



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

CIVIL SUIT NO. 271 OF 2018

RAPHAEL WAMITI GACHOKA.....PLAINTIFF

- VERSUS -

OAKPARK APARTMENTS MOMBASA LIMITED.....DEFENDANT

JUDGEMENT

I. Introduction

1. The Plaintiff herein instituted this suit against the Defendant through a Plaint dated 14th November 2018. He filed it on 20th November 2018. The summons to enter appearance dated 22nd November 2018 were served upon the Defendant on 2nd April 2019. The fact on proper service having been effected on the Defendant was supported by the evidence in the Affidavit of Service sworn by Leonard Peter Kimani on 9th April 2019 and filed in court on 24th April 2019 and shall be graphically demonstrated herein below.

2. Despite of service of summons and a hearing notice dated 18th February 2021, the Defendant never entered appearance. From the records, there is an Affidavit of Service dated 5th March 2021 and filed on 25th August 2021 which proved that on 4th March 2021 the Defendant was served with the hearing notice. Pursuant to this, and being satisfied that the service was proper, the Honorable Court directed that the matter proceeds for formal proof.

3. From the pleadings, the Plaintiff prayed that judgement be entered against the Defendant for:-

a) Specific performance of the agreement dated 12th September 2012 and the Defendant be ordered to compete registration of the lease document over Apartment No. 313 in Insulae Africanus situated on Shanzu beach on C.R No. 17990/1 (Subdivision of No. 3854 Original No. 1080/2) Section I Mainland and avail to the Plaintiff a duly registered copy of the lease document.

b) Damages for breach of contract.

c) Costs of the suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.

d) Any such other or further relief as this Honorable court may deem appropriate.

On 21st September 2019 the matter came up for hearing. On 12th February 2020, Mr. Mahungu Advocate was present for the Plaintiff. He informed court that the Defendant had never entered appearance despite being served with a hearing notice dated 18th February 2021. The Counsel referred court to an Affidavit of Service dated 5th March 2021 and filed on 25th August 2021 which proved that on 4th March 2021 the Defendant was served with the hearing notice. Therefore, the matter proceeded to formal proof.

To begin with, Mr. Mahugu Advocate orally applied to make some amendments arising from a minor typographical error onto the Plaintiff's witness statement. The name on the Witness Statement was amended to read "RAPHEL WAMITI GACHOKA" in stead of "JAMES GITHIKA GACHOKA". The amendment was endorsed and adopted by Honorable Court.

II. The Plaintiff's case

4. PW - 1 was sworn and testified in English. He stated that he was called Mr. Raphael Wamiti Gachoka. He was the holder of the national

identity card bearing numbers 0970980 issued on 6th August, 1996, a copy of which was produced and marked as Plaintiff Exhibit – 1”. He stated that he lived in Nanyuki while he carried out business at Nairobi. He also produced a list of documents dated 14th November, 2018 and filed in Court on 20th November, 2018 and the attached documents. They were marked as “Plaintiff Exhibit 2 to 13”. PW – 1 testified that he lived in Nanyuki and had to travel to Mombasa for the hearing of his case. He had spent a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/=) as flight and other logistical expenses.

5. His testimony was that by virtue of a letter of offer dated 1st March, 2012 by the Defendant to the Plaintiff where he offered to sell to him all that property known as – one bed roomed apartment Number 313 in Insuae Africanus situated at Shanzu beach on CR No. 17990 (Sub – division of Number 3854 (Original No. 1080/2) Section 1, Mainland. (hereinafter referred to as “The Suit Land”). It was for a consideration of Kenya Shillings Eighteen Million (Kshs. 18, 000, 000.00).

6. Subsequently, on 12th September, 2012, the Plaintiff and the Defendant executed a lease agreement terms and conditions stipulated thereof, with an initial payment of Kenya Shillings Sixty Thousand (Kshs. 6,000,000/=) as the deposit. The outstanding balance was to be paid in installments of Kenya Shillings Two Million Four Hundred Thousand (Kshs. 2,400,000/=) on diverse dates of 31st May, 2012, 30th June, 2012, 31st July, 2012, 31st August, 2012, 30th September, 2012 respectively. Eventually, the full payment for the purchase price was completed accordingly. He informed court having paid up all the statutory payments for instance the stamp duty, consents, approvals fees, registration fees accordingly.

7. He testified that the Defendant as the vendor was tasked with the registration of the lease. The registration was to be in favour of the Plaintiff the purchaser after compliance with the conditions of sale. The Plaintiff claimed to have fulfilled all the requirements including paying the full purchase price. The Plaintiff claimed to have forwarded a duly executed lease agreement to the Defendant’s advocate together with a sum of Kenya Shillings Seven Twenty Thousand and Fourty Hundred (Kshs. 720,040/=) for stamp duty fees.

8. PW -1 held that the suit property had been intended to serve as a business venture in the tourism sector. It was to be a well-furnished resort for holiday well-wishers and revelers. The Plaintiff averred that the Defendant failure to complete the registration of lease to date amounted to breach of lease agreement and the Plaintiff prayed for damages and an order of specific performance of the said lease agreement. He maintained and stressed that the Defendant had breached the contract and prayed for specific performance to complete the lease registration as well as general damages and costs of the suit. With that, the Plaintiff closed his case and urged Court to enter Judgement in his favour and against the Defendant as per the terms of the filed Plaintiff. That was all.

II. Submissions

9. On 21st September, 2021, immediately after the closure of the Plaintiff’s case, the Honorable Court directed the Advocate for the Plaintiff to file written submissions in support of this suit. Thereafter, the Plaintiff fully complied and the Honorable Court reserved a date for delivery of Judgement accordingly.

A. The Plaintiff’s Written Submissions

10. On 3rd December 2021, the Learned Counsel for the Plaintiff, the law firm of Messrs. Wangai Nyuthe & Company Advocates, filed their written submissions dated on the even date in support of the Plaintiff’s suit. Mr. Mahugu Advocate submitted that the Plaintiff instituted this suit through a filed Plaintiff on 20th November, 2018 and dated 14th November, 2018. He stated that the Plaintiff having served the Defendants with the Summons to Enter Appearance hearing notices, they never entered appearance. The matter proceeded on for formal proof on 21st September, 2021.

11. On 21st September, 2021, before the commencement of the hearing, the Plaintiff orally applied to amend the name on top of the witness statement erroneously written as “James Githiga Gachoka” instead of “Raphael Wamiti Gachoka”. The application was allowed. Pursuant to that, the Plaintiff as PW – 1 adopted his undated statement filed in court on 20th November, 2018. During the hearing, the Plaintiff produced the following twelve (12) documents as per the list of documents dated 14th November, 2018 and marked as “Plaintiff Exhibits 2 to 13”. These were:-

- a) Demand letter dated 20th September, 2018;
- b) Letter of offer dated 1st March, 2012;
- c) A copy of title documents;
- d) Statements of account and receipts issued by the Defendant;
- e) Agreement of Lease dated 12th September, 2012;
- f) Letter dated 20th February, 2012 forwarding duly executed lease and a cheque in settlement of lease processing form;
- g) Letter dated 15th January, 2013;
- h) Letter dated 18th January, 2013;

- i) Letter dated 18th February, 2013 forwarding a Cheque for Kshs. 720, 040.00 for payment of Stamp Duty;
- j) Bankers cheque No. 811985 for Kshs. 720, 040 for payment of Stamp Duty;
- k) Letter dated 6th June, 2013 forwarding completion documents to Kamotho Maiyo & Mbatia Advocates;
- l) Copies of letters to the Defendant's Advocates.

On 12th September, 2012 executed the lease agreement between himself and the Defendant and had produced "Plaintiff – Exhibit 4" receipts of payment of the full purchase price to the Defendant. He added that the Plaintiff even forwarded the executed lease together with the stamp duty payment to the Defendant to enable him complete the registration of the lease but the Defendant has breached the lease agreement by not completing the registration as agreed.

12. The Learned Counsel argued that the Plaintiff had completed all the conditions that were required of him, and when his advocate followed up with the Defendant on the status of the registration process there was no response forthcoming from the Defendant. The Learned Counsel concluded that the Plaintiff had proved his case on balance of probability and thus urged court to find in favour of the Plaintiff since the Defendant did not enter appearance and the evidence of Plaintiff remained uncontroverted and unchallenged thereof.

III. Analysis and Determination

13. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the relevant provisions of the law.

In order to arrive at an informed, just and fair decision, this Honorable Court has framed the following four (4) salient issues for determination. These were:-

- a) Whether service of Summons to Enter Appearance and hearing notices were properly effected upon the Defendant warranting for formal proof hearing.*
- b) Whether the agreement for sale dated 12th September, 2018 was duly executed by the parties, and if not what were the legal consequences?*
- c) Whether time was of essence in the Lease agreement duly executed by the Plaintiff and Defendant, if so was there breach?*
- d) Who bears the cost of the suit.*

ISSUE a). Whether service of Summons to Enter Appearance and hearing notices were properly effected upon the Defendant warranting for formal proof hearing.

14. Under this sub – heading, and stated above, I have taken great cognizance of the fact that the Defendant never entered appearance despite being served with Summons to Enter appearance and all the hearing notices. In particular, I have duly considered all Affidavits of service by one Mr. Leonard Peter Kimani a duly appointed High Court process Server and his attached copy of a Certificate issued by Judiciary bearing Serial Numbers CPS. 00420 and Reference Numbers 0172 issued on 6th March, 2018 hereto of diverse dates 28th January, 2019; and 5th March, 2021. I have in particular decided to re produced the contents of Paragraphs 4 to 8 verbatim thus:

“On the said day at 10.00am I proceeded to the Defendant (sic) head offices, situated next to Haadi Residential, Lavington in Nairobi County.....At the said place, I was told that the Defendant moved from that place in February 2021 to undisclosed place. At the said place, I called Mr. Reuben who works (sic) with Oakpark through his cell phone No. 0725 – 536 369, who told me where they are (sic) currently based, and off I went to accomplish my trade. At their new premises, situated opposite Bismillahi Traveller Hotel, along Nairobi County Avenue, show ground in Nairobi County, I met Madam Emma Achoki of Mobile No. 0733 - 499 – 028 who is the Managing Director of OakPark Apartments Mombasa Limited and well known to me. After formal greeting, I handed for (sic) her their copy for the retention and my original one for her acknowledgement receipt. After reading through the notice, madam Emma Achoka admitted that Oakpark Apartments Mombasa limited is (sic) the Defendant herein, retained their copy without signing my original one at 12.30 pm; which document I now return to this honorable court duly served.....”

Clearly, from the above evidence on service, the issue of proper and effect service upon the Defendant is not in any doubt.

ISSUE No. a). Whether the agreement for sale dated 12th September, 2018 was duly executed by the parties, and if not what were the legal consequences?

Brief Facts.

15. Before embarking on the in depth analysis of the above framed issues, the Honorable Court feels it imperative to expound of the brief

facts first and foremost. From the pleadings The Plaintiff instituted this suit on 20th November, 2018 through a Plaint dated 14th November, 2018. He sought for specific performance of agreement dated 12th September, 2012; damages for the breach of Contract and Costs of this suit together with interests at the court's rate. According to the Plaintiff, the Defendant vide a Letter of Offer offered to sell to the Plaintiff a one bedroom apartment on CR No. 17990/1 for a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) as a purchase price. Vide a letter of offer dated 1st March 2012. The Plaintiff accepted the offer and entered into a sale agreement for the apartment on 12th September 2012. The apartment was No. 313 in Insulae Africanus situated on Shanzu beach on C.R No. 17990/1 (Subdivision of No. 3854 Original No. 1080/2) Section I Mainland. The Defendant was a lessor from the government for 99 years, with the lease commencing on 1st November 2008. The Plaintiff agreed to purchase from the Defendant the suit property for a sum of Kenya Shillings Eighteen Million (Kshs 18,000,000/=.) On 20th December 2012, the law firm of Messrs. Wangai Nyuthe & Co Advocates, who were acting for the Plaintiff in the lease agreement, wrote to the firm of Kosgey & Masee Advocates, who were acting for the Defendant; to enclose the lease duly executed by the Plaintiff and informing them that Defendant ought to execute too.

16. Being convinced that the Defendant had become completely in complying with the terms of the lease agreement by causing the transfer and registration of the lease to the Plaintiff, he decided to seek legal redress by instituting this sought. To worsen the matter, despite effecting proper service upon the Defendant, he willfully refused, failed and/or neglected to enter appearance necessitating the formal proof hearing. That is all on the facts of the case.

17. Now turning to the issue under this sub – heading. It is trite law at this point that Section 3 (3) of the Contracts Act, Cap. 23 of the Laws of Kenya stipulates that a contract for the disposition of an interest in land shall be in writing and signed by all the parties thereto. Where a party to the contract is a body corporate, Sub - section 6 of Section 3 of the Contract Act, provides exactly how it ought to sign. A company signing a lease agreement therefore needs:-

a) The signature by an attorney of the body corporate duly appointed by a power of attorney registered under the Registration of Documents Act (Cap. 285);

b) The fixture of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate, as the case may be, in which case no further attestation shall be required

c) execution of the document in accordance with section 37 of the Companies Act, 2015, for body corporates incorporated under the Companies Act, 2015.

18. Section 37 (2) of the Companies Act, provides for options for execution of documents by a company, which provides that:-

A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorized signatories; or

(b) by a director of the company in the presence of a witness who attests the signature.

19. Though the lease agreement lacked the fixture of the common seal of the Defendant as a body corporate, from Section 37 of the Companies Act it is not a mandatory requirement for a company to affix its common seal to a documents to signify execution. I find that the parties executed the lease agreement, it is therefore valid. The directors of the Defendant signed the lease agreement and are therefore bound by the terms and conditions thereto.

20. Additionally, under the provisions of Section 38 (1) of the Land Act, No. 6 of 2012 makes a provision on the validity of contracts in sale of land as thus:

“Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land:-

a) The contract upon which the suit is founded:-

i. Is in writing;

ii. Is signed by all the parties thereto; and

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

It is evident all these legal conditions were fully fulfilled without any doubt at all. Thus, the agreement between the parties herein is valid.

Suffice to say, the Plaintiff has pleaded that the Defendant breached the said agreement by failing to deliver title to him despite fulfilling his obligations in the lease agreement. The Plaintiff has produced several receipts from the Defendant to demonstrate that he paid the purchase price in full. I make reference to the Plaintiff's Statement of Account as at 17th September 2012, which shows he had cleared with the Defendant a total amount of a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) which was the suit property purchase price. The Defendant did not challenge the testimony by the Plaintiff in trial neither did it file any pleadings, the Plaintiffs evidence stands

unchallenged. The court concludes that the purchase price of a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) was paid in full.

21. As per Clause 13 of the lease agreement, the Plaintiff was obligated to pay the Defendant's advocate upon signing of the agreement Kenya Shillings Two Hundred and Twenty Five Thousand (Kshs. 225,000/=) as legal costs. The Plaintiff's advocate wrote to the defendant's advocate on 20th December, 2012, enclosing a cheque of sum of Kenya Shillings Two Hundred and Twenty Five Thousand (Kshs 255,000/=) for the lease processing fees as required. Another payment that the Plaintiff was required to make to the Advocate for the Defendant as stipulated in 13 was a sum of Kenya Shillings Seven Twenty Thousand and Fourty Hundred (Kshs. 720,040/=) towards stamp duty and registration charges.

22. The Advocates for the Plaintiff wrote to the Defendant' advocate on 18th February 2013, enclosing a bankers cheque of a sum of Kenya Shillings Seven Twenty Thousand and Fourty Hundred (Kshs. 720,040/=) for stamping and registering the lease. The Plaintiff produced to court a bankers cheque No. 811985 for a sum of Kenya Shillings Seven Twenty Thousand and Forty Hundred (Kshs. 720,040/=) dated 11th February 2013. The Defendant never pushed through with the registration of the lease or delivering to the Plaintiff vacant possession of the suit property, hence the necessity to bring this suit.

23. Section 54 (5) of the Land Registration Act, provides that:-

“The Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, townhouses or offices having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land.

24. The above provisions require a lease to an apartment had to be registered, the lease agreement in this case was not registered. After forwarding the executed lease agreement, the Advocates for the Plaintiff wrote to their Counterparts, the Advocates for the Defendant on several occasions (24th June 2014, 5th September 2014, 17th February 2015, 21st July 2016 and 13th July 2018) to inquire on the status of the registration of the lease to no avail. All this notwithstanding, without any justifiable cause and/or reasonable cause, the Defendant willfully failed, refused and/or neglected to register the lease as required by law.

Be that as it may, by dint of Section 43 of the Land Registration Act, a lease has to be registered in order to confer interest in land, it provides:-

a) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.

b) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.

25. The lease agreement for the suit land was unregistered, it failed to comply with the above law, and therefore could not confer the rights legal rights over the suit property. Nevertheless, although the lease did not confirm legal rights to the Plaintiff, it is enforceable as between the parties as it has been found to be a validly executed contract. The **Court of Appeal** in the case of **Chon Jeuk Suk Kim & another – Versus - E. J. Austin & 2 others [2013] eKLR** held that:-

“Those decisions show that an agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate is nevertheless enforceable as contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties. Although those decisions relate to the construction of the provisions of the Registration of Titles Ordinance Act they apply with equal force to the legal effect of an agreement for a lease of unregistered lease of a period of over two years under the Registered Land Act as section 47 thereof is similar to the provision under consideration in those decisions.”

26. The lease is unregistered, yet there is a statutory requirement for registration, the lease as it stands is not capable of conferring legal or equitable estate in the land, however the terms and conditions stipulated in the contract are enforceable inter parties. Registration of a long term lease was the Defendant's obligation and as such, the failure by the Defendant to register the lease contract was a breach of contract. From both oral and documentary evidence adduced herein by the Plaintiff, undoubtedly, the Defendant failed to comply with complete the said transaction despite the numerous notices from the Plaintiff inquiring on the same. The correspondences between the law firm of Messrs. Wangai Nyuthe & Company Advocates, for the Plaintiff and Kosgey Masese Advocates for the Defendant, indicated that the Defendant's advocate was in the process of registering the lease. There was entry of another firm, that of Kamotho Maiyo & Mbatia Advocates, upon who the Counsel of Defendant wrote to them on 6th June 2013. It seems the Defendant's counsel the firm of Kosgey & Masese Advocates was registering the lease through that firm. However despite that, what stands unchallenged is that the lease was never registered by the Defendant, consequently, the Plaintiff was not conferred with any legal or equitable interest in the suit property.

27. The responsibility to register the lease laid squarely on the Defendant and the involvement of the firm of Kamotho Maiyo & Mbatia Advocates as seen from the correspondence exchanged after execution of the agreement does not waive that responsibility. The Plaintiff had

already done what was required of him, paid the purchase price as well as the legal and stamp duty fees. It is this Courts holding that the actions of the Defendant of accepting monies from the Plaintiff and failing to register the lease were breach of contract and the Plaintiff is entitled to damages as prayed.

28. The Plaintiff has prayed for specific of the lease agreement, for court to compel the Defendant to complete registration of the lease over the suit land and issue him with a duly registered copy of the lease document. Specific performance is an equitable remedy and must flow from a legal right, “**the Supreme Court of Uganda in Manor – Versus - Baram (2003) 2 E.A.** dealt with the issue of Contract and Specific Performance where it made a holding that:-

“Specific performance is an equitable remedy grounded in the equitable maxim that ‘equity regards as done, that which ought to be done’. As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the Plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course.”

29. The justification of specific performance is based on the existence of a valid, enforceable contract. The Plaintiff seeking specific performance must show that he has performed all terms of the contract which he has undertaken to perform whether expressly or by implications which ought to be performed within the timelines set in the contract. The question that begs to be answered is whether failure to register the lease agreement was an express term of the lease that its default would be termed as essential.

ISSUE b). Whether time was of essence in the Lease agreement duly executed by the Plaintiff and Defendant, if so was there breach?

30. Under this sub title, and based on the facts herein, undoubtedly, I have found that the Defendants, indeed are in breach, for failing to register the lease agreement for the Plaintiff as per the terms of the duly executed lease agreement. A reading from the contents under Clause 13 of the agreement, it was implied that after the Plaintiff pays up the stamp duty to the Defendant’s advocates, the Defendant would register the lease as required by law. There was no express stipulation from the clause or any indication in the agreement that time within which the Defendant was to commence and complete registration was of essence. The time within which the registration was to take place was not made of essence, however from the correspondence between the advocates, it was clear that the Plaintiff was subjected to unreasonable, inordinate and prolonged delay. In the case of “**Aida – Versus - John Mbiyo Njonjo & Charles Kigwe (1962) EA 88:-**

“When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence.”

The demand letter dated 21st July 2016 written by the Advocates for the Plaintiff addressed to the Counsel for the Defendant served as a proper and adequate notice to the Defendant in default, making time of essence.

31. The “**Court of Appeal in Civil Appeal No. 165 of 1996 between Gurdev Singh Birdi and Marinder Singh Gatora and Abubakar Madhubuti**, held that:-

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable.”

32. In my judgement, I find that though time was not expressly of essence in the contract, the correspondence between the parties and in particular the demand letters impliedly made time of essence. When the Plaintiff came to court seeking the relief of specific performance, he had performed his essential part of the agreement, namely payment of the purchase price in full, legal and stamp duty fees. I consider it just and equitable to grant him the equitable relief of specific performance. It will be oppressive, unjust and financially injurious to the Plaintiff who has fulfilled all his contractual obligation and who has not been guilty of laches or inordinate delay to forego the ownership of the suit property, more than ten (10) years after entering into the contract when its current market value has materially appreciated. It will be remembered that all this period the Defendant was still retaining the purchase price. To deny the Plaintiff the prayers sought would be to give unfair advantage to the Defendant.

33. Besides, the conduct of the Defendant in not only failing to fulfil its part of the bargain but also deliberately failing to enter appearance upon proper service of pleadings is rather disturbing. The Court finds it unmindful of other people’s rights but also unacceptable to say the least.

ISSUE No. d). Who will bear the Costs.

34. The Black Law Dictionary defines cost to means, “**the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other**”

The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the Plaintiff herein has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be

made to the Plaintiff herein to be borne by the Defendant herein.

IV. Conclusion and Disposition

35. After taking into consideration the natural justice, Conscience and Equity, the Honorable Court is satisfied that it ought to exercise its discretion in favour of the Plaintiff on the preponderance of probability. Therefore, the suit for the Plaintiff succeeds. I proceed to enter judgment in favour of the Plaintiff as prayed in terms of the Plaint dated 14th November 2018, with costs and interest at the court's rate.

IT IS SO ORDERS ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH MARCH, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna, Court Assistant.

Mr. Mahungu Advocate for the Plaintiff.

Non Appearance for the Defendant.