



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. CAUSE NO. 170 OF 2017**

NURU ALI JELZAN .....1<sup>ST</sup> PLAINTIFF

ANWAR MOHAMED BAYUSUF LTD. ....2<sup>ND</sup> PLAINTIFF

**VERSUS**

NASSAR MOHMAED BAYUSUF .....1<sup>ST</sup> DEFENDANT

M.A. BAYUSUF & SONS LTD. .... 2<sup>ND</sup> DEFENDANT

FATHIL M. BAYUSUF ..... 3<sup>RD</sup> DEFENDANT

AHMED M. BAYUSUF ..... 4<sup>TH</sup> DEFENDANT

**JUDGEMENT**

1. The suit by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs was filed at the Environment & Land Court, Mombasa on 16<sup>th</sup> May, 2017 vide a Plaint dated 16<sup>th</sup> May, 2017, Later on, upon attaining leave of court the Plaintiffs filed an amended plaint dated 24<sup>th</sup> April 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs sought for the following orders:-

***(a) Permanent restraining orders against the Defendants their employees, agents, servants, assigns and/or any other person acting under them be restrained from interfering dealing, threatening the Plaintiffs their clients, evicting and/or threatening to evict the Plaintiffs from Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa.***

***(b) Declaration that the 1<sup>st</sup> Plaintiff is the rightful heir and/or owner of Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa.***

***(c) General damages and costs of this suit.***

2. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs also filed a Notice of Motion application seeking both temporary and permanent injunction orders to restrain the Defendants by themselves, employees, agents, servants, assigns and/or any other person acting under them from interfering, dealing threatening the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs their, clients, evicting and/or threatening to evict the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs from all that parcel of land known as Land registration Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa pending the hearing and determination of both the application and the suit (hereinafter referred to as “The Suit Land”).

On 16<sup>th</sup> May 2017 the said application was canvassed “*ex - parte*” whereby it was certified urgent and the temporary injunction orders granted accordingly and an order that it be served to be heard “*inter - partes*” on 30<sup>th</sup> May, 2017.

On 30<sup>th</sup> May, 2017, the 1<sup>st</sup> Defendant/Respondent entered appearance, filed a replying affidavit and on 30<sup>th</sup> October, 2017 filed a Defence and Counter Claim dated 17<sup>th</sup> October, 2017. On 8<sup>th</sup> August 2018 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their Defence.

Eventually, on 19<sup>th</sup> April, 2018 by the consent of both the Plaintiff and Defendants Advocates to have the Notice of Motion application be compromised and allowed as settled in order to pave way for the full trial. Pursuant to that, pre-trial directions for the trial were taken.

3. From the records, thereafter as it became so difficult to secure the presence of the Plaintiffs to physically appear in court to prosecute their case having travelled abroad to Bahrain, to attend to their sick father. In the course of time and they were caught up by the upsurge of the global Corona Virus/Covid 19 – Pandemic and it followed that they could not travel back to the country - Kenya as had been anticipated. On 14<sup>th</sup> June 2021, the Advocates for both the Plaintiffs and the Defendants by consent agreed as follows that:-

- (a) The Plaintiff and Defendants statements dated 16<sup>th</sup> May, 2017 be adopted as the evidence in the matter,
- (b) The List of Documents filed by the Plaintiffs and the Defendants be produced as exhibits in this case.
- (c) Parties to file and exchange their, written submissions. The consent was adopted as an order of court.

## **II. THE PLAINTIFF'S CASE**

5. On 16<sup>th</sup> May, 2017, Ms. Nuru Ali Islam, a female adult of sound mind and resident of Mombasa within the County of Mombasa swore and signed her witness statement. The statement was adopted as shown above. She was the PW1, PW- 1 testified that she was the Managing Director of the Anwar Mohamed Bayusuf Ltd. – the 2<sup>nd</sup> Plaintiff with its full authority to swear the affidavit. From the statement, she deposed that the Defendants, and the agents, servants and/or employees were interfering with their property – the suit property. She stated that the Defendants on daily basis running their businesses on the said property and threatening their clients and customers preventing them from accessing. By this action had put their operations in jeopardy.

6. She informed court that, they operated a parking yard, petrol station and general storage facilities at the said premises. She indicated that they had signed several contracts with several motor vehicles owners and other general Cargo storage entities on agreed terms and conditions. But despite all this, she averred that the said properties and other third party items were at great risk of interference, damage and/or waste by the Defendant's and their hired goons.

7. She deposed that the yard had more than 30,000 liters of fuel stored on the premises which was fire risk if the activities by the Defendants their agents and/or servants were not curtailed by court and proper security guaranteed.

She held that together with her three (3) children they were the bona fide heirs of the suit premises through her late husband – ANWAR MOHAMED BAYUSUF. She informed court that she had applied and obtained the Grant Letter of Administration to her husband's estate.

8. She deposed that the 1<sup>st</sup> Defendant through her Advocates had written to her issuing her with a Notice to vacate from the suit premises. But before even the expiry of the said notice the 1<sup>st</sup> Defendant had been sending his agents and servants, unknown goons to interfere with their daily operations at the suit premises to the detriment of their clients and/or business. She indicated that even their security guards had been threatened and they risked losing business from customers of an income estimated at a sum of Kenya Shillings Four Hundred and Sixty Thousand (Kshs. 460,000/=) in rents and fees derived from the parking bay only. She stated the 1<sup>st</sup> Defendant had threatened on using the County Government of Mombasa askaris to clump down the motor vehicles a threat he would execute, anytime just to embarrass her and her clients.

9. She underscored the fact that she was a widow and mother of three (3) children and solely depended on the income from the business of the 2<sup>nd</sup> Plaintiff incorporated by her late husband Anwar Mohamed Bayusuf where she was the Director. She stressed that her husband was given the said yard by her late father in law and had been operating it for more than ten (10) years prior to his demise in the year 2010. She stated having been paying the land rates and rent and other utilities expenses for the said premises for over ten (10) years without anyone's help and interference. In the long analysis, she urged court to grant her the prayers sought in the suit.

10. To support her case she relied and produced as exhibit the following documents and which were admitted as evidence. These were:-

- (a) Copies of contracts with several/various customers.
- (b) Photostat images of the Motor Vehicle and third party parking yard.
- (c) A Copy of a Notice to vacate the suit premises dated 9<sup>th</sup> May 2017 by the 1<sup>st</sup> Defendant's Advocates M/s. M.K. Mulei & Co. Advocates.
- (d) A copy of the Certificate of death of the Plaintiff's father in law.
- (e) Copies of rates and rent receipts and other utilities expenses paid for the suit premises for over 10 years.

## **II. THE 1<sup>ST</sup> DEFENDANT'S CASE.**

11. On 30<sup>th</sup> October, 2017 the 1<sup>st</sup> Defendant through his Advocates the law Firm of M/s. M. K. Mulei & Co. Advocates filed a Defence and Counter Claim dated 17<sup>th</sup> October, 2017. From the Counter Claim the 1<sup>st</sup> Defendant stated that the land known as plot No. MN/V/1966 (Original No. MN/V/169211-2) which the Plaintiff are in occupation was given to him by M.A. Bayusuf & Sons Limited through its directors and was pending transfer. The 1<sup>st</sup> Defendant prayed for judgment against the Plaintiff for:-

- (a) An order of eviction of the Plaintiff from the Plot No. MN/V/1966 (Original No. MN/V/169211-2).***

***(b) The officer commanding Changamwe Police Station to assist in carrying out prayer (a) if necessary.***

***(c) Costs of the Counter Claim.***

***(d) Interest at Court rate.***

Subsequently upon being enjoined, in the suit the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants vide their Advocates the law firms of M/s. Sachdeva, Nabhan & Swaleh Advocates filed their defence dated 8<sup>th</sup> August 2018 and 22<sup>nd</sup> October, 2018 filed list of documents containing 11 documents which had been admitted by court. DW - 1 Nassar Mohamed Bayusuf stated that he was a Director of M.A. Bayusuf & Sons Limited which was a family business. He produced a certificate of incorporation of the said company and its resolutions. He held that in the year 2001 the said company purchased a Plot No. MN/V/1966 (Original No. 1292/2) the suit property from a private company trading in the name and style of Marcargo Limited He produced a copy of the certificate of the title deed. He confirmed that by the time of incorporation of the aforesaid company, the 1<sup>st</sup> Plaintiff's husband was its director.

12. He stated that prior to the death of their father, there had been alteration in the company arising from the financial impropriety perpetrated by the 1<sup>st</sup> Plaintiff's husband, whereby as a result he opted to resign from the company. In exchange of the resignation he was given some property being which included a plot similar to the subject matter being plot No. 194/VI/MN, a house on plot No. Block X/249 in Tudor and several lorries. He produced a copy of the said letter of resignation dated 2<sup>nd</sup> July, 2005 by the 1<sup>st</sup> Plaintiff's husband. He then transferred all his shares in the company to the other Directors including the 1<sup>st</sup> Defendant – he produced copies of the transfer of shares documents.

13. He requested the company through the main director their late father to be allowed to occupy the suit property as a process of removing a tenant trading in the name and style of Ocean freight Limited. and which was allowed. The request was granted on an undertaking that he would vacate the suit land once the process of the removal of the tenant had been complete. He produced copies of the extract of the eviction cause.

It was his testimony that the Plaintiff and her husband decided to charge the property MN/VI/194 to the bank even before the removal process of the tenant from the plot and by this time the plot had been in their company's name.

14. However, they were unable to service the charge and the property was sold by the bank and they were given the balance. For him and his brothers who remained in the company, after the resignation of the 1<sup>st</sup> Plaintiff's, they husband decided to share what was left of the company and he was given the suit land which was yet to be transferred to his name. To this effect, he produced a copy of the Company's resolution by the Co-directors of a meeting held on 9<sup>th</sup> August, 2010 at their offices. He held that the 1<sup>st</sup> Plaintiff was aware of all these facts but was planning dumb in the hope of benefiting from what she was not entitled to. He held that upon being served with the notice to vacate she approached him on request to be allowed to lease the suit property but he declined.

15. He denied the letter dated 23<sup>rd</sup> April, 2015 purportedly signed by their late father holding it was a forgery. He stated that all the land rates and rents had been paid by their manager one Hassan Mzee who had also recorded a witness statement in this case. He urged to have the suit and the prayers sought dismissed with costs. He produced all the documents and marked them as evidence in support of his case.

DW2 – Hassan Mzee a holder of the national identity card bearing numbers 8620186 –recorded his statement dated 9<sup>th</sup> October, 2018 and filed in court on 24<sup>th</sup> October, 2010. He further filed a further one on 19<sup>th</sup> February, 2019 and dated 18<sup>th</sup> February, 2019. It had been adopted by court by the consent entered by the parties on 14<sup>th</sup> June, 2021.

16. He stated that he was the Manager in the M.A. Bayusuf & Sons Limited since the year 2003. He stated that he had been aware of the resignation of Mr. Anwar Bayusuf resigned from the Company in the year 2006. As a result, he stated he lost having any further interest in the company. DW1 informed court that the current shareholders of the company were:-

Mohamed Ahmed Bayusuf (deceased)	– 520 shares;
Nasser Mohammed Bayusuf	- 120 shares;
Fathil Mohamed Bayusuf	- 120 shares;
Yusuf Mohamed Bayusuf	- 120 shares;
Ahmed Mohamed Bayusuf	- 120 shares.

It was his testimony that Mr. Anwar Mohamed Bayusuf was fully compensated by being given two plots – Plot No. 194/V/MN and Plot No. Block X/249/Tudor together with Trucks to start off his own company.

He testified that the Company called Anwar Mohamed Bayusuf Limited never prospered well. He stated that Mr. Anwar Bayusuf had earlier on requested the other directors through the Managing Director, by then their father, to be allowed to use a vacant Company Plot – which is the subject matter of this suit so that he would put pressure onto a problematic tenant to move out from the said plot. He had been granted the request and eventually died while still in occupation of the Company's Land.

17. It was the testimony of DW - 2 that the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs had by themselves and their agents illegally and irregularly taken possession of the suit property and had been benefitting from it. He denied that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants were interfering and/or threatening the daily running of the Plaintiffs' business or their customers. He stated that when the Directors of the company requested the widow to Mr. Anwar Bayusuf – the 1<sup>st</sup> Plaintiff herein to vacate from the plot she refused and instead decided to institute this suit hereof. He urged court to declare the 2<sup>nd</sup> Defendant as the lawful owner of the suit property order the eviction of the Plaintiffs from the suit land, dismissal of the suit and costs to the Defendants.

### **III. THE 2<sup>ND</sup>, 3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANT'S CASE**

18. On 9<sup>th</sup> August 2018, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their defence dated 8<sup>th</sup> August 2018. They held that at all times of the suit, the suit property plot No. MN/V/1966 was derived from 1692/V/MN it was registered under the M.A. Bayusuf & Sons Limited who was its legal registered owners. They held that the 1<sup>st</sup> Defendant wrote to the 1<sup>st</sup> Plaintiff on behalf of the M.A. Bayusuf & Sons Company demanding vacant possession by the Plaintiffs of the suit property. They held she was trespassing. They denied ever threatening the Plaintiff or their customers, clients or jeopardizing their operations in any manner.

19. They further denied each and every particulars of interference, trespass and/or disruptions of barriers as alleged from the Plaintiff. On the contrary they held that it was actually the Plaintiff who had been on the suit property illegally and profiting from it since the year 2010 to the detriment and loss of the M.A. Bayusuf Company. They held that it is actually them who had suffered and continued to suffer loss as a result of the illegal occupation of the property by the Plaintiff's. To support their case they produced the following documents and which were marked as evidence in this case.

- (a) A Copy of agreement dated 2<sup>nd</sup> July, 005
- (b) A Copy of Memorandum of agreement
- (c) A Copy of the incorporation certificate for M.A. Bayusuf & Sons Limited.
- (d) A Copy of a letter of employment for Mr. Hassan Mzee.
- (e) A Copies of the Company's Minutes and resolutions.
- (f) A Copy of the title deed to Plot No. 194/V/MN.
- (g) A Copy of a demand to vacate from M.A. Bayusuf & Sons Limited to the 1<sup>st</sup> plaintiff.
- (h) A letter to Oloo & Co. Advocates from M.A. Bayusuf & Sons.
- (i) A copy of a Demand and Notice of intention to sue.
- (j) A copy Resignation letter by Mr. Anwar Mohamed Bayusuf.
- (k) Transfer of shares by Mr. Anwar Mohamed Bayusuf.

### **IV THE SUBMISSIONS**

20. As stated above, on the 14<sup>th</sup> June, 2021 both parties the Advocates for the Plaintiff and Defendant in this matter entered into a mutual consent and agreed to dispose off the entire suit by way of written submissions. The consent was adopted as an order of court. Pursuant to that they all tendered their written submissions accordingly.

#### **A. THE PLAINTIFF'S WRITTEN SUBMISSIONS**

21. On 18<sup>th</sup> October, 2021 the Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, the Law Firm of Messer. Matete Mwelese and Company filed their written submissions. They submitted that the 1<sup>st</sup> Plaintiff was the sister in law to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they were the brothers to Mr. Anwar Mohamed Bayusuf who was now deceased. Together with their late father Mohamed Ahmed Bayusuf they all incorporated the M.A. Bayusuf & Sons Limited.

22. They averred that the deceased was a shareholder and director in the said company. Their late father allowed the 1<sup>st</sup> Plaintiff's husband to use the suit property for his business an issue which was well known and not disputed at all by the Defendants. According to the Advocates the Plaintiff's father in law bequeathed the suit property to the Plaintiff's husband. Nonetheless, in the year 2017 upon the demise of the 1<sup>st</sup> Plaintiff's father in law, some conflict between the Plaintiffs and the Defendants commenced. The deceased's brothers now want to frustrate her and to disinherit her off the property she had been in occupation since time immemorial.

22. The Advocates asserted that she had been utilizing the suit property in the name of the 2<sup>nd</sup> Plaintiff since her husband and its Co-Directors had been alive. Their arguments was that since the Plaintiff's husband had been bequeathed the suit property by her father in law, she had set up business on it and had been running business on it with the full knowledge of the Defendants. Hence, they just wanted to

disinherit her. They prayed that Court declared their actions illegal and the 1<sup>st</sup> Plaintiff as the bona fide owner and/or heir of the suit land. They contended that the Plaintiffs had all the proprietary rights of the land and were in actual possession to it. The Advocates wondered why the Defendants had never laid any claim to the suit land before the death of the 1<sup>st</sup> Plaintiff's husband and father in law. The Advocate imputed this was happening because she was a widow and her young children could not defend her against the aggressions by Defendants. They further opined it was because they had been aware of the fact that the property had been bequeathed to the Plaintiff's husband. They submitted that the 1<sup>st</sup> Plaintiff had been paying all the land rates over the years for the suit property. The Advocates sought for the orders restraining the Defendants from the threats and evicting them from the suit property a fact they held Plaintiff never denied having already issued her with a notice to vacate from it.

23. Finally, they urged court to consider awarding her general damages and costs taking that she had suffered great loss at the behest of the Defendants. In so doing, they urged court to consider the particulars of interferences stated out in the Amended Pleint, the threat to terminate the tenancy contracts with various tenants who utilized the suit property and which were their only source of income being a widow and her young children – as the sole bread winner. She further urged court to consider having a compensation for a sum of Kenya Shillings Two Million (Kshs. 2,000,000) by the Defendants for the interruptions of business, unnecessary tension and inconveniences to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs customers. They concluded having proved their case and prayed that the prayers sought in the Pleint be allowed.

## **B. THE SUBMISSIONS BY THE 1<sup>ST</sup> DEFENDANT**

24. On 13<sup>th</sup> October, 2021, the Advocates for the 1<sup>st</sup> Defendant the Law firm of Messers M.K. Mulei & Co. Advocates filed their written submissions dated 12<sup>th</sup> October, 2021. The Learned Counsels framed a few issues for considerations as a basis to their submissions as stated below:-

- (a) The issue of the legal ownership to the suit property.
- (b) Whether the Plaintiff had any legal right over the suit property.
- (c) Whether the Plaintiff should vacate from the suit property

According to them, the suit property was legally and lawfully owned by the 2<sup>nd</sup> Defendant – M.A. Bayusuf & Sons Company Limited and to proof it, a copy of the certificate of title was produced as evidence. They relied on the provision of Section 26 (1) of the Land Registration Act, 2012 to support their point – to the effect that the title deed was acquired genuinely and legally. Thus the 2<sup>nd</sup> Defendant was the lawful owner to the suit property – being a legal and not a natural person its affairs were conducted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as its Directors and who issued the notice to the Plaintiff to vacate from it.

25. On the contrary, the Advocates submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had no legal rights whatsoever over the suit property and they were merely licencees. The Advocates argued that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had no legal basis to refuse to vacate the suit premises upon the issuance of the notice to vacate. They ought to comply. They were not directors nor shareholders to the M.A. Bayusuf & Sons Company Limited. They argued that it was only the husband to the 1<sup>st</sup> Plaintiff who was once a Director and shareholder but he resigned and transferred his shares to the existing directors and he was compensated accordingly prior to his death.

To buttress their point, they relied on the decision of *New Designs Construction Limited –VS- Lyne Kerubo Mondieka [2020] eKLR* where in a situation such as this one, court allowed the eviction of the widow of a deceased shareholder and former directors and held that where the Plaintiff was the registered owner of the suit property, he was entitled to the possession and use of the property. And the Defendant being a licencee and the contract having been terminated had no right to occupy the Plaintiff's property.

26. Finally, the Advocates submitted that since the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had been issued with a notice to vacate but still persisted in staying on, they had then become trespassers and the only course of action in the given circumstances was for them to be forcefully evicted at their costs. They relied on the decision of *“Murtafar Ahmed Dahman & Another –VS- Athman Sudi [2013] eKLR”* to support their submissions on this point.

The upshot of all this, they urged court to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' with costs awarded to them and his Counter Claim be allowed with costs.

## **ANALYSIS AND DETERMINATION**

27. In order to arrive at an informed decision, this Honorable court has taken into account all the filed pleadings, the written submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff and Defendants Advocates, they relied authorities and the relevant and appropriate provisions of the law. It has framed the following issues as a guide in doing so. These are:-

- a) *Whether the Plaintiffs or the Defendants were bona fide owners to the suit property and had any legal right over it? If not should they provide vacate possession to it through lawful eviction?*
- b) *Whether the Plaintiffs had any existing overriding interest under Section 28 (1) of the Land Registration Act on matrimonial spouse and inheritance rights over the suit property?.*
- c) *Whether the parties are entitled to the relief sought?*

d) Who will bear the costs of the suit?

**ISSUE No. 1. - Whether the Plaintiffs or the Defendants were bona fide owners to the suit property and had any legal right over it? If not should they provide vacate possession to it through legal eviction?**

28. Prior to embarking on the analysis of the case, this court feels it is imperative to expound briefly on the facts of the case. This is a matter involving a family over a land ownership dispute. Sometimes in the year 2005 the late Mohamed Ahmed Bayusuf incorporated a company trading in the name and style of Mohamed Ahmed Bayusuf & Sons Company Limited (also known as M.A Bayusuf & Sons Limited) which is a family business. It has a Certificate of incorporation bearing numbers C53585. It was dealing mainly on transport industry. The 1<sup>st</sup> Defendant – Mr. Nassar Mohamed Bayusuf was a Director of the company. From the pleadings, in the year 2001 the said company purchased a Plot No. MN/V/1966 (Original No. 1292/2) the suit property from another company trading in the names and style of Marcargo Limited. It obtained a certificate of the title deed in its names. By the time of its incorporation, the 1<sup>st</sup> Plaintiff's husband – the late Anwar Mohamed Bayusuf was one of its director. Prior to the death of their father, there had been altercation in the company caused by some financial impropriety allegedly by the 1<sup>st</sup> Plaintiff's husband. Arising from this, Mr. Anwar Mohamed Bayusuf opted to resign from the company and was fully compensated by being given two plots similar to the subject matter plot No. 194/VI/MN, a house on plot No. Block X/249 in Tudor and several lorries. A copy of his letter of resignation dated 2<sup>nd</sup> July, 2005 was produced. He proceeded to incorporate his own company called Anwar Mohamed Bayusuf Limited but which with time never prospered well. Earlier on, Mr. Anwar Mohamed Bayusuf had requested the other directors through the Managing Director, by then their father to be allowed to use the suit property which had been a vacant Company's Plot in order – to remove a problematic tenant trading in the name and style of Ocean freight Limited. He was granted the request on an undertaking that he would vacate it once the process of the removal of the tenant had been complete. This was done and copies of the extract of the eviction cause were produced.

29. Unfortunately as fate would have it he died while still in occupation of the said Company's Land. Prior to that, he had transferred all his shares in company to the other Directors including the 1<sup>st</sup> Defendant. Copies of the transfer of shares documents were produced. Mr. Anwar Mohamed Bayusuf and the 1<sup>st</sup> Plaintiff decided to charge the property MN/VI/194 to the bank even before the removal process of the tenant from the plot and by this time this particular plot had been in their company's name. However, they were unable to service the charge and the property was sold by the bank and they were given the balance. For the brothers, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants who remained in the company after the resignation of the 1<sup>st</sup> Plaintiff's husband decided to share what was left of the company. A copy of the Company's resolution by the Co - directors of a meeting held on 9<sup>th</sup> August, 2010 at their offices was produced. It is stated that the 1<sup>st</sup> Plaintiff was aware of all these facts.

30. On 9<sup>th</sup> May, 2017 the 1<sup>st</sup> Plaintiff was served with a notice to vacate the suit premises. Upon service, she approached the 1<sup>st</sup> Defendant and requested to be allowed to lease the suit property but he declined. From the records and testimony of DW – 1 Mr. Hasan Mzee, a holder of the national identity card bearing numbers 8620186 and the Manager to M.A Bayusuf & Co since the year 2003, all the land rates and rents had been paid. The current shareholders of the company were:-

- i. Mohamed Ahmed Bayusuf (deceased) – 520 shares;
- ii. Nasser Mohammed Bayusuf - 120 shares;
- iii. Fathil Mohamed Bayusuf - 120 shares;
- iv. Yusuf Mohamed Bayusuf - 120 shares;
- v. Ahmed Mohamed Bayusuf - 120 shares.

31. It was the testimony of DW - 2 that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs had by themselves and their agents illegally and irregularly taken possession of the suit property and had been benefitting from the suit property. He denied that 2<sup>nd</sup> and 4<sup>th</sup> Defendants had been interfering and/or threatening the daily running of the Plaintiffs' business or their customers. He stated that when the Directors of the company requested the widow to Mr. Anwar Mohamed Bayusuf – the 1<sup>st</sup> Plaintiff herein to vacate from the plot she refused and instead decided to institute this suit hereof. He urged court to declare the 2<sup>nd</sup> Defendant as the lawful owner of the suit property, eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, dismissal of the suit and costs.

32. On the other hand, the Plaintiffs held that PW- 1 was the Managing Director of the Anwar Mohamed Bayusuf Ltd. – They were running their businesses on the said property and the Defendants were threatening their clients and customers by preventing them from accessing it and which action had put their operations in jeopardy. They operated a parking yard, petrol station and general storage facilities at the said premises. They had signed several contracts with several motor vehicles and other general Cargo storage on agreed terms and conditions. The said properties and other third party items were at great risk of interference, damage and/or waste by the Defendant's and their hired goons. The yard had more than 30,000 liters of fuel stored on the premises which was fire risk if the activities by the Defendants their agents and/or servants were not curtailed and proper security guaranteed. The Plaintiff together with her 3 children were the bona fide heirs of the suit premises through her late husband – ANWAR MOHAMED BAYUSUF. She had applied and obtained the Grant Letter of Administration to her husband's estate. The 1<sup>st</sup> Defendant through her Advocates had issued her Notice to vacate from the suit premises. But before even the expiry of the said notice the 1<sup>st</sup> Defendant had been sending his agents and servants, unknown goons to interfere with their daily operations at the suit premises to the detriment of their clients and/or business.

33. She indicated that even their security guards had been threatened and they risked losing business from customers of an income average of Kenya Shillings Four Hundred and Sixty Thousand (KShs. 460,000/=) in rents and fees derived from the parking bay only. She stated the 1<sup>st</sup> Defendant had threatened on using the askaris of County Government of Mombasa to clump down the motor vehicles a threat he would

execute just to embarrass her and her clients. She was a widow and mother of three children and solely depended on the income from the business of the 2<sup>nd</sup> Plaintiff wherein she was the Director, incorporated by her late husband Anwar Mohamed Bayusuf. She held that her husband was given the said yard by her late father in law and had been operating it for more than 10 years prior to his demise in 2010.

She stated having been paying the land rates and rent and other utilities expenses for the said premises for over 10 years without anyone's help and interference. She urged court to grant her the prayers sought in the suit. Indeed from these facts it is evident that the issue of land ownership is the integral part of the dispute here.

34. **The Land legal system in Kenya.** All said and done, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely. Thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods as follows:

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

**i. Allocations;**

**ii. Land Adjudication process;**

**iii. Compulsory acquisition;**

**iv. Prescription;**

**v. Settlement programs;**

**vi. Transmissions;**

**vii. Transfers;**

**viii. Long term leases exceeding Twenty one years created out private land; or**

**ix. Any other manner prescribed in the Act of Parliament.**

35. In Kenya, the effect of the Registration of Lands is founded in the provisions of Section 24 of **"The Land Registration Act"** which provides as follows:-

***"Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;***

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

***"The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever....."***

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

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

In order for this Honorable Court to effectively deal with the issues in this case, I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

***"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed***

*with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”*

In the case of “**Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR** - clearly spells out the purpose of the above provisions of Section 26 (1) (b) as one to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery unprocedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of Land Registration Act, the Provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play – “**Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others**” ELC (Kjd) No. 204 of 2017.”

37. In this case, it is not disputed that the 2<sup>nd</sup> Defendant acquired its land in the year 2001 from a company called Marco Company Limited. Therefore, the suit land is legally and absolutely registered in its name from the Certificate of lease produced which vests the indefeasible rights, interest and title to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs claim on it through inheritance rights or otherwise overriding interest has no legal basis and even taking that her husband resigned from the MA Bayusuf & Sons and was fully compensated as per the request. That concludes the analysis under this subheading.

**ISSUE No. 2 - Whether the Plaintiff had any existing overriding interest under Section 28 (1) of the Land Registration Act on matrimonial spouse and inheritance rights over the suit property?.**

38. Under this sub-heading The Plaintiff was a widow to her late husband Anwar Mohamed Bayusuf. She was a mother of three children. She is a Director of a company trading in the names and style of the 2<sup>nd</sup> Plaintiff incorporated by her and her late husband. She solely depended on the income from the business of the 2<sup>nd</sup> Plaintiff. From her testimony, her husband was given the said yard by her late father in law and had been operating it for more than 10 years prior to his demise in 2010. She stated having been paying the land rates and rent and other utilities expenses for the said premises for over 10 years without anyone’s help and interference. According to her, together with her 3 children they were the bona fide heirs of the suit premises through her late husband. She had applied and obtained the Grant Letter of Administration to her husband’s estate. As stated above, the suit land belongs to the 2<sup>nd</sup> Defendant. It is not a family matter. Thus, the Plaintiffs cannot lay any matrimonial claim over the said property at all.

39. The matter of overriding interest under Section 28 (1) of the Land Registration Act, 2012, and the registration of titles is not applicable in this case. Upon there being disagreement among the Directors of the Company, her husband resigned from the company and was fully compensated. Her husband requested to move onto the suit land in order to put pressure onto the problematic tenant to move out. Although the tenant moved out but the Plaintiffs continued to carry out business onto the suit land. These were all facts known to all the parties herein. They did not find themselves there as envisaged under the provision of the law. Therefore the claim over the land under overrunning interest is unmeritorious and the same collapses on arrival.

**ISSUE No. 3 - Whether the parties are entitled to the relief sought**

40. Firstly, from the evidence adduced and the authorities relied on, there is no doubt at all that the 2<sup>nd</sup> Defendant is the “*Prima facie*” registered owner of the suit land all that parcel of land known as Land Reference Numbers Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa. The 2<sup>nd</sup> Defendant is entitled to all indefensible rights, interest and title to it bestowed by law.

Secondly as per the pleadings by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, it will be prudent that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs legally vacate the suit land under the laid down Provision of Section 152 E (1) & (2) (a), (b), (c) & (d) of the Land (Amended) Act, 2016. While making this direction. I am reminded of Madan, JA (as he then was) in the case of “*Chase International Investment Corporation and Ano. – Versus – Laxman Keshra & Others (1978) eKLR 143; 143 (1976 – 80) 1 KLR 891*” to the effect that:-

***“If the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred”***

And that exactly what I have done here.

**Issue No. 4 - Who will bear the costs of this suit?**

41. Cost is at the discretion of the Court. The Provisions of Section 27 of the Civil Procedure Act, Cap 21 of the Laws of Kenya are clear to the effect that cost follow events where it simply means the results of the case. In this case the judgement is in favour of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and thus the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs will bear the costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants for the Suit.

**DETERMINATION**

For avoidance of doubt, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have failed to prove their case as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants vide their Amended Plaint dated 24<sup>th</sup> April, 2018 on the balance of probabilities and hence their case is hereof dismissed. Accordingly, I proceed to enter judgment in favour of the 1<sup>st</sup> Defendant against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs vide their Defence and Counter Claim dated 17<sup>th</sup> October, 2017. Specifically, I award the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants the following reliefs:-

**a) THAT a declaration that the 2<sup>nd</sup> Defendant, the company trading in the name and style of Mohammed Ahamed Bayusuf & Company (T/A M. A Bayusuf & Sons Limited) is the lawful registered proprietor of all that parcel of land known as Land**

Reference Numbers Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa .

b) THAT a permanent injunction issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs, their agents, servants, employees or anybody purporting to act under him from entering, remaining constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the 2<sup>nd</sup> Defendant's quiet possession, occupation and utilization of all that parcel of land known as Land Reference Numbers Plot No. MN/V/1966 (ORIGINAL NO. MN/V/169211-2 located at Jomvu area Mombasa.

c) THAT an order of legal eviction from the Plot No. MN/V/1966 (Original No. MN/V/169211- 2) by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs within the next 90 days from this date and pursuant to the provisions of Section 151E (1) & (2) (a), (b), (c) & (d) of the Land Act, of 2012. In default forceful eviction to ensue at the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs expenses.

d) THAT the County Commander of Police, the County of Mombasa and the Officer in Charge of Police Station (OCS), Changamwe Police Station, Mombasa, to ensure that these orders are fully complied with without failure.

e) THAT the general damages and costs of this suit to be awarded and borne by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.

f) THAT Interest at Court rate

**IT IS ORDERED.**

**DELIVERED AT MOMBASA ON THIS 18<sup>th</sup> DAY OF November 2021.**

**L.L. NAIKUNI**

**JUDGE**

**ELC MOMBASA**

*In the Presence of Yumna Court Assistant*

*No appearance by Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs*

*M/s. Zainab holding brief for Mr. Mulei Advocate for the 1<sup>st</sup> Defendant*

*M/s. Zainab holding brief for Mr. Faiz Advocate for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants*