

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ELC CASE EOO2 OF 2025

MOHAMMED SHEIKH ABDULLAHI.....PLAINTIFF

VERSUS

AHMED SHEIK ABDULLAHI.....DEFENDANT

JUDGEMENT

1. The Plaintiff, who is an elder brother to the Defendant, has approached the court *vide* plaint dated 24. 2.2025: and wherein same has sought various/ diverse reliefs. The reliefs sought are reproduced as hereunder:

(a) A declaration that the Defendant is in breach of his undertaking of transferring the suit to the Plaintiff.

(b) A declaration that Plot 34 located in Moyale township is/was a gift made to the Plaintiff vide a promise of gift made on or about 1994 the Defendant to be compelled to transfer the said plot to the plaintiff, in the alternative the registrar of lands Moyale to compel the transfer of the suit plot to the plaintiff.

(c) An order of injunction does issue prohibiting the Defendant and or his agents from dealing, alienating, selling, or parting with the possession of the property in question pending the hearing and determination of the suit.

(d) Cost of the suit and interest[s] from the date of filing until payment in full (f) Any other relief the court deems fit.

2. The Defendant duly entered appearance and thereafter filed a statement of defence; and counter claim dated 16.4.2025. The counter claim has highlighted the following reliefs:

(a) *A declaration that the Defendant has valid interest over the property known as LR NO 12255/56 Plot 34 situated at Moyale is lawfully the registered as proprietor thereof and is entitled to absolute ownership, possession and occupation of the same to the exclusion of the Plaintiff (b) An order of eviction to be issues upon the Plaintiff himself and/or other persons that may have placed on the land LR No 12255/56 plot 34 situated at Moyale.*

(b) *An order be issued directing the OCS Moyale police station to ensure compliance of order of Eviction of the Plaintiff from the Suit Property.*

(c) *A permanent injunction be issued restraining and/or prohibiting the Plaintiff whether by himself, agents, representatives and or servants or otherwise howsoever acting from entering upon, remaining upon, occupying, or in any other manner howsoever from interfering with the defendants ownership, occupation, quiet possession, and utilization of the suit property known as LR 12255/56 Plot 34 situated in Moyale in default, an eviction order to issue and which order should be enforced by the officer commanding station Moyale station or any other nearby police station.*

(e) Cost of the suit.

3. The Defendant contends that the Plaintiff is his elder brother and that because the Plaintiff was not economically endowed, same allowed/ permitted the Plaintiff to enter upon and take possession of the suit property. The permission, it is said, was intended to enable the Plaintiff to reside on the suit property and to draw rents from the houses / units that had been constructed on the suit property. Nevertheless, it has been posited that the permission did not confer / bestow upon the Plaintiff ownership right[s] to and in respect of the property.

4. Additionally, the Defendant has posited that the suit property was not gifted to the Plaintiff on the basis Zakar, either as contended or at all. Moreover, it has been contended that the Plaintiff was duly issued with a notice to vacate the premises in 2018, but the Plaintiff sought indulgence and extension of time for a duration of 5 years ending 2024. However, it has been stated that the Plaintiff has since reneged and still remains in occupation of the suit property albeit without the consent or permission of the Defendant.
5. The subject suit came up for the usual pre trial directions on the 3.7.2025; whereupon the advocates for the parties intimated to the court that same had filed and exchanged the requisite pleadings, list and bundle of documents; list of witnesses and the witness statement. To this end, the Advocates confirmed that the suit was ready for hearing.
6. The Plaintiff's case is premised on the evidence of 5 witnesses namely: Mohammed Sheikh Abdullahi, Ali Abdullahi, Ali Awad Abdala, Sheikh Uwash Abdullahi and Hussein Galgalo. Same testified as PW1, PW2, PW3, PW4 and PW5 respectively.
7. It was the testimony of PW1 [Mohammed Sheikh Abdullahi] that he is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that he is a businessman residing in Moyale. In addition, he averred that by virtue of being the Plaintiff, he is conversant with the facts of the case.
8. The witness thereafter referenced the witness statement dated 16.2.2025; and which statement, the witness sought to adopt and rely on as his evidence in chief. The witness statement was duly adopted and constituted as evidence in chief of the witness.
9. Moreover, the witness intimated to the court that same has also filed a list and bundle of documents dated the 24.2.2025 and which documents the witness sought to tender and produce before the court. However, the production of the documents under reference was objected to by learned counsel for the defendant. Nevertheless, upon the guidance of court and upon taking into account the nature of the objection, learned counsel for

the Defendant withdrew the objection and conceded the production of the documents.

10. Suffice it to state that the documents at the foot of the list dated 24.2.2025 were thereafter produced and admitted as PEXB 1 and PEXB 2, on behalf of the Plaintiff.
11. On cross examination by the learned counsel for the Defendant, the witness stated that he has indeed recorded and filed a witness statement. In addition, the witness acknowledged that he has indicated that the suit property belongs to the defendant. Moreover, the witness conceded that it is the Defendant who bought the plot in the year 1993.
12. While still under cross examination, the witness stated that even though the suit plot belongs to the defendant, same [suit plot] was gifted unto him as Zakar. Furthermore, the witness averred that the gifting of the suit property as Zakar was done in the presence of two witnesses namely; Johora Sheikh Abdullahi and Rahma sheikh Abdullahi.
13. It was the further testimony of the witness that Johara Abdullahi is still alive and resides in Moyale. The witness pointed out that Ramah Sheikh Abdullahi is deceased. The witness further testified that it is the two persons who were present at the time of the gifting.
14. Upon being asked as to whether Johara Sheikh Abdullahi had recorded a witness statement, the witness responded in the negative. Furthermore, the witness averred that Johara Abdullahi is not one of his witnesses.
15. Regarding whether the gift was reduced into writing, the witness averred that Zakar is never reduced into writing. In addition, the witness stated that Zakar is made verbally/ orally.
16. It was the further testimony of the witness that the rent from the suit property has been collected and utilized by him. The witness further admitted that the Defendant indeed issued and served him with a notice to vacate the suit property. Additionally, the witness admitted that though

served with the notice to vacate he has remained in the suit premises. In any event, the witness reiterated that the suit property was gifted to him.

17. On re-examination the witness stated that the suit property was gifted to him as Zakar. Furthermore, the witness averred that he has resided on the suit property for more than 30 years.

18. The next witness who testified on behalf of the Plaintiff was Ali Abdullahi. Same testified as PW2.

19. It was the testimony of the witness [PW2] that same is a business person currently residing in Moyale. In addition, the witness averred that he is familiar with the parties in the case. Moreover, he clarified that the parties are brothers.

20. Furthermore, the witness adverted to a witness statement dated 27.4.2025 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Thereafter the witness statement was duly adopted and constituted as the evidence in chief.

21. On cross-examination by learned counsel for the Defendant, the witness averred that same was not present when the Defendant is said to have gifted the suit property to the Plaintiff. In addition, the witness averred that it is the Plaintiff who informed him about the property having been gifted as Zakar.

22. Next in line was Ali Awad Abdalla. Same testified as PW3.

23. It was the testimony of the witness that same is conversant with the parties before the court. Furthermore, the witness also posited that he is conversant with the facts of the matter. Besides, the witness averred that same has since recorded a witness statement dated 16.2.2025 and which witness statement the witness sought to adopt as his evidence in chief. Suffice it to state that the witness statement was duly adopted as evidence in chief of the witness.

24. On cross examination by learned counsel for the Defendant, the witness averred that he has recorded a witness statement and that the contents thereof relate to what the Plaintiff informed him. In addition, the witness averred that he has always believed the Plaintiff to be the owner of the plot.
25. On further cross examination, the witness testified that though he believed the Plaintiff as the owner of the plot, he does not have any documents to prove same.
26. Regarding a question as to whether the property belongs to the defendant, the witness posited that he is not aware whether the Defendant is the owner of the property.
27. The fourth [4th] witness who testified on behalf of the Plaintiff was Sheikh Uwash Abdullahi. The witness testified as PW4.
28. It was the testimony of the witness that same is a resident of Wajir. In addition, the witness averred that he is conversant with the facts of the case. Moreover, the witness indicated that same has since recorded a witness statement dated 11.3.2025; and which witness statement the witness sought to adopt as his evidence in chief. Thereafter, the witness statement was duly adopted and constitute ad the evidence in chief of the witness.
29. On cross examination by learned counsel for the Defendant, the witness averred that it is the Plaintiff who informed him that the property had been gifted on the basis of Zakar. Besides, the witness averred that the Plaintiff informed him that there were two witnesses, who were present at the time the property was being gifted.
30. While still under cross examination, the witness testified that the witnesses who were said to have been present were; Johora Abdullahi and Ramah Abdullahi.

31. On further cross examination, the witness testified that he was in the republic of Somali between 1995 and 1998. However, the witness clarified that he was residing in Kenya in 1999.
32. The final witness who testified on behalf of the Plaintiff is Hussein Galgalo. The witness testified as PW5.
33. It was the testimony of the witness that same is a resident of Moyale town. In addition, the witness averred that he is a business person. It was the further testimony of the witness that same is familiar/converses with the facts of the matter. Moreover, the witness posited that he had recoded a witness statement dated 16.2.2025; and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was thereafter adopted and constituted as evidence in chief.
34. On cross examination by learned counsel for the Defendant, the witness averred that he is known to the Plaintiff and that the Plaintiff is a close neighbor and friend. The witness however, clarified that he was not present when the gift was allegedly given,
35. While still under cross examination, the witness clarified that he has recorded a witness statement, but he did not indicate therein anything concerning Zakar. Moreover, the witness clarified that the issue of Zakar was only brought to his attention by the plaintiff.
36. With the foregoing testimony the Plaintiff's case was closed.
37. The defendant's case is anchored on the evidence of two [2] witnesses. The witnesses are: Ahmed Sheikh Abdullahi and Abdullahi Sheikh Hajo.
38. It was the testimony of Ahmed Sheikh Abdullai [DW1] that he is the Defendant in respect of the instant matter. In addition, the witness averred that he is a business person based in Nairobi and currently he is the chairman of Eastleigh business community in Nairobi. Additionally, the witness averred that he has since recorded and filed a witness statement. To this end, the witness referenced statement dated 8.5.2025; and there

after sought to adopt and rely on the contents thereof. The witness statement under reference was adopted and constituted the evidence of the witness.

39. The witness further referenced a list and bundle of documents dated 8.5.2025 containing 11 documents and there after sought to produce same as exhibits. There being no objection to the production of the documents, same [Documents] were produced as DEXB 1-DEXB 11 respectively.

40. It was the further testimony of the witness that he has since filed a statement of defence and counter claim. The witness thereafter sought to adopt and rely on the contents of the statement defence and counter Claim before the Court. Moreover, the [Witness] implored the court to grant the reliefs sought.

41. Regarding whether the property was given as Zakar, the witness stated that the property was not given as Zakar. On the contrary, the witness averred that he is the one who bought the suit property; developed same and there after allowed the Plaintiff to reside therein pending the plaintiff's relocation to his permanent place of abode.

42. It was the further testimony of the witness that in the year 2018 the Plaintiff agreed to vacate. Furthermore, the Plaintiff signed the acknowledgement conforming his willingness to vacate the suit property. Besides, it was indicated that the acknowledgement was signed by the Plaintiff in the presence of his [Plaintiff's son].

43. On cross examination by learned counsel for the Plaintiff, the witness confirmed and acknowledged that the Plaintiff is his older brother. Furthermore, the witness averred that the Plaintiff is older to him by approximately 1 ½ years.

44. It was the further testimony of the witness that he is the one who allowed and authorized Plaintiff to occupy the property. Furthermore, he testified that the Plaintiff was to occupying the property as he, [the Plaintiff], made arrangement[s] for his permanent place of abode.

45. The witness testified that he did not gift the suit property to the plaintiff. Regarding Zakar, the witness clarified that the property was not gifted on the basis of Zakar.
46. On further cross examination, the witness testified that in the year 2013 he issued a verbal notice to the Plaintiff and the Plaintiff acknowledged that he was ready to vacate. Nevertheless, the witness clarified that the Plaintiff sought for indulgence of five years.
47. While still under cross examination, the witness averred that in 2018, he served the Plaintiff with a notice to vacate the premises. In particular, the witness posited that the Plaintiff acknowledged the vacation notice.
48. Additionally, the witness testified that the Plaintiff was re-served with a notice to vacate in 2024. Moreover, it was posited that the suit beforehand was precipitated by the demand notice which was served upon the plaintiff.
49. The next witness who testified was Abdullahi sheikh Hajo. Same testified as PW2.
50. It was the testimony of the witness that he is conversant with the facts of the case. To this end, the witness referenced the statement dated 8.5.2025 and which witness statement the witness sought to adopt as his evidence in chief. Suffice it to state that the witness statement was duly adopted and constituted the evidence in chief.
51. It was the further testimony of the witness that he has known the parties to the case [Plaintiff and defendant] since childhood. In addition, the witness averred that he is also familiar with the suit property. Moreover, the witness posited that he is the one who introduced the defendant to the suit property. It was the further testimony of the witness that in 2018 he was present and attended a meeting which was held at Moyale. Furthermore, the witness averred that both the Plaintiff and the Defendant were present at the meeting. In addition, the witness posited that the Plaintiff requested to be afforded five years to enable him to vacate the premises.

52. It was also the testimony of the witness that the meeting was also attended by the son of the Plaintiff and which son signed the minutes alongside the plaintiff.
53. On cross examination by learned counsel for the Plaintiff, the witness averred that he is conversant with the parties. In particular, the witness testified that the parties herein are members of his clan.
54. While still under cross examination, the witness testified that he is privy to the fact that the Defendant issued a demand notice to the plaintiff. Furthermore, the witness added that he was present during the meeting which was held in Moyale.
55. Regarding the minutes of the meeting, the witness confirmed that indeed minutes were prepared and same were signed by the various parties. The witness reiterated that the minutes were signed by the Plaintiff and his son.
56. With the forgoing testimony the defendant's case was closed.
57. Following the conclusion of the hearing, the advocates for the parties sought time to exchange written submissions. Thereafter the court issued directions pertaining to the filing and exchange of the written submissions. In particular, the court directed the parties to file and exchange written submissions within the circumscribed timelines.
58. The Plaintiff filed written submissions dated 27.11.2025 and wherein the Plaintiff has highlighted four [4] key issues. The issues highlighted by the Plaintiff are: what are the components of the gift of Zakar; the conditions for a valid oral gift [Hiba]; whether the Plaintiff has proved that the suit property was bequeathed to him by the defendant; and whether the Plaintiff is entitled to the reliefs sought.
59. The Defendant filed written submissions dated 3.12.2025 and wherein the Defendant has highlighted three [3] key issues. The issues highlighted are

namely; what are the proprietary rights of the Defendant as the registered owner of the suit property; whether the suit property was gifted to the Plaintiff or otherwise; and whether the Defendant is entitled to transfer the suit property to the Plaintiff or otherwise.

60. Having reviewed the pleadings; the evidence tendered [oral and documentary] and upon consideration of the written submissions filed by and/ on behalf of the parties three [3] key issues crystalize for determination. The issues are: Whether the Plaintiff has established/ proved his claim to the requisite standard or otherwise; whether the Defendant has established / proved the counter claim; and what reliefs [if at all] ought to issue.
61. Regarding the first issue, it is imperative to underscore that the Plaintiff approached the court contending that the suit property was gifted to him on the basis of Zakar. In particular, the Plaintiff posited that though the Defendant bought/ purchased the suit property in 1993, the suit property was gifted to him on or about the year 1994.
62. It was the plaintiff's case that the gift on the basis of Zakar was made orally and in the presence of two persons. The persons who were present at the time of the Zakar are indicated to be Johara Sheik Abdullahi and Rahma Abdullahi/
63. Additionally, the Plaintiff contended that arising from the gifting of the property, the Defendant allowed him to enter upon, take possession of and to reside therein. In particular, the Plaintiff posited that he indeed entered upon the suit property and has resided in for more than 30 years.
64. Be that as it may, the Plaintiff has contended that the Defendant has now reneged on the Zakar and is pursuing endeavors to evict and remove him [Plaintiff] from the suit property. To this end, the Plaintiff is now before the court and seeks the intervention of court to inter alia: declare that the suit property was gifted on the basis of Zakar; direct the Defendant to transfer the suit property and in default to empower the registrar Moyale to effect the transfer; and grant a permanent injunction to restrain the Defendant from interfering with the plaintiff's right to the suit property.

65. The starting point to appreciating whether the Plaintiff has proved his claim relates to proof of the gift. The Plaintiff contended that the property was indeed gifted on basis of Zakar. The Plaintiff clarified that there were only two people present and witnessed the gifting. For good measure, the Plaintiff identified the two people as; Johora Sheikh Abdullahi and Rahmah Abdullahi.
66. There is no gainsaying that the Plaintiff was chargeable with the obligation of proving Zakar. To this end, it was incumbent upon the Plaintiff to call both the witnesses who were present or any one of them. It suffices to state that by the grace of God, one of the witnesses who is said to have been present is still alive. The witness who is still alive is Johora Sheikh Abdullahi.
67. I beg to clarify that the Plaintiff herein confirmed and clarified that Johora Sheikh Abdullahi is alive and currently resides at Moyale. It is common ground that Johora Sheikh Abdullahi is a competent and compellable witness.
68. One would have expected the Plaintiff to call forth Johora Sheikh Abdullahi to attend court and to confirm/ deny whether the suit property was gifted as Zakar; and whether she was present during the gifting.
69. I beg to state that the evidence of Johora Sheikh Abdullahi is crucial and critical in determining the assertion of Zakar. However, despite her critical role, the Plaintiff choose to disregard the testimony of Johora Sheikh Abdullahi. Notably, no reason or explanation was tendered for the failure to call her.
70. I must clarify that the Plaintiff owed no duty to give an explanation to this court. Moreover, I must underscore that I was not owed any explanation. In addition, I am not looking forth to any explanation as to why Johora Sheikh Abdullahi was not called. However, it is important to highlight that where a critical witness is not called by a concerned party; such

failure or refusal breeds a fertile ground for the invocation and deployment of doctrine of adverse inference.

71. Notably, the evidence of Johora Sheikh would have been detrimental and adverse to the claims by the plaintiff. The law as pertains adverse inference has been the subject of various court decisions.

72. Recently the Court of Appeal in the case of **General & another v Hussein & 3 others [2025] KECA 1022 (KLR)** expounded on the doctrine.

73. The court stated thus ‘

37. In Just Names Properties II CC & Another v Fourie & Others 2007 (3) SA. 1 (W) the court held that: “In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her nonappearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision...”

38. In the instant case, there are many issues which required elucidation by Liberio Farm Ltd. The omission to call the said witnesses not only raises the need to draw reasonable inferences from their omission, but also means that the 1st, 2nd and 3rd respondents did very little to explain the root of the title they claim to have genuinely acquired. The general rule in civil cases is that the party who has the legal burden also has the evidential burden, and if he/she does not discharge this legal burden, then his/her claim will fail. It is evident that the 1st, 2nd and 3rd respondents’ Certificate of Lease was under challenge. Therefore, the procedure that was followed by Liberio Farm Ltd to acquire the land was in law a fact in issue. Facts in issue are the central contentions upon which a dispute

is cantered. The *Evidence Act* defines a fact in issue in Section 3 (1) (d) as follows: “fact in issue” means any fact from which, either by itself or in connexion with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

74. In my humble view the excerpt [supra] applies to the subject matter with equal force.

75. The second perspective that impact[s] on proof of the plaintiff’s claim relates to the ingredient that underpins gift *inter vivos*. It is instructive to observe that where a claimant, the Plaintiff not exempted seeks to hinge his claim on gift *inter vivos* then the Plaintiff must establish the elements surrounding gift *inter vivos*. To start with a gift *inter vivos* must be in writing. Same must be executed by the giftor. Thereafter same must be registered.

76. Nevertheless, there is an exception to the general rule. To this end, the exception touches on the gift *inter vivos* being oral/ verbal/ parole. However, where the gift *inter vivos* is not reduced into writing, the claimant must demonstrate that the gift was accompanied by effective delivery and ultimate registration.

77. The law underpinning gift *inter vivos* was succinctly expounded by Lady Justice P. Nyamwea Judge [as then was] In the case of **Re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] KEHC 944 [KLR]** where the court stated thus;

“For gifts inter vivos , the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance

of a gift is presumed until or unless dissent or disclaimer is signified by the donee.

“ In Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts: “Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the done a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

78.Has the Plaintiff fulfilled the conditions to warrant a finding that there was a gift intervivos? To my mind, the totality of the evidence on record falls short of proving a gift intervivos.

79.The final aspect that impacts on the Plaintiffs case touches on the quality and calibre of witnesses who were brought to court. The Plaintiff called four other witnesses in an endeavor to demonstrate that the suit property was gifted unto him. Sadly, none of the said witnesses were present during the alleged gifting.

80.Worse still, the witness[es] testified that it is the Plaintiff who sold into them the assertion [read hearsay] that the suit property had been gifted to him.

81.Surely, the evidence of PW2, PW3, PW4 AND PW5 relates to events that same did not witness. Instructively, such piece of evidence have no probative value.

82. Before concluding on this issue, it is important to take cognizance of the provisions of **section 63 of evidence Act, Chapter 80, Laws of Kenya**; which prohibits hearsay evidence. The said section stipulates thus:

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means—

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) With reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.(3)If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

83. Flowing from the forgoing discussion, and taking into account the provisions of **sections 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya**; I am afraid that the Plaintiff has not proved his claim to the requisite standard.

84. To this end the plaintiffs claim must of necessity fail.

85. Turning to the second issue, namely; whether the Defendant has proved his claim *vide* the counter claim or otherwise. I beg to start by saying that the Plaintiff conceded and acknowledged that the suit property was purchased/ acquired by the Defendant in 1993. In addition, the Plaintiff posited that the Defendant is indeed the registered owner of the suit property.
86. On his part the Defendant testified before the court and demonstrated the purchase of the suit property *vide* sale agreement dated 6.12.1993; the Letter of allotment relative to the property; payments of the rate[s] and ultimate issuance of the Certificate of title issued under the registration of titles Act [Now repealed].
87. From the forgoing, there is no gainsaying that the Defendant is indeed the registered and legitimate owner of the suit property. In any event, the fact that the Defendant was / is the owner is not in contest.
88. It is imperative to observe that the registered owner of a landed property, the Defendant not excepted, is vested with statutory rights and privileges over the designated property. Such rights and privileges include: exclusive occupation and possession: right to use: and right to charge.
89. Notably, the law as pertains the scope, extent and tenor of the rights of a registered owner of a landed property is established in a plethora of decision. It suffices to reference the holding of the Court of Appeal in the case of **Embakasi Properties Limited & another v Commissioner of Lands & another [2019] KECA 1001 (KLR)**.
90. The court held thus...

“Although it has been held time without end that the certificate of title is; “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section

23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner.

91. Additionally, it suffices to reference the decision in the case on **Mohansons (Kenya) Limited v Registrar of Titles & 2 others [2017] KEELC 2730 (KLR)**, where the court highlighted and underscored the rights of a property owner.

92. The court stated as hereunder:

“ [18] As held by the Court of Appeal for East Africa held in Moya Drift Farm Ltd. v. Theuri (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

93. Looking at the evidence on record, there is no gainsaying that the Defendant is the undisputed owner of the suit property. Further, and in addition, the Defendant has never divested himself of the property right[s] thereunder. For avoidance of doubt, the Defendant did not gift the suit property to the Plaintiff.

94. *In a nutshell*, the Defendant has established sufficient basis to warrant vacant possession. In any event, evidence abound that the Defendant has previously issued and served the Plaintiff with notices to vacate albeit to no avail.

95. Moving on to the third issue; namely; What reliefs if any that ought to be granted . I wish to state that the Plaintiff sought various reliefs at the foot of the Plaint. The crux /substratum of the Plaint sought declaration that the suit property was gifted to the Plaintiff. While discussing issue one, I found and held that the Plaintiff did not prove Zakar.

96. Having failed to prove that the suit property was gifted unto him [Plaintiff], it then means that the Plaintiff is not entitled to a declaration of ownership or to an order of permanent injunction. In any event, it is not lost on me that an order of permanent injunction cannot issue and be granted against the legitimate/ registered owner of the property, unless there exists exceptional grounds to do so.

97. Turning to the counter claim, the Defendant sought various reliefs *inter alia*: Declaration of ownership/ title to the suit property; eviction and order of permanent injunction to restrain the Plaintiff from re -entering onto or remaining on the suit property.

98. It suffices to state that the Defendant is indeed the registered owner of the suit property. To this end, the provisions of **section[s] 24 and 25 of Land registration Act, [2012]** bestows upon the Defendant certain statutory rights and privileges.

99. The rights and privileges that are bestowed upon the Defendant include: right to exclusive possession without interference by a third party. Consequently, where a third party enters upon and remains on the property without any color of right, the Defendant is entitled to an Eviction order.

100. In the case of **Waas Enterprises Limited v City Council Of Nairobi & another [2014] KEELC 605 (KLR)** Ekl the court stated as hereunder:

“As a registered proprietor, the Plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land.

It therefore follows from the above that only the Plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd Defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff. It is my opinion that the 1st Defendant should ensure that the 2nd Defendant has vacated the suit land and hands over vacant possession of the suit land to the Plaintiff within a period of 30 days from the date hereof.

101. Finally, the rights to exclusive occupation, possession and use which are underpinned by the land registration Act 2012 would not be realizable, if third parties can enter or re-enter the property at will. To avert any such offensive activities or actions, an order of permanent injunction suffices.

102. Simply put, I am persuaded and duly convinced that the Defendant has established a basis to warrant the grant of an Order of permanent injunction.

FINAL DISPOSITION:

103. From the analysis in the body of the Judgement, it must have become apparent that the Plaintiff has not proved/ established his case. In short, the Plaintiff's case is meritless.

104. On the contrary, the Defendant has proven his entitlement to the suit property. Moreover, the Provisions of **Section 25 of the Land Registration Act, 2012**, underpin the right[s] that accrue to a Titleholder.

105. In the upshot, the final orders that commend themselves to the court are as hereunder-

(a) The Plaintiff's suit be and is hereby Dismissed

(b) The Counter claim be and is hereby allowed and Judgement is entered in favor of the Defendant as here under-

(i) A declaration be and is hereby issued that the Defendant has valid interest over the property known as LR NO 12255/56 ,plot 34 situated at Moyale and is lawfully the registered proprietor thereof and is entitled to absolute ownership, possession and occupation of the same to the exclusion of the Plaintiff .

(ii) The Plaintiff be and Is hereby ordered to vacate and grant vacant possession of the suit property within a duration of 90 days.

(ii) In the event of default by the Plaintiff to vacate and give vacant possession within 90 days, the Defendant shall be at liberty to evict the Plaintiff from the suit property.

(iii) In the event of Eviction being levied by the Defendant, the cost /expenses incurred in levying eviction shall be certified

by the Deputy Registrar and same shall be recoverable as part of cost from the Plaintiff.

- (v) *There be and is hereby issued an order of permanent injunction restraining and/or prohibiting the Plaintiff whether by himself, agents, representatives and or servants or otherwise howsoever acting from entering upon, remaining upon, occupying, or in any other manner howsoever from interfering with the Defendants/ Counter-claimers' ownership, occupation, quiet possession, and utilization of the suit property known as LR 12255/56 Plot 34 situated in Moyale.*

(c) The Defendant is awarded cost of the suit and the counter claim.

It is so ordered.

DATED SIGNED AND DELIVERED AT ISIOLO ON THE 9TH OF FEBRUARY, 2026.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of :

Mukami/Hussein: Court Assistant

Mr. Stephen Wanyoike for the Plaintiff

Ms. Mburu holding Brief for Mr Bulle for the Defendant

