



REPUBLIC OF KENYA



**Sidi & another v Mwero & another (Land Case 182 of 2020)
[2025] KEELC 4831 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 182 OF 2020
LL NAIKUNI, J
JUNE 27, 2025**

BETWEEN

CATHERINE KENGA SIDI 1ST PLAINTIFF

JULIUS SIRYA THOYA 2ND PLAINTIFF

AND

SWALEH M MWERO 1ST DEFENDANT

JULIUS MUGIRE M'MARETE 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit instituted vide a Plaint dated 1st October, 2020 and filed on 9th October, 2020 by Catherine Sidi Kenga and Julius Sirya Thoya, the 1st and 2nd Plaintiffs herein against Walehe Mwero and Julius Mugire M'marete the 1st and 2nd Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the Defendants filed their Statement of Defence and Counter - Claim dated 10th November, 2020 but later on amended on 22nd February, 2022. The Plaintiffs responded to the Amended Statement of Defence and a Counter - Claim dated on 4th March, 2022.
3. It is instructive to note that at some point the parties were engaged in an intensive out of Court negotiation with a view of attaining an amicable settlement thereof. On 26th October, 2021 they informed Court of the tremendous progress they had made and only sought for some little time to finalise particularly on issue entailing a technical aspect of re – surveying of the suit land. Indeed, while granting them an extension of time, the Honourable Court encouraged them to pursue the mechanism taking that it was in tandem with the Judiciary policy on Social -Transformation on Access to Justice and Alternative Dispute Resolutions – Alternative Judicial System and Court – Annexed Mediation



enshrined under the provision of Article 159 [2] [c] of *the Constitution* 2010, Sections 59A, B,C and D of the *Civil Procedure Act*, Cap. 21 and Section 20 [1] and [2] of the Environment & *Land Act*, No. 19 of 2011. However, on both 30th November, 2021 and 24th January, 2022 the parties informed Court that the negotiations had become a cropper and hence the matter was fixed for hearing before this Court on 27th June, 2022.

II. Description of the Parties in the suit

4. The 1st and 2nd Plaintiffs were described as a Kenyan female and male adult of sound mind respectively, residing and carrying out business in the County of Mombasa within the Republic of Kenya.
5. The Defendants were described as male adults of sound mind residing and working for gain in County of Mombasa within the Republic of Kenya.

III. Court directions before the hearing

6. Nonetheless, on 23rd February, 2022, the Honourable Court fixed the hearing dated on 27th June, 2022 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 but due to various intervening reasons, the hearing could not commence. Eventually, the matter proceed for hearing on 2nd May, 2023 by way of adducing “viva voce” evidence with the Plaintiffs’ witnesses testifying in Court whereby they closed their case and the Defendants called their witnesses on 13th November, 2024 and closed their case thereafter.

IV. The Plaintiff’s case

7. From the filed pleadings, at all material times to this suit, the Plaintiffs were the owners of the suit property that was Parcel No.mn/ii/12032-deed Plan No. 355613 measuring approximately 0.0386Hectares having purchased the property from M’marete M’nthi [deceased]. Before the demise of the said M’marete M’nthi, transfer forms had been executed and all the requisite transfer fees paid.
8. On 29th May, 2018, the Plaintiffs lodged documents of registration in respect of Subdivision No.12032 [Original No.8411] of section II/MN. After lodging the documents for registration and issuance of title, they were informed of a letter dated 6th June, 2018 drawn by the 2nd Defendant requesting the Land Registrar to withhold the processing of the documents pending resolution of the dispute. In the said letter, the Defendants alleged that the 1st Defendant was sold part of the Plaintiff’s property that was, Parcel No. Mn/ii/12032-deed Plan No. 355613.
9. They were shocked by these allegations since the same M’Marete [deceased] that was said to have sold the 1st Defendant part of the Plaintiffs’ property had processed a deed plan for the Plaintiffs and executed Transfer documents for registration of the Plaintiffs’ title without mentioning the Respondents’ claim. The said plot measuring 60 x 30 as explained to the Plaintiffs by the 2nd Defendant affect the Plaintiffs’ Plot No. 12032, part of their neighboring Plot No. 12033 and the entire road reserve. They responded to the said letter dated 11th June, 2018 outlining the true position of the matter. The Defendants never replied to the said letter to date. On 29th September, 2020, the 1st Defendant through his agents’ began laying foundations on the said suit property and interfering with the access road to the neighbouring plot.
10. The Defendants never replied to the said letter to date. On 29th September, 2020, the 1st Defendant through his agents’ began laying foundations on the said suit property and interfering with the access road to the neighbouring plots. The matter was reported at Junda Police Post. On 30th September, 2020 the Plaintiffs wrote a letter to the Chief Officer, County Land, Planning and Housing to intervene on



the issue with an aim of giving each of the parties their due land acreage as per ownership documents or any legally acceptable documentation.

11. The Plaintiff relied on the following particulars of land dispute:-
 - a. Trespassing into the suit property.
 - b. Laying foundation and/or intending to erect permanent structures on the suit, property without consent of the Plaintiffs.
 - c. Intending to alienate and/or waste the suit Property without the consent of the Plaintiffs.
 - d. Interfering with the access road to the neighboring plots to the suit property.
12. The Plaintiffs stated that in the circumstance, the Plaintiff's claim against the Defendants was therefore for;
 - a. An order directing the Defendants to deconstruct the laid foundation and never construct any structures on the suit property.
 - b. An order restraining the Defendants from trespassing into the suit property.
 - c. An order directing the Defendants not to alienate, waste and/or transfer the suit property.
 - d. An order directing the Defendants not to interfere with the access road to the neighbouring plots of the Suit property.
 - e. An enforcement order be issued to Junda Police Station to ensure compliance.
13. The Plaintiffs also responded to the Defendants' Amended statement of defence and counterclaim through a response dated 4th March, 2020 where they averred that:-
 - a. The Plaintiff in response to Paragraphs 3 and 4 reiterated the contents of paragraph 5 of the Plaintiff.
 - b. The Plaintiff in response to Paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 14 of the Defendant's Defence, the Plaintiff reiterated the contents of Paragraphs 6,7,8,9,10,11,12,13,14 and 16 of the Plaintiff and continued to state that he was the beneficial owner of the Parcel No.mn/11/12032-deed Plan No.355613 measuring approximately 0.0386 Hectares.
 - c. The contents of paragraph 13 were admitted.
14. The Defence to Counter - Claim according to the Plaintiffs was that:-
 - i. In response to Paragraphs 1 and 2 of the counter claim, the Plaintiff stated that owners of Parcel No.mn/11/12032-deed Plan No.355613 was transferred and he was the rightful owner of the suit property.
 - ii. In response to Paragraphs 3, 4 and 5 of the counterclaim, the Plaintiff states that he was the beneficial owner of the Parcel No. Mn/11/12032- Deed Plan No. 355613 and as such, the defendants had trespassed his property.
 - iii. In response to Paragraph 5 of the Counter - Claim, the Plaintiff denied in toto.
 - iv. The Plaintiff prayed that the Defendants' Defence and Counter - Claim be dismissed with costs and Judgement entered for the Plaintiff as prayed in the Plaintiff.
15. The Plaintiffs called their witness PW - 1 on 2nd May, 2023 at 2.30 pm where he averred that: -



A. Examination in Chief of PW - 1 by M/s. Onyango Advocate.

16. PW - 1 testified under oath in English language. He was called Julius Sirya Thoya, a citizen of Kenya with all the particulars indicated from the national identity card shown to Court during the hearing of the matter. He resided in Kaloleni and a peasant farmer. He knew Catherine Sidi Kenga well. She was his wife. He associated himself with the witness statement dated 1st October, 2020 and the documents from the list of documents dated 1st October, 2020 be produced as Plaintiff Exhibit 1 to 12. He had commissioned a land surveyor and who prepared a report dated 29th January, 2021. It was marked for identification – MFI - “13”. In the year 1985, a friend of his sold him the land. He was paying ground monthly rent to the Landlord called Samson, but later on a Mr. Marete came in and he started paying rent to him in the year 2006, his neighbors called him that the land had been sub-divided and that ground was no longer paying ground rent, and they could buy the land. He did not have money then, but in July 2010 he went to Mshomoroni. All the neighbors were there. They all had paid the money to the Landlord so that the process could be continued. He was told the amount payable was a sum of Kenya Shillings One Hundred and Fifty Thousand [Kshs. 150,000/-] but he had an arrears of the said amount. It was in writing through an agreement of 11th July, 2010 [see the Plaintiff Exhibit Number 10].
17. The witness told the court that upon execution he made the payment. The Deed Plans were processed on 30th July, 2013 – Plaintiff Exhibits Numbers 3. After sometime he was called by the Landlord as he wanted some money. The Landlord took him to his Advocate and he executed the documents e.g. the Transfer Form – Plaintiff Exhibit No. 2 executed on 13th August, 2014; they were witnessed by an Advocate – the law firm of Messrs. J.N. Adongo. He paid the stamp duty – Plaintiff Exhibit Numbers 4, 5, 6 and 7.
18. He was not able to complete the transfer as he received a letter dated 6th June, 2018 from the Land Registrar indicating that he could not effect registration – Plaintiff Exhibit number 8. He was told to wait but later on he learnt that there was construction going on and that was how he came to court. The witness responded to the letter through another letter dated 11th June, 2018 [see Plaintiff Exhibit Number 9].
19. According to the witness the construction on site were photographs as shown under the Plaintiff Exhibit Numbers 12. The land measured 0.0386 HA. He refuted that he interfered with the sub – division as he was not there and they were the ones who appointed the surveyor. Before the letter was written, he had no issue with Mzee Swaleh, nor known him not the 1st Defendant. He had dealt with Mzee Marete and had seen the documents before Mzee Marete died. The agreement of 15th December, 2018, he told him that he had sold the land to any other person. The witness prayed for the orders sought from the filed Plaintiff.

B. Cross examination of PW - 1 by Mr. Adhoch Advocate.

20. PW - n1 confirmed that Mr. Samson was the brother to Mzee Marete. The witness bought the land from him in the year 1985. The house he bought was in the same plot but there was an extra portion. The ground rent was paid where his house was situated/standing. The house was smaller than the plot. He was called to pay the sum of Kenya Shillings One Hundred and Fifty Thousand [Kshs 150,000/-] the sub-division had been completed. The witness was shown, he was not present during the surveying and the sub-division. PW - 1 was asked to pay a sum of Kenya Shillings One Hundred and Fifty Thousand [Kshs. 150,000/-] for the extra space. They did not do a sale agreement for this. The Survey



was done the year 2005. The Deed Plan were done but which he could not remember the date. The witness came to know of the Swalehe M. Mwero when Mr. Marete died.

21. According to the witness the only document for the transfer for the new plot was the transfer signed on 13th August, 2014. He lodged the transfer in in the presence of Mzee Marete on 29th May, 2018 which was four [4] years thereafter. It was not true that the documents were backdated to fit to the dates when he died. PW - 1 reiterated that he met Swalehe in court. PW - 1 to the court that he was notified of the Swalehe by the Local Administration when the construction was going on. He went with all the documents on the land – the Deed Plan, the letter by Marete and the transfer.
22. On being referred to the sale agreement dated 11th July, 2010 the witness told the court that it was for the purchase of the land and he paid a sum of Kenya Shillings One Hundred and Fifty Thousand [Kshs. 150,000/-]. There was no proof of payment. He paid in instalments; he paid the first being a sum of Kenya Shillings Fifty Thousand [Kshs. 50,000/-] as first installment and the rest thereafter. He had no proof of the payment. The witness denied that he got more than what was required and that he denied his share. When it was put to him, the witness denied there was any back dating of the agreement to suit the situation.

C. Re - Examination of PW - 1 by M/s. Onyango Advocate.

23. PW - 1 affirmed that the agreement was never back dated. The sale agreement was the one Swalehe used for his land. When the new Administration came he said there was nothing that was outstanding. They were contended. The Landlord knew everyone. What was transferred to him was the same as what was on the ground and his house. Mr. Marete knew the parcels measuring 0.0386 HA.
24. The Plaintiffs called the Land Surveyor on 15th November, 2024 who testified that:

A. Examination in Chief of PW - 2 by M/s Odunga Advocate.

25. PW – 2 was sworn and testified in English language. He introduced himself as being Muimi Mwendwa. He told the Honourable Court that that he held a Bachelor’s Degree in Geo Matric Engineering and Geospatial – Information Systems from Jomo Kenyatta University. He worked for a Land Survey firm trading in the names and style of Messrs. Edward Kiguru Surveyors as a Land Surveyor assisting, and was a full member of ISK. In January, 2021 they were approached by their client Catherine Kenga to undertake boundary Survey for land MN/II/12032. The suit property was located at Shimoroni Mombasa. Their main task was to identify the boundary beacons and whether there was any development. They were to check on any construction activities and access of the plot. They were given Deed Plan and Transfer Form by which they were able to obtain the Survey Plan from the Director of Survey. The Survey Plan was No. FR/365/99.
26. Using the said Survey Plan they were able to locate the land. On the land there was a Swahili house which falls entirely on the land. They were also able to confirm there was a foundation of a building which was partially encroaching on the Plot No. 12032 by an area of 0.0047 HA and blocked the access of the Plot i.e. on a road reserve. PW - 2 stated that and that was their finding. He produced the Land Surveyor’s Report dated 29th January, 2021 and marked as Plaintiff Exhibit Number No. 13.

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

27. PW - 2 reiterated that he personally conducted the ground survey. At the initial stage the owner provided them with the Transfer documents. There was no Certificate of Lease. They had a copy of sale agreement. He did not have it in court as it was a long time ago. The witness based the Land Surveying exercise based on the Survey Plan. While doing so he confirmed that was contained on the Survey Plan



was what was on the ground. He admitted that the only discrepancies were the encroachment. They were instructed to survey only one plot – Plot No. 12032.

28. PW 2 stated the encroachment was on the plot. On being referred to to the Defendant Exhibit No. 4 he stated that while conducting the survey it was not necessary to conduct the neighbors. The Surveyor was guided through the coordinates. It's not necessary to have it pointed out be the owner. There was a boundary perimeter wall which does not encroach. The encroachment was on the road reserves. The plot No. 12032 – almost the whole part of the road reserve i.e. it's the foundation of the building not the beacon. By walking one would be able to access the plot but if the building got completed it would be not be possible by the owner. It would not be possible thought for any amendment it would be very complicated as it would mean apply for the amendment so the authorities taking that this was a Public Land – road reserve. In the meantime, it would mean stopping the construction. It would mean consultation of the neighbors through a public participation.

C. Re – examination of PW - 2 by M/s. Odunga Advocate

29. PW - 2 confirmed that that having the plot encroached on the road reserved it meant – calling for re – survey to correct the mistake which was complicated.
30. The Plaintiffs marked their case closed through his Counsel M/s. Onyango Advocate on 2nd May, 2023.

V. The Defendants' case

31. As already indicated, the Defendants responded to the Plaintiffs through an Statement of Defence and Counter - Claim dated 10th November, 2020 and Amended on 22nd February, 2022. The Contents of Paragraph 5 were denied in toto and the Plaintiffs were put to strict proof there. The Defendants further averred that the Plaintiffs had without any iota of right and without consultations with the Defendants extended the boundaries of Parcel No. Mn/ii/12032-deed Plan No.355613 which in effect has phased out the Defendants' parcel of land which was initially adjacent to the new parcel no.MN/II/12032 [Original no.84110] of Section II/MN.
32. The 2nd Defendant was the duly appointed Legal Administrator of all that parcel No. MN/II/12032 - Deed Plan no. 355613 formerly MN/II/202 together with two other persons not party parties to this suit by virtue of Grant of Letters of Administration issued by the Court on 30th June, 2015. In response to the contents of Paragraph 6, the Defendants averred that Mr. M'Marete, who was the 2nd Defendant's Father, now deceased, at no particular time disposed of the suit property to the Plaintiffs. The claim to the Plaintiffs' ownership was hereby denied, the Plaintiffs having failed to show this Court how they gained possession of the suit property. The Defendants averred that the Plaintiffs' acquisition of the Deed Plan and transfer documents was therefore fraudulent.
33. The contents of Paragraphs 7 and 8 were admitted and the Defendants further averred that the registration process was halted because the Plaintiffs had extended boundaries of the properties they purported to own, thereby claiming the adjacent parcel which they did not have proprietary right over. In response to the contents of Paragraph 9, the 2nd Defendant averred that sometime in the year 2008, his late Father Mr. M'Marete M'nthi had sold a portion of [60 X 30] off the suit property then known as MN/II/12032 to the 1st Defendant for a consideration.
34. Further the Defendants posited that during the sub-division process to create Plot no. MN/II/12032, the Plaintiffs intentionally provided falsified information to the Surveyor who mistakenly relying on the information provided, merged the two parcels of land which were curved out of the original land to obtain MN/II/12032 without the 2nd Defendant's knowledge and/or authorization as the administrator. The contents of Paragraphs 10, 11, 12 and 13 were denied and the Plaintiffs. The



- contents of paragraph 14 were admitted. The Defendants averred that the construction commenced on the basis that the 2nd Defendant as the Legal Administrator had the right to so construct as the holder of the mother title being parcel number MN/II/2020.
35. In response to the contents Paragraph 15, the Defendants asserted that being law abiding citizens, they halted the construction when the matter was reported to the Police. In response to paragraph 16, the Defendants denied each and every particulars of the Land Dispute as outlined therein and aver that it is the Plaintiffs who have illegally and/or fraudulently trespassed into the Defendants' property and intend to alienate and/or waste the suit property.
36. The Defendants relied on the following particulars of illegality and/ or fraud:-
- a. Illegally extending boundaries with the intention to alienate the Defendants' land without prior notice and authorization;
 - b. Providing falsified information to the surveyor which resulted into the instant boundaries dispute; and
 - c. Illegally merging the Defendants' portion of land measuring 60 x 30 with a new plot number 12032.
37. On the Amended Counter - Claim, the Defendant reiterated and adopted in toto the entire contents of their defence herein above and averred that: -
- i. The 2nd Defendant averred that he was the Administrator of the whole parcel of land known as MN/II/12032-Deed Plan No. 35561 formerly MN/II/202 owned by Mr. M'Marete M'ntii now Deceased by virtue of being the Legal Administrator and the Holder of the mother title to the property.
 - ii. The 2nd Defendant's claim of right to the title cannot be impeached and as a result he holds exclusive right of ownership to the suit property.
 - iii. The 2nd Defendant averred that prior to the demise of his late Father Mr. M'Marete M'ntii, he had sold to the 1st Plaintiff a portion of land measuring 60 x 30 adjacent to the house that the Plaintiffs occupy.
 - iv. It was not in dispute that the Plaintiffs were the owners of the Swahili House they occupy on the suit parcel. What was disputed was the ownership of the land adjacent to the suit property.
 - v. The Defendants averred that the process of registration of the Deed Plan and subsuming of the 2nd Defendant's plot to create a Parcel No. MN/II/12032 in favor of the Plaintiff was fraudulently done.
 - vi. The Defendants relied on the following particulars of illegality/ fraud:-
 - a. Illegally extending boundaries with the intention to alienate the 2nd Defendant's land;
 - b. Providing falsified information to the Surveyor which resulted into the instant boundaries dispute; and
 - c. Illegally merging of the Defendants' portion of land measuring 60 x 30 with plot number 12032.
38. The Defendants prayed for Judgment to be entered against the Plaintiffs jointly and/or severally for:-



- a. An Order of Mandatory Injunction directing the Plaintiffs to vacate the Portion of 60 x 30 of the property illegally curved and merged to form parcel number MN/II/12032.
 - b. An Order of directing the Land Registrar to conduct survey and separate the suit parcel of land initially merged as Parcel MN/II/12032;
 - c. Costs of the counterclaim.
39. On 13th November, 2024, the Defendants called DW - 1 and DW - 2 who testified as follows:-

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

40. DW - 1 testified under oath and in English language. He identified himself as being Batholomeu Mwanyungu. He introduced himself as being a Licensed Surveyor trading in the names and Style of Pi]matech Land Surveyors & Consultants. The witness stated having gotten authority from the Law firm of Messrs. FBO Adhoch & Company Advocate. He prepared the survey report dated 10th June, 2021. The terms of the Survey was that the position of the claimed un- surveyed plot in relation to parcel No. MN/II/2032 and 2033 – the development of plot No. MN/II/12032 and 12033. Further, they were to check and advise on the possibilities of consolidation of parcel MN/II/12032 and 12033 and sub-division into 3 to accommodate the un-surveyed plot. The methodology [Refer]. The Conclusion [Refer].
41. The witness stated that the person referred court to the Diagram attached to the report - “Defendant Exhibit Number 1”. The area of overlap was explained – the 4th & 5th bullets of the observation to wit that the part of MN/II/8411 leased to Mr. Swaleh M. Mwero now strided both MN/II/12033, 12034 and the road reserve. An area of 0.01HA of the leased plot was on the surveyed road reserve while an area of 0.013 of the same is on both parcel No. MN/II/12032 and 12033. The only way to resolve this issue was through an amicable settlement. The witness personally visited the suit land. DW - 1 stated that he charged a sum of Kenya Shillings Fifteen Thousand [Kshs. 15,000/-] for attending court to testify.

B. Cross examination of DW - 1 by M/s. Onyango Advocate.

42. DW - 1 reiterated that he had indicated the parcel was un – surveyed. He visited Plot No. 12032 and he saw the development of ordinary buildings. It was the owner’s obligation to conduct the sub – division. The size of the Plot 12032. The witness did not have the chance of meeting the owner of the two [2] plots. After the sub-division, a road reserve was created. The development on Plot 12032 – being un-surveyed land and hence there was encroachment.

C. Re - examination of DW - 1 by Mr. Adhoch Advocate.

43. DW - 1 confirmed that it was startup construction upto the 2 to 3 meters but it was not on the report. He was not shown any sale agreement for these plots. The Plots No. 12032 was bigger than Plot No. 12033. It was excluding the road reserve. The un-surveyed plan to be down, there was only the startup development, produced as Defendant Exhibit Number 1.
44. The Defendants called their second witness DW - 2 on 13th November, 2024 and he testified as follows:-

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

45. DW - 2 testified under oath and in English language. He was called Swaleh Mvurya Mwero a citizen of Kenya with all the particulars as indicated from the national identity card shown to Court during the hearing of the case. He lived in Mombasa, at Kisauni area Mshomoroni. The witness recorded



statement dated 10th November, 2020. The witness also filed a list of documents dated 10th November, 2010 – 7 documents produced as Defendant Exhibit Numbers 2 to 8. In his defence the witness stated that he filed a Counter - Claim. According to DW - 2, on 15th December, 2000, he bought a parcel of land – measuring 60 x 30 ft, by then it was Plot No. MN/II/202. From then on Mzee Marete and himself executed a sale agreement dated 15th December, 2008; the witness was shown the beacons, at the moment there were no development. Instead he was sued in 2012 to 2013 some sub division were done. His plot was 60 x 30 being from the plot No. MN/II/202. The witness came to learn about the sub division in 2018 which he was not involved. The witness came to learn that he had no plot left for him. The witness did not know who did the sub - division.

46. DW - 2 told the court that he summoned the seller before chief of the location. They came but it was not useful. The witness came to learn it's the Plaintiff who had benefited from the Plot. They were only showing them the deed plan. The witness subsequently engaged a land surveyor. He was aware of the funding and the recommendation by the survey. The witness could only be convinced that the Plot belonged to the Plaintiffs if they produced the title documents. But they only produced the deed plan. The witness told the court that he filed a Counter - Claim seeking for the consolidation of the plots and a new title issued. On the occupation of the Plaintiffs to be evicted to allow him to get his plot.

B. Cross examination of DW - 2 by M/s. Onyango Advocate.

47. DW - 2 confirmed that he bought the plot on 15th December, 2008. There were two [2] witnesses when he bought it – Mr. Osoro and Gophia N. Dzuoga when he bought the plot. The witness was shown the land and he visited it, there was existing boundaries. There were very clear demarcation and there were standard – but he had not produced in Court. Part of the sale agreement was hand written as he was using a template. If found the people on the land and Mr. M'Marete M'ntii was present.
48. According to the witness, it was Mr. Marete who caused the sub-division. He ought to have known what he was selling. He issued the titles to the ones he had sold the land to but he wondered how comes he left him out. The witness blamed the owners of the land and the Plaintiff as they were aware of the land they bought. DW 2 had no knowledge of when Marete passed on – the grant dated 21st October, 2014 – 6 years after he bought the land. They developed the land in 2021. In 2018 the witness came to learn of the issues before the Land Registrar, after they registered the caveat. The witness was not aware of the complaint by the land owners [Plaintiff Exhibit Number 9 being a copy of a letter dated 11th June, 2018]. With reference to his Replying Affidavit – documents the witness stated that from the letter they said the sub-division was done in 2010. The witness had not produced any evidence of fraud.

C. Re - examination of DW - 2 by Mr. Adhoch Advocate.

49. DW - 2 reiterated that it was not true that the survey was done in 2005. The Deed Plan for the land was procured. When the sub-dividing the land it was necessary to have neighbors. With reference to the Deed Plan the witness stated that it was dated 20th July, 2013. By that time he had already bought the land. He bought it in 2008. He had no problem with the deed plan although it had encroached on to the plot he bought.
50. The 1st and 2nd Defendants marked their case closed on 13th November, 2024 through their counsel on record Mr. Adhoch Advocate.

VI. Submissions

46. On 13th November, 2024 after the Plaintiffs and Defendants marked the closure of their cases, the Honourable Court directed that the parties file their written submissions within stringent timeframe



thereof on. Unfortunately, by the time of penning down this Judgement, the Honourable Court had managed to access the written submissions from neither the Judiciary CTS Portal nor filed at the Environment & Land Court Registry Mombasa. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 27th June, 2025.

VII. Analysis and Determination

47. I have keenly assessed the filed pleadings filed by all the 1st & 2nd Plaintiffs and 1st and 2nd Defendants herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
48. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four [4] issues for its determination. These are: -
 - a. Who is the bona fide purchaser for value without notice?
 - b. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff?
 - c. Whether the Defendants are entitled to the orders sought in the Counter claim?
 - d. Who bears the costs of the suit and counter claim?

ISSUE A: Who is the bona fide purchaser for value without notice

49. From the filed pleadings and the proceedings herein, both the Plaintiffs and the Defendants are claiming ownership of the suit property and interestingly on the premise of purchase. They are both deserving proprietary protection by this Court and to adequately donate this protection this Court must look into the root of their titles. This approach was well appreciated in the case of “Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others[2016] eKLR”, when the Court held: -

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

50. Presently, there exists two sale agreements over the suit property which was entered into between different parties. To start off, the Court will examine the Plaintiffs’ alleged ownership over the suit property and it will in the process seek to determine whether there was trespass as alleged by the Plaintiffs.
51. As earlier conceded, M’Marete M’ntii was the registered owner of the suit property prior to the Plaintiffs’ and Defendants’ claim of ownership. The Plaintiff adduced evidence through a Sale Agreement executed on the 11th July, 2010, which informs this Court that he bought the suit property from Marete as indicated in the agreement. Under the provision of Section 7 of the *land Act*, No. 6 of 2012, land acquisition by purchase is one of the process of acquiring land in Kenya. Equally, it is a requirement under the provision of Sections 3[3] of the Law Contract Act, Cap. 23 and 38 of the



Land Act, No. 6 of 2012 hold that any transactions touching on land must be reduced into writing. Section 3 of the Law of Contracts Act provides thus: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless-
[a]the contract on which the suit is founded –[i]is in writing.[ii]is signed by all parties thereto; and[b]the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

52. The Sale Agreement produced by the Plaintiff has the requisite tenements of a good contract in the sense that it contains the names of the contracting parties; it clearly sets out the terms and conditions and the same is fully executed. As well, it contains the agreed consideration for the purchase. The Plaintiff stated that he bought the suit property from M’Marete M’ntii, whether this is true or not is not clear to this Court, but as far as evidence is concerned, he has attached a copy of the sale agreement.
53. However, the 1st and 2nd Defendants challenged the authenticity of the sale agreement as well as the 1st and 2nd Plaintiff’s alleged ownership which the Defendants averred that the Plaintiff is seeking to deprive them of the property. The execution of the Sale Agreement shows the intentions of the contracting parties to be bound by the terms therein. In this case the parties had a covenant of sale and purchase of the suit property. The contract was not drawn by any advocate who could be contacted to confirm the same. It cannot be gainsaid, when the title of a party is under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. This was well captured in the case of “Munyu Maina v Hiram Gathiba Maina, Civil Appeal No 239 of 2009”, the Court of Appeal held that: -

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

54. The Plaintiff was thus duty bound to lead evidence as to their purchase. This court has perused Pex 2 which is a transfer between 1st Plaintiff and M’Marete M’ntii which was dated 13th August, 2014 which purported transfer was done in 2014 which was four [4] years after execution of the Sale Agreement. There are no completion documents sufficiently placed before this Court. Additionally, there is no evidence that the Plaintiff ever paid the consideration for the Sale. As it is, the Sale Agreement is an expression of intentions. It was a condition that possession was to be delivered up after completion of the purchase price.
55. The Plaintiff having opted not to avail the vendor or counsel who drew the sale Agreement, it was incumbent upon him to at least lead some evidence that he complied with the terms of the sale agreement. The provision of Sections 107[1] and 108, 109 of the Evidence Act, Cap. 80 on “Burden of Proof” - there be prove by the one who alleged. The Provision of Section 108 of the Evidence Act, Cap. 80 provides:

“108. Incidence of burden

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



56. Thus it required of the Plaintiff to plead evidence to support his claim of ownership. There being no title deed or any executed transfer forms, the Sale agreement cannot be used as conclusive evidence of ownership of land but mere expression of intention.
57. To this end, even though the Sale Agreement adduced by the Plaintiffs is a valid document the Plaintiffs failed to lead any shred of evidence to demonstrate that the title passed to him. It is curious to note that the Plaintiffs did not find it necessary to explain to this Court what took him that long before he could attempt to effect transfer. The Provision of Section 26 [1] of the *Land Registration Act*, No. 3 of 2012 held that a Certificate of title was conclusive “ prima facie evidence” of absolute and legal registration of the land. It vested an indefeasible rights, title and interest on land to the proprietor of the land by law. There is nowhere in the law that a Sale Agreement can be taken as proof of ownership unless parties have given effect to the intentions contained in the agreement. Example being where the purchaser has paid the consideration, completion documents have been availed and the transfer documents dully executed, the intentions of parties to confer ownership can be inferred. Herein, the Plaintiffs failed on a balance of probability to demonstrate his ownership over the suit property.
58. The Defendants alleged that the Plaintiff obtained the land fraudulently. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black’s Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Plaintiffs. How then can fraud be proved? The Court of Appeal in the case of:- “Mombasa Civ Appeal No 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR” held: -
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”. [emphasis added]
59. Similarly, the Court of Appeal decision in the case of “John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR” held that:
- “we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.”
60. The Defendants under paragraph 5 enumerated particulars of fraud and illegality which he attributed to the Plaintiffs. The basis for claiming fraud and illegality is that the Plaintiffs extended boundaries with the intention to alienate the 2nd Defendant’s land, providing falsified information to the surveyor which resulted into the instant boundaries dispute and illegality merging of the Defendants’ portion of land measuring 60 x 30 with plot number 12032. There is no evidence that has been placed before this Court to intimate existence of fraud. Against any backdrop of evidence, the Defendants did not place before this Court any material evidence to enable it to interrogate and conclude that there was fraud on the part of the Plaintiffs.



61. Having said that a bona fide purchaser has been defined by the Court in the case of “Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR” as:-

... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

62. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.

63. My answer to the first question is that there was a valid sale agreement entered into between the parties. The next question is whether the purchase price was paid in full. After the purchase price has been made in full then the Plaintiffs were meant to obtain land control board consents. Obtaining the Letter of Consent from the Land Control Board as required under the provisions of the land Control Act, Cap. 302 is a key ingredient to transfer of controlled agricultural land. Section 6 of the Land Control Act, Cap. 302 thereof provides as follows :-

Transactions affecting agricultural land[1]Each of the following transactions that is to say—

- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land [Planning] Regulations, 1961 [L.N. 516/1961] for the time being apply;

...is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

64. Additionally, there is no evidence that the Plaintiff ever paid the consideration for the Sale. As it is, the Sale Agreement is an expression of intentions. It was a condition that possession was to be delivered up after completion of the purchase price. The Plaintiffs having opted not to avail the vendor or counsel who drew the sale Agreement, it was incumbent upon him to at least lead some evidence that he complied with the terms of the sale agreement. As indicated the provision of Section 107[1] of the Evidence Act, Cap. 80 required of the Plaintiffs to lead evidence to support his claim of ownership. There being no title deed or any executed transfer forms, the Sale agreement cannot be used as conclusive evidence of ownership of land but mere expression of intention.



65. To this end, even though the Sale Agreement adduced by the Plaintiffs is a valid document the Plaintiffs failed to lead any shred of evidence to demonstrate that the title passed to him. It is curious to note that the Plaintiffs did not find it necessary to explain to this Court what took him that long before he could attempt to effect transfer. A certificate of title is prima facie evidence of absolute and indefeasible ownership of land. There is nowhere in the law that a Sale Agreement can be taken as proof of ownership unless parties have given effect to the intentions contained in the agreement. Example being where the purchaser has paid the consideration, completion documents have been availed and the transfer documents duly executed, the intentions of parties to confer ownership can be inferred. Herein, the Plaintiffs failed on a balance of probability to demonstrate his ownership over the suit property.
66. On the part of the land sale agreement by the 1st Defendant and M' Marete M'Ntii on 15th December, 2008 where the parties agreed that for the consideration of Kshs 160,000/- the landlord was permitting the tenant [1st Defendant] to construct a temporary residential house on the whole parcel of land known as MN/II/12032-Deed Plan No. 35561 formerly MN/II/202. The 2nd Defendant on the other hand was the Administrator of the whole parcel of land known as MN/II/12032-Deed Plan No. 35561 formerly MN/II/202 owned by Mr. M'Marete M'ntii now Deceased by virtue of being the Administrator and the Holder of the mother title to the property.
67. The 2nd Defendant's claim of right to the title cannot be impeached and as a result he holds exclusive right of ownership to the suit property. The 2nd Defendant averred that prior to the demise of his late Father Mr. M'Marete M'ntii, he had sold to the 1st Plaintiff a portion of land measuring 60 x 30 adjacent to the house that the Plaintiffs occupy. Personal Representative is defined in Section 3[1] of the [Law of Succession Act](#) to mean the executor or administrator, as the case may be, of a deceased person. A personal Representative is appointed by the Court after filing the necessary application as is provided by Section 51 of the [Law of Succession Act](#), Cap. 160.
68. The provision of Sections 79 & 82 of the said Succession Act, Cap. 160 specifies the powers and duties of the Personal Representative. Section 79 states as follows:-
- “the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and subject to any limitation imposed by the grant, all property of the deceased shall vest in him as personal representative.”
69. The taking out of Grant Letters of Administration of the estate of M'Marete M'Ntii makes the 2nd Defendant entitled to the protection of the rights of a beneficial proprietor of the suit property. This gets me to the discussion of the 1st Defendant's claim on house without land. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter is whether the 1st Defendant has proved ownership of the suit property being house without land. Before indulging into whether the 1st Defendant's case has merit, the Court shall discuss the concept of house without land. In coastal Kenya, a land tenure known as house without land is common. This is where a person can own a house without owning the land upon which the house stands. In the case of:- “Famau Mwenye & 19 others - Versus - Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005” [Ouko, J.] [as he then was] described the concept of house without land as follows:
- “The dispute arises from land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands.



It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

70. Further, in the case of:- “Christopher Baya and 2 Ors. v Philip Kiluko and Another Mombasa HC Civil Appeal No. 64 of 2004”, Khaminwa, J. correctly understood the concept as follows:

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

71. It is common knowledge that were a person is the registered owner of a parcel of land, there is a conclusive presumption that he is also the owner of all buildings of whatever kind thereon. Indeed, the Registration of Titles Act Cap 281 has defined land to include thing embedded for the permanent beneficial enjoyment of that to which it is so attached. However, the Land Title Act Cap 282 which is applicable to the coastal region, and which has since been repealed, abrogated partly the Mohammedan Law. Under the Mohammedan law and the Land Titles Act, Cap 282 a building erected by one person, even by a trespasser on the land of another does not become attached to the land but remains the property of the person who erected it. Such interests are, however, supposed to be noted in the certificate of title. It is therefore not uncommon in this region for the buildings of the type with which the present case is dealing with to be erected upon the land of another person in consideration of a monthly rent. The concept of owning a house or coconut trees by a person who is not the owner of the land was and still being used by absentee landlords to either generate an income for themselves or to forestall the claim of adverse possession by people who would have stayed on such parcels of land for more than twelve years. This interesting concept of “owing a house or coconut trees without land” as recognized under the Land Titles Act, which was enacted in 1908, was followed up by the enactment of the Eviction of Tenants [Control] [Mombasa] Ordinance Cap 298 which came into effect on 31st December 1956 and lapsed on 31st December 1969. Section 2 of the Ordinance defined a “house” to mean any building or erection used as a piece of residence and constructed on land which is not owned by the owner of such building or erection. As can be gleaned from the above authority, the question of ownership of the house-without land was wholly a question of physical possession of the subject house.

72. Having expounded on the concept of house without a land; I shall proceed to examine whether the 1st Defendant’s suit discloses any cause of action against the Plaintiffs. In this instant case we must note that by the arrangement of the concept of ‘house without land’, there would be no title deeds issued for the houses in question. The evidence of ownership of the house was two-fold:

- a. Actual physical possession of the house-without-land.
- b. Recognition of the physical possession by the true owner of the ground upon which the house stood.

73. Applying the two-fold test to this case shows that the 1st Defendant resided in the suit land the owner of the land the deceased was aware or recognized where the house stood. Therefore, by the first test, the Court finds that the owners of the building were the Defendants most especially the 1st Defendant.

74. Therefore, by the first test, the court finds that the owners of the building were the sellers who were the in active possession and they had full authority to transact in the property. The deceased being the owner of suit land and had full legal capacity to allow the construction of the house and there was no illegality on their part when they sold it. This has the effect of distinguishing the cited case of “Root Capital Incorporated v Tekangu Farmers Cooperative Society Ltd & Anor [2016]eKLR” because in



the present scenario the transactions were lawful and validly conducted by persons who had capacity to contract.

75. On the second aspect of the test, the recognition of the physical possession by the owner of the ground the agreement between M' Marete M'Ntii and the 1st Defendant in 2008 shows that the owner of the land was aware that the 1st Defendant was on the property.

76. By failing to discharge this specific evidential burden, the court finds that the Plaintiffs could not prove that Defendants trespassed. At page 193 of *The Broom's Maxims of Law - A Selection of legal Maxims : Classified and Illustrated [1864]* by Herbert Broom there is a chapter on "Fundamental Legal Principles" discussing this legal maxim : *Nullus commodum capere potest de injuria sua propria* : No man shall take advantage of his own wrong.

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

77. At page 195 the Maxim further provides that:-

"It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned."

78. In conclusion on this issue, the Honourable Court finds that the 1st and 2nd Defendants provided material and evidence to prove that they had a right to the house without land and that he had not trespassed. I find the argument plausible and cogent.

ISSUE No. B]. Whether the Plaintiffs are entitled to the orders sought in the Plaint

79. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaint, herein. Having concluded that the Plaintiffs have not proved their case. It is further the finding of this Honourable Court that they are not entitled to the reliefs sought in the Plaint.

ISSUE No. C]. Whether the Defendants are entitled to the orders sought in the Counter - Claim

51. Under this sub title, the Court has already previously stated and determined that the Defendants have proved their case in the counter claim. The Defendants prayed for judgment against the Plaintiffs jointly and/ or severally for;

- a. An Order of Mandatory Injunction directing the Plaintiffs to vacate the Portion of 60 x 30 of the property illegally curved and merged to form parcel number MN/II/12032.
- b. An Order of directing the Land Registrar to conduct survey and separate the suit parcel of land initially merged as Parcel MN/II/12032;
- c. Costs of the counterclaim.

80. The point of convergence in these authorities is that a mandatory injunction is different from a prohibitory injunction. In a prohibitory injunction the applicant must establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which



cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favour. These points were well elucidated in the locus classicus case of “Giella v Cassman Brown & Co. Ltd [1973] EA 358”.

81. An applicant in a mandatory injunction must, in addition to these parameters, establish the existence of special circumstances which makes it a higher standard of proof. The rationale for this is as was stated in the case of:- “Shepard Homes v Sandham [1970] 3 WLR Pg. 356” that: -

“Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Appellant was entitled to retain the erection”.

82. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.
83. It is evident that a Mandatory Order is an official order given by a court of law telling someone that they must do something or stop something. For this order to be issued, a hearing must be held and thereafter court determines whether to issue the mandatory order or not. The Defendants have proved their case as per the counterclaim they are therefore entitled to protection by this Court. The Defendants can only enjoy right of ownership, if the court would issue the mandatory order as sought.
84. On the second prayer, the Land Registrar and the Surveyor, who have been vested with the statutory mandate to establish, ascertain and fix boundaries have the technical capacity and are the custodians of the records relating to registered land. Before any parcel of land is registered and titled, there is ordinarily a survey undertaken and the dimensions of the land delineated and in respect of every registration section there is normally a survey map delineating all the parcels carried under the registration section. To rectify the mistake done I grant prayer 2 of the Counter - Claim. Prayer 3 shall be discussed separately.

ISSUE No. D]. Who bears the costs of the suit and Counter - Claim

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



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

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

87. In the present case, I reiterate that the Plaintiffs have failed to establish their case as pleaded against the Defendants therefore, I proceed to award the 1st & 2nd Defendants the costs of this suit. Further, the Defendants presented a counter claim which according to the analysis of the evidence by this Court was proved I therefore also award them the costs of the Counter – Claim.

VIII. Conclusion and Disposition

88. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have failed to established their case against the Defendants herein while the Defendants proved their case against the Plaintiffs as per the Counter - Claim. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the 1st & 2nd Defendants herein with costs as the 1st & 2nd Plaintiffs has failed to establish his case as per the plaint dated 1st October, 2020 and filed on 9th October, 2020.
- b. That Judgment be and is hereby entered in favour of the 1st & 2nd Defendants [Plaintiffs in the Counter – Claim] with costs for having proved their case according to the Counter - Claim dated 10th November, 2020 which was Amended on 22nd February, 2022.
- c. That the Plaintiffs’ case is dismissed in its entirety as the 1st & 2nd Plaintiffs has failed to prove his case on a Preponderance of Probabilities and the balance of convenience.
- d. That an Order of Mandatory Injunction be and is hereby issued directing the 1st and 2nd Plaintiffs to vacate the Portion of 60 x 30 of the property illegally curved and merged to form parcel number MN/II/12032 as provided for under the provision of Section 152E of the [Land Act](#), No. 6 of 2012.
- e. That an Order of directing the Land Registrar be and is hereby issued to conduct survey and separate the suit parcel of land initially merged as Parcel MN/II/12032
- f. That costs of litigation of the Plaint and Counter - Claim to the 1st & 2nd Defendants herein to be borne by the 1st & 2nd Plaintiffs herein.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF JUNE 2025.

HON. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT



Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Mubassu Advocate holding brief for M/s. Onyango Advocate for the Plaintiffs.
- c. No appearance for the Defendants.

