 173 of the Evidence Act, Cap 80 Laws of Kenya as read together with Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010, which allowed the Court to at any stage inspect any property in terms as it thinks fit.
 181. In attendance was the Honourable Court and its entourage, the Plaintiffs and their Advocates, the Defendants and their Advocates, Chaani Police Station Security Operatives and Constituency Representatives were also in tow. At the initial stage, the residents were not co-operative and appeared apprehensive, disturbed and anxious, probably due to the erstwhile regular visits by the Plaintiffs and State Officials, where they were always warned to vacate the suit premises. However, the reason for the visit was intensely explained away, whereupon they relaxed and cooperated.
 182. The parties agreed by consensus to conduct the visit by the team itself and no experts. It was noted that the visit was with a view of observing matters on the ground so as to assist the Court in decision making and not purposed to gather further evidence. That, it was purely to look, feel and observe on the issues brought to court while inspecting the premises. Further that the purpose was neither to adduce fresh evidence nor venture into veracity of evidence already adduced, but to check and confirm the evidence lest the Court runs into the risk of turning itself a witness in the case.
 183. Whilst many observations were made in the report availed to both parties, some of the notable deductions include; some of the land was fully developed with (semi)permanent structures but a large portion was vacant and bare. The defendants also did not know that there existed any title deed. There was no evidence that houses were burned and some demolished.
 184. The Learned Counsel submitted that the Plaintiffs' vehemently countered the claim that close to 200 persons inhabited the place and observed that when he came to serve demand letters, there were only 19 locals. That most of the houses and other structures were not there and most of them came from the neighboring plots. Additionally, two locals had attempted to sell off a portion of the Suit premises at a sum of Kenya Shillings Three Hundred Thousand (Kshs.300,000). There were close to 20 or 25 incomplete permanent houses for residential purposes and other structures used as toilets. The site visit report estimated that there were close to 50 or 60 inhabitants on the Suit premises and no social amenities such as schools, churches, shops or religious shrines. There were close to five (5) permanent houses well connected to electricity and water mains. The other semi-permanent structures were close to 25 and several unfinished semi-permanent houses.



185. According to the Learned Counsel, the 8th Defendant took the team to his 4 bedrooed residential house, two of which were rented out as there was a board to that effect. The 18th Defendant has a well-constructed permanent residential house while the 13th Defendant had a 4 room house and 2 tenants. The 4th and 5th Defendants houses were destroyed by rain, while the 7th Defendant had a semi-permanent house with a well-manicured and cleanly kept compound. He claimed that he managed subsistence farming with a few poultry and plantations in form of pawpaws, sugar canes, cowpeas and banana plantations.
186. The Court in its site visit report indicated that the parties should attempt exploring negotiation in as encouraged by Article 159 (2) (c) of *the Constitution* as read together with Sections 20 (1) and (2) of the *Environment and Land Court Act*. This has never happened since the Defendants instituted MOMBASA ELC (O.S) NO E.009OF 2023 shortly afterwards.
187. On the evidence, the Learned Counsel submitted that the Plaintiffs' case comprised of Four (4) witnesses whose testimony was as follows:
188. PW1 was the 2nd Plaintiff herein, one Lunde Jemi Mwendwa. She confirmed that she was one of the owners and/or beneficiaries of the Estate of the Registered owner and produced Plaintiffs' Exhibits; "LJM – 1" -being a copy of the Certificate of Title, "LJM – 2" -being a copy of the Transfer form by one Michael Drury to Michael Mwendwa Ngilu, "LJM – 3" - being a copy of Certificate of Postal Search as at 5th February 2021 which evidenced that the said Michael Mwendwa Ngilu was the registered proprietor and "LJM – 4" being a copy of the Confirmation of Grant issued in Nairobi Succession Cause No.321/2012, listing her as one of the beneficiaries and listing the Suit premises as one of the assets of the Registered Owner's Estate.
189. By dint of the evidence tendered by PW - 1, it was clear that the Registered Proprietor and his Dependents herein were bona fide innocent purchasers for value. This was because they paid a consideration, paid stamp duty, did a transfer and ultimately registered the portion in their name. This was the process that every other land buyer goes through in order to acquire proprietary rights. The Defendants were therefore put to strict proof to substantiate the allegations of fraud on the Plaintiffs' part or that of their late kin because he who alleged must prove. The Defendants also failed to bring any expert like the Chief Land Registrar, a Planner/Surveyor to speak to the allegations of fraud, yet have maintained their unfounded claim that the property was acquired illegally.
190. PW - 1 also revealed that the market value of the Suit premises was a sum of Kenya Shillings One Hundred & Fifty Million (Kshs.150,000,000.00/=) measures approximately 1.4 acres and produced Plaintiffs' Exhibit marked as "LJM – 7" -being a survey report dated 3m March 2021, demarcating the suit premises' boundaries. Further that, they have enjoyed peaceful, uninterrupted, exclusive occupation and possession of the suit premises. That in year 2020, they were informed by a neighbor that unknown persons had trespassed thereon and were trying to put up illegal structures. PW - 1 testified that she visited the Suit premises and indeed found this to be true as per Plaintiffs' Exhibit marked as "LJM – 5" which were a bundle of pictures taken on 24th February 2021. Plaintiffs' Exhibit "LJM – 8" was produced as evidence being OB No.16/24/2/2021 where PW - 1 reported the said trespass to Chaani Police Station.
191. PW - 1 also testified and produced the following Plaintiffs' Exhibits in support of their case: "LJM – 6", "LJM – 10" and "LJM – 12" - being the lists of names and contacts that the Defendants submitted to the Area Chief in the belief that the Plaintiffs would pay them to demolish the illegal structures and vacate the suit premises. PW - 1 also produced Plaintiffs' Exhibits "LJM – 9", "LJM – 11" and "LJM



- 13” being copies of the demand notices sent to the Defendants by their Advocates asking them to demolish the illegal structures and vacate the suit premises.
192. PW - 1 requested the Honourable Court to grant the orders as sought in the Plaint in order to protect their right to property that has since been violated by the Defendants' belligerence. None of PW - 1's evidence and exhibits was rebuttable on cross examination because these were material facts.
193. PW - 2 was the 1st Plaintiff herein, one Hon. Charity Kaluki Ngilu, who also reiterated PW - 1's sentiments and as well produced the Plaintiffs' Exhibits as above. She added that her husband bought the land in the year 1985 and produced the Plaintiff's Further List and Bundle of Documents dated 25th July 2023. PW - 2 relied on these documents and testified producing a copy of Google Map Aerial view as at the year 2020, which shows that the Suit premises was unoccupied in contrast to the same view as at the year 2023, which shows encroachments and illegal constructions by trespassers. Noteworthy is the fact that none of the Defendants could pinpoint their houses from the Google map photos-thereby speaking volumes to their regency on the suit land.
194. PW - 2 also revealed that the entire property had been fenced but the fence was taken down by encroachers. On cross examination, no material facts changed concerning the proprietary status of the suit premises. It also emerged that the Suit premises is of sentimental value to the Plaintiff, having been bought by their late kin. Upon being directed by the Court, PW - 2 also brought the original certificate of title which was inspected by the Court and the Defendants' Advocate. It was duly confirmed that there was an entry with respect to the ownership of the suit premises by the said Michael Mwendwa Ngilu.
195. PW - 3 was the only expert witness in this case, one Maina Rwingo, a licensed surveyor of over thirty (30) Years, currently at Seline Consultants Limited. He testified to the effect that PW - 1 instructed him to do a survey whereupon he visited the Suit premises on 22nd and 24th February 2021. PW - 3 surveyed and planted beacons for purposes of demarcating the boundaries, whereupon he prepared a survey report dated 3rd March 2024, duly produced in the Plaintiffs' Further List of Documents. PW1 testified to getting the Survey Plan No. FR 89/95 approved on 29th January 1960 by the then Director of Survey. PW - 3 attested to using GPS Technology, Google Maps and Real Time Kinematic kit (RTK), which helped him use the old beacons to replace the missing ones.
196. PW - 3 re-visited the site on 25th July 2023 and checked that the beams were rightly placed, thereafter issuing an expert report dated 25th July 2023, duly produced as the Plaintiffs' evidence to that effect. On cross exam, none of the facts attested to were rebutted and/or in dispute. PW - 3 also testified that he investigated the Suit premises and found that it was neither subject to, nor part of the Ndung'u Report on illegally acquired land nor any investigations on matters fraud. No evidence was tendered by the Defendants to the contrary, save for mere aspersions cast to that effect.
197. PW - 4 was one Daniel Munyasia Nyolu, who testified that he was looking to buy land and met the 12th and 20th Defendants through an agent, whereby they purported to sell land parcels. They offered him a plot measuring Sixty by Hundred Feet at a price of Kenya Shillings Three Hundred Thousand (Kshs. 300,000). He was shown the portion and paid a deposit of Kenya Shillings Five Thousand (Kshs. 5,000) via the 12th Defendant's M-Pesa address 0716466531. PW - 4 revealed that the portion was measured using a tape measure and produced a sale agreement, duly executed by the 12th Defendant, the 20th Defendant and himself. PW - 4 testified that he invited a friend (One Mr. Abdalla) to also purchase a parcel of land and were arrested when being shown the parcel to be allocated to the friend. They were taken to Changamwe Police Station and volunteered to be state witnesses against the 12th and 20th Defendants who were charged in Court for posing as owners whilst fully aware of the contrary position.



198. PW - 4 also produced the Plaintiffs' exhibits in court adduced in the Plaintiffs' further list of documents dated 27th February 2023, being a handwritten sale agreement on the said illegal sale. PW - 4 indicated that during the sale, only the 20th Defendant produced his Identity Card while the 12th Defendant failed to. On cross examination, PW - 4 attested to not seeing the Suit premises respective Title Deed and that the 12th and 20th Defendants posed as owners. The Plaintiffs then closed their case whereupon a date was issued for defence hearing.
199. The Defendants had Ten (10) witnesses. The first was the 20 Defendant one Omar Kai Kahindi aged 37 years. DW - 1 testified that he was born on the Suit premises and that he also sired and raised his three Children thereon. He claimed that he was not served with the demand notices as alleged and sought that his sworn statement to be adopted as evidence. On cross examination, DW - 1 admitted that he does not know how titles are acquired, he brought no expert to prove fraud, hence rebutting the allegation that the title was acquired fraudulently. DW - 1 stated that he did not receive any money and did not know that there was a title to the suit premises. It also emerged that no evidence was adduced to back up any of his claims. Further that he did not have a home thus the encroachment. He admitted to producing no certificate of production of electronic evidence or proof to the claim that the Suit premises was acquired fraudulently.
200. DW - 1 also confirmed on cross examination that the Suit premises was bare in the year 2019 from the Google Satellite photos. Also that he was born in Kisauni, contrary to his earlier statement that his parents entered thereon in the year 1970. DW1 adduced no evidence to show when he entered thereon. It also emerged that there was no expert witness to prove allegations of fraud. On re-examination, it emerged that he did not know that the Suit premises had a title deed.
201. DW - 2 was Mishi Keah Kombo, who sought their joint statement dated 4th March 2024 in the Counterclaim to be adopted as part of their evidence. She claimed that she was born and farmed on the Suit premises and knew of no objection to such occupation up until the year 2021. On cross examination, it emerged that DW - 2 had brought no documentation to Court to show that she was born or indeed farmed on the suit premises. Additionally, her identity Card indicated that she was born in Kwale County. Further, that she did not know whether the Suit premises was private or public or of the existence of any title to it. DW - 2 admitted to giving her name and contact details to the Area Chief and not obtaining any consent to build thereon.
202. DW – 5 to 10 as well gave their testimonies, reiterating the sentiments by the rest of the Defence witnesses to the effect that they have brought no expert witness to prove allegations of fraud on acquisition of the title deed. It also emerged from their Identity Cards that they were born (and some lived) elsewhere, despite claiming to have been born and living on the suit premises. DW - 10 was the only defence witness who talked about adverse possession but gave no justification as to why he felt so entitled to it, while the rest just asked the court to let them continue living on the suit premises and/or allocate them land elsewhere.
203. While the Defendants had built structures thereon, none of them adduced any evidence of the Plaintiffs or relevant authority approvals of building when they entered on the suit premises. Additionally, they did not produce any certificate of electronic evidence for production of photographs. While some of them produced birth certificates, these are not proof of ownership. Birth Certificates and other identification documents do not water down the rule on sanctity of titles that, registration is irrefutable proof of proprietorship.
204. On the issues for determination, the Learned Counsel submitted that as a result of the Plaintiffs' suit, the Defendants' defence and Counter - Claim, the following issues arise for determination:-



- a. Whether or not the Plaintiffs had satisfied the conditions necessary for issuance of a permanent injunction.
 - b. Whether or not the Plaintiffs were the rightful owners of the suit premises
 - c. Whether or not the Defendants' conduct amounted to trespass.
 - d. Whether or not the Plaintiffs were entitled to general and aggravated damages sought, Costs of the Suit and interests thereof.
 - e. Whether or not the Defendants' Defense and Counter - Claim raises any triable issues that go to the crux of the suit.
205. On whether or not the Plaintiffs had satisfied the conditions necessary for issuance of a permanent injunction. The Learned Counsel submitted that indeed, they had satisfied the conditions necessary for the issuance of a permanent injunction. In submitting so, the Plaintiffs cite the case of “Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018]eKLR” which held as follows on permanent injunctions:-
- “A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”
206. The Learned Counsel therefore submitted that in order for their proprietary rights to be protected as enshrined under Article 40 of *the Constitution*, it was imperative that this Honourable Court considers the Plaintiffs' evidence adduced to wit: the Certificate of title (which is irrefutable, indefeasible proof of ownership). The stance that a certificate of title was concrete evidence of ownership was pronounced in the case of “Samwel Ambasa & 3 others – Versus - Stella Ingasia [2022] eKLR” where the court held as follows on a similar matter: -
- “The Title Deed is conclusive evidence of proprietorship of the holder of the said title as provided under section 26 of the *Land Registration Act* stated above. The law is extremely protective of titles and provides only two instances for the challenge of title; where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme, both of which have not been adduced in the instant case. The Respondent's title therefore remains unchallenged.”
207. It was trite law that he who alleged must prove. The provision of Section 107 (i) of the *Evidence Act* provides that: -
- “Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



208. Under section 26 of the [Land Registration Act](#), a Certificate of title will be held as conclusive evidence of proprietorship. While the provision of Section 24(a) of the [Land Registration Act](#) provides that;

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

209. From a re-evaluation of the evidence adduced and the testimonies of each of the parties in the trial court, the Defendants did not adduce any evidence whatsoever in support of their averments. The Defendants did not challenge validity of the Title Deed or certificate of official search demonstrating that the suit property belongs to the Plaintiffs as evidenced in the documents produced by the Plaintiffs during the trial. The Defendants herein have only challenged the title deed on grounds of fraud but failed to adduce any evidence backing up their claim.

210. The Learned Counsel relied on the case of “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 Others [2015] eKLR”, where the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305,308).”

211. The Counsel stated that Justice JG Kemei in the case of:- “Nelius Muthoni Thegetha – Versus - Julius Ndungu Mwangi & another [2020] eKLR” further buttressed this position as he stated that:-

“The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence – Versus - Lord Norreys (1880)15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|Davy – Versus - Garrett (1878)7 ch.D.473 at 489). ‘General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.’”

212. According to the Learned Counsel in the case of “Koinange & 13 others – Versus - Koinange [1968] KLR 23” the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Further in the case of “Palace Investment Ltd – Versus - Geoffrey Kariuki Mwenda & Another (2015) eKLR”, the judges of Appeal held that:

“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not.



This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

213. From the evidence on record according to the Learned Counsel, there was no way that the Defendants had discharged this burden. They humbly prayed that this court be guided by the aforementioned dictums in noting that the Defendants had not produced any substantial evidence to cast doubt over the Plaintiffs' proprietorship and title to the suit premises. Mere allegations of fraud bear no weight if the same is not corroborated with any form of evidence. The Defendants only adduced birth certificates and identity cards in their claim, yet identification documents can neither support proof of ownership nor support their allegations of fraud.
214. The Plaintiffs being the legal and rightful owners of the Suit premises have every right to enjoy their proprietary rights as enshrined in *the Constitution* of Kenya. The Defendants' arbitrary acts of unlawfully encroaching upon the Plaintiffs' land and erecting structures thereon is tantamount to an infringement of their constitutional rights.
215. Therefore, the Plaintiffs submitted that since there was no evidence adduced by the Defendants to contradict the Plaintiffs' proprietorship over the suit premises, then their right to property as provided under Article 40 of *the Constitution* should be protected by the issuance of the permanent injunctions orders as prayed. Therefore, as long as the search comes out in the registered proprietor's name and the Plaintiffs hold a title to the suit premises, the Plaintiffs' right to the Suit premises is indefeasible in line with the doctrine of sanctity of titles.
216. On whether or not the Plaintiffs were the rightful owners of the suit premises. The Learned Counsel submitted that as stated in issue (a) above, the Plaintiffs reiterated that they were the rightful owners of the suit premises. PW - 1 produced Plaintiffs' Exhibits; “LJM – 1” - being a copy of the Certificate of Title, “LJM – 2” - being a copy of the Transfer form, “LJM – 3” - being a copy of Certificate of Postal Search as at 5th February 2021 and “LJM – 4” being a copy of the Confirmation of Grant issued in Nairobi Succession Cause No. 321/2012, listing her as one of the beneficiaries and listing the Suit premises as one of the assets of the Registered Owner's Estate. This was already clear and conclusive evidence in terms of ownership of the suit premises which hasn't been challenged by the Defendants.
217. They reiterated that the provisions of Section 24(a) of the *Land Registration Act*. The position was reiterated in “Dr Joseph Arap Ngok – Versus - Justice *Moiwo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997*” where the Court of Appeal stated as follows: -
- “Section 23 (1) of the Act gives absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
218. In buttressing the above stance, the Plaintiffs also rely on the case of “Nkena Ole Keshu – Versus - Meteki Ole Tiima (2021) eKLR” where C. Otieno L.J relied on “Civil Appeal No. 246 of 2013 Arthi



Highway Developers Limited – Versus - West End Butchery Limited and Others”, whilst upholding the principle of sanctity of titles, where the Court of Appeal held as follows: -

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

219. The Learned Counsel submitted that there being no proof of fraudulent conduct on the Plaintiffs' part in acquisition and ownership of the Suit premises as opposed to aspersions cast by the Defendants. It then follows that the Plaintiffs indeed were the rightful owners of the Suit premises. This was by virtue of the Plaintiffs being the beneficiaries and representatives of the estate of the Registered Proprietor. Their right to property as provided for under Article 40 of *the Constitution* should therefore be safeguarded by issuance of the orders sought.

220. On whether or not the Defendants' conduct amounts to trespass, the Learned Counsel submitted that on this limb, the Defendants conduct amounts to trespass, Section 3 (1) of the *Trespass Act*, Cap 294 provides that:-

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

221. Thus, trespass was an intrusion by a person into the land of another who was in possession and ownership. In the case of “Municipal Council of Eldoret – Versus - Titus Gatitu Njau [2020] eKLR” the court held as follows in matters pertaining to trespass:

“ Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land.”

222. It had been confirmed by the plaintiffs through the testimony and evidence produced by PW1 that the suit property is owned by the Plaintiffs. The Plaintiffs have never authorized the Defendants to enter the suit premises and erect any structures upon it. There has been no evidence introduced by the Defendants that challenges this position.

223. The Learned Counsel submitted that the Defendants never and still did not have the Plaintiffs' consent/permission to be on the suit premises. The Defendants forcefully entered on the Suit premises and had continued being in illegal possession and occupation of the Suit premises to date. The Counsel submitted that this court should find that the Defendants have unlawfully trespassed on the Plaintiffs' land.

224. On whether or not the Plaintiffs were entitled to the General and aggravated damages sought and the costs of the suit and interests thereof. The Learned Counsel contended that from the foregoing, it was clear that the Plaintiffs were the absolute, rightful and indefeasible owners of the Suit premises herein. It was also clear that the Defendants were encroaching and trespassing onto the Plaintiffs' land. The said encroachment continues to deny the Plaintiffs' use, occupation, possession and enjoyment



- of the suit premises, the Defendants on the other side had been cultivating and enjoying the use of the unlawful actions. It is this loss of use and all the incidental rights that had been infringed by the Defendants that the Plaintiffs now sought compensation for.
225. In the case of “Duncan Nderitu Ndegwa – Versus - KPLC Limited & Another (2013) eKLR” where P. Nyamweya J. held that: -
- “.....once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages.”
226. Justice Mohammed Kullow in “Keiyian Group Ranch – Versus - Samwel Oruta & 9 others [2021] eKLR” quoted the Halsbury Laws of England 4th Edition, Vol 45 at para 26,1503, which provides as follows: -
- “(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.”
227. On the issue of general damages for trespass, the issue that arose was what was the measure of it; the Learned Counsel submitted that E. Obaga J in the case of “Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR” held as follows: -
- “In light of the aforementioned dictum we humbly submit that the Plaintiffs pray that this Honourable Court should consider the value of the Suit premises before and after the Trespass, the restoration cost, loss of user and the costs incurred by the Plaintiffs in their bid to ensure that the Defendants demolish the illegal structures and vacate the Suit premises.”
228. On whether or not the Defendants’ Defence and Counter - Claim raised any triable issues that go to the crux of the suit. The Learned Counsel submitted that the Defendants’ Defense and Counter - Claim never raised any triable issues that go to the crux of the suit. They were diversionary tactics, couched to draw the Courts attention from the real issue in tussle - which was that the Defendants were notorious trespassers and had violated the Plaintiffs’ right to property. Moreover, the Defendants were clearly in court, sought equity but they come with unclean hands.
229. The court stated as follows in the case of “Caliph Properties Limited – Versus - Barbel Sharma & Another [2015] eKLR”:-
- “Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies....He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”
230. The Defendants’ collective soiled hands manifests profoundly by the duplicity of suits, which clearly showed that the Defendants were intentionally forum shopping. Abusing the Court process and wasting precious judicial time. If the Defendants were truly in pursuit of justice, they could have



withdrawn the Counter - Claim herein after filing their Originating Summons being ELCOS/E009/2023 - which again was an afterthought and speaks to how they were only jerked into action by the Plaintiffs' suit herein. Their Defence and Counter - Claim should therefore be disregarded and dismissed with costs awarded to the Plaintiffs as sought in the Plaint.

231. On whether the declaration that the registration of the suit property in the name of Michael Drury was fraudulent and or illegal. The Learned Counsel argued that the Court of Appeal in the case of:- “Kibathi t/a Osoro Chege Kibathi & Co Advocates – Versus - Musti Investments Ltd [2024]KECA 270 (KLR)” widely discussed on the issue of fraud and its standard of proof. It highlights as follows:-

“In this appeal, and as correctly noted by the trial judge, the fraud that the appellant relies upon was distinctly pleaded. The question is whether that fraud was proved to the required standard. The standard of proof of fraud in civil disputes is the intermediate one, not as high as beyond reasonable doubt, but higher than on a balance of probabilities. In R.G.Patel – Versus - Lalji Makanji [1957] EA 314, the former Court of Appeal for Eastern Africa explained the standard thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

33. Further, in Richard Akwesera Onditi – Versus Kenya Commercial Finance Co Ltd [2010] eKLR, this Court, in rejecting what it found to be bare allegations regarding fraud, stated thus:

“_fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability and the bare allegations put forward by the appellant do not therefore avail him.”

34. This Court has also rejected the notion that a party can prove fraud to the required standard purely from inference. In his concurring judgment in Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows on this point:

“It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts’

232. Taking guidance from the aforementioned dictum, it was clear that allegations of fraud must be strictly proved, mere allegation and inferences do not suffice. The Defendants via the Counter - Claim dated 3rd December 2022 had indicated particulars of fraud, however these should be treated as mere allegations and inference as the Defendants herein had not provided before this court and during trial, an iota of evidence to show that the allegations of fraud could be substantiated in any way. The Defendants had failed to call any expert witness and furthermore they had not produced any shred of evidence by way of an expert report to back their claim. The Plaintiffs through their licensed surveyor being PW - 3 testified that the Suit premises was neither subject to, nor part of the Ndung'u Report on illegally acquired land nor any investigations on matters fraud. No evidence was tendered by the Defendants to the contrary.



233. The Learned Counsel submitted that in the matter of the late “Muhambi Gogo Mwangari (Environment & Land Case 7 of 2017) [2023] KEELC 20069 (KLR) (28 September 2023) (Judgment)”, Justice Matheka dismissed allegations of fraud based on lack of evidence as follows:-

“Although the Defendant alleges fraud on the part of the Plaintiffs on how they obtained their title, they have offered no explanation on how this happened way back in 1990. They have also provided no proof that the Plaintiff knowingly took part in the alleged fraudulent dealings concerning the suit property.”

234. She further went on to add that: -

“It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto. In the instance suit the burden to prove the alleged fraud lies with the Defendant who have failed to adduced any evidence in support of those allegations.”

235. According to the Learned Counsel, based on the lack of evidence backing the allegations of fraud they humbly submitted that this prayer failed.

236. On whether the Court should issue a declaration that all subsequent registration including that of Michael Mwenda Ngilu should be null and void. The Learned Counsel opined that the Defendants’ claim of fraud were mere inferences and allegation which had no backing. However, in any case, she humbly submitted that Michael Mwendwa Ngilu was a bona fide purchaser for value and holds a good title to that effect. The supreme court in “Dina Management Limited – Versus - County Government of Mombasa & 5 others [2023] KESC 30 (KLR)” stated as follows in regards to what constitutes a bona fide purchaser for value: -

“The Court of Appeal in Uganda in Katende – Versus – Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

237. The Learned Counsel went further to state that in light of the aforementioned dictum, she submitted that Michael Mwendwa Ngilu falls under the criteria outlined above. First and foremost, she reiterated that there was no fraudulent activity that was involved in acquiring the suit premises and in any case the same had not been proved by the Defendants herein. Furthermore, the Plaintiffs had submitted that they have a good title to the suit premises which had not been challenged in any manner or form and



the same was duly registered under the name of that Michael Mwendwa Ngilu. If the Defendants were to somehow prove their allegations of fraud, they had in no way whatsoever challenged the fact that Michal Mwendwa was a bona fide purchaser for value of the suit premises and in that the 2nd prayer in their Counter - Claim should fall as well.

238. On whether the Defendants should be granted the suit by way of adverse possession. The Learned Counsel submitted that the statutory provisions that underpin the doctrine of adverse possession is set out under the provisions of Sections 7, 13 and 38 of Limitations of Actions Act Cap 22 and Order 37 (1) of the Civil Procedure Rules, 2010.
239. According to the Learned Counsel based on the aforementioned provisions of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under article 40 of the constitutions become extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land. The Learned Counsel stated that this Honourable Court in the case of:- “Kyule & 640 others – Versus - County Government of Kajiado & 5 others (Constitutional Petition 25 of 2020) [2023] KEELC 16997 (KLR) (21March 2023) (Judgment)” highlighted as follows in how a suit of adverse possession should be instituted:-

“The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the Limitation of Actions Act by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. Under the provision of Article 162 (2) of the Constitution of Kenya 2010, Section 13 of the Environment and Land Court Act and Section 38 of the Limitation of actions Act confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.

40. It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession.”

240. The Learned Counsel submitted that the prayers sought for adverse possession on the defendants counter claim dated 3rd December 2022 is from the onset defective both in form, substance and is an abuse of the court process. The defendants cannot purport to seek orders of adverse possession by way of a counterclaim and yet the Civil Procedure Rules expressly state on how one should move the court when seeking orders of adverse possession. On that notion alone, that prayer should fall.
241. Further this Court in “Kyule & 640 others – Versus - County Government of Kajiado & 5 others (Supra)” further goes on to buttress that for a claim for adverse possession to succeed key steps of the law must be followed. He stated as follows:-

“

“ 44. One must have to comply with certain structures set out by the law before he can realize such a right. Such structures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under Article 24. The principles were well set out in the case of “Kahindi Ngala Mwangandi – Versus



- Mtana Lewa [2021] eKLR" where the Court of Appeal sitting in Malindi held:-

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:-

7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.

- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The Court shall direct on whom and in what manner the summons shall be served.”

In the case of "Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira", Civil Appeal No.325 of 2003, the Court emphasized the importance of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of: -"Kyeyu – Versus - Omuto, Civil Appeal No. 8 of 1990", See also the present position in case "Johnson Kinyua-Versus-Simon Gitura Civil Appeal No.265 of 2005," where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

45. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a Judge under the provision of Order 37 Rules 13 and 16 of the Civil Procedure Rules, 2010 and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim.”

242. The Learned Counsel submitted that it was clear from the aforementioned dictum that a claim of adverse possession has a procedure manner which is set down by statute in which an applicant claiming such orders must follow. They humbly submitted that the Defendants had not in any manner or form followed the procedures highlighted in the aforementioned dictum. However, for avoidance of doubt, the thresholds of granting orders of adverse possession have been well outlined by various courts in this country.



243. The Court of Appeal in the case of “Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR” opined that a person claiming adverse possession must establish the following: -

“

- “(a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.”

244. The court of appeal in the aforementioned case further held that:

“the onus is on the persons claiming adverse possession. To prove that they have used the land which they claim as of right Nee Vi, Nec Clam, Nec Precavio (No force; No Secrecy, No evasion) so the Applicants must show that the Company had knowledge (or means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration.”

245. Further that for the Applicant to be entitled land by Adverse Possession, the Claimant must prove that he had been in exclusive possession of the land openly and as without interruption for a period of 12 years either after dispossession the owner or by discontinuation of the possession by the owner on his own volition. The Defendants had in no manner whatsoever satisfied the criteria indicated in the aforementioned dictum. Their possession has not been open and uninterrupted. She submitted that the court to take cognizance of the fact that the Plaintiff and its entourage had been conducted several visits to the suit premises wherein the Defendants had been indicating of their intention to vacate subject to a monetary compensation from the Plaintiff. Furthermore, and particularly on the visit on 8th May 2021 the 20th Defendant turned violent and threatened to assault the Plaintiff’s advocate. This was clearly not an open and uninterrupted occupation of the suit premises.

246. Furthermore, the court should note that from the evidence produced by PW - 2 being a copy of the Google Map Aerial view as at the year 2020, showed that the Suit premises was unoccupied in contrast to the same view as at the year 2023, which showed encroachments and illegal constructions by trespassers. The Learned Counsel submitted that this was just a mere span of 3 years in which the defendants had been in occupation of the suit premises. This was nowhere close to the 12 years as provided by statute. Thus the claim of adverse possession by the Defendants herein bear no weight at all.

247. On whether the court should grant an order compelling The county government of Mombasa, the Ministry of lands, public works, housing and urban development and the National Land Commission to settle the Defendants on the suit property or an alternative property. The Learned Counsel submitted that Article 64 of [the Constitution](#) of Kenya provides as follows:-

“

- “64. Private land
Private land consists of-



- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.”

248. The suit premises herein is private land. There had been nothing to challenge the validity of the title produced by the Plaintiffs herein. The aforementioned government institutions do not have the power to deal with private land as defined in Article 64 of *the Constitution*. The NLC was only mandated to review the grants or dispositions of public land and not private land as defined by *the Constitution*. The suit premises herein have never been converted into public land at any point whatsoever. Justice Angote in “Republic – Versus - National Land Commission Ex - Parte Holborn Properties Limited (Judicial Review 5 of 2015) [2016] KEELC 941(KLR) (6 May 2016) (Judgment)” quoted the case of “R – Versus - National Land Commission & 4 Others ex parte Fulson Company Limited and another (2015) eKLR” in which Emukule J held as follows:-

“In this case, Kilifi Beach properties Limited, the ex -parte Applicant is a private limited liability company, Shah Sesa and Edward Mzee Karezi are all private individuals. There is no material from the National Land Commission to rebut the claim that the subject land is private land. How the ex parte Applicant acquired it from the Interested Parties is a matter of claims under private law between those parties. The National Land Commission has neither the legal authority to review and much less to revoke titles relating to private land. On this ground alone, the ex parte applicant succeeds in its application for issue of an order of certiorari to quash the Commission's purported review and revocation of the ex-part Applicant title.”

249. The Learned Counsel submitted that this suit premises had never been converted into public land and had neither been compulsorily acquired by any government institution. This court should not grant orders in vain and thus the Counter - Claim should fall. On whether the Defendants were entitled to an order compelling the Government to Settle them on the Plaintiff's Land. The Learned Counsel submitted that as earlier stated, should the Government be so desirous of settling the Defendants on the Plaintiff's property, it should follow the procedure outlined in law for the doctrine of eminent domain, compensate the Plaintiff monetarily as provided for under Sections 110 - 120 of the *Land Act* as read together with *the Constitution*. Article 66 (1) of *the Constitution* for instance stipulates that the state may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health or land use planning.

250. The Article 40(3), under the Bill of Rights, states that the state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description unless the deprivation results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, or is for a public purpose or in the public interest and is carried out in accordance with *the Constitution*. Article 40(3)(b) continues by stating that such acquisition must be followed by prompt payment in full and just compensation to the person from whom such land is acquired and that such acquisition also allows any person who has an interest in, or right over, that property a right of access to a court of law.

251. The provision of Section 6 of the *National Land Commission Act* gives the Commission all the powers necessary for the execution of its mandate under *the Constitution*, the Act and any other written law. It gives the NLC unlimited powers with regard to the administration of land in the country. Whereas the *Land Act* states thirty-five functions of the NLC, the *Land Registration Act* states six functions and *the Constitution* states nine functions, the NLC Act states nine functions to be carried out by the



NLC. The 24th of the NLC functions in the *Land Act* mandates the NLC to make laws to govern the acquisition and just and adequate compensation of land. The 25th function gives the Commission the power to hold inquiry, award and promptly pay a just compensation before taking possession of the acquired land.

252. In the case of:- “Mwavumbo Group Ranch – Versus - National Land Commissions & 6 others (2017) eKLR”, for example, the Respondents sought a declaration that the refusal to compensate the Petitioner for the 174,646 hectares (436,615 acres) of its land was a breach of their fundamental right to land as enshrined under article 40(3)(b)(i) of *the Constitution* of Kenya. The Petitioners also wanted the Respondents to value the land and pay the required compensation. The Respondents had not given the Petitioners any reason for their failure to compensate them. The Respondents argued that the Petitioners had not exhausted the remedies provided for under sections 112 to 120 of the *Land Act*. These sections outline the procedure that landowners are supposed to follow to pursue compensation by the National Land Commission after their land has been acquired.
253. In the case of:- “Isabel Waithira Njoroge – Versus - Permanent Secretary Ministry of State for Provincial Administration & Internal Security & 4 others (2014) eKLR” where the Petitioner’s land had been compulsorily acquired but was not compensated for after the acquisition. The ELC (Gacheru J), noting that monetary compensation must be reasonable and fair taking into consideration the circumstances of each case, awarded the Petitioner a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) as compensation and proceeded to hold that the Petitioner’s right to property as protected by Article 40 was violated. Further, the Court held that failure to award compensation to the Petitioner was a breach of her right to fair administrative action which is safeguarded by article 47 of *the Constitution*.
254. Thus, the Learned Counsel held that they relied on the foregoing authorities in urging this Honourable Court to disregard the Defendants’ Counter - Claim and dismiss it with orders as to costs. That should this Honourable Court deem it fit to compel the Government to settle the Defendants on the Plaintiffs’ Land, then the process for compulsory acquisition of private land be followed as itemized in law and discussed hereinabove.
255. In conclusion, the Plaintiffs prayed that this Court considered their submissions and found that their suit was merited and granted the prayers sought. They humbly urged this Honourable Court not to send the Plaintiffs away from the seat of justice empty handed, but instead issue the orders sought with costs as prayed.

VII. Analysis and Determination

256. 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.
257. 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: -

SUBPARA a.

Whether the Plaintiffs are the legal proprietors of the suit property being the legal administrators of the Estate of Mwenda Ngilu?

b. Whether the Defendants have made out a claim in their Counter - Claim.

c. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff?



d. Who bears the costs of the suit and the counter claim?

Issue No. a). Whether the Plaintiffs are the legal proprietors of the suit property being the legal administrators of the Estate of Mwenda Ngilu

258. Prior to embarking on the analysis of this sub – heading, as indicated above by the consensus of the parties herein conducted a site visit (“Locus in Quo”) and hence below is the stated report.

Site visit Report

Republic Of Kenya

In The Environment And Land Court

At Mombasa

Elc Suit No. E095 Of 2022

Charity Kaluki Ngilu & 3 Othersplaintiffs

Versus –

Mishi Keah Kombo & 18 Others Defendant

A Site Visit Report of A Visit (“locus In Quo”) held at a place within the Portreiz/chaani/changamwe area of the County of Mombasa on 16th June, 2023 At 9.00 A.M.

A. Introduction.

1. The suit land where the site visit (“Locus in Quo”) took place was close to 15 or 20 kilometres from the Mombasa main land city centre. Its close to the Moi Jomo Kenyatta Airport and the Portreiz hospital. It is surrounded by a number of yards undertaking the commercial business of metallic containers utilized for shipping of goods abroad and inland; other adjacent parcels of land for residential use.
2. The site property on the northern part faces the Indian ocean and the Kenya Ports Authority which are on the lower southern part of it. It provides a very clear and nice scenery of the said ocean.
3. The team assembled at 11.00am and the meeting was called to order. A short word of prayer was held. The Honourable Judge commenced by explaining the purpose of the visit. Thereafter, a brief introduction of the team was conducted.
4. It is instructive to note that at the initial stage, the residents were not co – operative. They appeared rather apprehensive, disturbed and anxious. The team fully appreciated the perceived attitude bestowed by the residents. It felt that they must have been fatigued by the frequent and regular visits conducted by the officials of the Government whereby they were always warned to vacate the site. However, upon intense explanation by Court on the purpose of the visit, they relaxed and became extremely friendly and co – operative. They voluntarily, freely and without any duress offered information, guidance and support making the visit extremely successful, meaningful, effective and peaceful.



B. COURT

- a. Justice Hon. L.L. Naikuni – ELC. No. 3;
- b. M/s. Yumnah Hassan – Court Assistant;
- c. George Omondi – Usher/Bodyguard;
- d. Mr. John Ngari Mwaniki – Driver/Assistant.

C. The Plaintiffs

- a. Mr. Gathu Advocate appearing with Miss. Wamithi Advocate for the 1st, 2nd & 3rd Plaintiffs.
- b. Hon. Charity Ngilu – the 1st Plaintiff.

D. Defendants

1. Mr. Aboubakar Advocates for the Defendants.
2. Mr. Rama Ngoica (Representative of Mr. Misha Keah Kombo – the 1st Defendant.
3. M/s. Roseline Otieno (wife) representative of Mr. Duncan Ouko.
4. M/s. Salma Mbeyu – the 4th Defendant.
5. Mr. Abdalla Mwachigit – the 5th Defendant represented by M/s. Salma Mbeyu (the 4th Defendant).
6. M/s. Mercyline Kwamboka – the 6th Defendant.
7. Mr. Robert K. Goshi – the 9th Defendant represented by M/s. Selina Lyeri (wife).
8. Mr. Karisa Kenga – the 11th Defendant.
9. Mr. Mwijuma Mbwana – the 12th Defendant.
10. Mr. Njira Ngala – the 13th Defendant represented by Mr. Victor Nyondo (wife).
11. Mr. Kadama Toya – the 15th Defendant represented by Mr. Abdul Hamisi (son).
12. M/s. Sophia Ramadhan Salim – the 16th Defendant.
13. Mr. Abel Kilonzo – the 17th Defendant.
14. Mr. Mangi Katana Chengo – the 18th Defendant.
15. Mr. Omar Kai – the 19th Defendant;
16. Over 50 other people present posing as either residents or neighbours.

E. Security Operatives from Chaani Police Station.

1. Chief Inspector Hannington Mwasonga.
2. Chief Inspector Nelly Pendo.



3. Inspector Sophy Wanjala.
4. Sergeant Kadenge.
5. Sergeant Otieno.
6. Police Constable Ngania.
7. Police Constable Cosmus Tsuma.
8. Police Constable Clauphus Mwenda.
9. Police Constable Irene Muli.
10. Police Constable Marcus Mwamburi.

F. Constituency Representative

11. Martin Oyoo – Changamwe Constituency office, Co - ordinator of Changamwe MP, Chairman of ODM and Azimio at Changamwe.
(Hereinafter referred to as “The Team”).

G. The purpose (Objectives) for the Site Visit

12. 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 18th may. 2023 and 13th June, 2023 respectively 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.

13. 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.
14. 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.

H. The Procedure.

It was agreed by consensus that both the Plaintiff and the Defendant appoint their representatives to lead the team leaders for purposes of this Site Visit.

H. The general observations.

The team made the following both general and specific observations.

As indicated the suit land is close to the Moi Jomo Kenyatta Airport and the Portreitz hospital. The area is mainly an industrial as opposed to residential. It is surrounded by a number of yards undertaking the commercial business of metallic containers utilized for shipping of goods abroad and inland; other adjacent parcels of land for residential use. It is enroute to the Standard Gauge railway (SGR) station at Miritini place; the Dongo Kundu southern exit inter faced access road. It borders with the Kenya Ports Authority whereby the Indian Ocean and several the oil refinery tanks are visibly seen from the land. From the information contained from the Certificate of Official search conducted as at 5th February, 2021, before the offices of the Registrar of Titles, it indicates that the suit land known Sub – division Number 2427 (Original Number 2402/5) Section VI mainland North Mombasa. The title number is 14492 and measures approximately 1.41 acres. It is freehold registered under the Registration of Titles Act Cap. 281 (Now Repealed). It is generally rocky and dry land. Some parts of the land are sloppy in nature with a deep valley in between it and other adjacent parcel of land. The team was not able to see any of the planted beacon on the suit land. While some of the land was fully developed with semi – permanent structures, a large portion was vacant and bare. The land is situated on an higher part of the Indian Ocean. The Kenya Ports Authority is clearly visible from it.



8. acre Road

H. The Specific Observations.

At every stop over into the structures, and in order to attain first hand information, the team caused some direct interaction with the owners of the structures. M/s. Fatma Shaban, (approximately 65 years old or thereabout) indicated that she had been in occupation of the land since the year 1972. She informed the team, by the time of her occupation, the place was a forest and vacant. She put up a semi – permanent structure using simple coral



stones, mud walls and some coconut leave roof. She had lived there throughout with her family. She knew no other place. Mr. Martin Oyoo stated that most of the residents moved on the land from the year 2000. He stated that by then the land had been vacant and bushy. According to him, there had never any one during that time and they used to undertake fish activities from the nearby Indian ocean for commercial purposes. There was no one who made a claim on ownership to the suit land. They did not know that there existed any title deed to confirm the same. He further stated that the clan living there was called Mwinyucaï and the current area MP was from that clan. He estimated the habitants to be close to 200 persons. Mr. Mwijuma Mbwana – the 12th Defendant raised some security concern. He stated that there had been incidences of houses being burnt down and some houses demolished. Unfortunately, there were no evidence seen to this effect by the team. Mr. Gathu Advocate vehemently countered all these information. He informed the team that when he came there in the year 2019 to serve demand letters, there were only 19 locals. He observed that most of the houses and other structures were not there. According to him, most of them came from the neighboring plot and build here. The locals assisted the hired land surveyors to put up beacons. Two locals had already sold off two plots at a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=.) There were close to 20 or 25 incomplete semi permanent houses for residential purposes and other structures used as toilets. The team estimated that there were close to 50 or 60 inhabitants on the suit land. There were no social amenities such as schools, churches or religious shrines, shops. They depended on the facilities in the nearby vicinity. There existed an access road to the port. The team was informed that the neighboring plot belonged to one Mr. Singh, Honorable Balala and Mr. Ngome and the plot are not developed because KPA want to acquire them for development. There existed a few permanent houses and which were well connected to electricity and water tanks. The team estimated them to be close to five (5) structures of this nature). The others were semi – permanent structures constructed using coral bricks, mud walls and either coconut or old rusty iron (highly corroded by the heavy fluoride atmospheric emission and the breeze from the nearby Indian Ocean) sheets roofs. They were rather small rooms. The team estimated these structures to be close to 25 of them. We noted although most were occupied but some were unkempt, abandoned and neglected. They were wearing out due to the harsh hot and rainy weather conditions prevalent within the Coastal region. We noted there were several unfinished semi-permanent houses. There exists a main road and a deep valley separating the suit land with other adjacent parcels of land on the lower side. Mr. Tsuma Tsuma – 8th Defendant took the team to his house. It was a semi-permanent of 4 bedroomed residential house. The team noted that two of these were rented out as there was a board to that effect. Mr. Mangi Katana Chengo, the 18th Defendant herein showed the team his residential house. It was a well constructed a permanent house. Mr. Njira Ngala – 4 rooms houses and 2 tenant and he leaves in 1 room. Mr. Abdalla Mwachigit, the 5th Defendant house was destroyed due to rain. M/s. Salma Mbeyu had no house seen and she says her house is also destroyed by rain. Mr. Abel Kilonzo – the 7th Defendant showed the team his semi – permanent house with a well manicured and



cleanly kept compound. He managed a subsistence farming where there were a few poultry and plantations in form of pawpaws, sugar canes, cowpeas and banana plantations.

Conclusion and the way forward.

- a. That from the surrounding facts and inferences, there are all indications that there would be need for the parties to attempt exploring negotiation based on the principles of the Alternative Dispute Resolution (ADR) and/or Alternative Judicial System (AJS) in tandem of the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) & (2) of the Environment and Land Court Act, No. 19 of 2019.
- b. That the Court held and thus explained to the parties herein that it was an aspect that was ordinarily and highly encouraged by Courts for expediency in resolving such land disputes.
- c. That the Honourable Court will in due course prepare and share the draft Site Visit report for further input by the parties herein.
- d. That the matter set down for mention on 24th July, 2023 for further direction.

There being no further business to deliberate on the site visit ended at 11.20 A.M.

SITE VISIT REPORT PRESENTED ON THIS16thDAY OF..... JUNE.....2023.

.....

HON. MR. JUSTICE LL. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA

259. Under this sub – title, the Honourable Court shall discuss how the Plaintiffs came to be in possession of the suit property and if by virtue of the mode of disposition they are the legal proprietors of the suit property. The Honourable Court under this title is to decipher the main substratum herein is on the issue of legal ownership to the suit land and whether the Plaintiff and the Defendant have valid title, rights and interest over it in law whatsoever. From the very onset, Judicial notice will be taken to the fact that land in Kenya is extremely sensitive and emotive. Land is a source of livelihood and a lot of importance is bestowed on it. There has been plenty of disputes over the occupation, title and rights of land. According to the Constitution of Kenya, 2010 land is categorized into three – Private; Public and Community land.
260. With promulgation of the Constitution of Kenya, 2010, all the legal regime of land legislation were condensed into a few legal framework, Significant, after the repealing of several legislation, two of them were sustained being “The Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2016”.
261. It is instructive to note that the suit land was registered under the Registration of Title Act, Cap. 281 (now Repealed). As already correctly pointed out by the Learned Counsel for the Defendant, based on the provisions of Section 107 of the Land Registration Act No. 3 of 2012 provided that any right,



interest, title, power, or obligation acquired, accrued, or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act. This Legal position finds grounding in the provisions Section 23 (3) (c) of the [Interpretation and General Provisions Act](#), Cap. 2 which provides:-

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

Ideally, I wish to point out that the [Land Registration Act](#) makes provision on the effect and efficacy of registration of title and its indefeasibility. The provision of Section 24(a) of the [Land Registration Act](#) 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 appurtenant thereto.”

262. When a person’s ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

263. Further to this, the Honourable Court is guided by the Court of appeal in the case of: “Munyu Maina – Versus - [Hiram Gathiba Maina, Civil Appeal No.239 of 2009](#)”, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

264. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as ‘the prima facie’ conclusive evidence that the person named as proprietor of the land is the absolute and legal owner with indefeasible title, rights and interest on the land and the proprietor shall not be subject to challenge except – On the ground of fraud, mistake, omission or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

265. This court in considering this matter referred to the case of:- “Elijah Makeri Nyangw’ra – Versus - Stephen Mungai Njuguna & Another (2013) eKLR” where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally,



unprocedurally or through a corrupt scheme. The court in the case while considering the application of provision of Section 26(1) (a) and (b) of the Land Registration Act holds as follows:-

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

266. Now turning to the issues from the instant case. The golden question and the elephant in the room here is simple and straightforward: - “Who between the Plaintiffs and Defendants have certainly shown the root of their title?” To respond to this deep query, the Honourable Court would require more than the Solomonic wisdom anchored and founded from the Scriptures of 1 Kings 3 Verses 16 to 28 on the decision by King Solomon over the dispute of the parentage of the child being claimed by the two Harlots and the law. From the said scripture it upon King Solomon making the decision, it was stated that: “and all Israel heard of the Judgement which the King had rendered; and they stood in awe of the King, because they perceived that wisdom of God was in him, to render Justice...”. That should be the case in this matter herein.

267. In the case of “Alice Chemutai Too – Versus – Nickson Kipkurui Korir & 2 Others [2015] eKLR” Justice Sila Munyao held that:

“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. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –Versus - Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...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 titleholder. 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 titleholder 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. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

268. I am in agreement with Munyao J. that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. It is trite that he who alleges must prove, as provided by Section 107 of the Evidence Act. The Defendants have alleged fraud on the part of the Plaintiffs, and they had a duty to prove the existence of such fraud.



269. Black's Law Dictionary, 9th Edition defines fraud as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

270. In the case of “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others [Supra]”, the Court held that;

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

271. Where a person's title is under attack, he must of necessity give an account on how he acquired the same; the Accuser must also show the court that the property as truly obtained in a fraudulent transaction. In the case of “Munyu Maina – Versus - *Hiram Gathiba Maina, Civil Appeal No.239 of 2009*”, where the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

272. It is trite that fraud must be specifically proved. See the case of “Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”, where the Court held:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



273. See also the case of “Koinange & 13 others – Versus - Charles Karuga Koinange 1986 KLR” at page 23, where the court held that:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

274. Though the Defendants alleged fraud, and / or illegality, they did not provide any document or prove of the alleged fraud by the Plaintiffs. Further, in their testimonies in court, no evidence of fraud was availed by the Defendants. The Plaintiffs were able to prove how they obtained registration of the suit properties in their favour. Section 7 of the Land Act itemizes the following modes of acquisition of title to land:-

- a. allocation;
- b. land adjudication process;
- c. compulsory acquisition
- d. prescription
- e. settlement programs;
- f. transmission
- g. transfers;
- h. long term leases exceeding twenty one years created out of private land ; or any other manner prescribed in an Act of Parliament

275. The certificate of title was acquired in the year 1981 by the deceased who was the husband of the 1st Plaintiff. After the death of the deceased, the Plaintiffs acquired letters of grant of administration of the estate of MICHAEL MWENDWA NGILU therefore making them legal properitors of the suit property. After the grant of the letters of administration and as provided by Section 24 of the Land Registration Act, then the Plaintiffs became the absolute and indefeasible owners of their respective parcels of land.

276. From the records, the Defendants never provided no evidence to show that the title documents held by the Legal administrators of the estate of the late Michael Mwendwa are forged. There being no eivdden to the contrary I find that the Plaintiffs have a legitimate claim on the suit property as the legal administrators of the estate of the deceased. Based on law, I discern that the Plaintiffs are the absolute and legal owners to the suit property with all indefeasible rights, interest and title vested in them by law.

ISSUE No. b). Whether the Defendants have made out a claim in their Counter Claim.

277. Under this Sub – heading, the Honourable Court will critically assess the Counter – Claim by the Defendant and its legal validity. From the very onset, the Honourable Court takes cognizance that the Defendants added other parties being the 5th, 6th, 7th, 8th and 9th Defendants in the matter which was irregular as no leave was ever sought. Further, there was no proof whether Summons to Enter Appearance were ever extracted and thus served upon them as there was no affidavit of service filed as required under Order 5 Rule, 15 of the Civil Procedure Rules, 2010. It is not surprising therefore, that none of these parties filed their Defences nor participated in this proceedings whatsoever under Orders 7 and 11 of the Civil Procedure Rules, 2010.



278. Be that as it may, the Court notes that the Defendants/Plaintiffs from the filed Statement of Defence, Counter - Claim and in all the 21 paragraphed witness statements duly executed on dated 4th March, 2024, they pleaded several reliefs. Profoundly, one of them was on land adverse possession in their Counter - Claim. In light of the filed pleadings and the evidence adduced in Court, the Defendants submitted that it was clearly demonstrated that the Plaintiffs obtained the suit property illegally and fraudulently. According to the Defendants, the land ownership history indicated that the Plaintiffs were holding a Provisional Certificate of Title which was issued under the provision of Section 71 of the Registration of Titles Act, Chapter 281 of the Laws of Kenya (Now repealed). This Title was issued on 17th February 1981, forty - one (41) years before the date of filing of this suit – the Plaintiff Exhibit “LJM – 1”.
279. The Defendants held that the last entry in the said Provisional Certificate was entry number 7 indicating issuance of the Provisional Certificate. To them, there was no entry showing transfer of the property to the Plaintiffs or their deceased father and or husband. On the face of the record there was no proof of registration of the Plaintiffs as registered owners. Thus, by this fact alone fact the Plaintiffs' case must fail. Additionally, the Defendants held that the Plaintiffs had produced a copy of a transfer from Michael Drury to Michael Mwendwa Ngilu. This transfer was not confirmed by registration. A transfer which was not registered had no legal value or effect in law. The Defendants were of the view that the Plaintiffs' Exhibit "LJM - 2" being a transfer from Micheal Drury to Micheal Mwendwa Ngilu dated 23rd July, 1985 was not attested by the advocate who allegedly pre pare d it or by any other advocate.
280. Further, the Defendant's averred that the Plaintiffs had also produced a Certificate of Postal Search indicating the owner was Michael Mwendwa Ngilu. The Defendants queried this assertion to the effect that on what basis did the Registrar of Title issue such a Certificate when the title the Plaintiffs had produced in court ended at entry Number 7 showing the owner was Michael Drury? In any event, the provision of Section 24(a) of *Land Registration Act*, 2012 clearly indicated that it was the registration of a person as the proprietor of land which vested in that person as the absolute ownership of that land together with all lights and privileges belonging or appurtenant thereto.
281. Extensively, the Defendants raised several issues all challenging the validity of the Provisional Certificate of Title. These were as follows:-
- a. Plaintiff Exhibit "LJM - 1 " which was not clear, showed that as at 2nd July, 1974 the suit property was registered in favour of Port Reitz Properties Limited.
 - b. On 25th September, 1974 Port Reitz Properties Limited charged the suit property to Falon Harilal Harjivoan Kathari for a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-).
 - c. On 8th July , 1980, Mr. Micheal Drury registered a caveat against the suit property claiming purchasers' interest.
 - d. On 17th February, 1981 Micheal Drury withdrew the caveat dated 13th February, 1981.
 - e. On the same date – 17th February, 1981 there was a withdrawal of charge dated 13th February, 1981.
 - f. On the same date, that was, 17th February, 1981 a transfer dated 13th February, 1981 was registered in favour of Mr. Micheal Drury for a sum of Kenya Shillings One Hundred and Ten Thousand (Kshs. 110,000/-) in terms of Section 55(1) of the Registration of Titles Act.



- g. On the same day – 17th February, 1981 a Provisional Certificate was issued.
282. According to the Defendants, it was evident that as at 17th February, 1981 the original title had been lost and no proof of an application for another title is tendered rendering the issuance of the Provisional Title illegal. The suit property shows it had been charged to an individual but the transfer to Micheal Drury show his registration was through a purchase from the government after the registered owner failed to pay the government rent which is a contradiction of the facts. To the Defendants, the original grant to the original owner is not disclosed to show the nature of the grant and the conditions thereof. By and large, the Defendants were of the belief that the title documents in respect of this suit were obtained by fraud and or misrepresentation and therefore they were null and void contrary to the provision of Section 26 (1) of the *Land Registration Act*, 2012. The also averred that the Plaintiffs title to the suit property was extinguished under Section 17 of the *Limitation of Actions Act* as read together with Section 7 thereof. They held that from the title the Plaintiffs alleged that their late father and or husband purchased the suit property on 23rd July, 19 85 it was 37 years before filing of this suit. The suit property stayed unoccupied and undeveloped by the Plaintiffs for all those years. The 12th Defendant pleaded that he was born and brought up on the suit property. All other Defendants pleaded that they had been on the suit property for over 20 years. The Defendants produced photographs of themselves, their family and the houses they occupy for all that time. These were their permanent houses they still occupy.
283. Under this substratum, the Honourable Court shall examine the doctrine of Adverse possession and whether the Defendants/ Plaintiffs in counter claim qualify as adverse possessors. The law in respect to adverse possession is now settled.
284. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:
- “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. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.
285. Additionally, the provision of Section 13 on the other hand provides:
- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favor the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover



land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.
286. While the provision of Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Finally, the provision of Section 38 states: -
38. (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
- (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
287. From the above provisions of the law of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the rights of registered owner of a property under Article 40 of *the Constitution* of Kenya becomes extinguished in favor of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.
288. The procedure for filing a claim for adverse possession in Kenya is provided for under Order 37 of the Civil Procedure Rules, 2010 wherein a person is required to file an Application under Section 38 of the *Limitation of Actions Act* by way of an Originating Summons supported by an Affidavit to which a certified extract of the title to the land in question has been annexed. I take notice that this was exactly what the 1st and 2nd Plaintiffs herein did in the instant suit. Under the provision of Article 162 (2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on the Environment and Land Court as to handle claims premised on adverse possession.
289. It should be noted that this doctrine is one that cannot be borne out of right. The Provisions of Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 provides for the mandatory procedure for applying to court which is through an Originating Summons where the court determines the questions arising on adverse possession. Order 37 Rule 7 is to the effect that adverse possession is only applicable where the land is registered and there is a title, where the land is yet to be registered, it cannot be subject to adverse possession, it awaits the ascertainment of rights through the process of adjudication. For a claim of adverse possession to be entertained by court the applicant must specifically identify the exact title of land that is the subject of the claim.
290. One must have to comply with certain strictures set out by the law before he can realize such a right. Such strictures are to ensure that the doctrine of adverse which is a limitation to the right to property complies with the test for limitations of certain constitutional right set out under the provision of



Article 24. The principles were well set out in the case of “Kahindi Ngala Mwangandi - Versus - Mtana Lewa [2021] eKLR” where the Court of Appeal sitting in Malindi held:

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is therefore not automatic that once all the elements of adverse possession have been met the possessor, without more becomes the new owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 as follows:

“7(1) an application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.(3) The Court shall direct on whom and in what manner the summons shall be served.”

291. In the case of “Teresa Wachuka Gachira – Versus - Joseph Mwangi Gachira”, Civil Appeal No.325 of 2003, the Court emphasized the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See the case of:- “Kyeyu - Versus - Omuto, Civil Appeal No. 8 of 1990”. See also the present position in case “Johnson *Kinyua – Versus - Simon Gitura Civil Appeal No.265 of 2005*,” where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.

292. Within 30 days of filing and with notice to the parties, the summons may be set down for directions before a judge and thereafter fixed for hearing. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim. In the case of: “Kimani Ruchine – Versus - Swift Rutherford & Co. Limited (1980) KLR it was stated on this point that:-

“The Plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario* So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See the case of:- “Wanyoike Gathire – Versus - Berverly (1965) EA 514, 518, 519 per Miles, J.”

293. In the case of:- Teresa Wachuka Gachira (Supra), a dispute between a stepmother and a stepson the latter sought to evict the former from a parcel of land he claimed to be his. The former for her part invoked prescriptive rights by virtue of having been married on the suit land many years before the action was instituted. The Court, on appeal found that the appellant did not discharge the onus placed



on her in establishing a case for entitlement to the disputed land through adverse possession. The Court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

294. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “Maweu – Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430” where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”

295. Now applying these principles to the instant case, the main issue is whether the Plaintiffs proved adverse possession? From the evidence adduced, the Plaintiffs in counter claim came into the land on diverse dates. But none of them had proof as to when they came into the land. The Court noted that the Plaintiffs produced Satellite aerial google photographs from the year 2020 and it was evident from the same that there were no structures on the suit property as it was vacant. This evidence was never rebutted nor challenged by another land surveyors expert opinion. The Court fully concurs with the Learned Counsel for the Plaintiffs/1st to 4th Defendants in the Counter - Claim and taking that it was trite law that whoever alleges must prove based on the provisions of Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya. The Plaintiffs in Counter - Claim did not produce pictures or any sought of proof that they had been invited into the land more than 12 years ago from the time of filing the suit and when the court visited the suit property most of the houses were unfinished semi permanent houses and only a few permanent houses which were estimated to be five in nature. There were close to 20 or 25 incomplete semi-permanent houses for residential purposes and other structures used as toilets. The team estimated that there were close to 50 or 60 inhabitants on the suit land. There were no social amenities such as schools, churches or religious shrines, shops. They depended on the facilities in the nearby vicinity. This was clear evidence of them just recently moved onto the land. Furthermore, from the rather uniform testimony by all the ten (10) Defendant’s witnesses, they all indicated never having met the Plaintiffs until the year 2021, a time they also received demand letters to vacate the land. What a coincidence that its when the trespass and number of occupants started swelling undertaking incomplete semi and permanent houses as shown from the Satellite Google maps taken in the year 2020 and the Land Surveyors report that the Plaintiffs took action by reporting to the Chaani police station and issued eviction notices.

296. As indicated, this Honourable Court relied heavily on the filed Statement of Defence, the Counter - Claim and the 21 Paragraphed witness statements dated on 4th March, 2024 and duly executed by all the 10 Defendant Witnesses who testified in Court. Of great significance are the contents of Paragraph 19 of the said statements which bordered on admission and confession of their irregular and unlawful occupation of the suit land. It states ‘inter alia’:-

“Our occupation of the land on which we constructed our houses is open to the County Government of Mombasa which has promised us to allocate the land to us pursuant to its Constitutional duty or give us alternative land. The Provisional administration is also



aware of our occupation and have allowed us to continue with the occupation until we are allocated the land or are given alternative land...”

297. Evidently, in the given circumstances, the prayer for the claim of land adverse possession fails. On the issues about fraud the Court discussed it on the other issues and it also failed for lack of evidence.
298. From the above detailed analysis, I find that the Defendants/ Plaintiffs in Counter - Claim’s claim fails and is hereby dismissed.

ISSUE No. c). Whether or not the Plaintiffs are entitled to the prayers sought

299. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaint which are as follows:-
- a. A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the parcel of land being Subdivision Number 2427(Original Number 2402/5)Section VI Mainland North Mombasa.
 - b. A declaration that the Defendants, whether by themselves,or their servants or agents or otherwise howsoever, are wrongfully in occupation and possession of the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and are accordingly, trespassers on the same.
 - c. A declaration that the Defendants, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
 - d. A permanent injunction prohibiting, preventing or restraining the Defendants whether by themselves, their agents, employees and servants from trespassing on,wasting, alienating or otherwise interfering or dealing with the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
 - e. A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of the parcel of land being Subdivision Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and for the unconditional release handover and return of the parcel of land to the Plaintiffs.
 - f. An order evicting the Defendants whether by themselves or their agents, employees servants or otherwise from the parcel of land being Subdivision Number 2427(Original Number 2402/5) Section VI Mainland North Mombasa.
 - g. An order granting vacant possession of the parcel of land being Subdivision Number 2427(Original Number 2402/5)Section VI Mainland North Mombasa to the Plaintiffs.
 - h. An order to the Officer Commanding Station (OCS) Chaani Police Station to enforce compliance of the order(s) granted.
 - i. General damages for trespass by the Defendants
 - j. Aggravated damages
 - k. Costs of this suit
 - l. Interest on (9), (10) and (11) above for such period as the court deems fit at court rates



300. As already stated herein; the Plaintiffs produced documents to show that they were entitled to the land they claimed. 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.
301. 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*"
302. Having concluded that it is important to note that the title of the suit properties have been challenged and the form the basis of the prayers sought by the Plaintiffs. Having concluded in this judgment that the Plaintiffs have a legitimate claim to this suit. Prayers a to c are hereby allowed.
303. On whether a permanent injunction can issue, being that the Plaintiffs are the beneficial and legal owners of the suit property with all the indefeasible rights, title and interest vested on them by law, then the same are granted with accordance to the provision of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012. The upshot of it all is that the case by the Plaintiffs has been well established and hence they are entitled to the reliefs sought.
304. On the general damages for trespass; Section 3 (1) of the [Trespass Act](#), Cap 294 provides that:
- "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
305. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The Plaintiffs from the evidence never authorized the Defendants to enter their land and construct on it. I am therefore inclined to find that Defendants had trespassed on the suit land which belongs to the Plaintiffs. The Plaintiffs have sought general damages for trespass as well as aggravated damages.
306. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of "Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR" where it was held as follows:
- "The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).
307. In this case, the Plaintiffs had not provided the court with any document to show the value of the suit property before and after the trespass. This makes it difficult to assess the general damages. In "Nakuru



Industries Limited – Versus - S S Mehta & Sons [2016] eKLR” where the court faced such a similar situation it was held as follows:

“ A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Kshs 500,000/- (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

308. In the case of “Willesden *Investments Limited – Versus - Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000*” (a case cited by the plaintiff), the court stated that;

“ There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10,000,000 is a reasonable award for general damages”.

309. I have taken into account the fact that the the suit land is a rather expansive chunk of land, though the same is situated in an urban area. I am of the view that an award of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) as general damages is sufficient.

310. With regards to aggravated damages, they are awarded where the Defendant’s conduct is sufficiently outrageous to merit condemnation and would serve to compensate the claimant. Further, that they were entitled to reimbursement of incidental costs. In this particular case I find that the compensation of the Plaintiffs through the general damages for trespass is sufficient. I shall therefore not award the same.

311. Having also determined that the Defendants acts and continuous occupation on land is trespass; it goes without saying that they are stopping the Plaintiffs from quiet enjoyment of the suit property and therefore infringing on their indefeasible rights, title and interest vested on them by law, then the same are granted with accordance to the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 as the legal administrators of the estate of the deceased.

312. All said and done, the Environment & Land Court being a specialized Court of Law and established under the provision of the Article 162 (2) (b) of *the Constitution* of Kenya, 2010, and also governed by several other statutes such as Sections 3 and 13 of the Environment and *Land Act*, No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012, the Honorable Court is informed by the fact that *the Constitution* is a living tissue. Just like all other living tissues, it has to be fed and watered. It breathes and without oxygen and freshness it will die. With the fullness of time, I have learnt that these things are not just metaphorical. They are real. We all must know this fact. For a moment, this might sound rather academic but inevitable. The Courts of Law are guided by Jurisprudence, meaning knowledge of or skill in law, which was the first social science to be born. While making interpretation of Law, the Courts are guided by two broad philosophies. These are, firstly, “the Positivism” interpretation of Law, whereby it means that laws are mere commands of human beings with threats of force. It holds that law is valid notwithstanding its merits or demerits. In other words, law and morality are distinct. In a nutshell, positivists hold the view that it is not the business of lawyers and the Judges to say whether a law is good or bad. The business of rendering such moral verdicts is best left to Legislators, philosophers and the public. To them the works of Lawyers and Judges is to apply the Law ‘as it is’. Secondly, is “the natural” interpretation of the Law. Here it holds that law and morality cannot be divorced from each other. Like the siemese twins they are inseparable and intertwined. They hold that the law is based on basic human values that are universal and standard. It is based on values of intrinsic to human nature that can be deduced



and applied independently of man – made law. Such values include the universal need to preserve human life and livelihoods. It is my intuition that these are the Core Values that the makers and the legal experts of *the Constitution* of Kenya, 2010 had in mind by enacting the provisions of Articles 2 (1), (2), (3), (4), (5) and (6) on the Supremacy of *the Constitution* and the fact that any international treaty or law that Kenya has ratified shall be part of the laws of Kenya; 10 (2) (b) on the Core values of human dignity, equity, social justice, equality, human rights, non – discrimination, protection of the marginalized and sustainable development; Articles 43 (1) (b) on social and Economic rights – access to and adequate housing and decent standards of livelihood; 48 on access to Justice and Article 159 (2) (c) on Alternative Judicial System (AJS) currently being strongly advocated as a policy by the Judiciary in terms of resolving disputes amicably, justly, expeditiously and cost effectively. It leaves parties as friends and ones sustaining brotherhood and good neighbourhood. This is as opposed to losing a case and followed by forceful eviction. Recently, the Judiciary adopted some guiding principles known as “The Social Transformation through Access to Justice (STAJ) blue print which are:- a). Accessibility and Efficiency; b). Transparency and Accountability; c). Inclusiveness and Shared Leadership d). Co – operative Dialogue and e). Social Justice. In thus case, the Court is influenced by the (e) aspect of STAJ.

313. While at this point, the Honorable Court wishes to rely on the case of “Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme” where the Court adopted the General Comment No. 7 of the UN Commission on Human Rights and stated:-

“State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions are prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No. 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions.” The term “Forced Eviction” was defined in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-

“The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection” .

The Court cited:- “The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)” which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

“These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps



that Sates should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitmentsthe Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....

314. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the amendment into the Land Act, and inserted the provision of Section 152E of the Land (Amendment) Act, which provides:-

1. “If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without
2. The notice under Sub - Section (1) shall:-
 - a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.
 - b. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area”.

315. Following this lengthy deliberation, I wish to apply these principles to the instant case. It is imperative to appreciate that the 1st to 18th Defendants and as seen from the site visit report prepared by Court do live and continue occupying the suit land. Further, Honourable Court noted the desperate situation this order may have on them and taking that exists no a cordial relationship between the Plaintiffs and the Defendants. Thus, in order to avoid the Defendant and their families becoming destitute and homeless, based on social justice principles and humanitarian consideration – on gratia basis and the right to housing and settlement as provided for under Article 43 of the Constitution of Kenya, 2010, I urge the Government of Kenya (with its new rallying project of “Affordable Housing”) and the Plaintiffs to consider compensation/re – settlement scheme etc consider based on the doctrine of Compulsory Acquisition of the suit land by purchasing the land from the Plaintiff for purposes of settlement of the Defendants and their properties and hence promptly, adequately, fairly and justly compensating the Plaintiff for the Compulsory acquisition of the land pursuant to the provisions of Article 40 (3) of the Constitution of Kenya, 2010; Sections 101 to 118 and 134 of the Land Act, No. 6 of 2012; and through Settlement Scheme Program and/or Fund Trustees under the principles of land



policy under provision of Articles 10 and 60 (1) of *the Constitution* of Kenya, 2010; Sections 134 (2); 134 (5), (6); 135 (3) (a); 167 & 168 of the *Land Act*, No. 6 of 2012.

316. For these reasons, the prayers on eviction and vacant possession are granted but in accordance with the prescribed provision of the law.

ISSUE No. d). Who bears the costs of the suit and the Counter Claim

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

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

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp – Versus - Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

319. In the present case, I reiterate that the Plaintiffs have been able to establish their case as pleaded from the filed pleadings against the Defendants therefore, I proceed to award them the costs of their suit and the Counter claim.

VIII. Conclusion and Disposition

320. 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 1st, 2nd, 3rd & 4th Plaintiffs have established “a Prima facie” case against the 1st to the 18th Defendants herein. For avoidance of doubt, I proceed to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the Plaintiffs as pleaded in Plaintiff dated 1st August, 2022.
- s. That the 1st to 18th Defendants claim as per the Counter – claim dated 3rd November, 2022 be and is hereby found to lack merit and the same is dismissed.
- c.. That a declaration be and is hereby made that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the parcel of land being Sub - division Number 2427(Original Number 2402/5) Section VI Mainland North Mombasa.



- d. That a declaration be and is hereby made that the Defendants, whether by themselves, or their servants or agents or otherwise howsoever, are wrongfully in occupation and possession of the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and are accordingly, trespassers on the same
- e. THAT a declaration be and is hereby made that the Defendants, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa
- f. THAT an order of permanent injunction be and is hereby issued prohibiting, preventing or restraining the Defendants whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa.
- g. THAT an order of permanent injunction be and is hereby issued restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa and for the unconditional release handover and return of the parcel of land to the Plaintiffs.
- h. THAT an order of eviction pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012 be and is hereby issued against the Defendants whether by themselves or their agents, employees servants or otherwise from the parcel of land being Sub - division Number 2427(Original Number 2402/5) Section VI Mainland North Mombasa.
- i. THAT an order granting vacant possession do an is hereby issued for the parcel of land being Sub - division Number 2427 (Original Number 2402/5) Section VI Mainland North Mombasa to the Plaintiffs.
- j. THAT an order to the Officer Commanding Station (OCS) Chaani Police Station do and is hereby issued to enforce compliance of the order(s) granted.
- k. THAT the above notwithstanding and in the alternative to orders (a) to (k) above, in the meantime the following social and benevolent justice steps to be undertaken:-
 - i). The GOK (through the National Land Commission under Article 67 (2) (e) of *the Constitution* of Kenya, 2010) within the next thirty (30) days from the date of delivery of this Judgement to consider the doctrine of Compulsory Acquisition of the suit land by purchasing the land from the Plaintiffs for purposes of settlement of the Defendants and their properties and hence promptly, adequately, fairly and justly compensating the Plaintiff for the Compulsory acquisition of the land pursuant to the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010; Sections 101 to 118 and 134 of the *Land Act*, No. 6 of 2012; and through Settlement Scheme Program and/or Fund Trustees under the principles of land policy under provision of Articles 10 and 60 (1) of *the Constitution* of Kenya, 2010; Sections 134 (2); 134 (5), (6); 135 (3) (a); 167 & 168 of the *Land Act*, No. 6 of 2012; Section; and
 - ii). The Defendants embrace the offer to purchase the portion of land where they are occupying by entering into a mutually agreed upon sale agreement terms and condition stipulated thereof as per the Laws of Contract Cap 23 and the *Land*



Registration Act No. 3 of 2012 and Section 38 of the Land Act No. 6 of 2012 at reasonable and equitable rate within the next (90) days from the date of the delivery of this Judgment.

- l. THAT the Plaintiffs do and is hereby awarded general damages for trespass amounting to Kenya Shillings Ten Million (Kshs. 10,000,000/-) which amount is awarded with interest from the date of filling the suit until payment in full to be paid by the Defendants jointly and severally.
- m. THAT the costs of this suit vide the Plaint dated 1st August, 2022 and the Counter Claim dated 3rd November, 2022 be borne by the Defendants jointly and severally.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4th DAY OF NOVEMBER 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. M/s. Wamithi Advocate for the 1st, 2nd, 3rd & 4th Plaintiffs.
- c. No appearance for the 1st to 18th Defendants.

