

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 116 OF 2019

SUSAN MKANGOMBE MALOMBE (*Suing as the Power of Attorney for JANET WAKIO*

MGONGO.....**PLAINTIFF**

- VERSUS -

MARY NYATHIRIGA WANGAI

.....DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to a claim lodged through a Plaint dated 14th June, 2019 by *Susan Mkangombe Malombo, suing as the Power of Attorney for Janet Wakio Mgongo*, the Plaintiff herein. It was against *Mary Nyathiriga Wangai*, the Defendant herein.. The Plaintiff sought declarations that she was the lawful and registered owner of Plot No. Mombasa/ Mwembelegeza/375, an order of eviction against the Defendant, a permanent injunction restraining the Defendant from interfering with the Plaintiff's proprietary rights, mesne profits, costs, and interest.
2. Upon filing and service of the Plaint, the Defendant entered appearance on 18th June, 2020 through the Law firm of Messrs. Akanga Matende & Company Advocates and subsequently filed

her Statement of Defence on 15th October, 2020 dated the same day which was later amended on 13th May, 2024. The Defendant, on her part, asserted ownership through purchase from one Abdi Mohamed in 2005, and contended that the Ministry of Lands had directed a swapping of plots, thereby entitling her to occupation of the suit property.

3. The Plaintiff filed a Reply to Defence on 4th November, 2020. The matter thereafter proceeded to hearing, with both parties adducing oral and documentary evidence, and the Court was invited to pronounce itself on the competing claims of ownership and occupation of the suit property.

II. The description of the Parties

4. The Plaintiff, Susan Mkangombe Malombo, was described as a female adult of sound mind and understanding, residing and working for gain in Nairobi, Kenya. She brought this action on behalf of her mother, Janet Wakio Mgongo, by virtue of a registered Power of Attorney dated 16th April, 2019.
5. Janet Wakio Mgongo, on whose behalf the suit was instituted, was the biological mother of the Plaintiff and the registered proprietor of Plot No. Mombasa/Mwembelegeza/375 (Hereinafter referred to as “The Suit Land”), having been issued with a Letter of Allotment on 1st December, 1998 and a title deed on 14th April, 2016.
6. The Defendant, Mary Nyathiriga Wangai, was described as a female adult of sound mind residing and working for gain in Germany. She entered appearance through the Law firm of

Messrs. Akanga Matende & Company Advocates and later testified in person, asserting ownership of the suit property by virtue of a purchase from one Abdi Mohamed in the year 2005.

III. Court directions before the hearing

7. As a matter of brief background. On 7th August, 2019, the matter was placed before the Court registry where Counsel for the Plaintiff was present and no appearance was entered for the Defendant. The matter was fixed for hearing of the Notice of Motion application dated 2nd August, 2019 on 20th November, 2019.
8. On 20th November, 2019, the matter came before Hon. Justice C.K. Yano. The Counsel for the Plaintiff applied for leave to serve the Defendant by way of substituted service through WhatsApp. The Court, having considered the application and the supporting affidavit, allowed it as prayed and fixed the matter for mention on 30th January, 2020.
9. On 30th January, 2020, the Plaintiff confirmed that service had been effected and an affidavit of service filed. The Court fixed the matter for directions on 2nd July, 2020.
10. On 7th October, 2020, the matter came up before Hon. Justice C.K. Yano. The Counsel for the Plaintiff was present together with counsel for the Defendant. The Defendant sought leave to file defence out of time. The Court granted leave and directed that the defence be filed within seven days. The matter was fixed for mention on 11th November, 2020 to confirm compliance.

11. On 11th November, 2020, the Defendant confirmed that a defence had been filed but witness statements were yet to be filed as the witness was abroad. The Court fixed the matter for pre-trial directions on 28th January, 2021.
12. On 28th January, 2021, both parties confirmed that pleadings had closed. The Court fixed the matter for hearing on 16th September, 2021.
13. On 16th September, 2021, the matter came before this Honourable Court. The Plaintiff was ready to proceed with one witness, but the Defendant was absent. The Court, noting the absence of the Defendant, directed that the matter proceed on 19th October, 2021 without fail.
14. On 19th October, 2021, both parties were present. The Defendant, being abroad in Germany, requested to participate virtually. The Court allowed the request as an exception and directed that the hearing proceed virtually at 12.30 p.m. The Plaintiff commenced her case and produced documents including the original title deed, which the Court admitted.

IV. The Plaintiffs' case

15. From the pleadings before court, at all material times relevant to this suit, Janet Wakio Mgongo was the legal registered owner of the suit property - Plot No. Mombasa/Mwembelegeza/375 situated at Mwembelegeza, Mombasa - and she was the biological mother of the Plaintiff. On or about the year 1996, Janet Wakio Mgongo was registered as a squatter at Mwembelegeza and was issued with a letter of allotment on 1st

December, 1998, wherein she was allocated Plot Number 375 measuring approximately 50 x 100 feet at Mwembelegeza Squatter Settlement Scheme in Mombasa District.

16. The Plaintiff paid the requisite fees for the issuance of the title deed, which was subsequently issued on 14th April, 2016. The Plaintiff realized on or about the year 2010 that the Defendant had, without any legal right, entered the property and constructed upon it. The Plaintiff discovered that the Defendant resided in Germany and engaged her in discussions with a view to removing the illegal structures and vacating the property, but the Defendant remained adamant in her refusal to settle the matter amicably or vacate.
17. The Plaintiff wrote a demand letter to the Defendant on 21st November, 2018 and sent it via WhatsApp, copying the same to her lawyers. The Defendant's lawyers replied on 28th November, 2018, but the reply was ambiguous, vague, and uncertain. The Plaintiff's claim against the Defendant was for an order declaring her the lawful and registered owner of the suit property, an order compelling the Defendant to remove the illegal structures, and a permanent injunction restraining the Defendant, her servants, and/or agents from interfering with the Plaintiff's interest, entitlement, occupation, use, and peaceful enjoyment of the suit property.
18. The Plaintiff averred and maintained that there was no suit pending and that there had been no previous proceedings in

any court between the Plaintiff and the Defendant over said subject matter.

19. The suit property was located in Mwembelegeza, Mombasa, within the jurisdiction of this Honourable Court, which had the authority to determine the matter.

20. The Plaintiff prayed for orders against the Defendant as follows:-

- a. A declaration that the Plaintiff is the lawful and registered owner of the suit property.**
- b. An Order of eviction against the Defendant from Plot No. Mombasa/Mwembelegeza/375.**
- c. A permanent injunction restraining the Defendant, their servants and/or agents from interfering with the Plaintiff's interest, entitlement, occupation, use and/or peaceful enjoyment of the suit property.**
- d. Mesne profits at KShs.100,000/-per month from the date of filing suit.**
- e. Costs of this suit and interest therein at Court rates.**
- f. Any such further and/other relief this Honourable Court may deem fit to grant.**

21. The Plaintiff also responded to the Defence and averred as follows: -

- a. The Plaintiff joined issue with each and every allegation made in the Defence as though it had been set out verbatim and traversed seriatim.
- b. The Plaintiff denied paragraphs 12, 13, and 14 of the Defence and put the Defendant to strict proof. The Plaintiff specifically denied knowledge of any intended swapping of Plot No. Mombasa/Mwembelegeza/349 with Plot No. Mombasa/ Mwembelegeza/375 or Plot No. Mombasa/Mwembelegeza /925, and the Defendant was put to strict proof thereof.

- c. The Plaintiff further denied knowledge of the letters dated 3rd June, 2005 and 11th June, 2015, and denied knowledge that she had been directed by the Ministry of Lands, Housing and Urban Development to surrender her title for correction. The Defendant was put to strict proof of these allegations.
 - d. In answer to paragraph 15 of the Defence, the Plaintiff contended that her constitutional rights had been violated by the Defendant's conduct of grabbing her property and denying her access and use of the same.
 - e. The Plaintiff denied paragraph 18 of the Defence and specifically denied any knowledge of a surrender of title to the Ministry of Lands, Housing and Urban Development for correction. The Defendant was put to strict proof thereof.
 - f. For these reasons, the Plaintiff prayed that the Defendant's Defence be dismissed with costs to the Plaintiff.
22. The Plaintiff called PW - 1 on 19th October, 2021 who testified as follows: -
- A. Examination in Chief of PW - 1 bby M/s. Okata Advocate.**
23. PW - 1 testifies and was sworn in Swahili language. She was called SUSAN MKANGOMBE MALOMBO, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. She adopted her witness statement dated 29th May, 2019 and produced documents marked as Plaintiff's Exhibit Numbers 1 to 16 in that order. They included the National Identity Card of her mother, the Power of Attorney dated 26th March, 2019, the letter of allotment dated 1st December, 1998, and the title deed

issued on 14th April, 2016 in the name of Janet Wakio Mgongo.

24. The Plaintiff confirmed that she had seen the original Certificate of Title for Plot No. Mombasa/Mwembelegeza/375. The title was in the name of Janet Wakio Mgongo. She testified by virtue of the powers donated to her under a Power of Attorney dated 26th March, 2019. The Plaintiff stated that her mother was old. She was aged 84 years, and had her identity card. She had obtained the letter of allotment on 1st December, 1998 but had not entered the land as she had relocated to Taita Taveta. The family thereafter began processing the title deed. From the years 1998 to 2006, nobody occupied the plot. It was only in the year 2010 that the Plaintiff learned that the Defendant had encroached upon the land.
25. The Plaintiff testified that the Defendant had been told by the Secretary of Mwembelegeza that she was building on the wrong plot. The Plaintiff contacted the Defendant's sister, who confirmed that the Defendant resided abroad. The Plaintiff spoke with the Defendant, who indicated that she had a different plot and had been advised by the Ministry of Lands that the plots had been swapped. The Plaintiff stated that she had seen the letter from the Ministry.
26. By the year 2016, the Defendant had already constructed on the land. The Plaintiff testified that she had never met the Defendant in person but had spoken with her via WhatsApp.

Referring to the Defendant's documents, the Plaintiff stated that she was not aware of, nor had she seen, any communication from the Ministry of Lands regarding swapping of plots. She further testified that she was not aware of any surrender of the title deed. She emphasized that her case was to secure the plot for her mother before her demise.

27. The Plaintiff stated that she and her family had never entered onto the land, as they only had a letter of allotment and not a title deed until the year 2016. That was why they instituted the case in the year 2019. The Plaintiff urged the Court to ensure that the Mwembelegeza plot was secured for her mother. She explained that they had moved her mother to Taita Taveta because she was sickly, and they wanted her to spend her final years there.
28. The Court noted that there were semi-permanent structures constructed on the property.

B. Cross Examination of PW - 1 by Mr. Matende Advocate.

29. PW - 1 stated that she had not been present when her mother obtained the allotment of the suit land. She explained that she only came to know about it from the Secretary of Mwembelegeza. She confirmed that she had never seen any letters from the Ministry of Lands directing correction of the land records.

30. The Plaintiff testified that Mary had never been told of any correction of land by the Ministry, and that it was her advocate who had informed her of such matters. The Plaintiff further stated that she and her family had removed their mother from Mwembelegeza to Taita Taveta in 1994. She admitted that she did not know for how long her mother had stayed on the land prior to relocation.
31. The Plaintiff explained that she had been called by the Secretary of Mwembelegeza and, upon visiting, found an agent on the land. She testified that she and her family had struggled for two years to locate Mary, during which time structures had already been erected on the property.
32. The Plaintiff called her second witness on 19th October, 2021 wherein he testified that: -

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

33. PW - 2 was sworn and he testified in Swahili. He was called MESHACK MWAKIMOSO MWALUKUKU, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. He adopted his witness statement dated 10th June, 2019. He testified that he had been the Secretary of the Mwembelegeza Squatter Settlement Scheme from the year 1996. He stated that he had been told that the scheme had existed since 1958 and that Janet Wakio Mgongo had been a squatter there from 1958.

34. PW - 2 confirmed that he knew Susan, the daughter of Janet. He testified that the scheme had issued Janet with a letter of allotment to the plot and that people were required to pay a sum of Kenya Shillings Six Thousand (Kshs. 6,000/=) for the plots. He stated that Janet was given the letter of allotment and that the title deed was eventually issued in the year 2016 after delays in processing.
35. PW - 2 testified that in the year 2009 the Defendant, Mary, entered the plot and began construction. By that time, Janet had already moved from Mwembelegeza to Taita Taveta, where her children had relocated her to spend her final years. PW - 2 stated that he had been told that Mary lived abroad and that he obtained her contact through her sister, Susan.
36. PW - 2 emphasized that he had never heard of any exchange of plots involving Mary's Plot No. 349 and Janet's Plot No. 925, allegedly connected to one Abdi Mohamed. He testified that he had never seen anyone by that name in relation to the scheme.

B. Cross Examination of PW - 2 by Mr. Matende Advocate.

37. PW - 2 admitted that he did not have any documentary evidence to show that he had been the Secretary of the scheme. He confirmed that Janet Wakio was his blood sister. PW - 2 further testified that he had worked for Kenya Insurance Company and not the Ministry of Lands, and therefore he might not have known the reasons for any

alleged swapping of land. He reiterated that he had never heard of such swapping in relation to the suit property.

38. The Plaintiff called PW - 3 on 2nd December, 2021 who testified as follows: -

A. Examination in Chief of PW - 3 by M/s. Okata Advocate.

39. PW - 3 was sworn and he testified in English language. He identified himself as SAMMY MCHOMBO. He was the District Land and Settlement Officer (DLASO). He confirmed that there had been a Letter of Offer issued to Janet Wakio Mgongo, the Plaintiff herein, for Plot No. Mombasa/Mwembelegeza/375. He stated that Janet had paid the requisite fees on 27th December, 2000 and that a discharge of charge was issued on 30th October, 2015. He explained that he was not aware of the final document thereafter.

40. PW - 3 testified that the title deed was issued in the name of Janet Wakio Mgongo for Plot No. 375. He further stated that Plot No. 349 had been allocated to Mohamed. According to his office records, the Discharge of Charge was crucial because all properties under the settlement scheme were only granted title deeds once the charge had been settled, unless there was a presidential decree. He emphasized that there would be no swapping of plots under such circumstances.

B. Cross - Examination of PW - 3 by M/s. Kwamboka Advocate.

41. PW - 3 acknowledged that he was aware of a letter dated 11th June, 2015 referring to surrender of land. However, he testified that he was not aware of any swapping of plots or surrender of the title deed in respect of Plot No. 375.
42. PW - 3 explained that the letter of 11th June, 2015 had been accompanied by a ground status report, which showed that the Defendant was occupying the wrong property. He reiterated that according to his office records, what existed was a Letter of Allocation, and not any swapping of plots.

C. Re - Examination of PW - 3 by M/s. Okata Advocate.

43. PW - 3 clarified that he was not the author of the letter dated 11th June, 2015. He explained that the procedure for swapping required that all parties be called and involved, and that in this case, there had been no letter addressed to the Plaintiff.
44. The Plaintiff called PW - 4 on the same day and he testified as follows:

A. Examination in Chief of PW - 4 by M/s Okata Advocate.

45. PW - 4 was sworn and in English language. He was called (SAMMY WAMBUA. He worked with the Defendant and was the Regional Surveyor Coast. He confirmed that there were two properties in issue, Plot No. 375 and Plot No. 349.
46. PW - 4 informed Court that there was a Registry Index Map (RIM) depicting the parcels. He produced Mwembelegeza sheet No. 3, Reference No. 2001/1/5, published in August 1999, 12th Edition, signed by the District Surveyor, which was

marked as Plaintiff's Exhibit 2. He explained that the two plots were sequential but not adjacent to each other.

47. PW - 4 stated that the purpose of swapping arose when documents did not tally. He explained that swapping was done by consent, through an amendment panel, and was reflected on the map as an amendment. He clarified that while a party could be compelled to swap, the process was initiated by suggestion and required involvement of all parties.

B. Cross - Examination of PW - 4 by M/s. Kwamboka Advocate.

48. PW - 4 stated that swapping of plots was recommended when there was a problem. He confirmed that in this case, there was no swapping had been done. He acknowledged that there were many instances of swapping reflected on the map.

C. Court's Observation

49. The Court directed PW - 4 to show examples of swapping on the map parcels. He pointed to entries numbered 4, 8, 9, and 10, and confirmed that all of them had been swapping on voluntary basis.
50. The Plaintiff called PW - 5 who testified that: -

A. Examination in Chief of PW - 5 by M/s. Okata Advocate.

51. PW - 5 was sworn and testified in the English language. She identified herself as JOSEPHINE RAMA. She was the Land Registrar in Mombasa and had dealt with parcels under Mwembelegeza.
52. PW - 5 explained as the land Registry, when registering land emanating from Settlement Fund Trustee Schemes (SFT), the following documents had to be presented:
- (a) A Discharge of Charge from the District Land Adjudication Officer (DLASO),
 - (b) A national identity card of the Allottee (s).
 - (c) A Personal Identification Number (PIN), and
 - (d) A transfer from the Settlement Fund Trustees (SFT) under the Registered Land Act, Cap. 300 (Now Repealed).
53. PW - 5 testified that for Plot No. Mombasa/Mwembelegeza/375, her office had received all the requisite documents and issued a title deed to Janet Wakio Mgongo in the year 2016. She further stated that for Plot No. 349, her office had received documents from Abdi Mohamed on 8th February, 2000, and a title deed was issued to him. He later transferred the property to Mary Nyathiriga Wangai, the Defendant.
54. PW - 5 confirmed that there was a letter dated 11th June, 2015 authored by the Settlement Area Title (SAT) Land Registrar, recommending surrender of the title deed for correction purposes. She referred to the green card record, specifically Entry No. 6 dated 26th May, 2015, which was a letter from the DLAO. That letter indicated that no dealings could be

undertaken until the plots' occupation survey was complied with.

55. PW - 5 testified that the letter meant the Defendant was occupying the wrong plot. She explained that the letter dated 26th May, 2015 was a ground report from the DLASO, and that the Defendant had not surrendered her title for correction.
56. PW - 5 interpreted the letter to mean that the surrender of title was intended to change the numbering from Plot No. 379 to Plot No. 375. She clarified that the letter had not been written to Janet Wakio Mgongo, who at that time did not yet have a title. Janet later obtained her title after the anomaly had occurred. PW - 5 confirmed that as at the date of her testimony, Plot No. 379 belonged to Janet Wakio Mgongo.

B. Cross - Examination of PW - 5 by M/s. Kwamboka Advocate.

57. PW - 5 testified that she had been in Mombasa for two and a half years. She confirmed that Plot No. 349 had first been allotted to Abdi Mohamed and later transferred to Mary. She stated that the Land Registrar who authored the letter dated 11th June, 2015 had intended to change the numbering of the title deeds.
58. PW - 5 further testified that the Defendant's title for Plot No. 349 was not in the file because she had not surrendered it. She confirmed that the Land Registrar had not forced her to surrender the title. She reiterated that she did not deny the existence of the letter dated 11th June, 2015.

C. Re - examination of PW - 5 by M/s. Okata Advocate.

59. PW - 5 explained that correction of titles was a normal occurrence. She stated that it happened under many circumstances, including wrong numbering and mapping errors. She clarified that a party could move for correction, or the Land Registrar could do so *suo moto*, but in either case, all parties had to be involved.
60. The Counsel to the Plaintiff, M/s Okata Advocate, marked her case closed on 2nd December, 2021.

V. The Defendant's case

61. The Defendant responded to the Plaintiff's claim through an Amended Statement of Defence where he averred that:
- a. Save for what was specifically admitted, the Defendant denied all and singular allegations comprised in the Plaint as though the same had been set forth and traversed seriatim.
 - b. The Defendant admitted the Plaintiff's address of process but otherwise denied paragraph 1 of the Plaint. She further denied that the Plaintiff held a Power of Attorney as alleged and put the Plaintiff to strict proof thereof.
 - c. Paragraph 2 of the Plaint was not denied save that the Defendant's address of process was care of Mathew Nyabena & Company Advocates, Ambalal House, 1st Floor, North Wing, P.O. Box 88381-80100, Mombasa.
 - d. Without prejudice to anything comprised therein, the Defendant contended that the Plaintiff's suit was incompetent, bad in law, and otherwise an abuse of the court process. She stated that she would, at or prior to the

- hearing, seek to have the Plaintiff's suit struck out upon a preliminary point of law.
- e. The Defendant denied paragraph 3 of the Plaintiff and in particular denied that at all times material to the suit Janet Wakio Mgongo was the registered owner of Plot No. Mombasa/Mwembelegeza/375. The Plaintiff was put to strict proof thereof.
 - f. The Defendant denied paragraph 4 of the Plaintiff and denied that Janet Wakio Mgongo had been registered as a squatter at Mwembelegeza in the year 1996 or that she had been issued with a letter of allotment numbered 375 for the plot measuring approximately 50 x 100 feet at Mwembelegeza Squatter Settlement Scheme in Mombasa District. The Plaintiff was put to strict proof thereof.
 - g. The Defendant denied Paragraph 5 of the Plaintiff and denied that the Plaintiff had paid the requisite fees for the issuance of the alleged title deed dated 14th April, 2016. The Plaintiff was put to strict proof thereof.
 - h. The Defendant denied Paragraph 6 of the Plaintiff and particularly denied that in the year 2010 she had, without legal right, entered the Plaintiff's property and constructed upon it. The Plaintiff was put to strict proof thereof.
 - i. In further answer to Paragraph 6 of the Plaintiff, the Defendant averred that she was the legal registered owner of Plot No. Mombasa/Mwembelegeza/375, having purchased it for value from the previous owner, one Abdi Mohamed Adi, vide a Sale Agreement dated 4th June, 2005, and having been registered as proprietor in the year 2005.
 - j. The Defendant stated that as proof of ownership she held a Certificate of Title issued to her on 6th June, 2005.
 - k. The Defendant averred that ever since she purchased the property, she had been in quiet and exclusive possession

- of the suit property and had developed it by constructing rental houses thereon.
- i. The Defendant further contended that on or about 3rd June, 2005, the Ministry of Lands, Housing and Urban Development had swapped Plot No. Mombasa/Mwembelegeza/349 with Plot No. Mombasa/Mwembelegeza /375, and that Plot No. 375 had been swapped with Plot No. 925.
 - m. The Defendant contended that on or about 11th June, 2015, the Ministry of Lands, Housing and Urban Development had written to her asking her to surrender her title for Plot No. 349 for correction, as her plot number should have been Plot No. 375.
 - n. The Defendant averred that she had surrendered her title for Plot No. 349 to the Ministry of Lands, Housing and Urban Development for correction but had not been issued with another title since the Plaintiff had refused to surrender her title for correction.
 - o. The Defendant contended that the Plaintiff's refusal to surrender her title amounted to a gross violation of the Defendant's constitutional and property rights.
 - p. The Defendant averred that the Plaintiff's case did not disclose any reasonable cause of action against her and that she would seek to have the suit dismissed or struck out.
 - q. The Defendant admitted paragraph 7 of the Plaint only to the extent that she resided in Germany. She denied that the Plaintiff had ever engaged her in discussions with a view to removing the alleged illegal structures on the suit property or that she had refused to settle the matter amicably. The Plaintiff was put to strict proof thereof.
 - r. The Defendant denied paragraph 8 of the Plaint and denied that the Plaintiff had written a demand letter on 21st November, 2018 or that such letter had been sent to

her via WhatsApp. She further denied knowledge of the contents of the letter allegedly copied to her advocates and put the Plaintiff to strict proof thereof.

- s. The Defendant denied the claim under paragraph 9 of the Plaintiff that the Plaintiff was the lawful registered owner of the suit property. She further denied the claim for permanent injunction and put the Plaintiff to strict proof thereof.
- t. The Defendant averred and asserted that she had taken possession of the subject property and occupied the same in the year 2005 without any complaint and had openly occupied and developed the same. She contended that the Plaintiff's suit was time-barred under the provisions of the Limitations of Actions Act.
- u. The Defendant denied Paragraph 10 of the Plaintiff.
- v. The Defendant admitted the jurisdiction of this Honourable Court.
- w. The Defendant prayed that the Plaintiff's suit be dismissed or struck out with costs.

62. The Defendant called their first witness on 24th April, 2023 who testified as follows: -

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

63. DW - 1 was sworn and testified in Swahili language. She was called MARY NYATHIRIGA WANGAI, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing. She adopted her witness statement dated 25th January, 2021 and produced documents marked as Defendant's Exhibits 1 to 13, which were admitted in that order as evidence in chief.

64. DW - 1 stated that the case concerned Plot No. Mombasa/Mwembelegeza/375, where she had constructed permanent houses. She testified that she had intended to purchase land and had been shown Plot No. 349 on the ground, which was undeveloped and had plantations. She was informed that it belonged to Mr. Abdi Mohamed and that it had a title deed.
65. DW - 1 explained that before purchasing, she consulted the Chief, the Village Elder, and the Secretary of the scheme, Mr. Meshack Mukuhu. On 3rd June, 2005, she received a letter from the Chief recommending swapping of plots. She thereafter purchased the land from Abdi Mohamed, executed a sale agreement dated 4th June, 2005. She paid a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=), and was issued with a title deed. She referred to the Green Card, Entry No. 4, which bore her name.
66. DW- 1 testified that Plot No. 349 was registered in the names of Ketan Hirji Halai and Hirji Karasan Halai. She referred to a letter dated 26th May, 2015 from the DLASO to the Land Registrar, which recommended that Plot No. 349 be registered in the name of Lucy Mughoi and Plot No. 375 in the name of Abdi Mohamed Ali. She stated that she had constructed four one-bedroom units on the land.
67. DW - 1 explained that she had applied for approval to build from the Municipal Council in the year 2008 and had constructed the houses that year. She testified that everyone

saw her building and that there had been no interference, not even from the Plaintiff.

68. DW - 1 stated that she had lived on the land for 18 years. She explained that the Government had allocated the land and that she had relied on official documents and the Chief's letter. She was referred to a letter dated 11th June, 2015 from the Land Registrar requiring surrender of the title for correction according to the occupancy survey. Despite of this, it was her testimony that she had not surrendered the title as she had been abroad in Germany.

69. DW - 1 maintained that she had not encroached or trespassed, as she had been allowed to occupy by the Government and the Chief. She stated that Mr. Meshack Mukuhu, the Secretary, had seen her building and had even allowed her to cut plantations. She emphasized that if the Court were to decide that she vacate Plot No. 375, Janet Wakio Mgongo would end up with two plots - No. 375 & 349. DW - 1 contended that if there had been any error in allocation or swapping, it was the Government that had committed the error, not her.

B. Cross - Examination of DW - 1 by M/s Okata Advocate.

70. DW - 1 admitted that she did not know the names of the Assistant Chief who authored the letter dated 3rd June, 2005. She acknowledged that the Chief did not work at the Lands Registry and that the letter had been addressed "to whom it

may concern.” She stated that the letter confirmed her ownership of Plot No. 349.

71. DW- 1 confirmed that she had executed a sale agreement with Abdi Mohamed on 4th June, 2005 after seeing a copy of the title deed. She admitted that no title deed had been produced in Court. She further admitted that the agreement did not contain any clause indicating swapping of plots, and that the approval to construct from the Municipal Council had been for Plot No. 349.
72. DW - 1 testified that she could not recall when she received the letter dated 11th June, 2015 but believed it was on 16th June, 2015. She reiterated that she had not surrendered the title as she had been abroad. She admitted that there had been no swapping on paper and that she remained on Plot No. 349.
73. DW - 1 denied agreeing that Plot No. 349 be transferred to Ketan Hirji Halai and Hirji Karasan Halai. She stated that she had developed Plot No. 375 without a title, while awaiting correction letters. She acknowledged that the letter dated 26th May, 2015 contained recommendations but testified that she had no evidence that they had been implemented.
74. DW - 1 referred to the Plaintiff’s title, which had been issued on 14th April, 2016 following an application dated 30th November, 2015. She stated that Mr. Meshack Mukuhu and the Chief had shown her the plot and had not stopped her

from building. She admitted that she did not know whether she held a valid title for Plot No. 349.

C. Re - Examination of DW - 1 by Mr. Nyabena Advocate.

75. DW -1 testified that the Chief's letter bore his stamp and signature, and she trusted him. She stated that she was occupying Plot No. 375 and that Janet had never approached her to claim the land. DW - 1 contended that her Plot No. 349 had been exchanged with Plot No. 367. She referred to the Green Card for Plot No. 349, which bore the name of Abdi Mohamed. She testified that she had conducted an official search and had involved all parties, including the scheme. She stated that Plot No. 367 was not occupied.
76. The Defendant marked her case closed through his Counsel Mr. Nyabena Advocate on 24th April, 2023.

VI. Submissions

77. On 24th April, 2023 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.
78. Subsequently, all parties fully obliged. Pursuant to that the Honourable Court reserved a date to deliver its Judgement on notice. Eventually, the Judgement was delivered on 19th March, 2026 accordingly.

A. The Written Submissions by the Plaintiff

79. The Plaintiff through the Law firm of Messrs. V. N. Okata & Co. Advocates filed their written submissions dated 22nd May, 2023. M/s. Okata Advocate commenced her submission by providing a brief background of the matter. She submitted that the Plaintiff filed suit on 26th June, 2019 seeking a declaration that she was the lawful and registered owner of the suit land - Plot No. Mombasa/Mwembelegeza/375. She sought an order of eviction against the Defendant, a permanent injunction restraining the Defendant, her servants and/or agents from interfering with her interest, entitlement, occupation, use, and peaceful enjoyment of the suit property, mesne profits of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month from the date of filing suit, together with costs and interest.
80. The Plaintiff brought the action for and on behalf of Janet Wakio Mgongo vide Power of Attorney No. CR PA/20065, which had been registered on 16th April, 2019.
81. The Defendant was duly served and entered appearance on 14th July, 2020 through the firm of Akanga Matende & Company Advocates. She subsequently filed her Defence on 16th October, 2020. In her Defence, the Defendant denied that Janet Wakio Mgongo was the registered owner of Plot No. Mombasa/Mwembelegeza/375 and averred that there had been an apparent swapping between Plot No. 375, Plot No. 349, and Plot No. 925.

82. The Plaintiff filed a Reply to Defence on 9th November, 2020, traversing the allegations and putting the Defendant to strict proof. The matter proceeded to hearing virtually on 19th October, 2021 and later physically on 24th April, 2023 before this Honourable Court.
83. On the Plaintiff's evidence the Learned Counsel submitted that the Plaintiff adopted her witness statement and produced documents as per the list of documents dated 14th June, 2019. Plaintiff adopted her witness statement and produced documents as per the list of documents dated 14th June, 2019. PW - 1 testified that Janet Wakio Mgongo had obtained her Letter of Allotment on 1st December, 1998 (Plaintiff Exhibit No. 6 at page 10). She explained that Janet had relocated to Taita Taveta and that the plot had remained vacant until 2010, when she learned that someone had occupied the property.
84. PW - 1 testified that the Defendant had been informed by the Secretary of Mwembelegeza that she was building on the wrong property. PW - 1 stated that she had conversed with the Defendant via WhatsApp, where the Defendant claimed that the Ministry of Lands had swapped the plots and that she was therefore building on the correct property.
85. PW - 1 emphasized that she had never seen any documents from the Ministry of Lands indicating that Plot No. 375 had been swapped. She further testified that she was not aware of any surrender of the title deed. PW - 1 explained that there were structures on the land and that she had struggled for

two years to trace the Defendant, who was said to be residing in Germany. The Court verified the original title deed of Plot No. 375 on 21st October, 2021 and confirmed that it had been registered in the name of Janet Wakio Mgongo.

86. PW - 2, Mr. Meshack Mwakimoso, the Secretary of Mwembelegeza Squatter Settlement Scheme, testified and confirmed that he knew Janet Wakio Mgongo, who had been on the scheme as a squatter since the year 1958. He confirmed that Janet had obtained a letter of allotment and later a title deed in the year 2016. PW - 2 testified that the Defendant entered the plot in the year 2009 and commenced construction. He stated that he contacted the Defendant to inform her that she was constructing on the wrong property. As the Secretary of Mwembelegeza, he emphasized that he had never heard of any swapping of plots.
87. PW - 3, Mr. Sammy Mchombo, the District Land and Settlement Officer, testified that Janet Wakio Mgongo had been issued with a letter of offer for the suit Land - Plot No. Mombasa/Mwembelegeza/375, which she paid for, and a discharge of charge was issued on 30th October, 2015. He confirmed that Plot No. 349 had been allocated to Abdi Mohamed. He explained that his office was responsible for discharging property before a title was issued and confirmed that no swapping of plots had been undertaken.
88. PW - 4, Mr. Sammy Wambua, the Regional Surveyor Coast, produced Mwembelegeza sheet No. 3, Reference No.

2001/1/5, published in August 1999, 12th Edition, signed by the District Surveyor. He testified that Plot Nos. 375 and 349 were sequential but not adjacent to each other. He explained that swapping was only done by consent, through an amendment panel, and was reflected on the map as an amendment. He confirmed that no swapping had been done in this case and emphasized that swapping was voluntary. On request by Court he showed a few of such cases from the map.

89. PW - 5, Ms. Josephine, the Land Registrar Mombasa, testified that she dealt with parcels under Mwembelegeza. She explained that prior to registration of a title, the following documents were required: a discharge from the DLASO, an identity card and PIN, and a transfer from the Settlement Fund Trustees under the Registered Land Act. She confirmed that her office had received all the requisite documents from Janet Wakio Mgongo and registered the title in 2016. She further testified that Plot No. 349 had been registered to Abdi Mohamed on 8th February, 2000, and later transferred to the Defendant. She confirmed that the title deed for Plot No. 349 had not been surrendered for swapping as suggested by the letter dated 26th May, 2015.

90. The Defendant gave evidence on 24th April, 2023. She confirmed that she had constructed on Plot No. 375, Mwembelegeza. She admitted that she had initially been shown Plot No. 349 by Mr. Abdi Mohamed. The Defendant

adopted her witness statement dated 25th January, 2021 and produced her list of documents. She testified that on 3rd June, 2005 she received a letter concerning swapping of plots. On 4th June, 2005 she executed a Sale Agreement with Abdi Mohamed, paid a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=), and was issued with a title deed. The Defendant confirmed that she had never surrendered her title as required by the letter dated 11th June, 2015. She admitted that she had no title to Plot No. 375 but held a title to Plot No. 349. She claimed that Mr. Meshack Mwakimoso (PW - 2) had shown her Plot No. 375.

91. The Learned Counsel relied on the following four (4) issues for determination by the Honourable Court. Firstly, on the issue of the registered owner of Plot No. 375. The Learned Counsel submitted that the Court found that the registered owner of Plot No. Mombasa/Mwembelegeza/375 was Janet Wakio Mgongo, as per the title deed (Plaintiff Exhibit No. 12 at page 16) registered on 14th April, 2016. The process of obtaining the title deed was explained through evidence: Janet had been a squatter at Mwembelegeza, was issued with a letter of allotment dated 1st December, 1998, paid the requisite fees of a sum of Kenya Shillings Six Thousand Seven Sixty Two Hundred (Kshs. 6,762/=) on 22nd September, 2006 (Plaintiff Exhibit No. 11), and registered the discharge of charge on 30th October, 2015 before obtaining the title.

92. Secondly, on the issue of the registered owner of Plot No. 349. The the Learned Counsel submitted that the Defendant's list of documents dated 5th December, 2022 showed that she had carried out a search on Plot No. 349 on 20th May, 2005. She admitted in Court that on 3rd June, 2005 she obtained a letter from the Assistant Chief of Mwembelegeza Sub-Location (Dexh 8), addressed "To whom it may concern."
93. Despite the letter suggesting that plots were undergoing swapping, the Sale Agreement between Abdi Mohamed and the Defendant did not indicate any swapping. The Defendant was thereafter issued with a title deed to Plot No. 349 on 6th June, 2005. Her approval for development from the Municipal Council of Mombasa dated 2008 was also for Plot No. 349.
94. The letter dated 11th June, 2015 (Defendant exhibit 7) from the Ministry of Lands, Housing and Urban Development was addressed to the Defendant but not to the Plaintiff. The Defendant never surrendered her title, despite claiming in her pleadings that she had done so. She alleged that she had been abroad in Germany at the time, but no evidence was produced to support this claim. The letter dated 26th May, 2015 from J.M. Levu contained recommendations for swapping, but these recommendations were never implemented. Witnesses confirmed that swapping could only be done by consent, and in this case, no consent was shown.
95. The Green Card for Plot No. 349 indicated that the Defendant was the registered owner of Plot No. 349, subject to a caveat

of “no dealings until the plot occupancy survey is complied with.” There was no such caveat on the Green Card for Plot No. 375, hence the transfer to the Plaintiff was duly effected.

96. Thirdly, on the question of whether swapping had been done between Plot Nos. 375 and 349. The Learned Counsel submitted that the alleged swapping, which formed the backbone of the Defendant’s Defence, had never been effected. The Defendant had been aware of the issue since 3rd June, 2005, yet even when the Plaintiff reached out to her, she dismissed the concerns and insisted she was on the correct property. The Defendant admitted that she had not surrendered her title for Plot No. 349 as required.

97. The intended swapping was therefore never carried out. The Defendant’s witness statement and pleadings were at variance with her case. There was no law supporting compulsory swapping of plots. **Article 40 (2) of the Constitution of Kenya, 2010** provides:

“Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated.”

98. The Learned Counsel noted that the legal position was that parties could not be forced to swap properties. This principle had been affirmed in the case of:- **“HCC Succession Cause No. 158 of 2000, In the Matter of the Estate of Kisigwa Asuga Asuga**

(Deceased), Albert Imbuga Kisigwa - Versus - Pecho Kawai Kisigwa”, where Justice Njagi (as he then was) quoted Mwita J. as follows:

“If the Objector feels she has some sentimental attachment to the place she has settled on and does not want to move, she could very well approach the other beneficiary and mutually agree to swap their parcel. This is something only the two of them can agree on and resolve. I do not think it can be blamed on the Petitioner. Neither can the Court force parties to swap parcels of land.”

99. The Learned Counsel submitted that the legal position was that parties could not be forced to swap properties. The Defendant knew that there was an issue of swapping. Her pleadings do not reflect the seriousness of the matter. Abdi Mohamed, the person she purchased the property from has not been included in this suit. The Defendant has not sought in her defence any remedies or the nullification of the Plaintiff's title nor has she sought an order that swapping be done. A party is bound by her pleadings.

100. The Defendant's pleadings that she is the registered owner of Plot Number Mombasa/Mwembelegeza/375 is in total variance to the evidence adduced. Despite being aware that no swapping has been carried out the Defendant proceeded in 2009 to build a structure on Plot 375. The Defendant is the author of her own misfortune. Article 40 of the Constitution 2010 upholds the sanctity of titles. Article 40 of the Constitution of Kenya 2010 states as follows;

40 - Protection of Right to property

(1) Subject to Article 65, every person has the right, either individually or in association with other to acquire and own property:-

(a) of any description; and

(b) In any part of Kenya

101. The Learned Counsel averred that she held an indefeasible title to Plot Number Mombasa/Mwembelelgeza/375 and no evidence has been adduced to warrant swapping or its invalidation. Section 26 (1) of the Land Registration Act (No 3 of 2012) provides;

“The Certificate of Title issued by the Registrar upon registration, 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 the 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 has been acquired illegally, procedurally or through a corrupt scheme.”

102. Finally, on whether the Plaintiff is entitled to vacant possession of Plot Number Mombasa/Mwembelelgeza/ 375 and damages. The Learned Counsel submitted that taking into account the aforementioned the Plaintiff was entitled to vacant possession of Plot No. 375. They relied on the following authorities: -

- ***ELC NO. 417 OF 2015 KISUMU Samwel Odhiambo Oludhe & 2 Others - Versus - Jubilee Jumbo Hardware Limited where Justice M. A.Odeny awarded Damages for trespass of Kshs. 500,000/-.***

- ***ELC NO. 961 OF 2012 KISII Shimoni Resort - Versus - Registrar of Titles & 5 Others - where Justice J. M. Mutungi awarded Kshs. 2,000,000/-.***

103. The Learned Counsel submitted that the Plaintiff had pleaded a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month from the 26th June, 2019 to date which totals to a sum of Kenya Shillings Four Million Eight Hundred Thousand (Kshs. 4,800,000/-). The Plaintiff was seeking vacant possession of Plot No. Mombasa/Mwembelegeza/375 as pleaded in the Plaint this sum-as damages together with costs and interest as prayed in the Plaint.

B. The Written Submission by the Plaintiff in response to the Amended Statement of Defence.

104. The Plaintiff through the Law firm of Messer. V.N. Okata & Co. Advocates filed her written submissions dated 4th December, 2024. M/s. Okata Advocate submitted that the Plaintiff filed suit on the 26th June, 2019 seeking A declaration that the Plaintiff is the lawful and registered owner of Plot Number Mombasa/Mwembelegeza/375, an order of eviction against the defendant, a permanent injunction restraining the Defendant, her servants and/or agents from interfering with the Plaintiff's interest, entitlement, occupation, use and/or peaceful enjoyment of the suit property, mesne profits of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month from the date of filing suit, costs and interest as prayed. The Plaintiff

brings this action for and on behalf of JANET WAKIO MGONGO vide Power of Attorney No. CR PA/20065 Registered on the 16th April, 2019.

105. The Defendant was served and entered appearance on the 14th July, 2020 through the firm of Akanga Matende filed a defence on the 16th October, 2020. The Defence denied that Janet Wakio Mgongo is the registered owner of Plot Number Mombasa/Mwembelegeza/375, averred that an apparent swapping between Plot 375, Plot 349 and Plot 925 has been done. The Plaintiff filed a reply to the defence on the 9th November, 2020.

106. The Defendants current advocate Mathew Nyabena replaced Akanga Matende on the 10th June, 2022 and filed an application dated 10th June, 2022 to enable the dispute be adjudicated through the Mombasa District Land Adjudication and Settlement Officer. Despite the Plaintiff being agreeable to this and an order issued on the 5th April, 2023 and despite the Plaintiff going through the rigors of site visits and other attendant costs concerning adjudication the Defendant suddenly abandoned the process at the tail end of the process and filed in court an application dated 14th May, 2024 for amendment of her defence. In the meantime, the matter had proceeded for Defence hearing on the 24th April, 2023 and the Defendant closed their case. Plaintiff had filed their final submissions on the 23rd May, 2023. The Plaintiff relies on

these submissions dated 22nd May, 2023 and filed on the 23rd May, 2023 and the submissions filed herein.

107. On the evidence and case analysis after the filing of the Plaintiff's submissions dated 22nd May, 2023. The Learned Counsel submitted that on 5th April, 2023 Consent was entered for the involvement of the District Land Adjudication Officer (DLASO) for a possible solution to the matter. The suggestion to proceed to Alternative Dispute Resolution was introduced by the Defendant by way of Application dated 10th June, 2022.
108. Mr. Benjo K.D Land Adjudication Officer - Mombasa filed a report dated 6th December, 2023 outlining the outcome of the Alternative Dispute Resolution mechanism. The Plaintiff on the 16th November, 2023 filed a letter to the Deputy Registrar seeking confirmation of the filing of the Land Adjudication Officer which letter went unanswered. The Plaintiff filed the Land Adjudication Officers letter on the 4th December, 2024 for abundance of caution. The mediation process was abandoned by the Defendant on the 11th April, 2024 when a consent in line with the Adjudicators letter dated 6th December 2023 was sent to the Defendant by the Plaintiff and the Defendant did not reply to the said letter.
109. The Defendant had drawn the Plaintiff into a wild goose chase in terms of seeking an Alternative Dispute Resolution. After the report dated 6th December, 2023 the Defendant abandoned the process and filed the Application dated 14th

May, 2024 seeking to Reopen the case and Amend the Defence to include a prayer for Adverse possession. The Application dated 14th May, 2024 was partially allowed with the Defendant being allowed to Amend her Defence to introduce a prayer of Adverse possession by the Defendant. The Defendant Amended her Defence on the 29th October, 2024 and the Plaintiff filed an Amended Reply to Defence on the 4th November, 2024 and Amended her Plaintiff on the 6th November, 2024.

110. On the issues for determination, the Learned Counsel relied on the following: -

a. ***Whether the Plaintiff's claim is time barred under the Limitations of Actions Act.***

111. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve years.

112. Section 7 of the Limitations of Actions Act:

“An Action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.”

113. Section 13 (2) of the Limitation of Actions Act: -

“Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue

unless and until some person again takes adverse possession of land.”

114. In an adverse possession claim Time or the period when the Defendant entered the suit premises is of the essence. The Defendant claims to have entered the suit premises in the year 2005. There was no evidence of this as the Defendant bought Mombasa/Mwembelegeza 349 and/or 375. The Defendant had not led any evidence to show when she entered 375. The Defendant in this suit seems to be approbating and reprobating at the same time. The Defendant in her defence has stated that she is the owner of Plot Number Mombasa/Mwembelegeza/349 registered in her name and current owner of Mombasa/ Membelegeza/375 by way of swapping to be carried out by the District Land Registrar. At the same time her Amended Defence claims that on an unknown date she entered adversely on the suit premises. The Defendant does not seem to be certain of her defence or her position as regards to Mombasa/ Mwembelegeza/375. These are two conflicting positions. The position was the Plaintiff, an 84 years old lady became aware of the Defendant having taken her property in the year 2012 and she immediately started the process of seeking her eviction in 2019 which was hampered by the fact that the Defendant was not resident on the plot, but was resident in Germany and the Plaintiff had to undertake her own investigations to unearth who the Defendant was.

115. The burden of proving adverse possession is upon the person claiming it on a balance of probability as was set out in the case of ***“Kimani Ruchine - Versus - Swift Rutherford & Co. Limited (1980) KLR”*** where it was held that;

“The Plaintiffs have to prove that they have used his land which they claim, as of right: nec vi, nec clam. Nec precario. so the Plaintiffs must show that the Company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”.

116. In the case of:- ***“Civil Appeal No. 325 OF 2003 Teresa Wachuka Gachira - Versus - Joseph Mwangi Gachira”*** it was held that;

“There is no proof of exclusive, continuous and uninterrupted possession of the Land for twelve (12) years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature situation of other characteristics of the land, periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

117. In the case of:- ***“CACA 110 of 2016 Richard Wefwafwa Songoi - Versus - Ben Munyifwa Songoi”*** the JJA MAKHANDIA, KIAGE & OTIENO ODEK laid out what has to be proved by a party claiming adverse possession and stated the following;

“A person who claims adverse possession must inter alia show;

- (a) On what date he came into possession***
- (b) What was the nature of his possession***
- (c) Whether the fact of his possession was known to the other party***
- (d) For how long his possession has continued and;***

(e) That the possession was open and undisturbed for the requisite 12 years

There has been no evidence produced on the date the Defendant came into possession. Whether the fact of possession was known to the Plaintiff, it was not and whether it was open and undisturbed for 12 years. It was not as the Defendant was resident in Germany.

118. The Defendant as per the evidence did not occupy the property known as Mombasa/Mwembelegeza/375 in the year 2005 as alleged or at all as the Plaintiff was in Germany and was served Summons in Germany on the 22nd November, 2019. This has not been, disputed or challenged by the Defendant. The Plaintiff only became aware of the Defendant's occupation in 2012. There was no indication that the Defendant was on the premises before then. The date of occupation by the Defendant can only be 2012. The Plaintiff further submits that the Defendant's Residency in Germany is evidence that her stay on Plot Number Mombasa/Mwembelegeza/375 was not continuous, uninterrupted and unbroken.

119. The letter dated 11th June, 2015 recommending a swapping was not acted upon and the Plaintiff was not aware of any swapping to be carried out. The Plaintiff became aware of the presence of the Defendant on Mombasa/Mwembelegeza/375 (the suit property) in the year 2012, hence the Defendants presence (if any) was not open and uninterrupted. If swapping had allegedly been done the Plaintiff would not have been issued with a title on the 14th

April, 2016. The Defendant is registered owner of Plot Number Mombasa/Mwembelegeza/349 and is set to benefit twice if the claim of adverse possession succeeds. The approval the Defendant obtained from the Municipal Council Mombasa dated 20th August, 2008 was for Plot number Mombasa/Mwembelegeza/349 and not 375 and there is no proof that the Defendant occupied 375 in 2005 or 2008 or at all until the year 2012. The Defendant was not on the suit property 375 in 2005 as she was untraceable until 2019 when the Plaintiff managed to trace her for service of this suit. The Plaintiff had further had to apply for substituted service by way of an application dated 2nd August, 2019 as the Defendant was not resident in the country. The Defendant was served summons through her phone number +4917664652632 which is a German number.

120. The Learned Counsel submitted that the registered owner of Plot Mombasa/Mvembelegeza/375 is JANET WAKIO MGONGO as per title deed Pex 12 at page 16, registered on the 14th April, 2016. The process of obtaining the Title deed has been explained. Janet Wakio was a squatter in Mwembelegeza prior to being issued with a letter of allotment dated 1st December, 1998 for Plot Number 375. She subsequently moved to Taita Taveta but on the 22nd September, 2006 paid the Kshs 6, 762/- required to enable her Discharge the Title for Plot 375 see Plaintiff Exhibit No. 11. Janet Wakio

thereafter registered the Discharge of Charge on the 30th October, 2015, and duly obtained the title.

121. An Application for Adverse possession is brought under the provision of Order 37 Rule 6 (7) (1) of the Civil Procedure Rules, 2010 which states as follows:-

7(1) An Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons (Emphasis mine).

(2) The Summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed (Emphasis mine).

(3) The Court shall direct on whom and in what manner the summons shall be served.

122. The Learned Counsel submitted in conclusion that the Plaintiff prays that the Plaintiff's suit be allowed with costs and the Defendant's suit and subsequent pray for Adverse Possession be dismissed with costs.

B. The Written Submissions by the Defendant

123. On behalf of the Defendant, the Law firm of Messrs. Nyabena & Company Advocates filed the written submissions dated 28th November, 2024. Mr. Nyabena Advocate commenced the submissions by informing Court the position taken by the Plaintiff in this matter reminded one of the play "**The Merchant of Venice**" by William Shakespeare. In this case, just like Shylock in the play, the Plaintiff demands her pound of flesh; occupation of plot no.375 despite being offered Plot number 367 which was swapped with Plot no.375 which she rejects. She insisted that the Defendant who occupied Plot no.375 demolishes her

building and moves to plot No.349 and demolish the house of a third party.

124. The Counsel opined that, just like Portia in the aforesaid Play this Court was invited to use its Solomonic wisdom to ensure that no blood was spilt as Justice is not only served but there was a minimal destruction, demolitions and suffering to either party.

125. This case illustrated the problems that arose out of issues of land adjudication and settlement in Kenya. The parties herein may as well be innocent victims of mistakes made during the adjudication and settlement process. On one hand, the Plaintiff who was allocated her parcel in the year 1998 had never occupied the portion of land allocated to her.

126. On the other hand, in the year 2005 the Defendant was assured by the local Chief and the Land Settlement Committee that the plot she purchased had been swapped and the plot she occupied and built was Plot number 349. It seemed that the laxity and inaction by Plaintiff gave rise to this unfortunate dispute. If she had asserted her occupational rights earlier this state of affairs would not have arisen.

127. The Plaintiff's case.

According to the Learned Counsel, the Plaintiff filed the suit herein seeking the afore - stated. M/s. Janet Wakio Mgongo the allottee for Plot No. 375 did not testify in person. Instead, it was her daughter Susan Mkangombe Malombe testified on behalf based on a Power of Attorney. She testified that her mother was allocated the parcel of land in the year 1998 and she did not reside enter the land as she had moved to Taita Taveta.

128. It was in the year 2010, that she learnt there was someone on the land and found the Defendant had encroached on the land. She called the Defendant who was abroad at the time. The Defendant informed her that she had been informed by the Ministry that there was a swap of the plots. In cross examination, she testified that her mother was moved from Mwembelegeza to Taita in 1964. She would not state how long the mother had stayed on the land.

129. The Defendant called one Meshack Mwakimosho Mwalukuku. He testified that Janet Wakio Mgongo was his blood sister. He testified that he was the secretary of the settlement scheme and was not aware of any swapping of the plots and did not know the reason for swapping. He testified that in the year 2009 the Defendant got to the plot and started construction. The DLASO testified as PW - 3. He confirmed that he was aware of the letter dated 11th June, 2015. PW - 4 was Sammy Wambua, the Coast Regional Land Surveyor. His evidence

was to the effect that swapping could be recommended whenever there was a problem. He produced the area map and confirmed that there are many swappings from the map. He referred to entries numbers 4,8,9 and 10 which he said was voluntary. PW - 4, was M/s. Josephine Arama, the Land Registrar, Mombasa. She confirmed that in their records there was a letter dated 11th June, 2015 registered by Mr. Hashim Got Sat, a former Land Registrar for the surrender of title deed for correction purposes. She testified that there was an entry number 6 dated 26th May, 2015 prohibiting dealings with the land until ground survey was complied with. She testified that her interpretation was for surrender of Plot No. 349 to read Plot No. 375. She testified that the title to the Plaintiff was issued well after the letter for rectification of the anomaly. She further testified that correction of title was normal to correct wrong numbers and issues of mapping.

130. The Defendant's Case

According to the Learned Counsel, the Defendant testified that she purchased Plot No. Mombasa/Mwembelegeza/349 on the 4th June, 2005 from one Abdi Mohamed Ali for a consideration of a sum of Kenya Shillings Four Hundred Thousand (Kshs.400,000/=). She was registered as the owner and a title deed issued in her name. Before the said purchase the Defendant did due diligence by involving the

local Sub - Chief and the village elders who confirmed that Plot number 349 had been swapped with Plot number 375 and she proceeded to compensate the plant owners by paying a sum of Kenya Shillings Fifteen Thousand (Kshs. 15,000/=). She produced in evidence a letter dated 3rd June, 2003 from the assistant Chief which *inter - alia* states:

"...this is to confirm that my sub - location has been informed by the Mwembelegeza settlement scheme land committee that the undermentioned Plots nos. 349, 375, 925 were exchanged or swapped due to some understandable agreement by the concerned. Firstly, Plot_number 349 was swapped with plot no. 375 and then 375 was swapped with plot no. 925...."

132. Also produced in evidence is the ground report attached to the letter dated 26th May, 2015. It was a letter from the District Land Adjudication office addressed to the Land Registrar Mombasa. The letter basically reiterates the contents of the Chief's letter dated 3rd June, 2003. On Plot No. 375 the ground report states:-

"There is a permanent house on the ground belonging to Mary Wangari Nyathiriga Wangai. Mary bought the plot from one Abdi Mohamed Ali has the letter of offer for Plot No. 349....seemingly Plot No. 349 swaps with Plot No. 375...recommendation Plot No. 367 in the names of Janet Wakio Mgongo".

133. The report made recommendations for corrections to accord with the situation on the ground. It proposes that Plot Number 367 be registered in the name of Janet Wakio Mgongo the Plaintiff herein. Plot number 375 in the names of

Abdi Mohamed Ali who was succeeded by Mary Wangai Nyathiriga who bought the portion in the year 2005.

134. The Defendant testified that she upon purchase of the property she took possession of the same and commenced construction. She had been in occupation of the property to date. At no time did the Plaintiff or anyone else attempt to stop the construction and occupation which was open, notorious and exclusive. It was her defence that the Plaintiff's case was time barred under the Limitation of Actions Act, Cap. 22 and as such the orders sought in the Plaintiff's case could not issue. She further testified that currently, the Defendant/Applicant had discovered that her title Mombasa/Mwembelegeza/349 had been swapped with Plot No. 367 as per the green card in the consolidated list of documents number 10 the Land Registrar acted pursuant to the letter dated 26th May, 2015 and had already registered Plot 349 in the names of the owner/ beneficiary of Plot 367. What remained was for the allottee of Plot No. 375 (the Plaintiff) to be issued with title number 367 and allottee/ beneficiary (the Defendant) of Plot No. 349 to be issued with title for Plot number 375. In so doing, the ground occupation will accord with the titles without any loss to any party and the ends of justice would have been served.

135. Pursuant to orders of this Honourable court the District Land Adjudication and Settlement Officer (DLASO) in the company

of the area Chief visited the subject property. The DLASO filed a report which mirrors the earlier reports in terms of an amicable and just resolution of the dispute between the parties. The report was a useful guide as this Honourable Court seeks to deliver justice to the parties herein.

137. As per the ground occupancy recommendations, the Plaintiff occupied/used Plot No.367 and one Peris Wairimu Gitau occupied Plot No.349 while the Defendant occupied Plot No.375. From the evidence on record it emerged that the Plaintiff and the Defendant hold titles for Plot number 349 and 375 respectively. These were uncontested issues and the Defendant refused the invitation to make them issues for determination by this court. The issue was where were these Plots on the ground and whether issues arose during adjudication to comply with the respective ground positions. According to the Learned Counsel, based on the pleadings and evidence on record the following three (3) issues were for determination. Firstly, whether the plaintiff's claim is time barred under the limitation of Actions Act. The Learned Counsel held that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. The Defendant testified that she upon purchase of the property in the year 2005 she took possession of it and commenced construction. She had been in occupation of the

property to date. At no time did the Plaintiff or anyone else attempt to stop the construction and occupation which was open, notorious and exclusive. It was her defence that the Plaintiff's case was time barred under the Limitation of Actions Act and as such the orders sought in the Plaint could not issue. To buttress on that legal point, he cited the case of:- **"Sohanlaldurgadass Rajput & Soraj Sohanlala Rajput - Versus - Divisional Integrated Development Programmes Company Limited [2021] KEELC 1427 (KLR)"** the court held:-

"In the case of Edward Moonge Lengusuranga - Versus - James Lanaiyara

& Another [2019] e KLR, it was held as follows; "Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement."

34. *In view of the undisputed facts in both the Plaint and the Defence, I find that the causes of action in respect of the two suit plots arose on 8th December, 2007 and 25th January, 2008 respectively. 35. Section 7 of the Limitation of Actions Act provides as follows; "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

36. *The purpose of the Law of Limitation was stated in the case of Mehta - Versus - Shah [1965] E.A 321, as follows; "The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The*

effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

- 37. In *Gathoni - Versus - Kenya Co-operative Creameries Limited* [1982] KLR104, the Court of Appeal held as follows; "...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."**
- 38. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of *Iga - Versus - Makerere University* [1972] EA, the Court had this to say on the Law of Limitation; "A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."**
- 39. Under the provision of Section 7 of the Limitation of Actions Act provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. Therefore, in regard to the agreement of 8th December, 2007, the limitation period lapsed on 8th December, 2019. On the second agreement of 25th January, 2008, the limitation period lapsed on 25th January, 2020. Essentially therefore, the Plaintiffs' suit having been filed on 7th July 2020, was filed out of time". In the case of:- "*Dickson Ngige Ngugi - Versus - Consolidated Bank Limited (Formerly Jimba Credit Corporation Limited & Mathew Ndonga Kabau, Registered Trustees of the Catholic Diocese of Nakuru*[2020] KEELC 1324 (KLR)" the Court stated:-**

"...Under the provisions of section 7 of the Limitation of Actions Act, Cap. 22 Laws of Kenya, an action for the recovery of land cannot be brought after the expiry of twelve years.

139. In the case of: "**Gathoni - Versus - Kenya Co - Operative Creameries Limited (1982) KLR 104**" Potter, JA stated the rationale of the Law of Limitation as follows:-

"The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

Further in the case of: "**Rawal - Versus - Rawal (1990) KLR 275**" the

court held as follows:-

"...The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time." In the case of:- "**Melita - Versus - Shah (1965) EA 321**" cited with approval by Bosire, J in the above case. In the case of "**Tight Solutions Limited - Versus - Kidege Investment Limited & Chief Land Registrar**" the Court held:-

"The Respondents sought reliance in the decision of the Court of Appeal which dealt with similar issue of laches in the case of Daniel Kibet Mutai & 9 others - Versus - Attorney General, Civil Appeal (Eldoret) No. 95 of 2016, [2019] eKLR where it is noted, on the issue of laches:

"[47] Again this is an issue that has been addressed by the High Court and we are in agreement with the approach taken by the High Court (Mativo, J) in addressing a similar issue in Edward Akong'o Oyugi & 2 others - Versus - Attorney General [2009] eKLR in which the learned judge stated as follows:

80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should

exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.

81. The Respondent's counsel's contention is that this suit is barred by the doctrine of laches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim(ing the lawsuit), which has prejudiced the Defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.

82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc, such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights.]" Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.

83. To invoke laches the delay by the opposing party in imitating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favourable to the defendant becoming lost or degraded, witnesses favourable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.

84. The Respondent's counsel cited laches but never attempted to mention how the Respondent will be prejudiced. As pointed out earlier, no argument was advanced that witness or evidence cannot be traced. In any event, the Respondent is the government which has institutional succession and perpetuity; hence, evidence and records cannot be easily affected by lapse of time.

85. In considering whether the delay is inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the

facts; enquiry, relevant considerations may include the period of the delay, and the explanation offered, and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010. The reasons cited are inability to secure employment after being released from prison forcing them to travel overseas to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation, and detention. All the Petitioners suffered serious injuries and developed life threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable.

(48) Unlike the Petitioners in the above quoted case, who provided explanation for the delay in filing their Petition, the Appellants herein did not give any reasons in their affidavits, for the delay in filing their petition. Instead, an attempt was made by the appellants' advocate to explain the delay in the written submissions. But of course, written submissions are mere arguments postulated by counsel, which cannot pass for proven facts. Moreover, assuming that we were to take judicial notice of the fact that the appellants could not bring their claim during President Moi's regime, there is no explanation given as to why the claim was not led immediately after he impugned President Moi left power after the 2002 elections".

In the case of "**Gabriel George Gacheru (Suing as Administrator of the Estate of the late Monica Wangaru - Versus - Francis Macahria Njuguna & others**" the court held that:-

25. I rely on the dicta in the case of Adnam - Versus - Earl of Sandwich (1877) QB 485, where the Court held:-

"The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties."

140. On their part the PW - 1 stated testified that her mother was allocated the parcel of land in the year 1998 and she did not reside enter the land as she had already moved to Taita Taveta. She testified that her mother was moved from Mwembelegeza to Taita in the year 1964. She would not state how long the mother had stayed on the land if at all. That she learnt in the year 2010 that there was someone on the land and found the Defendant had encroached on the land. From the Plaintiff's evidence it was clear that the Plaintiff had never occupied the subject Plot number 375. When the allocations were done in the year 1998 she had already moved back to Taita Taveta. It was apparent that the Plaintiff since the date of allotment never took steps to identify, occupy or take steps to safeguard the property. If she was vigilant this state of affairs would not have arisen. This was clearly a case of an indolent Plaintiff. The maxim of equity that the law never aid the indolent but the vigilant is applicable in this case. The Learned Counsel submitted that the Plaintiff's right to take action to take possession of the subject land accrued as from the date of allocation in the year 1998 and the delay/laches of over 20 years for her to assert her rights has not been explained. The Defendant had provided evidence by way of a letter dated 3rd June, 2005 in the last paragraph 3 stated:-

".....the buyer (MARY NYATHIRIGA WANGAI) has now the right to develop her plot number 349 after having compensated the plant

owners today 3rd June, 2005 that amounted to Ksh.15,000 at my sub - locational office together with the elders as eye witnesses"

141. This piece of evidence lent credence to the Defendant's evidence that she moved to the premises immediately upon purchase of the land in the year 2005. Otherwise, she had no business compensating the plant owners to enable her take peaceful occupation of the property. On the other hand, PW - 1 testified that it was only in the year 2010 that she heard that there was a person on the land. The Learned Counsel averred that the Defendant had already underlined this piece of evidence because the witness talked about hearing. She did not disclose who told her. The witness did not state if she was ever on the land before the year 2010. Astonishingly, she did not state what steps she took to prevent such construction and occupation in the year 2010. If she was to be believed, she went into hibernation only to emerge and file suit in the year 2019 that was 9 years later. The only logical explanation was that the Defendant had fully taken occupation of the land in the year 2005 and fully developed the property in June 2005. As the Court considers this matter, it should note that the Plaintiff - Janet Wakio Mgongo basically lost interest in the subject land. There was no evidence as to what steps she took to secure plot. Her direct evidence would had been crucial in this matter. In the absence of such direct evidence and intervention, the Counsel submitted it proved on a balance of probabilities

that she lost interest in the land. Equity aids the vigilant and not the indolent. A question arose as to how she would allow construction on the subject property to be concluded without reporting to the police or filing a court action. Bearing in mind that PW - 2 Meshack Mwaluku who testified that he was a blood brother to the Plaintiff was a member of the settlement committee. Something was amiss, the Power of Attorney may as well be a use to hide the truth. The suit may as well be an afterthought. He submitted that by the time this suit was filed in November, 2019 over 12 years had lapsed from the date the Defendant took occupation of the property. The Plaintiff was also guilty of laches. He averred that the Plaintiff's suit was barred under the Limitation of Actions Act and this Honourable court should dismiss the costs.

142. Secondly, whether there was swapping of the subject plots at Mwembe Legeza scheme. The Learned Counsel submitted that there was abundant evidence that the Mwembelegeza scheme was affected by many mistakes that were corrected by swapping of plots to conform to the ground position. This was confirmed by the surveyor PW - 4 who referred to entries number 4, 8 ,9,and 10 which were swapped. The Plaintiff produced in evidence a letter dated 3rd June, 2003 from the assistant Chief which *inter - alia*' states:

"....this is to confirm that my sub-location has been informed by the Mwembelegeza settlement scheme land committee that the

undermentioned Plots nos. 349, 375, 925 were exchanged or swapped due to some understandable agreement by the concerned. Firstly, Plot number 349 was swapped with Plot no. 375 and then 375 was swapped with Plot no. 925...."

143. From the foregoing it is clear that the issue of swapping had been proposed by the settlement committee way back before the year 2003. The parties herein are victims of a bureaucracy that did not complete its processes to implement the swapping decision. Also produced in evidence is the ground report attached to the letter dated 26th May, 2015. It is a letter from the District Land Adjudication office addressed to the Land Registrar Mombasa. The letter basically reiterated the contents of the Chief's letter dated 3rd June, 2003. On Plot no. 375 the ground report states:-

"There is a permanent house on the ground belonging to Mary Nyathiriga Wangai. Mary bought the plot from one Abdi Mohamed Ali has the letter of offer for plot No. 349.... seemingly Plot No. 349 swaps with plot NO. 375"

144. PW - 5 the Land Registrar confirmed that corrections of title was normal and happens where there are wrong maps or wrong numbers. She confirmed that they have in their records there is a letter dated 11th June, 2015 registered by SAT, the Land Registrar for the surrender of title deed for correction purposes. She testified that there is an entry number 6 dated 26th May, 2015 prohibiting dealings with the land until ground survey is complied with. She testified that her interpretation was for surrender of Plot No. 349 to read plot 375. she testified that the title issued to the plaintiff was

issued well after the letter for rectification of the anomaly. She further testified that correction of title was normal to correct wrong numbers and issues of mapping. The Learned Counsel urged the court to hold and find that indeed the subject plots were swapped and the respective parties took occupation. In so holding, the court should be alive to the fact that JANET WAKIO MGONGO did not testify in these proceedings. The issues within her personal knowledge as to the swapping cannot be answered by the holder of the Power of Attorney. Between the years 1998 and 2019 when the suit was filed on her behalf she never raised any issue with the occupation of the subject parcels.

145. Finally, what orders should be made in the best interests of justice in the matter. The Learned Counsel notwithstanding their above submissions, it was apparent from the County Land Adjudication and Settlement Officer's report dated 6th December, 2023 that Plot number 367 which was swapped with Plot number 375 was still available. In essence, Plot Number 367 which according to the letter dated 11th June, 2015 was to be occupied by the Plaintiff was available and the Church that occupied it had agreed to remove the structure. The Learned Counsel urged the Court to exercise its Judicial Authority under the provisions of Article 159 of the Constitution of Kenya, 2010. Additionally, the Counsel averred that the Court to implement the recommendations of the County Land Adjudication and Settlement Officer's

report dated 6th December, 2023 as it would serve the ends of justice in this matter. In so doing, it will ensure that the Plaintiff recovered her plot which was renamed as Plot No. 367. It would also ensure that the Defendant and the interested party who occupied Plot number 349 would not suffer demolitions/evictions.

146. On the claim for mesne profits of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/=) per month, the Counsel asserted that it had not been substantiated at all. For one, from the evidence on record the plaintiff has never occupied the subject property at all since allotment. Simply, the Plaintiff was a paper owner who took no possession of the land. The issue was whether she ever made any profits from the land. In essence, the Plaintiff's suit failed and should be dismissed with costs.

VII. Analysis and Determination

147. I have carefully considered the parties' pleadings, all documentary evidence testimonies, written submissions, myriad of cited authorities, as well as the applicable statutory and case law. I shall address the issues sequentially as guided by their legal and factual complexity.

148. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

- a) Whether the Plaintiff proved ownership of Plot No. Mombasa/Mwembelegeza/375?**
- b) Whether the Defendant lawfully occupied the suit property.**
- c) Whether there was a valid swapping of plots between 349, 375, and 925.**
- d) Whether the Plaintiff was entitled to the reliefs sought.**
- e) Who should bear the costs of the suit.**

ISSUE No. a). Who is the lawful owner of the suit property;

149. Under this sub - heading, the Court was called upon to examine the central issue for determination, namely, who was the lawful proprietor of the suit property. The Plaintiff's case rested on the Power of Attorney granted by Janet Wakio Mgongo, the registered owner of Plot No. Mombasa/Mwembelegeza/375. PW - 1 produced the letter of allotment dated 1st December, 1998, the payment receipt of Kshs. 6,762 dated 22nd September, 2006, and the discharge of charge registered on 30th October, 2015. The Plaintiff further produced the title deed registered in Janet Wakio's name on 14th April, 2016 (Plaintiff Exhibit No. 12). The Land Registrar (PW - 5) confirmed that all requisite documents had been presented and that the title was duly issued to Janet Wakio Mgongo.

150. On the other hand, the Defendant's case relied on a Sale Agreement dated 4th June, 2005 between herself and Abdi Mohamed, followed by issuance of a title deed for Plot No. 349 on 6th June, 2005. She produced a letter dated 3rd June, 2005 from the Chief suggesting swapping of plots, and a

letter dated 11th June, 2015 from the Ministry of Lands recommending surrender of her title for correction. However, the Defendant admitted that she had never surrendered her title for Plot No. 349, and her approval for development from the Municipal Council in 2008 was for Plot No. 349, not Plot No. 375.

151. Section 24 (a) of the Land Registration Act, 2012 provides that:

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging thereto.”

152. Further, the provision of Section 25 (1) of the Act provides that:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided by law, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

153. Applying these provisions, the Court has found that the Plaintiff had proved ownership of Plot No. 375 through production of the title deed and supporting documents. The Defendant’s reliance on letters suggesting swapping was insufficient, as no evidence was produced to show that swapping had ever been effected. Witnesses PW - 2, PW - 3,

PW - 4, and PW - 5 consistently confirmed that no swapping had been undertaken.

154. It is instructive to note that while the proceedings was being concluded, parties proposed the need to explore an alternative dispute resolution to the matter. On 5th April, 2023 a Consent was entered for the involvement of the District Land Adjudication Officer (DLASO) for a possible solution to the matter. Mr. Benjo K.D Land Adjudication Officer - Mombasa filed a report dated 6th December, 2023 outlining the outcome of the Alternative Dispute Resolution mechanism. The Plaintiff on the 16th November, 2023 filed a letter to the Deputy Registrar seeking confirmation of the filing of the Land Adjudication Officer which letter went unanswered. The Plaintiff filed the Land Adjudication Officers letter on the 4th December, 2024 for abundance of caution. The mediation process was abandoned by the Defendant on the 11th April, 2024 when a consent in line with the Adjudicators letter dated 6th December 2023 was sent to the Defendant by the Plaintiff and the Defendant did not reply to the said letter. After the report dated 6th December, 2023 the Defendant abandoned the process and filed the Application dated 14th May, 2024 seeking to Reopen the case and Amend the Defence to include a prayer for Adverse possession. The Application dated 14th May, 2024 was partially allowed with the Defendant being allowed to Amend her Defence to introduce a prayer of Adverse possession by

the Defendant. The Defendant Amended her Defence on the 29th October, 2024 and the Plaintiff filed an Amended Reply to Defence on the 4th November, 2024 and Amended her Plaintiff on the 6th November, 2024.

155. The Court therefore hold that the registered owner of Plot No. Mombasa/Mwembelegeza/375 was Janet Wakio Mgongo, and that her title was valid and enforceable under Article 40 of the Constitution and the Land Registration Act.

ISSUE No. b). Whether there was double registration and fraud.

156. Under this sub-heading, the Court was called upon to determine whether the Defendant's occupation of the suit land - Plot No. Mombasa/Mwembelegeza/375 was lawful. The Defendant's case was that she had purchased land from Abdi Mohamed through a Sale Agreement dated 4th June, 2005 for a consideration of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-). She relied on a letter dated 3rd June, 2005 from the Chief suggesting swapping of plots, and claimed that she had been shown Plot No. 375 by the scheme's Secretary, Mr. Meshack Mwakimoso. She admitted, however, that she held a title deed for Plot No. 349, not Plot No. 375, and that she had never surrendered her title for Plot No. 349 despite being directed to do so by the Ministry of Lands in the letter dated 11th June, 2015.

157. The Plaintiff's evidence, supported by witnesses - PW - 2, PW - 3, PW - 4 and PW - 5, consistently confirmed that no swapping had ever been effected between Plot Nos. 375 and

349. The Land Registrar testified that Janet Wakio Mgongo had duly obtained her title for Plot No. 375 in the year 2016 after compliance with all statutory requirements. The Defendant's approval for development from the Municipal Council in the year 2008 was expressly for Plot No. 349, not Plot No. 375.

158. The Court noted that the Defendant's pleadings and testimony were at variance. While she claimed ownership of Plot No. 375, her documents and title deed related only to Plot No. 349. Her reliance on letters suggesting swapping was insufficient, as swapping could only be effected by consent and through an amendment panel, which had not occurred in this case.

159. Section 24(a) of the Land Registration Act, 2012 vested absolute ownership in the registered proprietor of land, together with all rights and privileges belonging thereto. Section 25(1) of the Act further provided that the rights of a proprietor could not be defeated except as provided by law.

160. The Defendant's occupation of Plot No. 375 was therefore unlawful, as she had no title to the property and no evidence of a lawful transfer or swapping. Her reliance on informal letters and alleged directions from the Chief could not override the sanctity of title protected under Article 40 of the Constitution and the Land Registration Act.

161. Thus, the Court strongly holds that the Defendant had unlawfully occupied Plot No. 375 and that her continued possession amounted to trespass.

ISSUE No. c). Whether there was a valid swapping of plots between 349, 375, and 925:

162. Under this sub-heading, the Court was called upon to determine whether the alleged swapping of plots between Plot Nos. 349, 375, and 925 was valid in law and fact. The Defendant relied on a letter dated 3rd June, 2005 from the Chief of Mwembelegeza Sub-Location, addressed "To whom it may concern," which suggested that swapping of plots was envisaged. She also relied on a letter dated 11th June, 2015 from the Ministry of Lands, Housing and Urban Development, which requested her to surrender her title for Plot No. 349 for correction. In her pleadings, she claimed to have surrendered the title but admitted in evidence that she had not done so.

163. The Plaintiff, supported by the witnesses - PW - 2, PW - 3, PW - 4, and PW - 5 respectively, consistently testified that no swapping had ever been effected. PW - 2, the Secretary of Mwembelegeza, stated that he had never heard of swapping of plots within the scheme. PW - 3, the District Land and Settlement Officer, confirmed that Plot No. 375 had been allocated to Janet Wakio Mgongo and Plot No. 349 to Abdi Mohamed, and that no swapping had been undertaken. PW - 4, the Regional Surveyor, explained that swapping could only be done by consent through an amendment panel and

reflected on the map, but confirmed that no such process had occurred in this case. PW5, the Land Registrar, testified that the title for Plot No. 375 had been duly registered in Janet Wakio's name in 2016, and that the title for Plot No. 349 had never been surrendered for correction.

164. The Court notes that the Green Card for Plot No. 349 bore a caveat of **"no dealings until the plot occupancy survey is complied with,"** but no such caveat existed for Plot No. 375. This explained why the transfer to Janet Wakio was effected. The Court has also found that the intended swapping was never effected. The Defendant's pleadings and witness statement were at variance with her case. Her reliance on letters suggesting swapping was insufficient, as swapping required consent of all parties and formal amendment of the Registry Index Map, which had not been done.
165. This Honourable Court emphasizes that the provision of Article 40 (2) of the Constitution of Kenya, 2010 prohibits arbitrary deprivation of property and protects the sanctity of title. The law does not permit the State or any person to force swapping of property without consent. This principle was affirmed in the case of:- **"HCC Succession Cause No. 158 of 2000, In the Matter of the Estate of Kisigwa Asuga Asuga (Deceased), Albert Imbuga Kisigwa - Versus - Pecho Kavai Kisigwa"**, where it was held that swapping of parcels could only be done by mutual agreement and not by compulsion of the Court.

166. Therefore, the Court holds that there was no valid swapping of Plot Nos. 349, 375, and 925. Hence, it follows that the Defendant's occupation of Plot No. 375 was unlawful, and her reliance on alleged swapping was unsupported by law or evidence.

ISSUE No. d). Whether the Plaintiff was entitled to the reliefs sought?

167. Under this sub-heading, the Court was called upon to determine whether the Plaintiff had proved her entitlement to the reliefs sought in the Plaint, namely: a declaration of ownership, eviction of the Defendant, a permanent injunction, mesne profits, costs, and interest. The Plaintiff produced documentary evidence showing that Janet Wakio Mgongo was the registered proprietor of Plot No. Mombasa/Mwembelegeza/375, having obtained a letter of allotment dated 1st December, 1998, paid the requisite fees, discharged the charge on 30th October, 2015, and obtained a title deed on 14th April, 2016. The Land Registrar confirmed the validity of the title.

168. The Defendant admitted that she held a title deed for Plot No. 349, not Plot No. 375, and that she had never surrendered her title for correction despite being directed to do so. Her reliance on letters suggesting swapping was unsupported by law or evidence. Witnesses PW - 2, PW - 3, PW - 4 and PW - 5 consistently confirmed that no swapping had ever been effected.

169. The provision of Section 24(a) of the Land Registration Act, No. 3 of 2012 vested absolute ownership in the registered proprietor of land, together with all rights and privileges belonging thereto. Section 25(1) further provided that the rights of a proprietor could not be defeated except as provided by law. Article 40 of the Constitution of Kenya, 2010 upheld the sanctity of title and protected the right to property.
170. On the issue of mesne profits. The Plaintiff sought mesne profits of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) per month from the date of filing suit until vacant possession was delivered. It is trite law that mesne profits fall within the category of special damages. They must be specifically pleaded and strictly proved. Mesne profits is a special damage which must be specifically pleaded and proved.
171. In the case of ***“Luva - Versus - Kimbio & 3 others [2023] KEELC 16462 (KLR)”***, the Court held: -
- “Mesne profits are in the category of special damages. They must be specifically pleaded and proved. The 1st Defendant did not set out the particulars of mesne profits in her Counterclaim. She did not furnish the Court with any evidence on the period the Plaintiff has been on the suit property and the loss she has suffered. I therefore find that she is not entitled to mesne profits.”***
172. Similarly, in the case of:- ***“Karanja Mbugua & another - Versus - Marybin Holding Co. Limited [2014] eKLR”***, the Court emphasized:

“This Court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of the Civil Procedure Act.”

173. Applying these principles, the Court noted that while the Plaintiff had pleaded mesne profits at a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/=) per month, she had not furnished sufficient evidence to prove the quantum of loss suffered. No valuation report, rental assessment, or comparable market evidence was produced to substantiate the claim. The Court therefore makes a finding that although the Plaintiff was entitled to vacant possession and protection of her proprietary rights, she had not proved her claim for mesne profits to the required standard. The prayer for mesne profits was accordingly declined.

174. Hence, on the basis of these provisions, the Court found that the Plaintiff had proved ownership of Plot No. 375 and was entitled to protection of her rights. The Defendant’s occupation of Plot No. 375 was unlawful and amounted to trespass.

175. Consequently, the Plaintiff was entitled to:

- a) A declaration that she was the lawful and registered owner of Plot No. Mombasa/Mwembelegeza/375.***
- b) An order of eviction against the Defendant.***
- c) A permanent injunction restraining the Defendant, her servants, and/or agents from interfering with the Plaintiff’s***

interest, entitlement, occupation, use, and peaceful enjoyment of the suit property.

ISSUE No. e). Who should bear the costs of the suit.

176. Under this sub-heading, the Court has considered the conduct of the parties, the nature of the dispute, and the applicable legal principles to determine who should bear the costs of the suit. It is now well established that the issue of Costs is at the discretion of the Court.

177. 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.

178. 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.”

179. In the present case, the Plaintiff successfully proved ownership of Plot No. Mombasa/Mwembelegeza/375, established that no valid swapping of plots had been effected, and demonstrated that the Defendant’s occupation of the suit property was unlawful. The Defendant’s defence and counterclaim were found to be without merit, inconsistent with her own documents, and unsupported by law.

180. Accordingly, the Court held that the Plaintiff is entitled to costs of the suit. The Defendant, having failed in her defence, was ordered to bear the costs of the proceedings.

VIII. Conclusion and Disposition

181. Ultimately, having conducted a comprehensive and in-depth analysis of the pleadings, the evidence tendered, the applicable legal principles, and the submissions of all parties,

the Honourable Court, on the preponderance of probabilities and guided by the balance of convenience, finds as follows:

- (a) **THAT Judgment be and is hereby entered in favour of the Plaintiff in respect of the Plaint dated 26th June, 2019, the Plaintiff having proved her case on a balance of probabilities.**
- (b) **THAT the Defence and Counterclaim filed by the Defendant be and are hereby found to lack merit and the same are dismissed in their entirety.**
- (c) **THAT for avoidance of doubt, accordingly, having considered the pleadings, evidence, submissions, and applicable law, the Court makes the following orders:**

 - (i) **It is hereby declared that the Plaintiff, JANET WAKIO MGONGO, is the lawful and registered proprietor of all that parcel of land known as Plot No. Mombasa/Mwembelegeza/375.**
 - (ii) **The Defendant, her servants, agents, or any person claiming under her, shall vacate Plot No. 375 forthwith, and an order of eviction is hereby issued.**
 - (iii) **THAT a permanent injunction be and is hereby issued restraining the Defendant, her servants, agents, or any person claiming under her from entering, occupying, constructing upon, or in any way interfering with the Plaintiff's quiet possession and enjoyment of Plot No. 375.**
 - (iv) **THAT the Plaintiff's prayer for mesne profits is declined, the same having been pleaded but not proved to the required standard of special damages, in line with the authorities of *Luva - Versus - Kimbio & 3 others [2023] KEELC 16462 (KLR)* and *Karanja***

*Mbugua & another - Versus -Marybin Holding Co. Ltd
[2014] eKLR.*

- (d) **THAT** the Defendant's occupation of Plot No. 375 was unlawful, and her reliance on alleged swapping was unsupported by law or evidence. The sanctity of title under Article 40 of the Constitution and Sections 24 and 25 of the Land Registration Act is hereby upheld.
- (e) **THAT** the Plaintiffs are awarded general damages in the sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) against the 3rd Defendant, the Chief Land Registrar, for negligence in maintaining the land register and for the consequential loss and hardship suffered by the Plaintiffs.
- (f) **THAT** the Plaintiff is awarded costs of the suit together with interest at court rates.

IT IS SO ORDERED ACCORDINGLY
**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS
.....19THDAY OFMARCH.....2026.**

.....
**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) M/s. Okata Advocate for the Plaintiff.
- c) Mr. Nyabena Advocate for the Defendant.