

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 374 OF 2016

JOHN NGOWA ZIRO.....
PLAINTIFF

- VERSUS -

1. FELIX MUTHEE
2. BONIFACE
ONYANGO.....DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to claim instituted vide a Civil suit by way of a Plaint dated and filed in 2nd December, 2016. It was filed by *John Ngowa Ziro*, the Plaintiff herein, against *Felix Muthee and Boniface Onyango*, the 1st and 2nd Defendants herein.
2. In a nutshell, the Plaintiff sought declarations that he was the lawful and registered owner of Sub - division No. 6325 (original No. 190/11 Mainland North), CR No. 55381 (Hereinafter referred to as "The Suit Property"), situated in Mombasa Municipality, an order of mandatory injunction compelling the Defendants to vacate, demolition of the structures erected thereon, a permanent injunction restraining interference, damages for loss of use, mesne profits, costs, and interest.

3. Upon filing and service of the Plaint, the Defendants entered appearance through the Law firm of Messrs. Angelo Owino & Company Advocates and filed their Defence dated 10th March 2017. They denied the Plaintiff's ownership and trespass allegations, asserted occupation, and prayed for dismissal of the suit with costs.

II. The description of the Parties

4. The Plaintiff was described as a male adult of sound mind, resident of Mombasa and working for gain in Kericho. He was the registered proprietor of the suit property, having purchased it in the year 2013 through financing by Transnational Bank Limited, which registered charges over the property.

5. The 1st and 2nd Defendants, Felix Muthee and Boniface Onyango, were male adults of sound mind residing and working for gain in Mombasa. They claimed occupation of the suit property as squatters and asserted adverse possession.

III. Court directions before the hearing

6. On 22nd July 2021, the matter was fixed for hearing on 8th November 2021. On that date, counsel for the Plaintiff was ready to proceed with one witness, while counsel for the Defendants sought to cease acting. The Court declined adjournment and directed that the matter proceed. The Plaintiff testified, and the Defence case was closed for non-attendance under Order 12(1) and Order 17 Rule 2 of the Civil Procedure Rules.

7. On 6th February 2023, the Defendants sought recall of the Plaintiff for cross-examination. The Court allowed the request, and the Plaintiff was cross-examined and re-examined. Thereafter, the Defendants opened their case, called DW1, and produced documents by consent. Both parties closed their cases, and the Court directed filing of submissions.

IV. The Plaintiffs' case

8. From the pleadings before court, the Plaintiff averred that at all material times prior to this suit, he had been and was the registered proprietor of all that parcel of land known as CR Number 55381, situated in Mombasa Municipality in Mombasa District, measuring approximately nought decimal nought four nine five (0.0495) hectares, being Sub - division Number 6325 (Original Number 190/11 Mainland North).
9. Being the bona fide and registered owner of the suit property, the Plaintiff stated that he had always intended to develop the suit property by constructing his matrimonial home. However, his efforts had gone to nought owing to interference from the Defendants, who by themselves, their agents, servants, and/or employees had unlawfully encroached upon, interfered with, frustrated, and/or prevented the Plaintiff from doing so.
10. The Plaintiff stated that sometime in January 2016, the Defendants, by themselves, their agents, servants, and/or employees, illegally and without any colour of right, justification, or consent, trespassed and encroached into the suit property. They commenced putting up permanent

structures thereon, vandalized, destroyed, and/or misused the Plaintiff's property.

11. The Plaintiff averred that despite registering his protestations with the Defendants and asking them to vacate the suit property, the Defendants had failed and continued to remain in occupation of the property. The Plaintiff stated that as a result of the illegal and unlawful occupation of his land by the Defendants, he had suffered massive damage and loss.
12. The Plaintiff relied on following particulars for damages: -
 - a. Total loss of use of land from January 2016 to date
 - b. And the Plaintiff claims mesne profits from January 2016 to the time the Defendants' vacate the suit property.
 - c. Further to the above, the plaintiff has suffered stress and anguish over the aforesaid losses and the plaintiff claim for damages.
13. The Plaintiff stated that despite constant demands that the Defendants vacate the suit property, they had failed, refused, and/or neglected to do so, and continued to trespass without his consent or approval, thereby making it necessary for him to institute these proceedings.
14. The Plaintiff therefore sought a mandatory injunction to compel the Defendants, by themselves, their agents, relatives, employees, servants, and/or any other person acting on their authority or instructions, to vacate the suit property and to demolish the houses illegally constructed thereon. He further

sought a permanent injunction restraining them from trespassing or in any way interfering with the suit property.

15. The Plaintiff accordingly claimed against the Defendants vacant possession of the suit property. The Plaintiff averred that there was no other suit pending and that there had been no previous proceedings in any court between the parties over the same cause of action. The Plaintiff further averred that the cause of action had arisen at Mombasa within the jurisdiction of this Honourable Court.

16. The Plaintiff prayed for orders against the Defendants, jointly and severally as follows:-

a. A mandatory injunction to compel the Defendants, their relatives, agents, servants and/or any other person under instructions to the Defendants to give vacant possession of property and to demolish the structures constructed thereon and to remove all the materials falling which the structures be demolished and removed at their costs.

b. An order of permanent injunction restraining the persons mentioned in (i) above from trespassing and encroaching upon and/or interfering in any way with the suit property.

c. General damages for loss of use of the said piece of land from January 2016 to date and interests at prevailing court rates.

d. Mesne profits arising out of illegal occupation of the suit property from January 2016 to the time they vacate the land.

e. Costs of this suit and interests at court rates.

17. The Plaintiffs called PW - 1 on 8th November, 2021 who testified as follows: -

A. Examination in Chief of PW - 1 by M/s. Mulongo holding brief for Mr. Gakuo Advocate.

18. PW - 1 was sworn and he testified in English language. He was called JOHN NGOWA ZIRO, a citizen of Kenya and holding the national identity card bearing all the particulars as shown to Court. He confirmed having sworn a Witness Statement dated 22nd November 2016, which was admitted without objection and the List of Documents dated 2nd December 2016, marked Exhibits 2-13, was admitted as part of the Plaintiff's evidence. He explained that he was the registered owner of the the suit property known as Sub - division No. 6325 (Original Number Mombasa Mainland - 390/115/ Section 2 having been duly registered transfer documents and an entry to confirm the transfer registered at Mombasa Land Registry as CR. No. 55381/2.
19. He averred that he had bought it from Purpose Investment Ltd and had secured a loan in order to purchase the property and added that the bank had given him enough funds after conducting due diligence.
20. PW - 1 stated stated that the bank had sent a valuer to go on the ground and value the land and that he had also visited the property a number of times. He further indicated that the transfer had been made in his name and that it was a burden he was servicing the loan to date. He stated that he had wanted to put up a matrimonial home so that he could settle there with his family. He added that he had also planned to

get a second loan for construction, which required approvals from the County Government of Mombasa. After obtaining approval, the bank had given him a further charge and that he had secured the first certificate for construction. He added that the finances were to be done in tranches and that he had been given the first sum. He indicated that they had gone on the ground with materials, ballast, and sand, but upon arrival at the site, they had met some people who were violent and had forced them to run away.

21. PW - 1 averred that later he could only remember one person and that around that time he had come to know that there was encroachment. He stated that the contractor had reported the matter to the police that people had encroached on his property and had been constructing on his ground, though he had not been sure whether they had been on his land as he had not seen the beacon. He observed that at that time, two people, Felix and Boniface, had been calling him and referred to the surveyor's map by J.M. Mugaa and Edward Kiguru, which measured 0.095 Ha.
22. PW - 1 estimated that the land was worth a sum of Kenya Shillings One Million One Hundred Thousand (Kshs. 1,100,000.00/=) and that he had taken a loan of a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000.00/=), and that the matrimonial house would have cost him a sum of Kenya Shillings Four Million (Kshs. 4,000,000.00/=) as per the time of purchase, while the current

value would be approximately a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000.00/-). He stated that the people who had chased him away had later called him in the evening and identified them as Boniface Onyango and Felix Muthei, and that his phone had a true caller. He averred that when he had served them with summons to enter appearance, they had accepted and had filed their documents, including their Statement of Defence filed on 10th March 2017, with an authority to act and plead and a list of documents.

23. PW - 1 stated that they had asked him to sit and agree to give them part of his plot. He added that prior to year 2016, the property had been vacant and that the structures had only come up after he had started delivering materials. He expressed that he had wanted his wife to inspect the property but had feared for the safety of his family. He prayed for the orders sought, including demolition of the structures. He added that the houses constructed by the two were to be demolished and that they had never been on the land from the year 2013.
24. PW - 1 indicated that he needed to be compensated for the loss of the property and that he suffered anguish and hardly slept. He added that he had wanted to relocate from town and that he was still servicing the loan. PW-1 said that on the ground, part of the map marked as "A" and "B" showed that they had constructed permanent structures where they lived. He stated that from the Defence, they had no title deed and

were squatters. He added that the plot had been vacant and that it was during construction that they had started building and claiming adverse possession from a statement and not from the pleadings.

25. PW - 1 confirmed that his title deed was charged with the bank and that there was an official search showing two entries; a charge dated 2nd July 2013 to Transnational Bank Limited for a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000/-) and a further charge dated 22nd July 2016 to Transnational Bank Limited for a sum of Kenya Shillings Four Million Six Sixty Thousand (Kshs. 4,660,000/-) as per page 3 of the list of documents. He added that they had offered to meet and pay him, which he had refused. He added that the structures were approximately a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for both houses.

26. On 6th February, 2023, the Plaintiff was recalled for cross examination:-

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

27. PW - 1 stated that he was the owner of the suit land. He explained that initially the land had not been subdivided and that he could only remember his parcel as No. 6325/MN/. He noted that from the Plaint, it was L.R No. 6325 (original No. 190/11/Mainland). He averred that the original owner had been Two Thirds Investment Limited. He added that when he bought the land, there had been no squatters on the suit land. He emphasized that the plot he bought, L.R No. 6325, had no

squatters. He acknowledged that he had been shown a letter dated 1st June 2014 which made reference to plot allocation to squatters and added that he had been shown a letter dated 1st November 2011 referring to plot allocation to squatters on original Plot MN/11/390 Utange. He stated that by the time he filed the suit in 2016, there had been two structures on the land, belonging to Boniface Onyango and Muthee, and that for Felix Muthee it had been after the year 2016.

28. PW - 1 clarified that from his Surveyor's Report, it did not indicate that one of the houses had been under construction, but it stated that there had been houses. He maintained that there had been another case but that he had never authorized anyone to file it on his behalf. He stated that from a ruling by Justice Yano dated 24th May, 2018, it mentioned Civil Case No. 232 of 2014 at page 3, but that he was not aware of it. He asserted that he had never attempted to demolish the house belonging to the Defendant. He explained that he had not been the one who planted the trees on the land.
29. PW - 1 stated that he had purchased the land from the bank in the year 2013 and that in the year 2015 there had been structures. He added that he had been very vigilant. In the year 2016 he had gone on the ground but had been chased away. He stated that there had been a structure belonging to Boniface, but he had not been certain whether it had been on his land and hence he engaged a surveyor to ascertain the facts, and the surveyor had prepared a report.

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

30. PW - 1 testified that he had bought the property from the bank and that the loan had been approved after conducting due diligence. The bank had sent a land valuer and that the land had been vacant. After purchasing the land, he had done very little. He added that before constructing the house, he had taken another loan and obtained approvals, but when he had taken materials for building, he had been stopped and had learned that there was something fishy and engaged a surveyor. He clarified that the report had indicated that the drawings showed two houses protruding into the suit property, which constituted encroachment, and that it observed that construction would be difficult further said that he had filed the suit due to the encroachment by the two houses.
31. PW - 1 indicated that he had not been privy to Two Thirds Investments Limited. He added that he had heard that there had been squatters on the land but that the two individuals had not been part of the squatters. He averred that none of the two letters shown to him had been addressed to him. He stated that he had filed the case due to the suffering he had undergone. He indicated that he had intended to build his home on the land but had been compelled to move elsewhere. He stated that he was still servicing the two loans.
32. PW - 1 stated that he had never interacted with the two letters shown to him by the Advocates. He requested that the two houses to be demolished to allow him to recover his land.

33. The Learned Counsel to the Plaintiff, M/s. Mulongo Advocate, marked their case closed on 6th February, 2023.

V. The case by the 1st & 2nd Defendants

34. The 1st & 2nd Defendants responded to the Plaintiff's claim through a Statement of Defence where they averred that:

- a. Save as was expressly admitted, the 1st & 2nd Defendants denied the singular and several allegations of fact contained in the Plaint as if the same were set out herein below and traversed seriatim.
- b. The Defendants admitted the contents of Paragraphs 1 and 2 of the Plaint in so far as the same were merely descriptive of the parties to the suit, save that their address for service for the purpose of this suit.
- c. The Defendants denied the contents of Paragraphs 3 and 4 of the Plaint and put the Plaintiff to strict proof thereof.
- d. The Defendants denied the contents of Paragraphs 5, 6, and 7 of the Plaint and put the Plaintiff to strict proof thereof.
- e. The particulars of damages alleged by the Plaintiff were denied, and the Plaintiff was put to strict proof thereof.
- f. The Defendants denied that demand had been made or notice of intention to sue given.
- g. The Defendants admitted the contents of Paragraph 11 of the Plaint.
- h. The jurisdiction of this Honourable Court was admitted.

35. For the reasons wherefore the Defendants prayed that this suit be dismissed with costs.

36. The Defendants called their first witness on 6th February, 2023 wherein the witness told the court that: -

A. Examination in Chief of DW - by Mr. Kenga Advocate.

37. DW - 1 was sworn and testified in Swahili language. He was called BONIFACE OPIYO ONYANGO - the 2nd Defendant herein. He was a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court during the hearing of the case. He testified that he was born on 1st January, 1977. He explained that he had recorded a statement on 21st July, 2021 and had filed five (5) documents on 21st July, 2021. DW - 1 stated that Defendants' Exhibits 1(a) & (b) and 2(a) to (d) were photographs. He stated that the three letters marked as "DMF - 1, 2, and 3" respectively.

38. DW - 1 testified that he had entered the land in year 2003 and that Felix had joined a month later. He refuted the Plaintiff's assertion that he had been there from the year 2013. By the year 2003 he had had a temporary mud house and that in the year 2008 he had constructed a permanent house, with Felix joining a month later. DW - 1 stated that the letters identified four families of squatters on the land, namely Ali Juma Mwakkeno, Chambe Stephen Charo, Katana Kalame, and Juma Lasingi Mwari. He stated that it belonged to the family of Chambe Stephen Charo, who was his uncle.

39. DW - 1 mentioned that there was a case in court regarding ownership, namely cases No. 232 and 315 of 2024. He stated that there had been a time when their houses had been demolished in year 2016 and that his house had been partially affected without a court order. He prayed to be given the land, stating that he had been on it for 12 years and had nowhere else to go. He confirmed that he had planted the trees shown in the photographs. He clarified that it was that day that he had seen the Plaintiff, John Ngowa, for the first time. He explained that Felix Muthee was from the family of Mwakeneno.

B. Cross Examination of DW - 1 by Mr. Mulango Advocates.

40. DW - 1 testified that he had entered the land in the year 2003 through his uncle, Chambe Stephen Charo. He stated that he had not brought his uncle to Court as he was the one sued. He admitted that he had constructed his house in the year 2013 and had no approvals or title documents. He stated that he knew Felix as his neighbour on L.R No. 390 and that they all lived on parcel No. 390.

41. DW - 1 clarified that from the Land Surveyor's Report, L.R No. 5365 belonged to the Plaintiff and that 5366 belonged to another person, and that neither his name nor Felix's appeared on the map. He stated that discussions had taken place between squatters and Two Thirds Investments Limited, but that his name did not appear in the letters and was only

covered under “other squatters” and that there was nothing in the letters showing his name. He admitted that he had no proof of when the building had been constructed and that he was not aware that he had encroached onto the land.

42. DW - 1 stated that from his statement, he was claiming adverse possession but had no supporting documents and was only aware of an ongoing case. He confirmed that he had not sued the Plaintiff for adverse possession and that from the Defence filed on 10th March 2017, he had no claim against the Plaintiff.

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

43. DW - 1 was referred to paragraph 11 of Felix Muthee’s Replying Affidavit and clarified that the three (3) letters had been addressed to the four (4) families. He explained that Felix was his neighbour on Plot No. 6325, which was a subdivision of Plot No. 390/11/MN.
44. The Defendants marked their case closed through their Counsel Mr. Kenga Advocate on 6th February, 2023.

VI. Submissions

45. On 6th February, 2023 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 17th April, 2026 accordingly.

A. The Written Submissions by the Plaintiff.

46. The Plaintiff through the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written submissions dated 11th February, 2025. M/s. Mulongo Advocate commenced his submissions by stating that the duly registered owner of land known as CR. No. 55381 whose desire to settle his then young family in his abode crumbled right before his eyes something which the Plaintiff least expected and/or anticipated. Despite sacrificing and taking 2 loans for acquisition and construction of suitable unit for his family, it's sad to state that the later never materialized. To add salt to this injury was the fact that the Plaintiff was still painfully servicing the loans with no single structure to show for it due to the notorious occupation of the Defendants on his property. This unlawful act by the Defendants has deprived the Plaintiff utilization, use and possession of his rightful property for a decade now.
47. More sadly was how the Plaintiff narrated while giving evidence how he had to scamper for his safety the day he arrived on his property with construction materials due to the hostility accorded to him by the Defendants and their proxies who violently chased him away with Machetes (*pangas*). Thus, the Plaintiff moved this Honourable Court as the duly registered proprietor of the suit land - CR Number 55381 situated North of Mombasa Municipality within Mombasa District containing by measurement nought decimal nought four nine five (0.0495) hectares or thereabouts and being sub-division number 6325 (Original Number 390/115)II/MN

aaggrieved by the illegal and unlawful occupation of the Defendants on his property without his consent and/or permission, the Plaintiff filed a Plaint herein dated 2nd December, 2016, seeking Judgment against the Defendants jointly and severally for the above stated orders.

48. The Learned Counsel averred that it was worth noting that there was a Judgment delivered by the Environment and Land Court in Mombasa on the 6th November, 2014 by Justice Kibunja in ELC No. 232 of 2014 which was uploaded on the CTS on the 6th December, 2014 pursuant to an order of this court WITH CONCURRENCE by the Defendants' Advocate on record.
49. The Learned Counsel submitted that the said Judgment emanated from a suit which was filed by squatters against a company trading in the style and names of "**Two Thirds Investment Limited**" seeking orders of adverse possession over the original property title No. CR. 1222, MN/11/390 area 28.3 acres. Two Thirds Investment Ltd was the registered proprietor of CR. No. 1222 containing by measurement 28.3 acres. During the trial, it was established that the original parcel of land was non-existent as the same had been sub - divided into several portions and sold to individuals thus an order for adverse possession could not be issued.
50. Based on the above findings, Justice Kibunja dismissed the claim filed by the squatters noting that the suit property therein being CR No. 1222 was non-existent by virtue of the

resultant sub - divisions and that Two Thirds Investment Limited was wrongly sued as it could not hold a title to a non-existent property for that matter. Thus, this Judgment aided the Court to forego the site visit as scheduled as the ELC Court had already pronounced itself by dismissing the claim for adverse possession which case the Defendants heavily relied upon.

51. On the evidence by the Plaintiff. The Learned Counsel submitted that PW - 1 the Plaintiff gave his sworn testimony on the 8th November, 2021 wherein he adopted his witness statement dated 22nd November, 2016 as his testimony in chief and produced the documents contained in the Plaintiffs' list of documents as Plaintiffs' Exhibit Numbers 2 to 13. The Plaintiffs' Identity Card was produced as Plaintiffs' Exhibit No.1. It was the evidence of the Plaintiff that he purchased parcel of land known as CR Number 55381 situated North of Mombasa Municipality within Mombasa District containing by measurement nought decimal nought four nine five (0.0495) hectares or thereabouts and being subdivision number 6325 (Original Number 390/115) II/MN from Two Thirds Investment Limited.
52. It was his testimony that he did not have the financial muscle to purchase the property on cash basis therefore he applied a financial facility from Transnational Bank wherein the Bank financed the purchase of the suit property as a result of which, a charge instrument dated 2nd July, 2013 was duly registered.

He produced the charge instrument as Plaintiffs' exhibit no. 5 (page 6 to 35 of the Plaintiffs' bundle). He informed the Court that the amount advanced through the charge of a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000/=) was to be repaid back together with all the accrued interest as provided for in Clause 3 of the charge.

53. Consequently, PW - 1 stated that a transfer instrument was duly executed and registered after which the Plaintiff was issued with a Title Deed which contains an entry of the charge registered against the title in favor of Transnational Bank now referred to as Access Bank. The transfer was produced as Plaintiff Number 9 contained at page 72 to 77 and the title Deed with the charge entry registered as Plaintiff Exhibit Numbers 2 contained at page 1 to 2 of the Plaintiffs bundle. He confirmed that prior to the purchase of the suit property he conducted a search at the Lands Registry wherein he confirmed that Two Thirds Investment Ltd were the duly registered owner of the suit property. This was demonstrated by the Plaintiff Exhibit Number 2 as Two Thirds Investment Ltd transferred the title to the Plaintiff. He also confirmed that after conducting the search, he physically visited the suit premises wherein he ascertained that the same was vacant plot and he was satisfied that the place was suitable for constructing his matrimonial home for purposes of settling his family. However, this was not that to be immediately within the year 2013 as he had a loan to offset. He thus embarked on

servicing the loan monthly from the year 2013 to the year 2016.

54. He stated that in the year 2016, he applied for the development permission from the County Government of Mombasa vide form PPA 2 dated 20th May, 2016 produced as Plaintiff Exhibit Number 8 contained at page 71 of the Plaintiffs' bundle which was approved. However, since Plaintiff did not have the financial capacity to jumpstart the construction exercise, he opted to secure a further charge against the suit property in the sum of Kenya Shillings Four Million Six Hundred Thousand (Kshs. 4,600,000/=) from Trans-National Bank to enable him secure finances for the construction of his matrimonial home. The Further charge dated 22nd July, 2016 was produced as Plaintiff Exhibit Number 6 contained at pages 36 to 67 of the Plaintiffs' bundle.
55. He also produced in evidence, a Certificate of Postal search dated 27th July, 2016 as Plaintiff Exhibit Number No. 2 at page 3 of the Plaintiffs' bundle which clearly shows that the Plaintiff was the duly registered owner of the suit property and that the same property is burdened with two financial facilities from Transnational Bank charge dated 2nd July, 2013 and a further charge dated 22nd July, 2016. He affirmed under oath that he is still servicing the two facilities.
56. The Plaintiff informed the Court that after the further charge of a sum of Kenya Shillings Four Million Six Hundred thousand (Kshs. 4,600,000/=) was approved, the amount was disbursed

to him in phases and after disbursement of the 1st batch he immediately purchased sand and stones which he took to the site with the aim of ground breaking and commencing the construction activities towards realizing his dream of being a home owner. However, in an unfortunate turn of events before he could offload the construction materials, he was violently chased away and threatened by the Defendants. Also, it was just about the same period that the Plaintiff transferred to work in Kericho where he has been discharging his duties to date and that is when the Defendants utilized the opportunity to construct permanent structures on the Plaintiffs land. Thereafter, the Defendants made numerous phone calls to the Plaintiff seeking to amicably settle the issue. The Plaintiff was reluctant to their demands having rightfully and lawfully purchased the suit property and thus filed the suit herein.

57. It was his evidence that he has been deprived the loss of use of his property from the year 2013 when he acquired it to date owing to the illegal and unlawful encroachment of the Defendants who are hostile and have even threatened the Plaintiff whenever he went to the suit property. The Plaintiff further confirmed that he has been frustrated by the acts of the Defendants since his family does not have a place to reside as he had intended to construct his matrimonial home on the suit property. He produced a Land Survey report dated 1st September, 2016 by Edward M Kiguru as Plaintiff Exhibit no. 3 in which report the Surveyor confirms that:

- a. There existed 2 encroaching houses on Plot No. MN/II/6325.
- b. The extent and location of the encroachments of the two houses renders the Plot owners' intention to construct a residential house impossible.

58. On the Defence, the Learned Counsel submitted that the Defendants entered appearance and filed their statement of Defence dated 10th March, 2017 which contained mere denials. They also filed their pre-trial documents dated 21st July, 2021 and a statement of one Boniface Onyango, the 2nd Defendant was filed wherein he stated that he was a resident of Plot No. 6325 (Original No. 390/11/MN situate at Utange Bamburi within Mombasa County which said parcel of land he has occupied and/or resided and/or stayed and/or lived therein from the year 2003 together with the 1st Defendant who also entered the suit premises in the year 2003 in the month of April, one month before his entry. That they have built their residential houses on the suit premises and also do subsistence farming as well as rearing birds and/or animals. That their entry and/occupation on the suit premises was without the authority and/or consent and/or permission of the Plaintiff and that they have both lived on the suit premises openly, and/or uninterruptedly and/or continuously and/or executively and/or adversely to the title of the registered owner.

59. That since their entry onto the suit premises was without anybody's permission and/or authority and/or consent and further that their occupation and/or stay on the plot has been open and continuous and/or uninterrupted and/or exclusively and above all adverse to the title of the registered owner, they were entitled to be registered as the owners of the suit premises by way of Land Adverse possession. That their claim was recognized and/or admitted by the predecessor in title, Two Thirds Investment Company Limited who engaged them in negotiations even before the Plaintiff purchased the portion of land forming the subject matter of the suit herein which was part of the mother parcel of land known as Plot No. 390/11/MN. That he prayed that the Plaintiffs' suit be dismissed with costs and that an order be made to the effect that himself and the 1st Defendant be declared as the lawful and/or legal owners and/or tenants in common (equal share) of the suit premises.

60. They also filed a List of documents dated 21st July, 2021 containing 5 documents the first two being a set of photographs of the 1st and 2nd Defendants residential houses and trees on the suit premises. The other three being copies of letters by Two Thirds Investment Company Limited dated 1st June, 2014, 1st November, 2014 and 10th November, 2014 respectively. The Defendants never gave their testimony in Court and only adopted their witness statements. It was evident from the witness statement of the Defendants'

admission to wit that they were squatters on the Plaintiffs' property.

61. The Learned Counsel relied on the following five (5) issues for determination of the Court. These were, firstly on whether the Plaintiff was the registered owner of the suit land. The Learned Counsel asserted that the Plaintiff has demonstrated on a balance of probabilities that he is the registered owner of the parcel of land known as CR. 55381/2 situated North of Mombasa Municipality within Mombasa District containing by measurement nought decimal nought four nine five (0.0495) hectares or thereabouts and being sub - division number 6325 (Original Number 390/115) II/MN. He produced in evidence Exhibit 2 a Certificate of title which contains an entry of transfer of the suit property to his name made on the 4th July, 2013 after he purchased the property. The said title also shows an entry for a charge to Transnational Bank Limited made on the same date as the Plaintiff acquired the property through asset financing. The Plaintiff also produced a copy of the Certificate of Postal Search as on 27th July, 2016 which affirms that he is the legal and duly registered owner of the suit property herein.
62. Further to this the Plaintiff demonstrated a good root of title by demonstrating to the Court how he purchased the suit property, the transfer document was registered and consequently a title deed was issued in his name though in the name of the Plaintiff and Trans-National Bank since the bank

financed the Plaintiff. The Plaintiff also confirmed before the Court that he duly paid stamp duty during the registration process. There is no contravening evidence which has been brought forth by the Defendants to counter the Plaintiff's title. As such, the Counsel submitted that the Plaintiff was the legal and rightful registered owner of the suit land. To buttress on this point, the Counsel relied on the authority of: **“Miliki Limited - Versus - Ali & 3 others [2024] KEELC 13604 (KLR)”** Makori J made the following observation:

“I agree with the submissions by the Plaintiff, being the registered owner who bears the title to the suit land, has conclusive ownership of the land unless the same is challenged on the grounds of fraud and illegalities or corrupt scheme. See - Ali Wanje Ziro - Versus - Abdulbasit Abeid Said & another [2022] eKLR where the Court observed that: “The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except- On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra -Versus - Stephen Mungai Njuguna & Another (2013) eKLR where the court held that “-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained

by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

63. Secondly, on whether the Defendants had encroached on the suit property. The Learned Counsel submitted that the Plaintiffs' testimony was that before he purchased the suit property he visited the premises and established that the same was vacant free from any construction and/or occupation by third parties. Since the Plaintiff purchased the suit property in the year 2013 through an asset finance facility through Trans-National Bank, he serviced the said facility till sometime in the year 2016 when he applied a further charge to enable him construct a matrimonial home for his family. He produced in evidence Plaintiff Exhibit Number 8, the Application for the Development Plan dated 20th May, 2016 and a copy of the further Charge dated 7th July, 2016 as Plaintiff Exhibit Number 9.
64. He clarified that upon the remittance of the first installment through the further Charge, he purchased sand and other construction materials and proceeded to his plot where he was optimistic that the construction works would commence without any further delay. However, to his utter shock and disappointment, he was violently chased away by the Defendants who were armed something which he least expected. Unfortunate enough, the Plaintiff was transferred to Kericho at about that time and the Defendants took advantage

of the Plaintiffs' absence and constructed two houses on the Plaintiffs' property. The photographs showing the houses were produced as Plaintiffs' Exhibit Numbers 7.

65. The Plaintiff also produced in evidence as Plaintiff Exhibit Number 4, a Survey Report dated 1st September, 2016 by Edward Kiguru which confirmed that there were two houses encroaching onto the Plaintiffs' property. The surveyors' comment on the extent of such encroachment was that: "**the extent and location of the encroachments of the two houses renders the plot owners' intention to construct a residential house impossible (notwithstanding the fact that the owner has duly approved Building plans for construction of the same on his plot**".

66. The Defendants through the witness statement by the 2nd Defendant had admitted having built their residential houses on the suit premises where they also did their subsistence farming. Although they were not candid enough with the Court so as to indicate when the construction of the two houses was done, they had stated having been adversely occupying the Plaintiffs' property without the Plaintiffs' consent. They had further filed the photographs showing their houses encroaching on the Defendants' plot attached to the Defendants' list of documents dated 21st July, 2021.

67. With all the above having been demonstrated, it was evident that the Defendants had encroached onto the Plaintiffs' property. For these reasons, the Counsel urged the Court to grant a mandatory order of injunction to compel the

Defendants to give vacant possession of the property and to demolish the structures constructed thereon at their cost and they be barred by an order of a permanent injunction restraining them from trespassing and encroaching on the Plaintiffs' plot.

68. On this aspect, the Learned Counsel relied on the case of **"Miliki Limited - Versus - Ali (supra)"**, the Court granted an order directing the Defendants to give vacant possession of the property. The Court held:

"As opined by the Plaintiff, In Black's Law Dictionary 8th Edition, a continuing trespass is defined as: "A trespass like a permanent invasion on another's rights, such as a sign that overhangs another's property".

15. In Charles Ogejo Ochieng - Versus - Geoffrey Okumu, [1995] eKLR, the Court held that trespass is an injury to a possessory right. Therefore, the proper Plaintiff in an action for trespass to land is the person who has title to it or is deemed to have been in possession at the time of trespass. The Plaintiff has further provided photographic evidence showing the defendants' illegal occupation and use of the suit property. Thus, the claim for trespass stands proved.

16. Whether the Plaintiff is entitled to the reliefs sought, from the evidence adduced, the Defendants invaded the suit property, have been on the ground, been invited to move out, but have refused or neglected to do so with impunity. Therefore, the Plaintiff will be entitled to General Damages as enunciated by Obaga J. in Philip Ayaya Aluchio - Versus - Crispus Ngayo [2014]eKLR:"..... measures of damages for trespass is the difference in value of the Plaintiff's property

immediately after trespass or costs of restoration whichever is first”

17.The claim herein will succeed against the Defendants jointly and severally as follows:

a. A permanent injunction is hereby issued against the Defendants from further occupying, constructing, building, drilling boreholes or water wells, subdividing, putting up a fence, selling, advertising for sale, letting, sub-letting, or in any manner interfering with the suit properties in protection of the plaintiff's right of owning property under Article 40 of the Constitution.

b. An order be and is hereby issued directing the eviction, and or vacant possession directed at the Defendants herein, to move out of parcel of land known as LAMU BLOCK 2/347, 2/348, and 2/350 situated at Langoni area on the Lamu island (Judgment of this Court be served on the Defendants to vacate within 90 days hereof, failure forceful eviction to take effect.

c. Kshs. 500,000/- is hereby awarded to the Plaintiffs for trespass.”

69. In the case of ***“Jacob Ernest Ambala Odondi - Versus - Violet Shikuku [2021] eKLR”*** the Court while holding that the Plaintiff therein had proved his case and deserved a mandatory injunction observed as follows:

“The surveyor's report in Plaintiff Exhibit No. 4 stated as follows;

‘The excess of 0.18Ha (approximately 2 acre) was hived off to compensate for the loss on parcel No. 1459. That was on a consensus basis otherwise establishing the boundary as it

is mapped would mean going into the homestead of the owner of parcel No. 3276.'

From the above quoted section, it is clear that the disputed land belongs to the Plaintiff as was explained by the surveyor.

9. Both the district Land Registrar and the Land Surveyor in their reports indicated that the Defendant is occupying an excess of 0.18Ha which is approximately 2 acres. Since those reports were not disputed by the Defendant, they corroborate the Plaintiff's claim of trespass and this court finds that the Defendant has encroached into the plaintiff's land known as South Teso/Angoromo/1459 by a portion measuring 0.18ha. The court finds that the Plaintiff has proved his case on the required standard of balance of probabilities and is therefore entitled to prayer (a) and (b) of the Plaint being a permanent and mandatory injunction against the Defendant".

70. Further, the Counsel cited the case of *"Mohamed - Versus - Kenga & 13 others (Environment & Land Case 41 of 2018) [2022] KEELC 14837 (KLR) (16 November 2022) (Judgment)"* Lady Justice Odeny ordered the demolitions of the Defendants who had encroached onto the Plaintiffs' property, the Court held:-

*"I have considered the pleadings, the evidence and submissions and find that the Plaintiff has proved her case against the Defendants. Trespass is actionable per se and find that Kshs 300, 000/ is a reasonable amount as general damages. 28. I therefore make the following specific orders:
a. A declaration is hereby issued that the Plaintiff is the absolute and indefeasible proprietor of parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 le 3536*

situate in Malindi. b. Declaration is hereby issued that the Defendants jointly and severally have illegally, unlawfully, wrongfully and without any colour of right encroached and trespassed into the Plaintiff's parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi. c. An order is hereby issued compelling or requiring the Defendants, their agents, servants, relatives and any other person under their instructions to demolish and or pull down and remove the illegal structures constructed and or erected on Parcel of land Reference No. 434 Malindi Title No. LT.21 Folio 668 file 3536 situate in Malindi within 45 days failure to which the Plaintiff and or his agents, contractors and or servants be authorized to demolish and remove the illegal structure and the costs incurred thereby be paid by the Defendants."

71. Thirdly, on whether the Defendants have sufficiently justified their illegal encroachment on the suit property, the Learned Counsel submitted that they wished to draw to the Court's attention to the Statement of Defence dated 10th March, 2017 which contains mere denials and no substantive Defence to the Plaintiffs' Claim. However, a perusal of the witness statement by the 2nd Defendant deduce that the Defendants allege that they have adversely occupied the suit property from the year 2003 without the consent and permission of the Plaintiff. They thus allege that they are entitled as the owners of the suit premises by way of Adverse possession. They also allege that their claim is recognized by the predecessor in title, Two Thirds Investment Company Limited who engaged

them in negotiations even before the Plaintiff purchased the portion of land known as Plot No. 390/11/MN.

72. In this regard, they wished to the Court to consider the following issues:-

a. Whether the Defendants can raise a claim of Adverse possession through a witness statement.

b. What is the fate of Plot No. 390/II/MN to which the Defendants claim ownership before the Plaintiff?

73. Fourthly, on whether the Defendants can raise a claim of Adverse possession through a witness statement. The Learned Counsel opined that it is trite law that parties were bound by their pleadings and where an issue had not been pleaded the same could not be addressed as the other party got no opportunity to rebut through pleadings. The Defendants filed a general Statement of Defence which contained mere denials to the Claim. However, it was through their witness statement that they sought to raise a new claim for adverse possession which we submit that the same cannot be considered extensively by this Court as it was not pleaded in the statement of Defence. The High Court in the case of ***“Kihara & 2 others - Versus - Njihia & 4 others (Environment & Land Case E014 of 2021) [2024] KEELC 5106 (KLR) (4 July 2024) (Judgment)”*** where the Defendant raised the issue of adverse possession in their submissions held as follows:

“The Defendants raised the issue adverse possession in their submissions. They alleged that they have been on the suit land since birth and are entitled to ownership of the suit

land through adverse possession... Further, in their statement of Defence, the Defendants did not plead adverse possession, and therefore, they could not advance such a claim through written submissions, as submissions are not pleadings. See the case of Hannington Oloo Ogumbe - Versus - Albert Makau Kyambo & Another (2021) eKLR; where the court held;

“in any event, the Plaintiff cannot claim the suit property by way of adverse possession and in the same breath challenge the 1st Defendant’s title. By mere fact that the Plaintiff is claiming the suit property by way of adverse possession, he has conceded to the fact that the 1st Defendant is the bona fide registered proprietor of the suit property...Consequently, the court finds that the Defendants are not entitled to a claim of adverse possession. However, the Plaintiffs are entitled to the prayers sought in their Plaint and thus they have proved their case on the balance of probabilities.”

74. Fifthly, on what was the fate of Plot No. 390/11/MN to which the Defendants claim ownership before the Plaintiff. The Learned Counsel submitted that even assuming that the Defendants allegation on the Claim of Adverse possession is anything to go by we submit that that Defence is no longer tenable to the Defendants by dint of the Judgment delivered by Justice Kibunja sitting at the Environment and Land Court ELC Court at Mombasa in ELC No. 232 of 2014 wherein the presiding judge dismissed the claim for adverse possession that had been filed by squatters against Two Thirds Investment Limited on the grounds that the original plot No.

390/11/MN was non-existent as the same had already been subdivided into several parcels which were sold to individual owners thus an order of Adverse possession could not issue.

75. By virtue of this Judgment which was delivered by Justice Kibunja on the 6th November, 2014 in ELC NO. 234 of 2014 at Mombasa, computation of time by the Defendants for adverse possession was disrupted. Therefore, it is our most humble submission that the Defendants' claim for adverse possession is premature and cannot be entertained by this Court.

76. They urged the Honourable Court to be guided by the Appellate Court authority of **"Kuria Kiarie & 2 others - Versus - Sammy Magera [2018] KECA 467 (KLR)"** where the Appellate Court noted as follows:

"If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in Joseph Gachumi Kiritu - Versus - Lawrence Munyambu Kabura [1996] eKLR:

"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him."

77. Sixthly, on whether the Plaintiff deserves the orders sought, the Learned Counsel submitted that the Plaintiff deserves the orders of mandatory and permanent injunction as sought in

the Plaintiff as prayed. On the award of General Damages, we urge the Court to award the Plaintiff General damages of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) for loss of use of the suit property from January, 2016 to date (Nine Years). They urged the Court to be guided by the authority of **“Kihara & 2 others - Versus - Njihia (Supra)”** where the Court awarded each Plaintiff a sum of Kenya Shillings Five Million (Kshs. 500,000/=) for loss of use of property from the year 2021 to 2024 when the Court rendered its judgment. While awarding General damages, the Court noted as follows:

“The Plaintiffs having proved trespass on the part of the Defendants, the court finds that they are entitled to general damages of Kshs 500,000/= each payable with interests at courts rate. See the case of Duncan Nderitu Ndegwa - Versus - Kenya Pipeline Co & Another (2013) eKLR,” where the court held; “..on the issue of quantum and general damages, once a trespass to land is established, it is actionable per se and indeed no proof of damages is necessary for the court to award general damages”

78. In conclusion, the Learned Counsel urged the Court to find that the Plaintiffs’ suit was merited and should be allowed with costs to the Plaintiff.

B. The Written Submissions by the Defendants

79. The Defendants through the Law firm of Messrs. Kenga & Company Advocates filed their written submissions on 26th June, 2025. Mr. Kenga Advocate submitted on behalf of the Defendants herein that by way of a Plaintiff dated and filed on

2nd December, 2016 was non-meritorious and thus ought to be dismissed with costs.

80. On the background, the Learned Counsel submitted that the Plaintiff filed this suit on 2nd December, 2016 vide a Plaint of even date, seeking for mandatory and/or permanent injunctive orders against the Defendants herein in respect of the suit land on the purported ground of being trespassers on the suit land. He also sought for damages and mesne profits plus costs of the suit and interests.
81. The suit is defended through the filing of a Statement of Defence dated 10th March, 2017 but prior to the hearing of the main suit, the court had to deal with an injunctive application dated 2nd December, 2016 which also opposed by the Defendants through a Replying affidavit in which the Defendants claimed to have lived on the suit premises for over 12 years and therefore they're entitled to be awarded the suit premises by way of adverse possession.
82. On the evidence, the Learned Counsel submitted that the matter went through pre-trial directions and eventually, the Plaintiff's case commenced on 8th November, 2021 where the Plaintiff, testified as PW - 1. He adopted his witness statement dated 22nd November, 2016 and produced all the documents itemized in his List of Documents dated 2nd December, 2016. The witness was recalled for cross-examination vide directions made on 22nd September, 2022 as his testimony had been taken in the absence of the Defendants' advocates. He was

cross-examined on 6th February, 2023 and upon closure of his case, the 2nd Defendant testified as DW - 1 on the very same day.

83. The 2nd Defendant adopted his Statement dated 21st July, 2021 as his evidence and insisted that him and the 1st Defendant had lived on the suit premises for over 12 years and thus was entitled to the suit land by way of adverse possession. He produced scanned photographs as Defence Exhibit Numbers - 1(a) & (b) and 2(a) & (b), evidencing possession and/or occupation of the suit premises. Three Letters dated 1st June, 2014, 1st November, 2014 and 10th November, 2014 were marked for identification and summons were issued for the authors of the three letters to produce them. The authors are the Directors of Two Thirds Investment Company Limited, the original owner of the suit premises (refer to the transfer instrument dated 2nd July, 2013 produced by the Plaintiff as Pex-8).
84. The three letters, aforementioned were eventually produced by consent on 5th November, 2024 as Defence Exhibit Numbers 3 to 5, respectively and their intention was to prove that the original registered owners of the suit premises, Two Thirds Investment Company Limited from whom the Plaintiff purchased a portion thereof, are aware that the suit premises is in physical and/or actual possession or occupation of the Defendants herein. The Plaintiff did not challenge the evidence touching on the said letters.

85. On the law and analysis, the Learned Counsel submitted that the Defendants had invoked the provisions of Section 7 as read with Section 17 of the Limitation of Actions Act, Cap. 22. They had through their testimony, including the Statement dated 21st July, 2021 and the Replying Affidavit of 10th March, 2017 stated that they had been in physical and/or actual possession or occupation of the suit premises for over 12 years and therefore were entitled to orders of Land adverse possession. It was held in the case of **“Chevron (K) Limited (formerly known as Caltex Oil Kenya Limited) - Versus - Harrison Charo Wa Shutu, being COACA No. 17 of 2016 (Malindi)”** that a Defence on Limitation was as good as a suit or a Counter - Claim for orders of adverse possession as in the said authority, the learned Judges stated that claims for Adverse possession could be prosecuted through a Counter - Claim or a Defence on Limitation and since the Defendants invoked a Defence on Limitation, they are entitled to the suit premises by way of adverse possession. The learned Judges stated as follows:

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See Mariba - Versus - Mariba Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See Wabala - Versus - Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin - Versus - Julius Charo Karisa, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala - Versus - Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure.

Similarly, in Bayete Co. Ltd - Versus - Kosgey [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

86. Flowing from the above, the Defendants ought to be awarded the suit premises based on their Defence on Limitation.

87. In conclusion, the Learned Counsel urged the Honourable Court to be guided by the evidence tendered herein and any applicable laws and the various Authorities available (including the above, which was also attached hereto) in dismissing the Plaintiff's suit as you allow the Defendants' Defence of limitation.

VII. Analysis and Determination

88. I have carefully considered the parties' pleadings, testimonies, submissions, and all documentary evidence, as well as the applicable statutory and case law. I shall address the issues sequentially as guided by their legal and factual complexity.
89. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a) Whether the Plaintiff was the legal and absolute registered proprietor of the suit property?**
 - b) Whether the Defendants unlawfully encroached/trespassed upon the suit property?**
 - c) Whether the Plaintiff was entitled to the reliefs sought?**
 - d) Who should bear the costs of the suit.**

ISSUE No. a). Whether the Plaintiff was the legal and absolute registered proprietor of the suit property.

90. Under this sub - heading, the Court was called upon to examine the central issue for determination, namely whether the Plaintiff was the lawful proprietor of the suit property in accordance to the provisions of the law. The question of ownership of the suit land between the Plaintiff and the Defendants lay at the heart of the dispute, for without establishing the Plaintiff's title, the remedies sought could not be granted.
91. The Plaintiff's case rested on his purchase of Subdivision Number 6325 (Original Number 190/11 Mainland North), CR Number 55381, situated in Mombasa Municipality. He produced documentary evidence including the title deed, charges registered in favour of Transnational Bank Limited, and official searches confirming his registration. He testified

that he had acquired the property from Purpose Investment Limited in the year 2013, financed by a loan of a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000/-), and later secured a further charge of a sum of Kenya Shillings Four Million Six Sixty Thousand (Kshs. 4,660,000/-) in the year 2016. The Plaintiff explained that the bank had conducted due diligence, sent valuers to the ground, and confirmed the property was available for purchase. He further stated that he had obtained approvals from the County Government of Mombasa for construction, underscoring his intention to develop the land as his matrimonial home.

92. In order to legally decipher the efficacy and effectiveness of the registration and ownership of land are anchored from the provisions of Article 40 (1) & (2) of the Constitution of Kenya, 2010, Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.

93. It is evident that the right to own and acquire property in Kenya is premised under the provision of Article 40 of the Constitution of Kenya, 2010. The said Article provides as follows:-

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) 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 in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law....”

94. Thus, once a party produces a duly registered title, the burden shifts to the challenger to demonstrate fraud, illegality, or procedural impropriety. These provisions collectively establish the principle of indefeasibility of title, subject to statutory exceptions. It will be seen from the provision of Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. The provisions of Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights

comprised in the subject land. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the Land Registration Act gives the registered proprietor absolute rights over the registered land, Section 26 gives sanctity to title and makes provisions of when such title can be cancelled or revoked.

95. 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.”

96. Further, as provided by Section 25 of the said Act, his ownership cannot be defeated except as provided by the law. See Section 25 (1) of Land Registration Act, No. 3 of 2012.

“(1) 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 held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

97. The provision of Section 26 (1) of the Land Registration Act 2012 provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions

contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”

98. In the case of: ***“Munyu Maina - Versus - Hiram Gathiha Maina [2013] eKLR”*** the Court of Appeal held;

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

99. The Plaintiffs’ evidence must satisfy the requirement in ***“Munyu Maina - Versus - Hiram Gathiha Maina [supra]”***, where the Court of Appeal held that when the root of title is challenged, the registered proprietor must demonstrate the process of acquisition.

100. Under the Land Registration Act, the registered proprietor’s title is prima facie determinative; earlier valid registration ordinarily prevails over later registrations. A later registered title that is tainted by fraud may be set aside; conversely, an earlier registered title may be impeached if it was itself procured by fraud. The court must decide which title was lawfully and validly created. The party alleging fraud or forgery

bears the burden to prove it on the balance of probabilities. Where documentary entries conflict, the court examines the contemporaneous documentary trail, witness evidence and any independent corroboration (bank receipts, RTGS, stamp duty receipts, court orders, police exhibits). The Registrar must maintain an accurate register; where the register contains inconsistent or duplicate entries, the Registrar has a duty to investigate and, if necessary, rectify the register.

101. In the case of:- **“Kinyanjui Kamau - Versus - George Kamau [2015] eKLR”**, the Court of Appeal observed that;

“.....It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo - Versus - Ndolo [2008] 1 KLR (G & F) 742 wherein the Court stated that: “....We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (Emphasis mine)

102. The court in the case of **“Patel & another - Versus - MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)”** observed as follows;

“It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has

to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.”

The court went on further to say:

In the case of Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis mine.

103. The Court of Appeal in the case of ***“Ardhi Highway Developers Limited - Versus - West End Butchery Limited & 6 others [2015] eKLR”*** as cited in ***“Hebron Orucho Gisebe & 2 others - Versus - Joseph Ombura Gisebe & another [2022] eKLR”*** in considering the issue of fraud observed as follows: -

“ It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427: “Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts

must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence - Versus - Lord Norreys [1880] 15 App. Case. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy - Versus - Garrett [1878] 7 ch. D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".

104. Similarly, in the case of:- **"Kuria Greens Limited - Versus - Registrar of Titles & Another [2011] eKLR"**, the High Court affirmed that courts will cancel titles obtained through fraud or irregularity to protect genuine proprietors.

105. Applying these legal principles to the instant case, the Plaintiff produced contemporaneous documentary material showing registration and bank charges. He explained the financing chain (loan advanced by Transnational Bank Limited; charge entries dated 2nd July 2013 and 22nd July 2016 were placed on the title) and described the bank's due diligence and valuation visits. He produced the surveyor's report and searches relied upon in his List of Documents. The

documentary trail, taken together with the Plaintiff's oral testimony, established a coherent account of acquisition, registration and subsequent dealings with the land.

106. On the contrary, the Defendants did not produce a competing registered title in their favour. Their case rested on occupation and on letters and other material said to relate to squatters and plot allocation; DW-1 admitted under cross-examination that he had no title and that his occupation had no documentary root. The letters relied upon by the Defendants were not addressed to the Plaintiff, did not show transfer of title to the Defendants, and did not displace the Plaintiff's documentary evidence of registration. The Defendants' pleaded adverse possession claim was not supported by pleaded particulars or cogent and empirical documentary proof of exclusive, continuous possession for the statutory period.

107. Indeed, I fully concur with the comprehensive submissions by the Learned Counsel for the Plaintiff and based on the provision of Order 2 Rule 6 of the Civil procedure Rules, 2010 to the effect that parties were bound by their own pleadings. From the filed Replying Affidavit and the Statement of Defence, dated 10th March, 2017 respectively there was no assertion nor any claim for the suit land by way of Land Adverse possession. Evidently, for the elaborate legal ratio founded in the Court of Appeal case of ***“Chevron (K) Limited (formerly known as Caltex Oil Kenya Limited) (Supra)”*** as ably

cited by the Learned Counsel for the Defendants to apply in the instant case, I discern that the Defendant never raised this claim as their Defence nor filed Counter - Claim from their filed pleadings. Therefore, the Courts discern that the claim that the Defendants were entitled to the suit land on the strength of Land Adverse possession on the justification of having been in continuous and uninterrupted physical and/or actual possession or in occupation of the suit land for over 12 years as founded under the provision of Sections 7, 13 and 38 of the Limitation of Action Act, Cap. 22 and Order 36 of the Civil Procedure Rules 2010 was only introduced by the Defendants through its witness statement and submissions but not pleadings were mere after thought and hence not binding in law to be considered by this Honourable Court in the given circumstances whatsoever. Its an issue that must be disregarded outrightly in all fairness.

108. In the case of ***“Hubert L. Martin & 2 Others - Versus - Margaret J. Kamar & 5 Others[2016] eKLR”***, Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such

litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

109. This position was emphasized in the case of **"Wreck Motors Enterprises - Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997"**, where the court held that: -

'Where there are two competing titles the one registered earlier is the one that takes priority.'

110. The same position was held in the case of **"Gitwany Investment Ltd - Versus - Tajmal Ltd & 3 Others (2006) eKLR"** where the Court held that:-

'...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'

111. The courts have consistently held that production of a title deed or certified copy is sufficient to establish a prima facie case of ownership, unless there is evidence to the contrary, such as fraud, illegality, or procedural irregularity. Where a

registered title is challenged, the challenger bears the burden of proving fraud, illegality or other statutory ground for impeaching the title. Allegations of fraud must be pleaded with particularity and proved to a high standard; mere irregularity in later entries on the register does not, of itself, establish that an earlier registration was invalid. The Court must therefore examine the root of title and the contemporaneous documentary trail where competing entries or anomalies appear.

112. I have opined before in the case of ***“Said & 3 others - Versus - Kenya Rural Roads Authority (Environment & Land Case 198 of 2020) [2024] KEELC 4662 (KLR) (4 June 2024) (Judgment)”*** that: -

58. Under this sub - title, the Honourable Court deciphers that the main substratum in this matter is based on the claim of legal ownership to the suit property. Flowing from that, whether there were any acts of encroachment and/or trespass and the consequential damages thereof. It is trite law that for a person to prove legal ownership of land they must bear a prima facie conclusive evidence in form of documentation for instance a Certificate of Title. The proprietor and/or absolute owner ought to have it registered in his/her name. have a title for one to have acquired indefeasible title, interest and title on the land as vested in law. Ideally, the legal effect and efficacy of registration of the documentation is provided for under the provision of Section 24 of the Land Registration Act, No. 3 of 2012 which provides as follows:-

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

59. Section 25 (1) of the said Act further provides that:-

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

60. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the Land Registration Act which provides; -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

a. on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

113. The Supreme Court of Kenya, in ***“Sehmi & another - Versus - Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)”***, clarified that a title deed is prima facie evidence of ownership, not conclusive proof. The court stated:

“Under the Land Registration Act, a certificate of title was to be regarded by courts as prima facie evidence that the person named therein was the absolute and indefeasible owner of the land. It was therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.”

114. This position is consistent with earlier Court of Appeal decisions, such as ***“Munyu Maina - Versus - Hiram Gathiha Maina [2013] eKLR”*** and ***“Arthi Highway Developers Limited - Versus - West End Butchery Limited & Others [2015] eKLR”***, which held that once a title is challenged, the registered owner must go beyond producing the document and demonstrate how the land was lawfully acquired.

115. On the root of title and unlawful acquisition, the courts have emphasized the need to interrogate the root of title. Currently, in the case of:- ***“Dina Management Limited - Versus - County Government of Mombasa & 5 others [2023] KESC 30 (KLR)”***, the Supreme Court held:

“To establish whether the appellant is a bona fide purchaser for value, we must first go to the root of the title, right from

the first allotment, as this is the bone of contention in this matter.”

116. Thus, the Plaintiff must not only produce the title deed but also, if challenged, demonstrate that the process leading to its issuance was lawful.

117. The provision Section 26 (1)(a) and (b) of the Land Registration Act provide that a certificate of title may be challenged on grounds of fraud or misrepresentation to which the proprietor is proved to be a party, or where the certificate was acquired illegally, unprocedurally, or through a corrupt scheme. The burden of proving fraud or illegality lies on the party alleging it, and the standard of proof is higher than a balance of probabilities, though not as high as beyond reasonable doubt.

118. The Plaintiff's title was supported by contemporaneous documents and official searches showing registration and bank charges. The Plaintiff's evidence that the bank had carried out due diligence and that charges were registered on the title corroborated the acquisition story. The Defendants produced no transfer or title in their names and no contemporaneous instrument that established a lawful proprietary interest superior to the Plaintiff's registered title. The surveyor's report and the Plaintiff's evidence of attempts to develop the land (approvals, materials on site) further corroborated his proprietary claim.

119. If registry anomalies or later inconsistent entries had been shown to exist, those anomalies would call for careful scrutiny of the root of title. However, the mere existence of irregular or inconsistent entries on the register does not automatically defeat a properly documented registered title. The Court must be satisfied, on cogent evidence, that the Plaintiff's title was procured by fraud, misrepresentation, or illegal procedure before setting it aside. No such cogent evidence was produced by the Defendants in this case.

120. Applying the statutory principles and the authorities on the root of title, and having considered the documentary and oral evidence, the Court found on the balance of probabilities that the Plaintiff was the registered proprietor of the suit property. The Plaintiff had produced the title documentation, searches and supporting contemporaneous evidence of acquisition and financing; the Defendants have not produced a competing registered title or cogent evidence of fraud or illegality that would impeach the Plaintiff's registration. Accordingly, the Plaintiff's title is prima facie valid and was not displaced by the Defendants' evidence.

121. The Court therefore holds that the Plaintiff was the registered proprietor of Subdivision No. 6325 (Original No. 190/11 Mainland North), CR No. 55381, and was entitled to the protection and remedies afforded to a registered proprietor under the Land Registration Act, No. 3 of 2012.

ISSUE No. b). Whether the Defendants unlawfully encroached/trespass upon the suit property.

122. Under this sub-heading, the Court has to consider whether the Defendants, by their acts and conduct, unlawfully encroach upon the suit property and thereby interfere with the Plaintiff's proprietary rights.

123. The **Black's Law Dictionary** defines encroachment as:

“an unauthorised intrusion or invasion of another's property; a physical intrusion such as a wall, fence, or structure that unlawfully extends onto or diminishes the area of another's land; in the law of easements, an alteration of the dominant tenement that imposes an additional burden on the servient tenement is also described as an encroachment.”

124. Encroachment in Kenyan law is an unauthorised physical intrusion or occupation of another's land (a form of trespass); a registered proprietor is protected by the Land Registration Act and may seek removal, demolition, mesne profits and damages, while criminal and summary remedies exist under the Trespass Act. Key statutory anchors are the Trespass Act (Cap. 294) and the Land Registration Act, 2012 (Sections 24-26).

125. The Plaintiff contends that the Defendants enter the suit property in or about January 2016 without the Plaintiff's consent, approval or permission and commence erecting permanent structures. The Plaintiff asserts that he brings building materials to the site, obtains approvals for construction from the County Government, and is violently

driven off the ground by persons later identified as the Defendants. The Plaintiff relies on a surveyor's report that shows two houses protruding into the Plaintiff's parcel, photographs, witness testimony of having been chased away, and documentary evidence of his registered title and bank charges.

126. The Defendants assert that they occupy the land as squatters or long-standing occupants who entered the area earlier (one Defendant claims entry in year 2003 and construction of a permanent house in year 2008). They rely on letters and local communications referring to squatters and plot allocations, photographs of structures and trees they planted, and oral testimony that they have lived on the ground for many years. The Defendants do not produce a registered title in their favour and do not produce statutory approvals or transfer instruments that confer proprietary rights over the Plaintiff's registered parcel.

127. A person who is not the registered proprietor has no proprietary right to occupy another's registered land unless that person establishes a legal basis such as a valid transfer, a subsisting lease, or adverse possession established by continuous, exclusive, open and notorious possession for the statutory period. Trespass and encroachment occur where a person enters and occupies land without the owner's consent. The registered proprietor is entitled to protection against unlawful occupation and may seek mandatory relief,

demolition of unauthorised structures, mesne profits and damages for loss of use.

128. To establish unlawful encroachment, the Plaintiff must show

- (a) ownership or a superior proprietary right to the land;**
- (b) that the Defendants entered or remained on the land without consent; and**
- (c) that the Defendants erected structures or otherwise interfered with the Plaintiff's use and enjoyment. Conversely, a Defendant who claims adverse possession must plead and prove exclusive, continuous, open and hostile possession for the requisite statutory period and show that such possession is inconsistent with the owner's title.**

129. On ownership, the Court notes that while the Plaintiff produced an original registered Certificate of title and official searches showing registration of the suit land in his name; on the other hand the Defendants never produced any competing registered title. The Plaintiff therefore enjoys the statutory protection of a registered proprietor.

130. On the entry and occupation, the Plaintiff gives credible evidence that he brings materials and is prevented from developing the land by persons who identify themselves as the Defendants; the Plaintiff's contractor reports encroachment to the police; the surveyor's report and photographs show structures protruding into the Plaintiff's parcel. These facts, taken together, establish that the

Defendants enter and occupy parts of the Plaintiff's registered parcel without his consent.

131. Further on the Defendants' assertions, the Defendants rely on long-standing occupation and letters referring to squatters. Those materials do not amount to a transfer of title or to documentary proof of a legal right to occupy the Plaintiff's registered parcel. The Defendants do not plead or prove the elements of adverse possession with the necessary particularity (exclusive, continuous and hostile possession for the statutory period). Their oral assertions of long occupation are not supported by contemporaneous instruments that displace the Plaintiff's registered title.

132. Finally on the violence and interference, the Plaintiff's account of being driven away from the site and of materials being placed to commence construction supports a finding of forcible interference with the Plaintiff's rights. The presence of permanent structures on the Plaintiff's parcel and the Defendants' refusal to vacate after demand further demonstrate ongoing unlawful occupation.

133. Letters or administrative communications that refer to squatters or to plot allocation do not, without more, confer proprietary rights over a registered parcel. Such letters may be relevant to the question of who occupied the general area, but they do not displace a registered proprietor's title or justify construction on another person's registered parcel. Where a Defendant relies on administrative correction or swapping of

plots, the Defendant must produce clear documentary proof of a lawful correction or a new title; mere assertions or internal letters are insufficient.

134. On the balance of probabilities, the Plaintiff establishes that the Defendants unlawfully encroach upon the suit property. The Plaintiff proves that the Defendants enter and occupy parts of the registered parcel without consent, erect permanent structures, and interfere with the Plaintiff's intended development. The Defendants fail to establish a lawful basis for their occupation or to prove adverse possession with the required particularity. The Court therefore finds that the Defendants unlawfully encroach upon the suit property and that the Plaintiff is entitled to remedies for trespass and encroachment.

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

135. Under this sub-heading, the Court has considered whether, having established proprietorship and unlawful encroachment, the Plaintiff is entitled to the specific remedies claimed. These remedies include:

- a. vacant possession and a mandatory injunction;**
- b. demolition of the unauthorised structures;**
- c. mesne profits and general damages for loss of use, stress and anguish; and**
- d. costs and interest**

136. A registered proprietor who proves unlawful occupation by another is entitled to equitable and statutory reliefs to

vindicate proprietary rights. These include mandatory injunctions, orders for vacant possession, demolition of unauthorised works, mesne profits, and damages. On the indefeasibility of rights, titles and interest of land, the Court has already cited the provision of Sections 24, 25 & 26 of the Land Registration Act, No. 3 of 2012

137. Section 3 of the Trespass Act criminalizes entry, occupation, or erection of structures on private land without the consent of the occupier, thereby providing statutory protection against encroachment.

138. In the case of ***“Munyu Maina - Versus - Hiram Gathiha Maina (Supra)”***, the Court of Appeal held that when the root of title is challenged, the registered proprietor must go beyond producing the instrument of title and demonstrate the legality of acquisition. Further in the case of:- ***“Kuria Greens Limited - Versus - Registrar of Titles & Another [2011] eKLR”***, the High Court affirmed that Courts will cancel titles obtained through fraud or irregularity to protect genuine proprietors.

139. The Court’s discretion in granting equitable reliefs is guided by whether the Plaintiff demonstrates a clear legal right, whether damages alone are adequate, and whether the balance of convenience and justice favours restoration of possession and removal of encroachment.

140. The Plaintiff is the registered proprietor of the suit property. The Defendants occupy parts of the parcel without consent or lawful title. The Plaintiff seeks a mandatory injunction

compelling them to vacate. The Plaintiff's right to possession is clear and protected by registration under the provision of Sections 24, 25 & 26 of the Land Registration Act, No. 3 of 2012. The Defendants fail to establish any lawful justification for continued occupation. Damages alone cannot adequately vindicate the Plaintiff's proprietary right to possession or enable him to proceed with his intended development of a matrimonial home.

141. The Plaintiff is entitled to an order for vacant possession and a mandatory injunction compelling the Defendants and any persons acting under their authority to vacate the suit property.

142. On demolition of structures, the Defendants erect permanent structures on the Plaintiff's registered parcel. Where unauthorized permanent works are erected on another's land, the Court may order demolition or removal to restore the owner's rights and prevent continuing trespass. The Plaintiff seeks demolition and removal of materials at the Defendants' cost. Given the Plaintiff's clear proprietary right and the Defendants' lack of lawful title or statutory authorization, justice favours demolition to restore the land to the Plaintiff's control.

143. The Plaintiff is entitled to an order directing demolition of the unauthorised structures and removal of building materials from the suit property, at the Defendants' cost. The Court may

provide a reasonable period for voluntary compliance before authorising enforcement.

144. On the mesne profits and general damages, mesne profits are sums awarded by a court to the lawful owner or possessor of land for loss suffered because another person unlawfully occupied or used the land. They compensate for the value of occupation (rent, profits from use) for the period of wrongful possession up to delivery of possession.

145. On the issue of Mesne Profits. Mesne profits are akin to special damages and must be pleaded with particulars and proven. A claimant is expected to provide particulars such as the dates of wrongful occupation, the basis of calculation [actual rents received, profits earned, or market rent]. The Civil Procedure Rules also allow for the assessment of mesne profits; however, courts have ruled that mesne profits cannot be awarded where a claim is unsupported. It is also well established that courts do not grant both general damages and mesne profits; a claimant must choose to claim one or the other. I discern that in this case, the Plaintiff failed to particularize and prove this claim. It is therefore unsubstantiated and fails.

146. On the issue of trespass. Trespass on the other hand is the unauthorized occupation of another's land without their consent and knowledge. In this case the court having held that the Defendants were in illegal occupation of the suit land, there is no justifiable reason why they should be in

occupation of the land other than as a trespasser. **Halsbury 4th ed, Vol 45 at para 26, 1503** provides as follows on computation of damages in an action of trespass:-

- (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.**
- (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**
- (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.**
- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

147. In the case of ***"Duncan Ndegwa - Versus -Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)"*** where the court held:-

"The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The

overriding principles is to put the claimant in the position he was prior to the infliction of the harm.”

148. Further in the case of ***“Phillip Aluchio - Versus - Crispinus Ngayo [2014] eKLR”*** the court held that-

“...The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....”

149. It has been admitted by DW - 1 (Boniface Onyango) who testified that he entered the land in the year 2003 through his uncle, initially erecting a temporary mud house and later constructing a permanent house in year 2008. He further stated that Felix Muthee joined him a month later. The Plaintiff, however, contends that the Defendants only came onto the land in the year 2016, when he had commenced delivery of construction materials and approvals for his matrimonial home. He testified that prior to 2016 the property was vacant, and that the Defendants only began erecting structures after he had started development.

150. Thus, the Defendants’ own evidence places their occupation as beginning in the year 2003, while the Plaintiff’s evidence places the encroachment in the year 2016. The Court must weigh these competing accounts, but on the Defendants’ testimony, they claim occupation from the year 2003

onwards, with permanent structures erected by the year 2008.

151. Given that trespass is actionable per se, the length of the trespass and the circumstances under which the Defendants entered the suit land, I award general damages in the sum of Kenya Shillings Three Million, Five Hundred (Kshs. 3,500,000/-).

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

152. 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.

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

Sirat - Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

154. In the case of:- **“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 - Versus - 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.”

155. The Plaintiff establishes registered ownership of the suit property and proves unlawful encroachment by the Defendants. The Defendants fail to demonstrate any lawful entitlement to the land. The Plaintiff therefore succeeds on the substantive issues of proprietorship and trespass.

156. Under this sub-heading, the Court finds that in line with Section 27 of the Civil Procedure Act and the principle that costs follow the event, the Defendants bear the costs of the suit. The Plaintiff, being the successful party, is entitled to

recover costs and incidentals of the proceedings, together with interest at court rates, unless the Court finds special circumstances to order otherwise.

VIII. Conclusion and Disposition

157. 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 on the Plaint dated and filed on 2nd December 2016, the Plaintiff having proved proprietorship and unlawful encroachment by the 1st & 2nd Defendants on a balance of probabilities.**
- (b) THAT the 1st & 2nd Defendants' defence dated 10th March 2017 be and is hereby found to lack merit and hence it is dismissed with costs.**
- (c) THAT for avoidance of doubt, accordingly, having considered the pleadings, evidence, submissions, and applicable law, the Court makes the following orders:**
 - (i) A mandatory injunction be and is hereby issued compelling the 1st & 2nd Defendants, their relatives, agents, servants and/or any other person under their instructions to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all materials, failing which the structures be demolished and removed at their costs.**

- (ii) The eviction and/or demolition of the illegal structures to be undertaken in accordance to the provision of Section 152A, B, C, D and E of the Land Act, No. 6 of 2012.
- (iii) a permanent injunction be and is hereby issued restraining the 1st & 2nd Defendants, their relatives, agents, servants and/or any other person claiming under them from trespassing, encroaching upon, or interfering in any way with the Plaintiff's quiet possession and enjoyment of the suit property.
- (iv) the Plaintiff's claim for mesne profits is dismissed for want of particularization and proof.
- (d) **THAT** the Plaintiff is awarded general damages for trespass in the sum of Kenya Shillings Three Million, Five Hundred Thousand (Kshs. 3,500,000/=).
- (e) **THAT** the Plaintiff is entitled to interest on the award of general damages at court rates from the date of Judgment until payment in full.
- (f) **THAT** the 1st & 2nd Defendants to jointly and severally bear the costs of the suit in line with the provision of Section 27 of the Civil Procedure Act, Cap. 21, awarded to the Plaintiff being the successful party, together with interest at court rates.

IT IS SO ORDERED ACCORDINGLY

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS
.....17THDAY OFAPRIL.....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. Ambutsi Advocate holding brief for Mr. Gakuo Advocate for the Plaintiff.
- c) M/s. Chengo Advocate holding brief for Mr. Kenga Advocate for the 1st and 2nd Defendants.