



**Mbatia v Mchangamwe & another (Environment & Land Case
E020 of 2022) [2025] KEELC 4640 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4640 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E020 OF 2022**

**LL NAIKUNI, J
JUNE 20, 2025**

BETWEEN

ANNE WANJIRU MBATIA PLAINTIFF

AND

ALI KHAMIS MCHANGAMWE 1ST DEFENDANT

OMAR KHAMIS MCHANGAMWE 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains the Complaint dated 25th February, 2022 and filed on 28th February, 2022 by Anne Wanjiru Mbatia, the Plaintiff herein against Omari Khamis Mchangamwe and Ali Khamis Mchangamwe the 1st & 2nd Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the Defendants entered appearance and subsequently filed their statement of defence dated 21st November, 2022 and filed 23rd November, 2022.

II. Description of the parties

3. The Plaintiff was described as an adult female of sound mind and understanding. The 1st Defendant was described as a male adult residing in Chaani Mombasa County. The 2nd Defendant was described as a male adult residing in Chaani Mombasa County.

III. Court directions before the hearing

4. Nonetheless, on 17th May, 2022, the Honourable Court fixed the hearing dated on 19th September, 2022 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Plaintiff’s



witnesses PW - 1; testifying in Court on 19th September, 2023 after which they marked her case closed on 9th December, 2024 and the Defendant called their witness DW - 1 on the same date they marked their case closed on the same day.

IV. The Plaintiff's case

5. From the filed pleadings, it is the Plaintiff's case that at all material times to the suit, the Plaintiff was the owner of Plot No.21/15 upon purchase from the County of Mombasa since 1985. A search was conducted on 21st February, 2022 confirming that the land belonged to the Plaintiff and so did a letter dated 22nd February, 2022 from County Commissioner of Changamwe Sub County. Upon Application a search was also conducted on the neighboring plots No. 21/16 and the results were that the next plot belongs to one HAMISI MCHANGAMWE KISU A who happens to be the deceased father of the 1st and 2nd Defendants.
6. The Plaintiff had been stopped from using this Plot recently when she sought to build on the vacant portion by the Defendants. They are insisting that this plot No. 21/15 was theirs despite the clear documentation of title. That the Deputy County Commissioner has equally verified the same facts and written a letter to the effect that Plot No. 21/15 and 21/16 belongs to the Plaintiff and the Defendants' father respectively. That the County Officers have done a topographical survey and verified the said information. The continued insistence by the Defendants that this plot No.21/15 was theirs did not hold water at all as their father plot is next and they live on their plot. The Plaintiff's mother was the one who applied for the initial plot No.1128 where she was living but insisted that the Plaintiff be documented on the same in 1982.
7. According to the Plaintiff prior to the year 1982, the three places Chaani, Miritini and Mikindani had other inhabitants that the World Bank project bought these three places from the original owners and created a planned settlement properly serviced with roads and electricity and water lines and beacons. The initial plot No. 1128 which the Plaintiff had paid for was overrun by road in the ensuing plan of Chaani and the Plaintiff had to be resettled to plot No. 21/15, in the year 1985 an offer letter was issued. Since that time, the Plaintiff dug a foundation and placed Ballast and sand on the site, but could not finish the construction.
8. The Plaintiff then gave a caretaker one Mr. Kageri to use the plot. He would be selling charcoal and vegetables on the said plot. He also raised his children on the Plaintiff's plot. Eventually, in the year 2010, he left the Plot. Upon the caretaker leaving, his daughter one Damaris Mwendu Kageri used the place and leased it to a church between the years 2010 and 2019. However, in the year 2019, the Plaintiff required to construct on the place. She wrote a formal letter to her dated 26th November, 2019 and she managed to have the church relocate from the place. She also vacated the plot.
9. Needing the construct, the Plaintiff was impeded by the Defendant in 2019. They went to the County Commissioner who deliberated over the matter and they accepted to leave. Again they were now frustrating the Plaintiff efforts to build hence the present stalemate that brought the matter to court. The Plaintiff had commenced construction when the heated exchange came up prompting the Plaintiff to seek Police assistance. The Defendants were blocking the Plaintiff from accessing her plot. That a consignment of construction stones was off loaded at Chaani Police station. There was no basis for the Defendants to block the Plaintiff from utilizing her plot No 21/15. The Plaintiff sought injunctive orders together with Police assistance. This Court had jurisdiction to hear and determine this matter. There was no other cause of action neither any other previous case between the same parties over the same subject matter.
10. The Plaintiff prayed for Judgment against the 1st & 2nd Defendants severally and jointly for:-



- a. That a permanent injunction do issue against the Defendant prohibiting them by themselves, their agents and or servants or by any other person acting on their behalf from invading, using, attempting to occupy, harassing or in other way seeking to divest the plaintiff and her workers from the quiet enjoyment and exclusive use of the property Plot No. 21/15 at Chaani SITE and Service Scheme.
 - b. That a declaration to issue that plot Number 21/15 belongs to the Plaintiff.
 - c. That the OCS Chaani Police station be ordered to enforce the orders issued herein at the interim and upon judgment herein.
 - d. That the costs for this suit be borne by the Defendants.
11. The Plaintiff called his witness on 14th March, 2022 at 12 noon who testified as follows:-

A. Examination – in – Chief of PW - 1 by Akanga Advocate.

12. PW - 1 testified under oath and in English language. She identified herself as ANNE WANJIRU MBATIA, a citizen of Kenya with all the particulars as indicated in the national identity card shown to Court. She resided at Mariakani and the Plaintiff herein. She recorded a witness statement dated 25th November, 2022, She produced 18 documents to support her case as Plaintiffs Exhibit Numbers 1 to 18. Her plot was Plot No. 21/15 at Chaani site service scheme. The plot No. 21/16 for Defendants and hers were adjacent to each other for a period of 30 years from year 1986. According to her, these plots were sub – divided and hence apportioned to them. It was for owners. They were bought by World Bank who sub - divided them and it was sold to them by the Municipal Council of Mombasa. The Defendant’s father was well known to her. From the year 1985, she had been occupation of the said plot; She gave it to a tenant to use it upto the year 2010 but they left to upcountry. They left their daughter – Mwendu who had put up a church. She surrendered it to her.
13. According to the witness, from 2021, she approached the Municipal Council to enable her commence construction but the Defendant objected to the effect that it was then Plot No. 21/15. The witness commissioned the Land Surveyor to survey the land and found out that the plots were intact. There was no encroachment. Indeed her plot was smaller as there had been a road. She produced all the developed. She urged the Court to grant her all the prayers sought from the filed Plaintiff.

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

14. PW - 1 stated that in the year 1982, she dug the foundation, but she stopped as her father died. There was no interference. She allowed tenants who used to sell charcoal but never paid any rent. With reference to a copy of the letter of Allotment- it has three dates 24th August, 1982 and 31st December, 1987 at the appendix. Further, there is a letter of offer dated 27th May 1985 for the plot 21/15 Chaani.
15. According to the witness, her mother used to live on this plot but it happened to be a road use/ reserve and she was given an alternative land- hers was no 1128 the letter of Allotment was written Resettled Tenant. Plot No. 21/15 had no one as it had not been in court- to testify on the evolving and background historical facts- the use and occupation of the suit properties Plots Nos 21/15 and Plot No 21/ 16 accordingly. She followed all the pre – conditions as set out in the Letter of Allotment. She poured building material and dug a foundation but was stopped due to the demise of her husband. The value of the land was a sum of Kenya Shillings One Million (Kshs. 1,000,000/-).
16. PW - 1 told the court that she had filed a suit in the lower court - CMCC – ELC No. 15 of 2020 but she withdrew it. She had not demolished anything on the plot; it had been vacant all along.



C. Re - examination of PW 1 by Mr. Akanga Advocate.

17. PW - 1 confirmed that with reference to the letter of offer; the date of 24th August, 1982 was the received date for the payments. They would be making every time they paid for the plot.
18. The matter was adjourned and the Plaintiff called her second witness on 18th July, 2024 where the witness testified as follows:-

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

19. PW - 2 testified on oath and in English language. He identified himself as CAXTON MBARU and worked at the County Government of Mombasa as the Senior Land Surveyor – Land, Planning and Housing Department. He did the report dated 8th March, 2022 on this matter. A complaint was lodged in their office by an advocate called Nyangwezi and Odundo Advocate and Hali Hamisi and there was another complaint had been done by the Deputy County Commissioner. The witness went to the ground and examined the two (2) plots- No. 21/15 and 21/16 at Chaani site- on 4th March, 2022 and there were people on the ground. He conducted the survey.
20. According to witness his findings were that plot 21/15 belonged to Anne Mbatia while Plot no 21/16 belonged to Omar Hamisi Mchangamwe. From the official search the Plot No. 21/15 was for Anne Mbatia, she had rent arrears. The 3 documents- plaintiffs Exhibits 16,17 and 18: -
 - a. Letter dated 11th February, 2022
 - b. The Survey report.
 - c. The official search.
21. They had already planted the beacons earlier on.

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

22. PW - 2 reiterated that he was instructed by the Director of Planning based on the two (2) letters. In his report he had completed acreage for Plot No. 21/16 for 473M. In his report he had completed acreage for Plot No. 21/15 the beacons. He had not annexed to the Datum for survey though it was referred to. The People in attendance i.e. 12 people – apart from the Security personnel and the parties. He did not know their relevance. The witness told the court that he had already done for Plot No. 21/15 and hence he did not need to do another survey.
23. The Chaani site came into being in the year 1981. Before then, it belonged to other people – it was the World Bank purchased and gave the County of Mombasa who re-distributed to the individuals.

C. Re – examination of PW - 2 by Mr. Akanga Advocate.

24. PW - 2 confirmed that he had the Survey Plan and the two plots were shown theirs. That was all. The Plaintiff called her case to a close on 18th July, 2024 through her advocate Mr. Akanga.

V. The 1st and 2nd Defendants' case

25. The 1st and 2nd Defendants filed their Statement of Defence on 23rd November, 2022 dated 21st November, 2022, the Defendants denied paragraph 3 of the Plaint putting the Plaintiff to strict proof averring that they through their now deceased father and later themselves have been on the said parcel for an uninterrupted period from year 1981 and that the disputed portion claimed by the Plaintiff is actually part and parcel of their Plot No.21/16.



26. In response to Paragraph 4 of Plaintiff the Defendants averred that the searches alluded to by the Plaintiff were from the Mombasa County that did not in any way give the boundaries or locations of the two plots and most importantly the acreage of both plots had not been supported by any survey report in any manner whatsoever. In further response to paragraphs 4 & 5 of Plaintiff it was absurd that the County Commissioner of Changamwe Sub-County would purport to write a letter confirming ownership of a parcel of land while the custodian of such records were clearly not vested in their offices. The averment that Plot Number 21/16 belonged Hamisi Mchanagamwe Kisua was admitted and further that the portion now claimed by the Plaintiff has been in their possession for over 40 years and that they have even had tenants on the said parcel who were paying them rent until the Plaintiff forcefully evicted them in December 2021.
27. In further response to Paragraph 5 of Plaintiff the Defendants averred that the resistance by them of any attempts to construct on the disputed portion is due to the forceful manner their tenants were evicted from the parcel and the construction of a metallic (mabati) fence erected around it under police escort and supervision without any court order. The Defendants were strangers to the averments made in Paragraphs 6 and 7 of the Plaintiff and the Plaintiff was put to strict proof.
28. The contents of Paragraph 8 of the Plaintiff were denied in toto and the attempted resettlement, if any, of the Plaintiff on the Defendants plot or hiving off from their plot was illegal, unlawful and null and void. The contents of paragraphs 9 and 10 of Plaintiff were denied by the Defendants and they averred that they had rent paying tenants on the parcel of carrying out carpentry and charcoal selling known as Sammy Kivusyu and Chengo Yaa Baya who were evicted by the Plaintiff with Police assistance that was excessive, unjustified and unlawful.
29. In response to Paragraph 11, the Defendants asserted that the County Commissioner had never formally responded to any letters written by the Defendants, their advocates and it was not true that the Defendants' Tenants and later proceeded to erect the fence by intimidating the Defendants with arrest and dire consequences and had come to court with unclean hands and hence should not get the reliefs sought herein. According to the Defendants, the averments of Paragraph 12 were untrue that the Plaintiff began construction and a heated exchange ensued but rather that the Plaintiff used her influence over the Police to forcefully evict the Defendants' Tenants and later proceeded to erect the fence by intimidating the Defendants with arrest and dire consequences and has come to court with unclean hands and hence should not get the reliefs sought herein.
30. The 1st and 2nd Defendants denied the jurisdiction of this court stating that it was wrongly invoked as the parcel involved could not be worth more than a sum of Kenya Shillings Four Million (Kshs. 4,000,000/-) and the Defendants would raise a preliminary objection at the earliest opportunity.
31. According to the Defendants there was another case being MCELC NO. 5 of 2020 at Mombasa, which had neither been determined nor withdrawn by the Plaintiff over the same subject matter and against the Defendants, which fact has deliberately been concealed from the Honorable Court. Further the 1st and 2nd Defendants averred that the County Government should be made a party to these proceedings as they are the authors of all the confusion if they indeed resettled the Plaintiff on the Defendants land without informing them in any way whatsoever. The Defendants will indeed make the appropriate application to ensure they are made substantive parties to this suit.
32. For reasons whereof the Defendants prayed that the Plaintiff's suit be dismissed with costs.
33. In his opening remarks, the Learned Counsel for the Defendants Mr. Odundo stated that the Defendants were brothers. They had been in the two plots 21/15 and 21/16. They had always been in it. To their knowledge, they had always known the plot to belong to the Family and hence that the



reason they wanted the custodian of the records to know whether there had been any alteration in the plots according to 19th September, 2023 the court issued witness summons to have the custodian of records to appear so that to unveil the actual status of the two plots today. The case was on the disputed land, where the Plaintiffs sought the right and ownership of the land while the Defendants claims to have been in occupation though it had been cordoned off issuing iron sheet- they did not have a Counter claim to the suit.

34. The Defendants on 18th July, 2024 called its first witness DW - 1 who told the court that:-

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

35. DW - 1 gave a sworn testimony in Swahili language. He identified himself as ALI KHAMISI MCHANGAMWE, a citizen of Kenya with all the particulars as found from the national identity card shown to court. He resided in Changamwe within the County of Mombasa. He was the 2nd Defendant herein. The 1st Defendant was his older brother. He was a long distance driver. On 10th March, 2023, he recorded a witness statement to be adopted as part of his evidence. There was a list of documents dated 7th March, 2023 – 8 documents Defendants Exhibit No. 1 to 8 – on Plot No. 21/15 and 21/16 before that their grandfather called Kisua Mchangamwe died and left the Plots to their father called Hamisi Mchangamwe but he also died. The parcels had been theirs. They had caused cultivation of subsistence on it and at times they had leased them for income.

36. But later on they were surprised when the Plaintiff appeared and made claim over the said suit land. How did she acquire them and as they had not seen any documents. She came in the year 2018; there before had been no one on the land.

B. Cross examination of DW - 1 by Mr. Akanga Advocate.

37. DW - 1 reiterated that the Plots were Sub - divided by the County Government of Mombasa and the plots had numbers and if one conducted search would know the owner. On being referred to the Letter of Allotment for Plot No. 21/16 and the official search for George Willis Seje for Plot No. 27/32 dated 21st October, 2020 and 9th July, 2020. He did not have proof of the consolidation of the Plots to one. He was now 50 Years old. In the year 1978. He was 3 years old and he did not know anything about on land.

38. DW - 1 told the court that his father died in the year 1999 and his grandfather died in the year 1989. He was not aware whether his grandfather and father ever instituted civil case in Court on the distribution of the land. He knew a lady called Mwendu who dealt with charcoal selling. The Husband was called Kaleli and they had been there for over 10 years until year 2022. He was aware of the demand letter by the Plaintiff.

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

39. DW - 1 confirmed that M/s. Mwendu and her husband Mr. Kaleli had been on the land – at first they were their tenants but they later on they allowed to occupy. There was no land dispute and hence no suit was necessary they brought the official search for Mr. George Willis Seje Owner of plots 27/32 and 27/33 to prove that one person was capable of being allocated more than one plot. Currently, they were the ones in occupation.

40. The Defendants called DW - 2 on 9th December, 2024 who testified that:-



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

41. The witness testified under oath and in English language. She identified herself as being M/s. ROSE MBARAKA MUNUPE. She was the Director of Land Administration County of Mombasa. DW - 2 was a Land Surveyor though not licensed. She had been Summoned to tender evidence over the Subject matter. The documents she had the information on ownership of the land as follows;
 - a. LR NO. 21/16 for 1981 belonging to Khamisi N. Kisau (deceased) – the father to the Defendant.
 - b. LR NO. 21/15 for 1982 belonging to Anne Wanjiku Mbatia the Plaintiff.
42. The parcel file had Letters of Allotment for each parcels issued as follows- Plot No. 21/16- 1981— Plot No 21/15- 1982. The Chaani Area was for the County of Mombasa and since they had not been given title deed, she would not have known as she had not joined the County Government. But from experience, it was those who had already occupied the land and ground verification was done. Before the allocation, no survey was not done but only appear acreage subject to the undertaking of the final survey and the Part Developed Plan (PDP) after they were done, the Letter of Allotment had the sizes on them.
43. DW - 2 told the court that it appeared in the appendix referred to the Allotment for Anne Mbatia had a house reference No. 1128 and Plot No. 21/15 from the documents he had. Below it was Re- settled tenant and its typed from our records. ‘Re Settled Tenant’ meaning those who were already on ground; as opposed to those from out of the ground and hence applied. Ideally there were no people on the ground, but she would not know as she was not there by then; the size was 223 meters sq. Mr. Kai works for the county and who prepared a report- its 423 sq meter and 224-meter sq. the area on the letters of Allotment is based on the PDP; The survey has been done but still be confirmed/ appointed by the Director of survey.
44. DW - 2 stated that the sites were not even. Some were small while others were big size. The request was for plot no 21/15. The sizes were still to be confirmed. The owners pay plot rates; if one defaults – the notices were issued and if it persists it was re – possessed to be re – allocated to someone else. She knew the 2nd Defendant personally; she never had a meeting with the 2nd Defendant nor informed them that they defaulted and hence their plot was re – allocated to the Plaintiff.

B. Cross examination of DW - 2 by Mr. Akanga Advocate.

45. DW - 2 reiterated that the house No. For Plot 21/15 was 563. There had never been any notices for re-possession but there were notices for non-payment – from the survey the survey by Caxton both of them are adjacent to each other. They had had several meetings with the 2nd Defendant, they had other participants county Secretary and the 2nd Defendant- minutes of 8th March, 2022 the 2nd Defendant was not present but his brother was there and so the Plaintiffs.
46. DW - 2 stated that they resolved the matter and their conclusion was that the two adjacent to each other only that they are different in sizes. They share boundaries- during the allotment there were those who were already on the ground and out of it but all were required to apply for the plots. Those who had already been on the ground would be picked. The 1st and 2nd Defendants had not shown in any Court document on their relationship with the father nor told them whether they owned plots elsewhere – Mr. Caxton works under her and its correct to say that she was the one who send him on the ground to do the land surveying exercise.



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

47. DW - 2 confirmed that the Defendants were required to produce the Letter of Administration Grant for the Estate of their father; the proof of payment of rates and the ground reports. She did not have the ground report in her file.
48. On the same day, the Defendants called DW - 3 who testified that:-

A. Examination - in – Chief of DW - 3 by Mr. Odundo Advocate.

49. DW - 3 testified under oath and in Swahili language. He identified himself as CHENGO YAA BAYA a citizen of Kenya with all the particulars as indicated from the national identity card and shown to Court. He told the court that he lived at Changamwe – Chaani area; he was a laundry person/dealer. He had lived there from the year 1985 to date. He recorded a witness statement on 10th March, 2023 and wished to rely on it as his evidence. The witness told the Defendants. He knew their father from the year 1980 and later on came to know them. The witness did not know the Plaintiff and had never seen her. The witness had knowledge of Plot No. 21/15 as it belonged to Khamisi and there was a structure. There was a foundation built on it but it could not be completed as there was a dispute between the construction and Mr. Khamisi. There was a structure for selling vegetable of formation, a church and timber shop. The witness did not know whether they were paying rent. The witness was a tenant on Plot No. 21/16. He had never witness any dispute on it since the year 1985.

B. Cross examination of DW - 2 by Mr. Akanga Advocate.

50. DW - 3 reiterated that he had been a tenant on Plot No. 21/16. There had been vegetable shop, a church and timber shop e.t.c on Plot No. 21/15. He saw Mama Mwendu who used to sell tomatoes on Plot No. 21/15. The witness had never seen any papers in respect of Plot No. 21/15 and they had never been involved in any dispute.
51. On 9th December, 2024, the Defendant through their legal counsel Mr. Odundo closed their case.

VI. Submissions

52. On 9th December, 2024 after the Plaintiff and Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Unfortunately, by the time the Court was penning down its Judgement it had not accessed the submissions by the parties from neither the Judiciary portals nor elsewhere. Nonetheless, the Honourable Court reserved a date to deliver its Judgement on its own merit.

VII. Analysis and Determination

53. I have keenly assessed the filed pleadings by all the parties - the Plaintiff and 1st and 2nd Defendants herein, both oral and documentary the evidence adduced, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
54. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following issues for its determination. These are: -
- a. Whether the Plaintiff from her instituted suit has proved her claim?
 - b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff



- c. Who bears the costs of the suit?

ISSUE No. A). Whether the Plaintiff from the instituted suit has proved her claim.

55. Under this sub title we shall examine the merits behind the Plaintiff's claim. The question and the main substratum herein would be then who is the legal owner of the suit? Evidently, land in Kenya is a very emotive and sensitive issue. It is the source of livelihood. The suit land is not an exception.
56. It is evident that the legal rights, interest and title of a registered owner of property are clearly set out under the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012, which provide as follows:-
24. "Subject to this Act
- a. The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."
57. Further Section 25 (1) of the Act provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. However, ownership of such title is not absolute as the said Certificate of title can be impeached under certain circumstances as contemplated in the provision of Section 26 of the *Land Registration Act*. Section 26 (1) which provides:-
- "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.
58. The legal purpose for this provision was not only to provide the conclusive "prima case" evidence on the ownership of land. It vests the legal and absolute registered owner with the indefeasible rights, title and interest to the land. Further, it assists in preserving the land. In the instant case, it is the Plaintiff's case that at all material times to the suit, the Plaintiff was the owner of Plot No.21/15 upon purchase from the County of Mombasa since the year 1985. This claim has been demonstrated by a number of aspect. Firstly, an official search was conducted on 21st February, 2022 which confirming that the land belonged to the Plaintiff and so did a letter dated 22nd February, 2022 from County Commissioner of Changamwe Sub County. Upon application a search was also conducted on the neighbouring plots No. 21/16 and the results were that the next plot belonged to one HAMISI MCHANGAMWE KISU A who happened to be the deceased father of the 1st and 2nd Defendants.
59. Secondly, the Plaintiff had been stopped from using this Plot recently when she sought to build on the vacant portion by the Defendants. They are insisting that this plot No. 21/15 was theirs despite the clear documentation of title. That the Deputy County Commissioner has equally verified the same facts and written a letter to the effect that Plot No. 21/15 and 21/16 belongs to the Plaintiff and the Defendants' father respectively. That the County Officers have done a topographical survey and verified



the said information. The continued insistence by the Defendants that this plot No.21/15 was theirs did not hold water at all as their father plot is next and they live on their plot. The Plaintiff's mother was the one who applied for the initial plot No.1128 where she was living but insisted that the Plaintiff be documented on the same in year 1982.

60. Thirdly, significantly though summoned as a witness by the Defendant, the evidence of DW – 2 was extremely valuable. DW -2 who is the Director of Land Administration County of Mombasa, a Land Surveyor and who are the legal custodian of all records testified by producing the parcel file in Court. Her evidence was intact and tight emphatically to the effect that the suit plot was registered in the names of the Plaintiff. The Court has no choice but to endorse that evidence as proof enough on the legal ownership to the suit land.
61. It is trite that when a person's title is called into question, the said proprietor has to show the root of his ownership. In the case of "Hebert L Martin & 2 Others – Versus - Margaret J Kamar & 5 Others {2016} eKLR" 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.”
62. 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.
63. Having been so guided, this Court will move to ascertain which party has proved the root of its title. The Plaintiff has led evidence that prior to year 1982, the three places Chaani, Miritini and Mikindani had other inhabitants that the World Bank project bought these three places from the original owners and created a planned settlement properly serviced with roads and electricity and water lines and beacons. The initial plot No. 1128 which the Plaintiff had paid for was overrun by road in the ensuing plan of Chaani and the Plaintiff had to be resettled to plot No. 21/15, in 1985 an offer letter was issued in 1985. That since 1985, The Plaintiff dug a foundation and placed Ballast and sand on the site, but could not finish the construction.
64. The Court has no reason to doubt the evidence adduced by the Plaintiff and the contents of the official search produced by the Plaintiff. To this end, this Court is convinced that the Plaintiff has on a balance of probability proved the root of his title in compliance with the provision of Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya. Having found as above, the Court finds and holds that the



Plaintiff has proved the root of his title and is the legal owner of the suit property to the exclusion of all others including but not limited to the Defendants.

ISSUE No. B). Whether the Plaintiff is entitled to the orders sought in the Plaint

65. Under this substratum we shall examine the prayers sought by the Plaintiff. The Plaintiff also sought for:-
- a. That a permanent injunction do issue against the Defendant prohibiting them by themselves, their agents and or servants or by any other person acting on their behalf from invading, using, attempting to occupy, harassing or in other way seeking to divest the plaintiff and her workers from the quiet enjoyment and exclusive use of the property Plot No. 21/15 at Chaani SITE and Service Scheme.
 - b. A declaration to issue that plot Number 21/15 belongs to the Plaintiff.
 - c. That the OCS Chaani Police station be ordered to enforce the orders issued herein at the interim and upon judgment herein.
 - d. That the costs for this suit be borne by the Defendants.
66. The Plaintiff prayed for permanent injunction to restrain the Defendants from entering or trespassing on the suit land. It is trite that permanent injunction is issued after the rights of the parties have been determined. The said injunction is issued upon the merit of the case after evidence in support of and against the claim has been tendered. It is trite that permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. The court has held that the Plaintiff is the rightful owner of the suit property, thus his right should be protected by issuance of a permanent injunction. See the case of “Free Pentecostal Fellowship in Kenya – Versus - County Government of Nyamira(2021) eKLR”, where the court while relying in the case of “Kenya Power & Lighting Company Limited – Versus - Sheriff Molan Habib”, held as follows with regard to Permanent injunction:-

“It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

67. Having carefully considered the available evidence as above, the court finds that the Plaintiff herein has proved his case on the required standard of balance of probabilities. The upshot of the foregoing is that Judgement is entered for the Plaintiff against the Defendants herein in terms of prayers No. a, b and c of the filed Plaint respectively.

ISSUE No. C). Who bears the costs of the suit

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



eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

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

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs 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.”

70. In the present case, for the fact that the Plaintiff proved her claim they shall have costs of the suit.

VIII. Conclusion and Disposition

71. 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 Plaintiff have established their case against the Defendants. Thus, for avoidance of any doubt, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff in respect to the Plaint dated 25th February, 2022 and filed on 28th February, 2022 in its entirety with costs.
- b. That a declaration do and is hereby issued that plot Number 21/15 belongs to the Plaintiff.
- c. That the OCS Chaani Police station be and is hereby ordered to enforce the orders issued herein at the interim and upon judgment herein.
- d. That the Plaintiff has the costs of the suit.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF JUNE 2025.

.....
HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Akanga Advocate for the Plaintiff.
- c. Mr. Odundo Advocate for the 1st & 2nd Defendants.

