



**Germano Chincerini Foundation (The Registered Trustee) v Mwakuzimu & another
(Environment & Land Case 59 of 2016) [2023] KEELC 17448 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 59 OF 2016**

LL NAIKUNI, J

MAY 9, 2023

BETWEEN

**GERMANO CHINCHERINI FOUNDATION (THE REGISTERED
TRUSTEE) PLAINTIFF**

AND

HASSAN JUMA MWAKUZIMU 1ST DEFENDANT

ATHMAN ALI MWAKUZIMU 2ND DEFENDANT

JUDGMENT

Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Germano Chincerini Foundation (The Registered Trustees) the Plaintiffs herein through a Plaint dated 5th April, 2016 and filed on court on 7th April, 2016 against the 1st and 2nd Defendants herein. Fundamentally, the Plaintiff moved court by filing a Notice of Motion application dated 5th April, 2016 under Certificate of Urgency seeking temporary injunction orders to restrain the 1st and 2nd Defendants from erecting any structure or carrying out any construction of any nature on all that parcel of land known as Kwale/ Ukunda Settlement Scheme/24 (hereinafter referred as “The Suit Property” No. 24).
2. Upon service of the pleadings and summons to enter appearance dated 21st April, 2016 thereon, on 14th April, 2016, the 1st and 2nd Defendants entered appearance. On 14th June, 2016, the 1st and 2nd Defendants filed their statement of Defence dated 10th June, 2016.
3. On 10th April, 2017 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial. In the meantime, for a while parties informed Court that they were attempted exploring an out of court negotiations with a view of arriving at a settlement but in vain.



4. On 5th July, 2021 the hearing commenced in earnest whereby PW - 1 and PW - 2 testified on behalf of the Plaintiff and closed down its case. Subsequently, on 15th November, 2021, the Defence case commenced whereby the 1st and 2nd Defendants summoned DW - 1, DW - 2 and DW - 3 respectively and they testified. On 21st February, 2022 they closed their case.

It is instructive to note that this dispute being one of boundary line, with the leave of court both parties were directed to engage their own independent surveyors to conduct their survey over the disputed boundary lines and prepare their reports.

5. On 24th March, 2022 the parties by consent agreed that the two (2) Land Surveyors Mr. Maina Ringo and Mr. Edward N. Kiguru surveyor do conduct a joint Land Survey exercise of the suit land and prepare and filed a joint land survey report accordingly to be admitted as evidence of this proceedings. Pursuant to that on 19th July, 2022 the Land Surveyor's Report dated 23rd May, 2022 was filed and adopted accordingly.

II. The Plaintiff's case.

5. Based on the filed pleadings the Plaintiff claimed to be the registered as the proprietor of the suit land known as Land Reference No. Kwale/Ukunda Settlement Scheme/24 (Suit land No. 24) while the 1st Defendant was the registered owner of all that parcel of land known as Land Reference No. Kwale/Ukunda Settlement Scheme/57 (Suit Land No. 57).
6. The Plaintiff claimed that the Defendants without the consent and right entered upon the suit property No. 24 and had started erecting a structure thereon which action was still continuing – an act which amounted to trespass. Hence, as a result the Plaintiff was deprived of the use and enjoyment of the suit property No. 24 and had suffered loss and damage. The plaintiff's claim against the 1st and 2nd Defendants was for orders of injunction to restrain them from continuing with the trespass and to compel them to demolish and remove from the suit land No. 24 the structure which they were constructing, thus the Plaintiff sought for the following orders:-
 - a. An order of permanent injunction restraining the Defendants by themselves, servants, agents and/or employees or otherwise howsoever from erecting any structures of carrying out any construction of any nature or otherwise entering upon or dealing with the suit land known as Land Reference No. Kwale/Ukunda Settlement Scheme/24.
 - b. A mandatory injunction compelling the Defendants either by themselves their agents or servants or otherwise to remove any structure of any nature erected on the suit premises.
 - c. Costs of the suit.
7. On 5th July, 2021, the hearing for the Plaintiff commenced whereby he summoned two (2) witnesses - the PW – 1 and PW. They testified as follows: -

Examination in Chief of PW - 1 by Mr. Omollo Advocate.

PW – 1 was sworn and testified in English/Kiswahili languages. He identified himself as Mr. John Muoki Munyao. He lived in Ukunda. He worked with an Organization taking care of orphans. The Plaintiff in this matter was an Administrator. The Plaintiff was a registered foundation and he had the Certificate of Incorporation. He recorded the witness statements filed on 17th September, 2020. He adopted it as his evidence in this case. He also produced all the documents filed on 7th April, 2016, except document No. 8 which was Marked for identification. The exhibit was marked as Plaintiff Exhibit Nos. 1 to 7.



8. He also produced the supplementary list of documents which was a Certificate of Lease. It was marked as Plaintiff Exhibit number 9. The founders of the Plaintiff were foreigners and the title deed (P. Exhibit 3) was changed to a Certificate of Lease – Plaintiff Exhibit Number 9. He was involved in the land dispute before the Land Registrar. The Defendants were their neighbors. They had trespassed on about 2 acres of their land. They had put up houses, despite the court issuing an injunction order. The Defendants were in breach of the injunctive orders. He prayed for the orders sought in the Plaintiff.

Cross Examination of PW – 1 by Mr. Abubakar Advocate

9. PW – 1 had not produced his Letter of Administration. He was not one of the witnesses initially listed. He recorded his witness statement later on. The suit was over Plot No. 24. The Title deed showed the area was 4.89 Hectares. The Registry Map sheet was shown as No. 2. He had produced a certificate of lease (P. Exhibit 9) showing the area as 4.89 Ha.
10. It had no difference with the title deed. There was a boundary dispute. He could see the report attached to the letter dated 9th January, 2013. The Registrar had not referred to the map sheet.’ The registrar had not stated in the report the acreage of 4.89 Ha. He could see the Plaintiff Exhibit No. 1. It was the resolution for the Trustees. It was dated 5th April, 2016. It was given to Helena Gundel Malon authority to testify. There was no resolution in his name. The Defendants were the registered owners of Plot No. 57 and they were their neighbors. They took a Land surveyor to carry out the surveying exercise. He was aware there was a survey report but he had not read it. He did not know what it said.

Re - Examination of PW – 1 by Mr. Omollo Advocate.

11. The Trustee Resolution authorized Helena to swear the verifying Affidavit and any affidavit. In the Boundary Dispute Report, his name was there. He was present when the survey was done.

Examination in Chief by PW - 2 by Mr. Omollo Advocate.

12. PW – 2 was sworn and testified in English. He identified himself as Mr. Ephraim Maina Rwingo. He lived in Nyali estate. He was a Licences Surveyor practicing in name of Messrs. Seline Consultants Limited. He could see the Land Survey report dated 18th March, 2016. He was the one who prepared the said report. His findings were at page 2. Under Paragraph 4 of the report it showed the area that was encroached as 0.67 Hectares. Under Paragraph 5, it indicated that when he visited the site, there was construction going on.
13. The Land Registrar and the District Surveyor had determined the dispute earlier on. The Plaintiff asked him to be present during the exercise. There was a report prepared by the Land Registrar. The Land Registrar concluded that the owners of Plot No. 57 had encroached on Plot No. 24 by 40 meters by 37 Meters which was about 0.75 Ha. It was the same area he found. He also prepared a sketch map. The areas were slightly different, but that was the reason they used the term approximately. He had seen the report by the Defendants on 30th June, 2017, by Mr. Edward Kiguru, a Land Surveyor. He stated that the area of tile No. 57 as per the title deed was 4.80 hectares while on the ground it was 5.49 hectares. There was no difference with what he had stated in his report. He produced the Land Survey report and marked as Plaintiff Exhibit No. 8.

Cross Examination of PW - 2 by Mr. Abubakar Advocate.

14. He looked at the title of Plot No. 24. He had not put the acreage of the plot in the report. He had not indicated the acreage of Plot No. 57. In Kenya there were two types boundaries - General and Fixed boundaries. Fixed boundaries were very precise to 3 centimetres while the general boundaries were



general. Shown on the title. The only difference was on the co - ordinates. In general boundaries there were no Co - ordinates.

In fixed boundaries there were Co - ordinates. The acreage was shown in the title, whether fixed or general boundaries. Map sheet number 2 had the acreage of the two plots.

15. The map sheet No. 2 did not indicate the acreages. Each map was drawn to a scale. He used the scale. It was true in his report, he had indicated the acreages of the two plots, but he had indicated the acreages in the map. He had indicated 4.89 Ha. which he found on the ground. His drawings showed an area of 4.89ha. He did not indicate the area of Plot No. 57 because he did not measure Plot No. 57. He did not survey Plot No. 57. He had seen the report made by the Surveyor Mr. Kiguru. It was true that Mr. Kiguru also looked at Map Sheet No. 2. According to him, the beacons were in situ (in place). According to him, there was no difference between the Physical boundary of Plot No. 57 and that of Sheet 2. According to him, there was no encroachment to neighbouring Plots. The only documents to show one the area of the plots was the map sheet No. 2 and the title. In his report, he had not indicated the acreage of Plot. No. 57. He had indicated the acreage on my map. He did not mention the Registrar's report in his report.

Re - Examination of PW – 2 by Mr. Omollo Advocate

16. PW – 2 stated that attached to his report was a drawing. Plot No. 24 which was 4.89 ha. He had drawn exactly there the encroachment was exact. There was no difference between his report, that of Mr. Kiguru and that of the Land Registrar. On the map, he had drawn, Plot No. 24 was 4.89 ha. He measured the encroachment. He had given the size and the area of the encroachment.

III. The 1st and 2nd Defendant's Case.

17. The 1st and 2nd Defendants were male adults of sound mind and understanding. They denied the contents of Paragraphs 2, 3 and 5 of the filed Defence. They held that the family of Juma Bakari Mwakuzimu – 1st Defendant averred that he and his two brothers Hamisi Bakari and Kassim Bakari Mwakuzimu were the registered owners of all that parcel of land known as Land Reference No. Suit Land 57.

They held that the suit land 57 was made a settlement scheme in the year 1966 and beacons registered in the year 1972 where the 1st and 2nd Defendant's late father one Shame Ali Gatanga was registered as the bona fide owner of the said suit land No. 57 and their adjacent neighbours the late Ali Rajaab Marara (Who was survived by his children) the registered and bona fide owners of suit land No. 24.

18. Pursuant to this, the averred that they had been living on the suit land No. 57 peacefully and uninterruptedly for 44 years and carrying out farming activities planting mangoes, coconut, cassava and other on the large plantation of their property measuring 14 acres. They refuted that there had been any development carried on the suit land No. 24 and that the Plaintiff had only bought the land in the year 2011.
19. The Defendants stated that the registered beacon in the year 1972 were carried out by the District Surveyor. They were found to be straight just as in the other plots being Numbers 23, 24, 25, 56, 57 and 59 and there had been no dispute whatsoever. On 15th November, 2022, DW - 1, DW - 2 and DW - 3 respectively testified as follows: -

Examination in Chief of DW – 1 by Mr. Aboubakar Advocate

20. DW – 1 was sworn and testified in Kiswahili language. He identified himself as Mr. Hassan Bakari Mwakuzimu, the 1st Defendant herein. He was a holder of the Kenyan national identity Card bearing



numbers 2215543. He lived at Ukunda. He was the 1st Defendant. He recorded his witness statement dated 17th June, 2016 and which was admitted as evidence. Also to be adopted was a List of documents of Defendant dated 17th June, 2016 and marked as Defence Exhibit Number 1 & 2. He also had a further list of documents being a Surveyor Report marked for identification to be produced by a Private Surveyor Mr. Edward Kiguru “DFI -1”. He had not constructed on Plot No. 24. It was true Plot No. 57 was theirs. Mr. Bakari was his elder brother. He was not a party to the suit that is Khasim Bakari Mwakuzimu was not in list nor party to the suit.

21. He had not built on Plot No. 24. Theirs was a family plot. Upon being sued, they sought the services of Land Surveyor. He prepared a report. Our land surveyor never said that they build on the Plot No. 24 but on Plot No. 57.

Cross Examination of DW – 1 by Mr. Omollo Advocate

22. Mr. Hassan Bakari was his nephew. He never started building, before the plot was bought. Boundary dispute between Plot No. 24 and 57 was taken to the Land Registrar and he prepared a report which he never saw but he knew about it. He did not agree with it as the house had been there before. They never appealed against the report but instead they decided to engage a private surveyor – Mr. Edward Kiguru. On the title deed, Mr. Juma Bakari Mwakuzimu, Kassim Bakari Mwakuzimu and Hamisi Bakari Mwakuzimu are trustees of the family.
23. DW – 1 stated that their land on title was 4.80 HA but on the ground it was 5.49 HA. This was according to Land Surveyor Edward Kiguru the Private Surveyor. The Land Surveyor found the land to measured 0.575HA and is what they alleged to have been encroached. Kiguru said that the land difference was by 0.69 HA. He knew there was a private surveyor called Maina. He found the difference was 0.67HA by the Plaintiff. The Land was determined by map and beacon.

Re - Examination of DW – 1 by Mr. Abubakar Advocate.

24. The report by the Land Registrar held they got in. They decided to engage a private surveyor not to appeal. He never saw the findings by the private surveyor – Mr. Maina. But he know he testified. He could not remember whether he stated what was the acreage. He never stated it. From the title deed bears the names of trustees but not identified whom the trustee were.

Examination in Chief of DW - 2 by Mr. Aboubakar Advocate

25. DW – 2 was sworn and in Kiswahili language. His name was Mr. Athman Ali Mwakuzimu. He was the 2nd Defendant. He was a holder of the Kenya national identity card bearing numbers 22413255. It was issued on 20th September, 2000. He recorded a witness statement dated and filed in Court on 17th June, 2016 which was admitted as evidence in this case. His names never appeared on the title. He had not built on Plot No. 24. It was alleged that they had build on Plot No. 24.

Cross Examination of DW – 2 by Mr. Omollo Advocate.

26. DW – 2 was shown a photo of his house. He admitted that he was building a house there. He never saw any court order stopping him from building. He was aware that where his house was situated was where there was a land dispute. At Kwale Land Registrar the complaint was over. Referred to the Report by Land Registrar, Kwale dated 19th January, 2013. The conclusion of it was the registered owners of Kwale/Ukunda S.S/57 had been encroached on Kwale Ukunda 85/24 by 40 metres on one side and 37 meters on. They did not appeal.



Re - Examination of DW – 2 by Mr. Abubakar Advocate

27. They need not agree with the report by the Land Registrar and hence they decided to engage our private surveyor.

Examination in Chief of DW – 3 by Mr. Abubakar Advocate

28. DW – 3 was sworn and testifies in English language. He was called Mr. Edward Munene Kiguru. He was a Licensed Land Surveyor. He traded in the name and style of Messrs. Edward K. Kiguru surveyor. They requested by Mr. Juma Bakari Kassim Hamis to carry out a survey and did a Land Survey report. He conducted the survey at Kwale. He visited the land and relocated the boundaries using special machines. His report was dated 13th June, 2017. He used a map recognized by the Survey of Kenya. The methodology used as – a relocation of the plot was found on the ground of state. These were done by the Government during the settlement scheme time. The observations were in the report. They were:-
- the Plot was 5.97.
 - The area of the Plot on the title is 4.80 HA
 - The ground area was 5.49 HA thus giving a difference of 0.69HA (1.7acres).
 - There was no encroachment to neighboring plot. The owners structures were built within the premises and not of them was out of Plot 57. There was no boundary issues.
29. The area indicated in the title was the official size. But if one wanted to be rectified, one would have to apply to the Land Registrar for the amendment and the RIM by the land. The title deed was 4.80 HA and on the ground was 5.49 Ha. (13.57 acres) the procedure was to make an amendment by the Land Registrar attaching a surveyors report, the Maps to do so. There was another report by another Land Surveyor – Seline Consultants Limited dated 18th March, 2016. He saw it was for parcels No. 24/Kwale/Ukunda settlement Scheme. His interpretation of the difference was what belonged to Plot No. 24. That is all.

Cross Examination of DW - 3 by Mr. Omollo Advocate

30. This was a boundary dispute between Plot No. 24 and 57 and which was a general boundary which was dealt with by the Land Registrar. If he had been informed of this reports by the Land Registrar, he would have considered it. That is all.

Re - Examination by Mr. Abubakar Advocate.

31. Whenever there were disputes of general boundaries, the matter was dealt with by the Land Registrar. He summoned all the parties and the surveyor. He could not solely depend on only the RIM. He would call the people and date available – check on the existing hedges, roads, common natural features such as rivers, e.t.c.

Court:-

He would have asked for a re-survey or Independent surveyor.

Mr. Abubakar Advocate:- This is a close of the Defence Case.

32. In view of the circumstances of the matter, the Honourable Court feels it significant to re produce the proceedings of the Court Verbatim herein for ease of reference of the matter.



Court direction:-

33. Based on the open discussion by parties and guidance by the Land Surveyor an expert and court, it was felt needful to explore further survey solutions to the issue pertaining to the boundary of Plots No 24 and 57. These may include but limited to:-
- a. Holding a joint survey exercise by the surveyors Edward K. Kiguru and Seline Consultants or
 - b. Engaging an independent surveyor away apart the above two or
 - c. Seek for a surveyor opinion – Government surveyor.

For these reason parties were accorded time to consider and pick the best option out of these. The matter to be mentioned on 21st March, 2022. Hence the proceedings of court thereafter were as follows:-

21.3.2022

Before: Hon. Justice L.L. Naikuni

Court Clerk: Yumna

Mr. Omollo for the Plaintiff

No appearance for the Defendant

Mr. Omollo Advocate:-

The matter was part heard. We had agreed we do a joint survey.

Court:-

The matter to be further mention on 24th March, 2022. Notice to Issue.

On 24.3.2022

Before: Hon. Justice L.L. Naikuni

Court Clerk: Yumna

Mr. Omollo for the Plaintiff

Mr. Abubakar for the Defendant

Mr. Omollo:-

There was the issue of the survey. We have agreed by consent that the two (2) Land Surveyors Mr. Maina Ringo and Mr. Edward N. Kiguru surveyors do conduct a joint survey of the suit premises namely Title No. Kwale.ukunda Settlement Scheme/24 and prepare a report. Later in the joint survey report. Report be filed and hereby admitted as evidence of this proceedings.

Parties will need 30 days to confirm that consent order.

Mr. Abubakar Advocate:-

That is the position.

Court:-

The consent by the parties be and is hereby admitted as an order of this court. The matter to be mentioned on 30th May, 2022 for further directions.

Court:-



In view of the bereavement of Mr. Omollo and the absence of Mr. Abubakar the matter to be further mentioned on 19th July, 2022 as the issues are rather technical which require the presence of both counsels. Notice to issue.

19.7.2022

Before: Hon. Justice L.L. Naikuni

Court Clerk: Yumna

Mr. Omollo for the Plaintiff

No appearance for the Defendant

Mr. Omollo:-

The matter is fully heard. The court agreed that the two surveyors file a joint report and I hope it is on record. The joint report seem to support the Plaintiff's position. We need to file submissions.

Court:-

In view of the filed Joint Land Surveyor's report dated 23rd June, 2022 and the closure of both the Plaintiff and Defendant's case, parties to filed their submissions as follows:-

- a. That the Plaintiff be and is hereby granted 21 days leave to file and serve written submissions.
- b. That thereafter upon service the Defendant be and is hereby granted 21 days leave to file and serve written submissions.
- c. That judgment to be delivered on 8th November, 2022 Notice issue by Mr. Omollo Advocate.

IV. The Submissions

34. Upon the closure of the case by both the Plaintiff, the 1st and 2nd Defendants herein, the parties were directed to file their written submission within stringent timeframe thereof. Pursuant to that they all complied accordingly. The honourable court reserved a date to deliver its judgement on notice to all the parties.

A) The written submissions by the Plaintiff.

35. On 23RD September, 2022 the Learned Counsel for the Plaintiff, the Law firm of Messrs. Kamoti Omollo & Co. Advocates filed their written submissions dated 20th September, 2022. Mr. Omollo Advocate commenced his submissions by providing court on the detailed background of the case filed by the Plaintiff and the defence mounted by the Defendant. He referred to the reliefs sought by the Plaintiff.

36. The Learned Counsel informed court that the Plaintiff was a body duly registered under the Trustee/ Perpetual Succession Act Cap 164 of the Laws of Kenya with power to own moveable and immovable property as seen from the Plaintiff Exhibit No. 2 in the list of documents by the Plaintiff. He held that the Plaintiff was registered owner of all that parcel of land known as Kwale/Ukunda settlement Scheme/24 as seen from the Plaintiff Exhibit No. 3 of the List of documents by the Plaintiff. On the other hand, the Defendants were the registered owners of all that property known as Land Reference No. Kwale/Ukunda Settlement Scheme/57 owned by their family.



37. The Learned Counsel recounted the facts to the effect that the dispute between the parties commenced as boundary dispute. The boundary dispute was referred to the District Land Registrar, County of Kwale under the provisions of Section 18(2) of the Land Registration Act No. 3 of 2022. The Land Registrar prepared a report dated 4.12.2012 whereby he concluded that the owners of Plot No. 57 had encroached into Plot No. 24 by 40 meters and 37 meters approximately area of 0.75 Hectares. He ruled that the owners of Plot No. 57 should stop the interference on Plot No. 24 so that its owners could enjoy their possession. He concluded that any party not satisfied with the said ruling to prefer an appeal before the Chief Land Registrar within 30 days from that date. From the record no party preferred any appeal – seen from the Plaintiff Exhibits Nos. 5, 6, and 7 of the List of Documents by the Plaintiff.

38. The Learned Counsel held that despite the above decision, the Defendant entered into the disputed area of plot No. 24 and commenced construction of a house and as a result it cause the Plaintiff to file this suit.

The Plaintiff called its witness Mr. Maina Rwingo a licensed surveyor who adduced evidence in terms of his survey report dated 18th March, 2015. He confirmed that the house in dispute was being constructed on Plot No. 24 belonging to Plaintiff and not Plot No. 57 for the Defendant.

39. The Counsel averred that on their part, the Defendant engaged the services of Mr. Edward M.J. Kiguru who testified in terms of his survey report dated 13th June, 2017. He found that Plot No. 57 on the ground measured 5.49 Hectares whilst per the title deed Plot No. 57 was 4.80 Hectares thus a difference of 0.69 Hectares.

40. The Learned Counsel submitted that since there was a serious discrepancy in the two (2) survey reports the Honorable Court directed that there be a joint survey conducted and hence a joint report be prepared to be filed in court on 27th May, 2022. Pursuant to this the two (2) surveyors obliged. The prepared a joint report dated 23rd May, 2022 which was filed in court on 27th May, 2022. From the said joint report, they both confirmed that the house in contention was constructed on plot No. 24 and not Plot No.

41. Further thus they confirmed that the boundary dispute between the owners of Plot Number 24 and Plot No. 57 had been determined by the District Land Registrar. Hence the two surveyors concurred with the ruling made by the Land registrar dated 4th December, 2012. In conclusion the 2 surveyors stated that the Defendant had encroached on the Plaintiff's property Plot No. 24 and had constructed a house thereon without his consent.

The Learned Counsel averred that if the Defendants had been dissatisfied by the ruling made by the Land Registrar they should have appealed against it but they did not do so. He held that there was a clear case of trespass by the Defendants and urged court to be guided by the decision of “Azzuri Limited – Versus- Pink Properties Limited (2017) eKLR and issue the reliefs sought. They also urged court to grant the Plaintiff costs of the suit.

B. The Written Submission by the Defendant's

42. From the record, I have noticed from record that on 27th October, 2022 the Defendants filed a notice to act in person in place of their previous Advocates the Law firm of M/s. Aboubakar, Mwanakitina & Company Advocates. For these reason they never filed any written submissions and court has had to rely on the filed pleadings by the Defendant and the evidence adduced thereof.



III. Issues of Determination

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

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

- a. Whether the suit instituted by the Plaintiff herein against the Defendant has any merit whatsoever.
- b. Whether the parties herein are entitled to the reliefs sought from their filed pleadings.
- c. Who will bear the Costs of the suit.

IV. Analysis and Determination.

Issue No. a). Whether the suit instituted by the Plaintiff herein against the Defendant has any merit whatsoever.

Brief facts

44. Before embarking on the issues under this Sub – heading its imperative that the Honorable Court dealt with brief facts on this case. From the filed Plaintiff, it is not disputed that the Plaintiff are the legal registered owners to all that parcel of land Known as Kwale/Ukunda No. 24 while the Defendants are the owners of parcel no. 57. As stated herein, these parcels appear to be adjacent to each other. Sometimes back, a boundary dispute arose between the Plaintiff and the Defendant. The issue was lodged before the Land Registrar of the County of Kwale. Upon receipt of the Compliant, the Registrar invoked his powers as enshrined under the provisions of Section 18 (1) of the *Land Registration Act*, No. 3 of 2012 and conducted an inquiry accordingly. Pursuant to this, on 4th December, 2012 he delivered a detailed Ruling concluding that there was an encroachment onto the Plots numbers 24 by Plot No. 57 meted by the Defendant. The ruling stated thus:-

“There is no doubt that the Plaintiff are the legal registered owners to all that parcel of land Known as Kwale/Ukunda No. 24 while the Defendants are the owners of parcel no. 57. As stated herein, these parcels appear to be adjacent to each other. Sometimes, a boundary dispute arose between the Plaintiff and the Defendant. The issue was lodged before the land Registrar of the County of Kwale. Upon receipt of the Compliant, he invoked his powers as enshrined under the provisions of Section 18 (1) of the *Land Registration Act*, No. 3 of 2012 and conducted an inquiry accordingly. Pursuant to this on 4th December, 2012 he delivered a Ruling to the effect that there was an encroachment onto the Plots numbers 24 by Plot No. 57. The Land Registrar held:-

“It’s the observation of the Land Registrar that the registered owners of Plot Kwale/ Ukunda 85/57 are using the boundary between Plot Kwale/Ukunda S.S/24 and Kwale/ Ukunda85/56 to determine the position of the supposed boundary between Kwale/ Ukunda S.S/24 and Kwale/Ukunda 85/57. The land Registrar observed that the beacons were intact and contrary to what the registered owners of Kwale/Ukunda/85/57...(sic)Its the conclusion of the land Registrar that the registered owners of Kwale/Ukunda S.S/57 have encroached on Kwale/Ukunda 85/24 by 40 metres on one side and 37 meters on the other side an approximate area of 0.75HA.The registered owners of Kwale/ Ukunda 85/57 should stop the interference on Plot kwale/Ukunda/S.S/24 so that owners



can enjoy their possession. Any party who is not satisfied with the ruling can appeal to the Chief Land Registrar within thirty (30) days from today.....”

45. Although, from the said ruling, the Land Registrar granted an opportunity to prefer an appeal before the Chief Land Registrar, none of the parties took this step. Hence, it was assumed that they were satisfied and not aggrieved. Even if they were not contended, they opted to be silent. On being asked, the Defendant stated that they decided to engage a private surveyor to undertake a surveying exercise. In the course of time, the Plaintiff realized that the Defendant were constructing a house on the disputes area of their property an issue that caused them to institute this suit. During the pendency of the proceedings, each of the parties engaged their separate and independent Land Surveyors and who prepared reports and testified in Court. It was noted that there existed some wide discrepancy from these two reports an issue that compelled the Honorable Court to direct that they conduct a joint survey and prepare a report. This was done by the consent of the parties. On 27th May, 2022, a Joint Report was filed in Court.
46. It is critical that I re – produce the joint report verbatim inter alia:-

“In compliance with the direction of the Honorable Judge in Court and by Consent of both parties, Surveyor Edward M.J Kiguru (Licensed Land Surveyor) and Surveyor Maina Rwingo (Licensed Surveyor – Seline Consultants Limited), on 20th May, 2022, carried out a Joint ground survey on the subject properties – Kwale/Ukunda Settlement Scheme/24 & Kwale/Ukunda Settlement Scheme/57). In this connection, we wish to report as follows:-

- a. That the contentious boundary between parcels 24 & 57 was relocated by the two Surveyors and drawn on an appropriate Topographical – cum – Cadastral Map which is attached herewith to this report.
- b. Due consideration was taken into account of the boundaries of abutting properties and, indeed, we conclude that the boundary between Parcels 24 and 57 is as indicated on the Joint Drawing – ie. Running along Survey marks shown as “A” and “B”.
- c. An existing house, marked H, is located entirely on Parcel No. 24 – ie it is not encroaching into parcel No. 57.
- d. It is also noted that the said boundary Dispute was earlier reported to the Land Registrar Kwale for his determination and we concur with his Ruling dated 4th December, 2012.

Signed by both Surveyors and dated 23rd May, 2022.

47. Thus, based on this a Judgement was delivered on this matter. That is adequate on facts. It is my view from the surrounding facts and inferences of this matter and shall be demonstrated in more details below, from the very onset and in the fullness of time, the suit instituted by the Plaintiff has merit.

Issue No. b). Whether the parties herein are entitled to the reliefs sought from their filed pleadings.

48. Under this sub heading and based on the facts stated herein, from the facts of the case, there is no dispute that the Plaintiff a body duly registered under the Trustee/Perpetual Succession Act Cap 164 of the Laws of Kenya with power to own moveable and immovable property was registered owner of all that parcel of land known as Kwale/Ukunda settlement Scheme/24 as seen from the Plaintiff Exhibit No. 3 of the List of documents by the Plaintiff. On the other hand, the 1st and 2nd Defendants were



the registered owners of all that property known as Land Reference No. Kwale/Ukunda Settlement Scheme/57 owned by their family.

49. From the evidence adduced during the proceedings, there arose a boundary and/or land dispute between the parties. The boundary dispute was referred to the District Land Registrar, County of Kwale under the provisions of Section 18(2) of the Land Registration Act No. 3 of 2022. The Land Registrar delivered a detailed ruling dated 4th December, 2012 whereby he concluded that the owners of Plot No. 57 had encroached into Plot No. 24 by 40 meters and 37 meters approximately area of 0.75 Hectares. He ruled that the owners of Plot No. 57 should stop the interference on Plot No. 24 so that its owners could enjoy their possession. He concluded that any party not satisfied with the said ruling to prefer an appeal before the Chief Land Registrar within 30 days from that date. From the record no party preferred any appeal – seen from the Plaintiff Exhibits Nos. 5, 6, and 7 of the List of Documents by the Plaintiff. Despite the above decision, the Defendant entered into the disputed area of plot No. 24 and commenced construction of a house and as a result it caused the Plaintiff to file this suit. The Plaintiff called its witness Mr. Maina Rwingo a licensed surveyor who adduced evidence in terms of his survey report dated 18th March, 2015. He confirmed that the house in dispute was being constructed on Plot No. 24 belonging to Plaintiff and not Plot No. 57 for the Defendant. The Defendant engaged the services of Mr. Edward M.J. Kiguru who testified in terms of his survey report dated 13th June, 2017. He found that Plot No. 57 on the ground measured 5.49 Hectares whilst per the title deed Plot No. 57 was 4.80 Hectares thus a difference of 0.69 Hectares. Due to the serious discrepancy in the two (2) survey reports the Honourable Court directed that there be a joint survey conducted and hence a joint report be prepared to be filed in court on 27th May, 2022. Pursuant to this the two (2) surveyors obliged. The prepared a joint report dated 23rd May, 2022 which was filed in court on 27th May, 2022. From the said joint report, they both confirmed that the house in contention was constructed on plot No. 24 and not Plot No. 57. They Further confirmed that the boundary dispute between the owners of Plot Number 24 and Plot No. 57 had been determined by the District Land Registrar. Hence the two surveyors concurred with the ruling made by the Land registrar dated 4th December, 2012. In conclusion the 2 surveyors stated that the Defendant had encroached on the Plaintiff's property Plot No. 24 and had constructed a house thereon without his consent.
50. The Honourable Court fully concurs with the Learned Counsel for the Plaintiff that had the Defendants been dissatisfied by the ruling made by the Land Registrar they should have appealed against it. From the ruling by the Land Registrar and the failure by the Defendants to lodge an appeal as required by law and also based on the findings from the Joint report, to me there was a clear case of trespass onto the Plaintiff's land meted by the Defendant.
51. Having demonstrated and the Plaintiff having proved that the 1st and 2nd Defendants had trespassed and caused nuisance to the Plaintiff's parcel, it followed that the Plaintiff was entitled to the award of damages without necessarily tabling proof of damages. To buttress on that point he cited the case of:- “John Nduba –Versus- Director of Surveys and Another (2022) eKLR” where the Court referred to the provisions of Section 3 (1) of the Trespass Act Cap 294 and “Clerk & Lindsell on Torts 17th page 1354 Paragraph 24”, “Park Towers Limited –Versus- John Mithama Njika & 7 others (2014) eKLR” and “Duncun Nderitu Ndegwa –Versus- KPLC Ltd & Another (2013) eKLR”
52. Additionally, the Plaintiff on a balance of probability proved that the 1st and 2nd Defendants had trespassed onto their parcel of land and hence were entitled to Permanent Injunction as held in the case



of:- “Kenya Power & Lighting Co. Limited –Versus - Sheriff Molana Habib (2018) eKLR” whereby the Court held:-

“.....the aspect of Permanent Injunction perpetual injunction granted by Court upon merit of case after evidence in support of and against the claim has been tendered and one which fully determines the right of the Parties before the Court”.

53. In all fairness, it follows that the 1st and 2nd Defendants ought to demolish and remove all the debris from the disputed site within a stipulated time without failure under the provision of Section 152E of the *Land Act*, No. 6 of the 2012.

Issue No. c). Who will bear the Costs of the suit

54. It’s now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of “Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR” where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

55. In the instant case, the Plaintiff has been able to establish its case against the Defendant and therefore they are entitled to be awarded the costs of the suit.

V. Conclusion & Disposition.

56. Consequently, upon conducting an elaborate analysis of the framed issues herein, the Honourable Court on preponderance of probability is fully satisfied that the Plaintiff has managed to establish “a prima facie case’ against the 1st and 2nd Defendants herein. For avoidance of doubt, therefore, I proceed to grant the following specific orders. These are:-
- a. That Judgement be and is hereby entered in favour of the Plaintiff as it is a clear case of trespass.
 - b. That an order of permanent injunction be and is hereby made restraining the Defendants by themselves, servants, agents and/or employees or otherwise howsoever from erecting any structures of carrying out any construction of any nature or otherwise entering upon or dealing with the suit land known as Land Reference No. Kwale/Ukunda Settlement Scheme/24.
 - c. That an order of mandatory injunction and eviction orders made under the provision of Section 152E of the *Land Act*, No. 6 of 2012 be and is hereby compelling the Defendants either by themselves their agents or servants or otherwise to remove any structure of any nature erected on the suit premises within the next ninety (90) days from the date of the delivery of this Judgement herein.



- d. That an order made herein that upon the failure to adhere with this order, the Plaintiff to be at liberty to remove any such illegal structures constructed on its land at the expenses of the 1st and 2nd Defendants herein.
- e. That an order be and is hereby made for the Plaintiff to be granted special and exemplary damages arising from the acts of trespass meted by the Defendant into the suit land belonging to the Plaintiff.
- f. That the Costs and interest of the suit at Courts rate to be awarded to the Plaintiff herein and to be borne by the Defendant.

It Is Ordered Accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF MAY 2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT

MOMBASA

Judgement delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Omollo Advocate for the Plaintiff.
- c. No appearance for the 1st and 2nd Defendants.

