



REPUBLIC OF KENYA



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**Gakuria & another v Mwangi & 4 others (Environment & Land Case  
134 of 2021) [2025] KEELC 1014 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1014 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 134 OF 2021  
LL NAIKUNI, J  
FEBRUARY 28, 2025**

**BETWEEN**

**SULEIMAN KUWEAH GAKURIA ..... 1<sup>ST</sup> PLAINTIFF**

**BINTI OMAR MOHAMMED ALIAS HAWA ABDUL MWASSERRAH .... 2<sup>ND</sup>  
PLAINTIFF**

**AND**

**DOUGLAS MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**ALI NDULI ..... 2<sup>ND</sup> DEFENDANT**

**MBAYA BAKARI ..... 3<sup>RD</sup> DEFENDANT**

**MOHAMMED HAMISI ..... 4<sup>TH</sup> DEFENDANT**

**ALI HAMISI ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**I. Introduction**

1. The Judgment of this court pertains the Plaint dated 13<sup>th</sup> July, 2021 by Suleiman Kuweah Gakuroa and Binti Omar Mohamed alias Hawa Abdul Mwasserah, the Plaintiffs herein against Douglas Mwangi, Ali Nduli, Mbaya Bakari, Mohamed Hamisi and Ali Hamisi the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the Defendants entered appearance through a memorandum of appearance dated 16<sup>th</sup> August, 2021 and subsequently filed their statement of defence on 30<sup>th</sup> August, 2021 dated the same day.
3. It is instructive to note that this suit is directly related to another civil suit being “ELC No. 178 of 2020 – Mohammed Mwabungare – Versus – Binti Omar Mohammed & Another” in that the parties and subject matter is the same. However, for some reason or the other the two suits were never consolidated



but proceeded all side together. At the same time, upon request by the parties, on 6<sup>th</sup> December, 2024 the Honourable Court conducted a site visit (“Locus in Quo”) and the prepared report is part of this Judgement for ease of reference.

## **II. Description of the parties**

4. The Plaintiffs were described as male and female adults respectively of legal capacity residing and/or working for gain in Mombasa County in the Republic of Kenya.
5. The Defendants were described as adults of sound mind residing and working for gain in Mombasa or elsewhere within the Republic of Kenya.

## **III. Court directions before the hearing**

6. Nonetheless, on 16<sup>th</sup> June, 2022, the Honourable Court fixed the hearing dated on 14<sup>th</sup> October, 2022 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witnesses PW1; PW 2 and PW 3 testifying in Court on 4<sup>th</sup> June, 2024 after which they marked their case closed and the Defendants called their witness DW 1 and DW 2 on 18<sup>th</sup> September, 2024 they marked their case closed on the same day.

## **IV. Opening remarks**

7. Prior to the commencement of the Plaintiff’s case, the Learned Counsel for the Plaintiffs Ms. Jaji Advocate in her opening remarks stated that the claim was an issue of trespass. She averred that the Defendants had invaded the Plaintiffs’ property - the suit land and had been constructing on it. She was planning on calling two witnesses PW - 1 and PW - 2 and a surveyor.

## **V. The Plaintiff’s case**

8. From the filed pleadings, at all material times to this suit the Plaintiffs were the legal registered proprietors of all that lease hold interest granted by the Government of the Republic of Kenya for a term of 99 years from the 1<sup>st</sup> day of June 1996 over all the parcel of land known as Mombasa/mainland/south/block 1/1808 (Hereinafter referred to as the suit property) situated at Likoni area, Mombasa County.
9. According to the Plaintiffs the Defendants whether by themselves, their agents, servants and or employees, have without any colour of right unlawfully and illegally entered into the suit property and commenced acts of waste by continuing to erect permanent structures upon the said property and they have persistently remained thereon and continue to perform acts of waste in derogation of the Plaintiffs lawful title.
10. The Defendants further continued wrongful acts have deprived them of their right to develop and fully utilize the suit property further to the Defendants constructing permanent residential properties whereas the suit property is a commercial property with a change of user thereof having not been done thus the Plaintiffs stand to suffer irreparable loss and damage.
11. Despite demand and notice of intention to sue having been given, the Defendants have refused, failed and or ignored to stop the illegal construction and other acts of waste and delivery of vacant possession of the property hence rendering this suit necessary. The Plaintiffs contended that unless restrained by this Honorable Court, the Defendants and/or their agents, servants and or employees shall continue with the unlawful construction works on the suit property to the detriment of the Plaintiffs.



12. There was no other suit according to the Plaintiff pending and that there were no previous proceedings in any court between the Plaintiffs and the Defendants herein over the same subject matter. The Jurisdiction of the Honourable court to determine the instant suit was acknowledged.

13. The Plaintiff humbly prayed for Judgment against the Defendant in the following terms:-

a. A permanent injunction restraining the Defendants and or their agents, servants or employees or otherwise howsoever from entering into, trespassing, constructing and or continuing with any construction, erecting any other structures and or doing any acts of waste or in any way interfering with the suit property being plot No. Mombasa/mainland South/block 1/1808.

FOOTNOTE 1

b. An order of eviction of the Defendants, their servants, agents and or employees or otherwise howsoever and demolition and or removal of all the structures and debris erected by the Defendants on the suit property.

c. Costs of and incidentals to this suit.

d. Any other and further relief that this Honorable Court may deem fit to grant.

14. The Plaintiffs called their witnesses on 14<sup>th</sup> October, 2022 who testified as follows:-

**A. Examination of PW - 1 by Mr. Jadi Advocate.**

15. PW - 1 testified under oath in English language. He identified himself as SULEIMAN KUWEAH GAKURIA. He was a citizen of Kenya with all the particulars as sated out in the national identity card shown to Court. He was born in the year 1961. He told the court that he recorded a statement dated 13<sup>th</sup> July, 2021 which he adopted together with several documents dated 9<sup>th</sup> February, 2022. They were six (6) documents produced as Plaintiffs Exhibits numbers 1 to 6. The 2<sup>nd</sup> list of documents had one (1) document marked as “MFI – 7” dated 20<sup>th</sup> March, 2022 which was to be produced by an expert as its maker. Additionally, the surveyor’s report was marked as “MFI - 8” dated 2<sup>nd</sup> June, 202; the valuation report dated 6<sup>th</sup> January, 2022 was marked as “MFI – 9”.

16. PW - 1 told the court that he was the 2<sup>nd</sup> Plaintiff. He was in court because of a property he owned LR. MB/Mainland South/ Block I/1808. He jointly co – owned the property with Binti Omar Mohamed. They had an original Certificate of Lease dated 8<sup>th</sup> April, 1997 and which he produced as Plaintiff Exhibit No. 3. They were issued with a Letter of Allotment was dated 11<sup>th</sup> June, 1996. PW - 1 told the court that he was suing Douglas Mwangi (1<sup>st</sup> to the 5<sup>th</sup> Defendants) who were claiming ownership to the property.

17. According to PW – 1, the said Defendants had been building structures on the site day and night. In the year 2020 the Plaintiffs discovered there was a construction of a toilet ongoing and they came to court. They engaged the services of a private investigation and they established it’s the Defendants who had been constructing on their land. They reported the matter at the police station. The Defendants were arrested but released. The Plaintiffs feel that there was a conspiracy – the matter was booked under the Occurrence book no. 5/4/2021.

18. PW - 1 further told the court that there was a pit latrine on the land and some construction of permanent structures. They had no proper designs. The Plaintiffs had never sold the land. They had intended to develop it but due to circumstances they could not. They had never had their title deed

<sup>1</sup> (content missing)



challenged in court. They went to the County Government and sought the services of a Land Surveyor. The County Government came to the ground and found there were small traders and hawkers carrying out small scale businesses on the suit land. Nobody asked the Plaintiffs for their title deeds. The Plaintiffs believed that the structures were illegal.

19. PW - 1 prayed for their land to be given back to them, a site visit be conducted by Court and the demolition of all the illegal structures erected on the suit land. According to the witness it was indicated in the valuation report that the use of the land was commercial. There were illegal semi – permanent structures, permanent and small business stalls. According to the witness he sought for eviction; the Plaintiffs wanted full ownership of the property. The Defendant had admitted that they were not the owners of the property. The Plaintiffs had never engaged them as artisans (fundis).
20. PW - 1 was referred to Paragraphs 3 and 4 of the Complaint and he indicated being aware of the civil suit ELC. No. 178 of 2020 by Mohamed Mohamed Mwabungare. He had been sued in the suit. His title deed had not been challenged nor declared null and void. The 1<sup>st</sup> to 5<sup>th</sup> Defendants claimed to have been engaged by Mohamed Mohamed Mwabungare - as his artisan. He was hearing this for the first time. He did not know Mr. Mwabungare. There were numerous construction on the ground. There was somebody developing the plot without his permission. The surveying exercise was not done due to the hostility by the numerous people on the ground. They needed to do ground survey.

#### **B. Cross examination of PW - 1 by Mr. Ondieki Advocate.**

21. PW - 1 confirmed that he was retired from employment service. He used to work at the Text Book Centre. His co – proprietor of the suit land worked at the County Government of Mombasa. She had also retired from employment. There was another civil suit – ELC No. 178 of 2020 instituted by Mohamed Mohamed Mwabungare. PW – 1 was aware that in that suit the Plaintiff was claiming the suit land through Land Adverse Possession on ancestral right. He had injunction orders from the suit.
22. The witness sought for injunctive orders in his suit but the orders were denied – that was in December 2020. He filed this suit in the year 2021 after his suit had been dismissed. He sought to have the Defendants be restrained from constructing the pit latrine on the suit land. He did not own any developments on the land. PW - 1 had never lived on the land. He had not produced or indicated the existence of another suit. The investigations report came after the filing of the suit. They did not know which building belonged to who, they never included all the names founded in the Investigations report in the suit. The Plaintiffs had not brought them to court. Nobody had been given the right over his property. He knew the name of Mohamed Mwabungare but not the person. He was not forum shopping by filing the instant suit. He was being guided by his Counsel.

#### **C. Re – examination of PW - 1 by Ms. Jadi Advocate.**

23. PW - 1 reiterated that parties had not been heard and the suit had not been determined in the civil case ELC No. 178 of 2020. In that case, the Plaintiff was claiming the property as his and that he resided on the suit property yet the suit property was a commercial permitted user. From the plots there were other properties. They had not sued them as they had not been able to get them. These were the only ones they managed to get.
24. The Plaintiff also called PW - 2 who testified on 4<sup>th</sup> June, 2024 as follows:-

#### **D. Examination in Chief of PW - 2 by Ms. Jadi Advocate.**

25. PW - 2 sworn and testified in English language. He identified himself as DAVID KAMANDE NDUNGU. He was a citizen of Kenya with all the particulars in the national identity card as shown



to Court. He told the court that he was a Land Valuer attached to a company trading in the names and style of “Prestige management Valuers Limited”. He had conducted an inspection on 4<sup>th</sup> October, 2022 as instructed by Suleiman Kuweah Gakuria, PW – 1 and the 1<sup>st</sup> Plaintiff herein. He prepared the valuation report filed and dated 6<sup>th</sup> October, 2022. With reference to the report – the user was commercial and the registered owners were Binti Omar Mohamed and Suleiman Kuweah Gakaria.

26. PW - 2 relied on the availed official search but he eventually got a search. From the remarks on the report, it stated that the suit land was a commercial plot within the Likoni Ferry area. It was an area easily accessible from the Mombasa city centre. It was largely comprised of varying use small and medium scale commercial development. The persons on the land were not the owners. The property was valued at a sum of Kenya Shillings Thirteen Million (Kshs 13,000,000/-) without any development. He produced the Valuation report as “Plaintiff Exhibit 8”.

#### **E. Cross examination of PW - 2 by Mr. Ondieki Advocate.**

27. PW - 2 told the court that he found both permanent and semi – permanent improvement on the land. Unfortunately, he had not captioned them in his report. The Plaintiff did not have any improvement on the land. PW - 2 never conducted an official search as on 4<sup>th</sup> March, 2022. Instead, they only relied on the copy of the lease to know the proprietors.
28. The Plaintiff called PW - 3 on the same day who testified as follows:-

#### **F. Examination in Chief of PW - 3 by Ms. Jadi Advocate.**

29. PW - 3 was sworn and testified in the English language. He was called GILBERT MUNJUGA NDERITO. He was a citizen of Kenya with all the particulars as shown in the national identity card as shown to Court. He was a Land Surveyor who worked for the County Government of Mombasa. As for the Plot No. MN/S/Block/1808 they were instructed by the owners. They conducted a Land Surveying exercise on 2<sup>nd</sup> June, 2021 and they prepared a report dated 2<sup>nd</sup> June, 2021.
30. According to PW - 3, the purpose was to locate the beacon. Although, they visited the land, they were not able to conduct the survey exercise as there was extensive encroachment by habitation. Hence, the beacon could not be seen/identified on the ground. Besides, they were confronted by people who blocked them from doing their task. They claimed that there was in existence of a court order. For these reasons, they stopped the exercise. They may have needed to do a topographical survey that showed the boundary (MFI - 7). The land survey report was produced as Plaintiff Exhibit Number 7.

#### **G. Cross examination of PW - 3 by Mr. Ondieki Advocate.**

31. PW - 3 confirmed that he knew Mr. Suleiman Kuweah Gakaria – the 1<sup>st</sup> Plaintiff herein. He was the one who came to their offices. He told them the land was vacant, but when they got there they found there were development already and they were quite old. He had done a letter but he had not produced it. His instructing person was County of Mombasa to go conduct the land surveying exercise. This was because he was rate payers thus the County of Mombasa got an interest to the matter. He did the survey and prepared a report which was handed over to the Director. He was not aware that Mr. Gakaria worked for the County Government of Mombasa. PW - 3 he did not have an instruction letter, by Binti Omar nor Mr. Gakaria and yet Mr. Gakaria was a former employee of County Government did not add up.



### **H. Re – examination of PW - 3 by Ms. Jadi Advocate.**

32. PW - 3 confirmed that he was not aware whether Mr. Gakaria was an employee of the County Government of Mombasa. The survey conducted was initiated by the owner who wrote a letter to them and proceeded to undertake the exercise. They would not have done it without such an authority.
33. On 4<sup>th</sup> June, 2024, the Plaintiff through their counsel Ms. Jadi closed their case.

### **VI. The Defendants case.**

34. Opening Remarks:- The Learned Counsel for the Defendants Mr. Ondieki Advocate made his opening remarks. He stated that the Plaintiffs alleged that they were the owners of the property; the Defendants would prove that the Plaintiffs were to embarrass the case. The Plaintiffs did not claim ownership. The Plaintiff's case was a misconceived suit; a suit intended to circumvent court. Mr. Mohamed Wa Mungai sued the Plaintiff herein and got injunction order and the Plaintiff filed a Counter application seeking injunction to stop construction of a toilet and the court delivered its orders dismissing the application and the Plaintiff herein decided to sue the Mason/Artisan who were building the toilet trying to circumvent the suit, decided not to appeal against that suit but filed the suit.
35. At paragraph 4 of the Defence the Defendants claimed that they were hired. The Defendants intended on relying on the doctrine of Res – judicata. The Plaintiff claims were hired. There were two conflicting orders of Justice Yano - Defence Exhibit No. 2 the building of the toilet. Page 6 paragraph of the Ruling in ELC. No. 178/2020. In this present case, specifically suing employees they raised a preliminary objection – court held that there was no relationship between the two suits. Indeed, the Plaintiff in this suit were on forum shopping – when they were denied an injunction the ELC. No. 178/2020. It has a hearing on 18<sup>th</sup> January, 2023 before ELC. No. 3. He reiterated that they intended on proving, the Plaintiffs were forum shopping and all intended to embarrass the court. The Defendants would prove that there was no trespass.
36. The Defendants filed their Statement of Defence on 30<sup>th</sup> August, 2021, the Defendants denied the contents Paragraphs 4 of 5 of the Plaint. The Defendants denied the allegations raised in Paragraphs 4, 5 and 7 of the Plaint and specifically denied that they unlawfully and illegally entered into the suit property known as Mombasa/mainland/south/block 1/1808 and averred that they were hired by the beneficial owner of the suit Property – Mohammed Mohammed Mwabugare to undertake masonry work and/or make repairs on his Toilets which work has since been completed.
37. The Defendants further averred and in response to paragraphs 8 of the Plaint stated that this suit offended the provision of Section 6 of the *Civil Procedure Act* Cap. 21 as the same was “Res - sub judice” and “Res Judicata” since there was an active Civil Suit ELC No. 178 of 2020 over the same subject matter and which is currently pending hearing and determination at Land and Environment Court Mombasa. The Defendants denied having received any demand and/ or notice of intention to sue as alleged in Paragraph 6 of the Plaint. The Defendants denied the jurisdiction this Honourable Court as the same was functus officio as the prayers were the same as the one in ELC No. 178 of 2020.
38. The Defendants prayed that the Plaintiffs’ suit be dismissed with costs.
39. On 18<sup>th</sup> September, 2024 the Defendants through its advocate Mr. Ondieki called their first Defendants witness at 12.00 Noon where DW 1 testified that:-



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

40. DW - 1 gave a sworn testimony in Swahili language. He identified himself as Mr. Douglas Maina Mwangi. He was a citizen of Kenya and a holder of the national identity card bearing all the particulars as shown to Court. He was born in the year 1963. He was a businessman and lived in Likoni. He filed a witness statement dated 15<sup>th</sup> June, 2022. He also filed two (2) documents – produced as Defendants Exhibit Numbers 1 & 2. He did not know the Plaintiff. He did not know why he was sued but he was later on informed it was because he had been constructing the toilet on the suit land. He knew the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Defendants well.
41. He was not claiming the ownership to the land. He was not aware it was trespass. DW - 1 was only constructing a toilet. He was not aware of the ownership of the land. He only heard it was for Mr. Mwambugare. He was the one who engaged him to construct the toilet. He started doing so afresh. He wished to be exonerated from the suit.

**B. Cross examination of DW - 1 by Ms. Jadi Advocate.**

42. DW - 1 reiterated that he was an artisan/mason. He was engaged by Mr. Mohamed Mwabungare to construct a toilet on the suit land. There was no toilet there before. As a mason, he was told the Court that Mr. Mwabungare had attained approval from the County Government. He did not know the Plaintiffs. He did not know the reason he was called to court though he was later told it was because he was constructing a toilet. He knew the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The witness was not claiming the suit land. He was only given the construction worked by Mohamed Mwabungare; he was claimed to be the owner of the land. He wished to be exonerated from the suit as he was not concerned with the land.

**C. Re - examination of DW 1 by Mr. Ondieki Advocate:-**

43. DW - 1 confirmed that he knew Mr. Mohamed Mwambugare. He knew it was his land as he had been with him for many years. Mohamed told the witness that he had he had a court order. He was not aware of the land. He started the construction of toilet afresh. There had been an old toilet before this construction took place.

**A. Examination in Chief of DW - 2 by Mr. Ondieki Advocate:-**

44. DW - 2 sworn and testified in Swahili language. He was called Mohammed Mohammed Mwabungare. He was a citizen of Kenya with all particulars as shown on the national identity card as shown to Court. He lived in Likoni. He was an Engineer for ships but currently a businessman. The witness recorded a statement filed on 11<sup>th</sup> October, 2022, which he adopted and filed documents – Defendants Exhibit 1 and 2 admitted dated 11<sup>th</sup> October, 2022. The Defendants were all artisans. He knew Mr. Douglas Maina for over 25 years. He knew the suit. The Defendants were sued wrongfully as he the one who allowed them to construct the toilet. He knew the Plaintiffs – Binti Omar Mohamed and Suleiman Kuweah Gakaria. They had filed another case – as the Plaintiffs to stop the construction of the toilet. He got a court order in ELC No. 178 of 2020 (OS) to continue with the construction of the toilet. Douglas Mwangi was not the owner of the land but a Mason of the toilet.

**B. Cross examination of DW - 2 by Ms. Jadi Advocate.**

45. DW - 2 confirmed that he was born in Likoni. It was his father who lived on the land. He died in the year 1972 while he was in class 6. He was born in the year 1956 on the land which he lived from 1980. He had built houses – Swahili houses and 3 shops on the land in the year 2002. His father used to



cultivate and a friend who used to obtain quarry blocks. It was both residential and business. He was the one who engaged Douglas Mwangi to construct the toilet as the land was mine. He did not have a title to the land. He had not sold the land to anyone.

46. DW - 2 filed the O.S. claiming the land under Land Adverse Possession in 2020 (178 of 2020). He filed the case after he received a demand letter urging him to stop construction of the toilet. From the year 2017, all the people were removed by the Government to pave away for the construction of the land. He got a court order to undertake the construction of the toilet. DW - 2 had not sold the land. He brought some of them while the other just came in. There was a bar. As the owner of the land he allowed them to construct on the land.
47. By the time his father died, he had no title to it. He had never applied for the land from the Government. From the year 1980s they never claimed the land until the year 2020. He was surprised that Binti Omar Mohamed and Suleiman Kuweah were claiming the land. His brother – Abdalla died. He did not know whether he had any case with them. He lived at Mgombani which was after crossing the ferry – he used the land for conducting business. He had not sold the land to anyone.

### **C. Re – examination of DW - 2 by Mr. Ondieki Advocate.**

48. DW - 2 reiterated that he did not have any title to the land. He had only been living on the land for many years and there were other squatters on the land. It was bushy and hence possible for causing cultivation and digging of building blocks. From the civil suit ELC. No. 178 of 2020 he was given the court order with reference to Defendants Exhibit 1. They also got an order to stop the construction of the toilet. The land was first occupied and used by his father. He had no title deed. His father was a fisherman. M/s. Binti Omar Mohamed and Suleiman got title deed in the year 1997 they were just on the land. They had never occupied on the land. They had never applied for the inheritance rights of their father.
49. DW - 2 stated that his father died in the year 1972 and 1997 his father had already died by the time they acquired the title. After the structure were demolished by the Government for the construction of the road, but the portion that remained he called his law – Peter Ben and they occupied it. The place was used for business and there was a hotel called Flosan from the 1980s. With the passage of time, it developed from small settlement upto where it was not which included the toilets, which was demolished by the Government of Kenya.
50. On 18<sup>th</sup> September, 2024, the Defendants through their Legal Counsel Mr. Ondieki closed their case.

### **VII. Submissions**

51. Upon the closure of the Plaintiffs and Defendants case on 18<sup>th</sup> September, 2024 the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that, parties complied and on 13<sup>th</sup> November, 2024 the Honourable court reserved a date to deliver its Judgement on 14<sup>th</sup> January, 2025. Unfortunately due to unavoidable circumstances, it was eventually delivered on 28<sup>th</sup> February, 2025.



## A. The Written Submissions by the Plaintiffs

52. The Plaintiffs through the Law firm of Messrs. Madzayo Mrima & Jadi Advocates dated 11<sup>th</sup> October, 2024 filed their written submissions. M/s. Jadi Advocate commenced by referring Court to the English black's law dictionary on the definition trespassing as:-

“An unlawful act committed against the person or property of another especially, wrongful entry on another's real property.”

53. The Learned Counsel submitted the trespass happened when someone knowingly entered another person's property or land without permission which encroached on the owners' privacy or property interests. Trespass upon private land occurred when any person who without reasonable excuse enters, was or remain upon or erected any structure on or cultivated or tilted or grazed stock to be on private land without the consent of the occupier. The provision of Article 40 (1) of *the Constitution* of Kenya, 2010 provided that every person had the right either individually or in association with other to acquire and own property of any description and in any part of Kenya.

54. According to the Learned Counsel, vide a Plaint dated 13<sup>th</sup> July, 2021 and filed in Court on the same day, the Plaintiffs sought for the following prayers:-

- a. A permanent injunction restraining the Defendants and /or their agents, servants or employees or otherwise howsoever from entering into, trespassing, constructing and continuing with any construction, erecting any other structures and or doing any acts of waste or in anyway interfering with Plot No. Mombasa/mainland South/block/1/1808 (Hereinafter referred to as the suit property).
- b. An order of eviction of the Defendants, their servants, agents and or employees or otherwise howsoever and demolition and removal of all the structures and debris erected by the Defendants on the suit property
- c. Costs of and incidentals to this suit.
- d. Any other and further reliefs that this Honorable Court may deem fit to grant.

55. The Learned Counsel stated that accompanying the Plaint was a list of documents filed on 9<sup>th</sup> February, 2022, a further list of documents filed on 22<sup>nd</sup> March, 2022 and a further further a list of documents filed on 7<sup>th</sup> October, 2022. A joint witness statement of the Plaintiffs was filed on 13<sup>th</sup> July, 2022. On diverse dates, the Defendants filed a Statement of Defence and witness statements by one Douglas Mwangi and Mohamed Mohamed Mwabungare.

56. According to the Learned Counsel submitted that the Plaintiffs case was that Mr. Suleiman Kuweah Gakuria, the 1<sup>st</sup> Plaintiff herein who testified on his behalf and also on behalf of the 2<sup>nd</sup> Plaintiff adopted the witness statement and stated that he was a joint registered proprietor of the suit property together with the second Plaintiff. The property was situated at Likoni area within the County of Mombasa. The witness stated that the Defendants had trespassed on the suit property and were carrying acts of waste including erection of temporary kiosks and other permanent structures upon the said parcel of land and have persistently remained thereupon and continue to perform acts of waste in derogation of their lawful title.

57. The witness further stated that he legally acquired the suit property together with the 2<sup>nd</sup> Plaintiff and he produced a title deed to that effect. He further stated that the title deed to the property has never been challenged in any Court thus remains valid. Further that in June 2021, the Defendants invaded



the suit property and constructed permanent and temporary structures. The witness prayed that the prayers sought in the plaint be allowed.

58. Mr. Gilbert Nderitu, a Land surveyor from the County of Mombasa testified. He stated that he had been instructed to conduct a survey of the suit property following a request by the Plaintiffs. That upon visiting the suit property, he was unable to conduct the survey as he was informed that there was a Court Order that the owner was restrained from accessing the suit property. He opined that unless another Court Order was issued, the exercise could not be undertaken. He however noted that there was encroachment on the suit property. Mr. David K. Ndungu, a registered and Practicing Valuer testified and produced a Valuation Report dated 6<sup>th</sup> October, 2022. He noted in his report that there are various developments on the suit property comprising of permanent buildings, semi-permanent and temporary structures occupied by different people. The Valuer also noted the user of the property to be commercial.
59. The Learned Counsel asserted that the Defendants' case was that they Defendants adopted their witness statements. DW - 1 testified that he was the main contractor during the construction of a toilet on the suit property having been contracted by one Mohamed Mwabungare. He stated that the other Defendants were his fundi's and that they have no connection/interest in the suit property. He further stated that he knew the said Mr. Mwabugare as the owner of the suit property.
60. DW - 2 Mohamed Mwabungare testified that he was the one who contracted DW - 1 and the other Defendants to construct a toilet on the suit property. The witness claimed to be the owner of the suit property which belonged to his late father. On Cross examination, the witness stated that he has been inviting people on the suit property including one Peter Ben among others. He stated that he lived at a place called Magombani in Likoni area and that he had constructed a house on the suit property which has tenants. Further, that the other people he has allowed on the suit property have constructed commercial houses with one being used as a Hotel/Restaurant. The witness further stated that he had no ownership documents and since the shamba was Government land, he had intended to ask the Government to allocate it to him. He further stated that his late father did not have any documents of ownership of the suit property. The witness did not have any Grand Letters of Administration for his father's deceased estate.
61. The issues for determination according to the Learned Counsel for the Honourable Court were:-
- i. Whether the Plaintiffs are the legally registered owners of the suit property.
  - ii. Whether the Defendants have committed acts of trespass.
  - iii. What orders should the Court grant in the circumstances
62. On whether the Plaintiffs were the legally registered owners of the suit property. The Learned Counsel referred Court to the provision of Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 provides:-
- “The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the Proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ,subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the Certificate and the title of that proprietor shall not be subject to challenge.”
63. The Learned Counsel averred that the 1<sup>st</sup> Plaintiff produced a Certificate of Lease for the suit property issued on 8<sup>th</sup> April, 1997 following the due process of allocation by the Government. A current search was also filed in the List of Documents and produced in Court. The Certificate of lease issued has



never been challenged in any Court of law hence remains valid. The Plaintiffs did takeover possession of the property upon allocation by the Government and had intended to use the same as a commercial property. The Plaintiff's title deed having not been challenged and or annulled by any Court of Law then they did submit that the Plaintiffs were the legal registered owners of the suit property. They relied on the case of "Keiyian Group Ranch – Versus - Samwel Oruta & 9 Others (2021) eKLR" where the Court emphasized that a title deed is indefeasible evidence of ownership of land.

64. The 2<sup>nd</sup> Defendants' witness claim to the owner of the suit property having inherited the same from his late father. The witness alleged that his late father used to farm on the suit property. Despite claiming ownership rights, the said witness did not produced any Grand Letters of Administration allowing him to make the purported claim over the suit property. The Plaintiffs thus remain the legal registered owners under the law. They relied on the case of "Mohammed – Versus - Barnabas & 15 Others (Environment and Land Case 202 of 2021) (2024) KEELC 6246 (KLR) (24 September 2024) Neutral Citation: [2024] KEELC 6246 (KLR)".
65. DW - 2 claimed in his testimony that he won a case being the civil case of Environment and Land Case No.178 OF 2020 (OS) and that vide the Court order of 12t November 2020, he was allowed to use the suit property as he pleases in exclusion of the registered owners. They submitted that the said case which was a case for adverse possession was yet to be heard and determined. The issues raised in the said case are different from the issue of trespass on private land raised herein.
66. On whether the Defendants had committed acts of trespass. The Learned Counsel submitted that DW - 1 testified and stated that he was the main contractor having been contracted by DW - 2 to erect a toilet on the suit property and that the other Defendants were his artisans/masons. This statement was not true since the Plaintiffs conducting due diligence with the help of a private investigator, it was noted that the said Defendants own houses on the suit property and a site visit will confirm this. They submitted that the allegation of them being artisans/masons was made in conclusion with DW - 2 as a scheme and in an attempt to defeat this suit on a claim of misjoinder.
67. This explained why the other Defendants had never showed in Court and have never bothered to come to Court to even follow the proceedings. The Plaintiffs produced photos taken from the suit property before the filing of this suit which photos indicate ongoing construction. The photos show permanent and semi-permanent structures on the suit property. DW - 2 testified that he owned one house on the suit property which has tenants. He stated that he had "given" some portions of the suit property to other people who have constructed thereon. The valuation report produced by the Valuer has also captured the permanent and temporary constructions. They submitted that these properties belong to the Defendants herein.
68. From the definition of the word 'trespass', it was clear that the Defendants had committed acts of trespass. The Defendants had admitted to had entered the suit property purportedly to construct a toilet. If the statement that the Defendants entered the suit property to construct a toilet was true, which was denied, one wonders why the Defendants have structures on the suit property? Why have the Defendants continued with the said trespass, the purported toilet having been long constructed and completed? Why were the Defendants still living on the suit property? They submitted that the Defendants herein were known professional land invaders in Likoni who invaded land to later claim it to be theirs. This explained why apart from the 1<sup>st</sup> Defendant who purported to be a fundi, the rest had not bothered with the case herein.
69. They submitted that the Defendants entry and continuous trespass on the suit property was being done without the permission of the registered owners who were the Plaintiffs herein. DW - 2 admitted



to have allowed the Defendants and other trespassers on the suit property. The Defendants actions thus amount to trespass hence punishable under the Law.

70. On what orders should the Court grant in the circumstances, the Learned Counsel posited that as submitted herein, it was clear that the Defendants did not have any authority from the two registered owners to enter into the suit property. Even the person who purportedly authorized them to enter the suit property did not have authority from the registered owners and more so even before he was authorized by the Court after his suit for adverse possession has been heard and determined in his favor. The Defendants were still on the suit property and were busy conducting acts of waste as constructions are undergoing to date.
71. The Learned Counsel argued that it was clear that the Defendants did not have any authority from the two registered owners to enter into the suit property. Even the person who purportedly authorized them to enter the suit property did not have authority from the registered owners and more so even before he was authorized by the Court after his suit for adverse possession has been heard and determined in his favor. The Defendants were still on the suit property and are busy conducting acts of waste as constructions are undergoing to date.
72. According to the Learned Counsel, trespass having been so proved, then it is only fair that the Plaintiffs suit be allowed and an order of permanent injunction granted restraining the Defendants and/or their, servants or employees from entering into, trespassing continuing with construction and doing any acts of waste on the suit property further to eviction orders to be issued for removal of all the structures erected on the suit property.
73. The Learned Counsel also prayed that this Honorable Court awards the Plaintiffs damages for trespass. They relied on the case of “Hebron Oroche Gisebe & 2 others – Versus - Joseph Ombura Gisebe & Another (2022) eKLR” where the Court stated at paragraph 41 thus;-

“...41.Lastly with regards to general damages, it is trite law that trespass is actionable per se and unlike special damages which must be specifically pleaded and strictly proved, general damages for trespass are usually awarded once trespass is proved. I am guided by the case of Park Towers Limited -VS- John Mithamo Njika & 7 Others (2014) eKLR, Mutungi J stated as follows;-

“I agree with the Learned Judges that where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded general damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

74. The Learned Counsel submitted that going by the Valuation Report produced herein which paged the value of the suit property at Kenya Shillings Thirteen Million (Kshs.13,000,000/-) as at October 2022, they submitted that an award of Kenya Shillings Seven Million (Kshs.7,000,000/-) being general damages for trespass from the year 2021 to date is sufficient in compensation.
75. In conclusion, the Learned Counsel prayed that the Plaintiffs suit be allowed as prayed.

## **B. The Written Submissions by the Defendants**

76. The Defendants through the Law firm of Messrs. Kedeki & Co Advocates filed their written submissions dated 12<sup>th</sup> November, 2024. Mr. Ondieki Advocate submitted that the following was the Defendants written submissions in respect to the Plaintiffs’ suit whereof the Plaintiff was seeking orders



of permanent injunction restraining the Defendants in dealing with parcel of land Plot of Land being MOMBASA/MAINALND SOUTH/BLOCK I/1808.

77. The Defendants opposed the Plaintiffs' suit and had filed their written statement of defence raising the following point of law that suit offends Section 6 of the *Civil Procedure Act* Cap. 21 and was therefore res – sub judice.
78. According to the Learned Counsel, the brief facts about the case was that while there was a subsisting suit between the Plaintiff and the Defendant's principal in the civil case of ELC No. 178 of 2020 and being a party therein they filed this instant suit. The Learned Counsel further submitted that the Plaintiff nonetheless filed this instant suit fully aware that the Defendant were merely workers and/or agent of the Plaintiff in ELC No. 178 of 2020 and any claim whatsoever ought to have been channeled to the said Mohamed Moha Med Mwabungare.
79. It was the Learned Counsel's submission that in their Statement of Defence, written statement and testimony before this Honourable Court they had emphatically indicated that they had no interest in the suit property and this instant case was an abuse of the Court process. As clearly outlined in paragraphs 4, 5 and 7 of the Defence and that the Defendants were merely hired workers and/or employees of one Mohamed Mohamed Mwabungare and had no personal interest on the suit property and even if the orders sought herein were to be granted against them. The Plaintiff in ELC No. 178 of 2020 could still proceed and hire any other person to work for him on his properties.
80. According to the Learned Counsel, the Plaintiffs came to this Honourable Court with unclean hand and deliberately failed to disclose to this Honourable Court that there exist before this Honourable Court a similar Civil Suit ELC No. 178 of 2020. The main dispute in these two suits revolved around Plots of land known as Mombasa/mainalnd South/block I/1808. The Learned Counsel further submitted that the Plaintiff wanted to hoodwink this Honorable Court by suing the Defendants in their personal capacity to obtain injunctive order(s) which they had been declined in ELC No. 178 of 2020 when all aware that the Defendants were just workers and had no interest on the suit property.
81. To buttress on this point, the Learned Counsel relied on the finding of this Honourable Court in the case of:- "E.T – Versus - Attorney General & Another (2012) eKLR" where it was held that:

"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi – Versus - National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata...."

82. The Learned Counsel also relied on the finding of the Honourable Court in "Republic – Versus - Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR" where it was held:

"The mere addition of a party or parties does not alter the pith and substance of the suit. The Black's Law Dictionary [7] defines lis pendens, as a Latin expression which simply refers to a



“pending suit or action.” The Oxford Dictionary of Law [8] defines the expression in similar terms. In the context of Section 6 of the *Civil Procedure Act* [9] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.”

83. According to the Learned Counsel it was therefore the Defendant’s submission that the Plaintiff was trying to abuse the Court process to gain possession of the land and which was ultimately meant to frustrate the hearing and determination of the pending case ELC No. 178 of 2020. The Learned Counsel relied on the finding in the High Court of Uganda held in the case of:- “Nyanza Garage – Versus - Attorney General”:-

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

84. The Learned Counsel concluded by stating that the Plaintiffs suit was incompetent and an abuse of the Court process. The Plaintiff suit was malicious, scandalous, incompetent, and res sub judice and a multiplicity and therefore should be dismissed with costs.

### **VIII. Analysis and Determination**

85. I have keenly assessed the filed pleadings by all the Plaintiffs and Defendants herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

86. 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 Defendants trespassed the suit property?
- b. Whether there should be a permanent injunction issued against the Defendants?
- c. Whether the Plaintiff is entitled to the orders sought in the Plaint
- d. Who bears the costs of the suit?

#### **Issue No. a). Whether the Defendants trespassed the suit property**

87. The Site Visit Report

88. Prior to proceeding on with the analysis of the issues under the Sub – title, as indicated the Honourable Court conducted a Site Visit on 6<sup>th</sup> December, 2024. Below is the said report.

Environment & Land Court

ELC Case No. 178 of 2020 & 134 of 2021

Mohammed Mohammed Mwabugare



Versus –

BInti Omar Mohammed & Sulleiman Kuwea GakuRia

A Site visit report on a visit held at likoni on 6<sup>th</sup> December 2024

## **I. Introduction.**

1. The site visit (“Locus in Quo”) was conducted at an area within Likoni of the County of Mombasa. It is close to 5 Kilometres from the Kenya Ferry.
2. The team assembled at around 1.30am. Brief introductions of the Court and the parties present were conducted. The Judge explained the purpose and the procedure of the visit.
3. It was agreed by the team that both the Plaintiff – Mr. Mohhammed Mohamed Mwabugare and Mr. Gakuria on behalf of the Defendant would lead the team.

## **II. The Report**

### **A. The Court**

1. Before Hon Justice L.L Naikuni –Judge.
2. M/S Fridaus Mbula – the Court Assistant.
3. Mr. George Omondi – the Judge’s Usher.
4. Mr. John Ngari – the Judge’s Driver.

### **B. The Plaintiff**

1. Mr. Lianza Advocate held brief for M/s Kideki Advocate for the Plaintiff.
2. Mohammed Mwabingare - the 1<sup>st</sup> Plaintiff.
3. Peter Kariuki – the 2<sup>nd</sup> Plaintiff.
4. Jackson Munene – the P.A to the 2<sup>nd</sup> Defendant.
5. Douglas Maina.

### **C. The Defendants**

1. Mrs. Farida Jadi – the Advocate for the Defendant.
2. Mr. Mwinyi Gakuria- Brother to the 1<sup>st</sup> Defendant.  
(Hereinafter all referred to as “The Team”).

### **D. Security Operatives**

1. Inspector Peter Komu- Deputy OCS Likoni Police Station.
2. Corporal Maluki– Likoni Police Station.
3. Police Constable Musembi – Likoni Police Station.
4. Police Cinstable Menza- Likoni Police Station.



### III. The purpose for the Site Visit

4. The site visit was in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 (1) (a) provided to wit:-

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

- a. Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.

5. Ideally the site visit – (“the Locus in quo”) was with a view of inspecting the land to fully appreciate its nature. Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
6. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred due to the likely hood of being abused particularly through Social media. The report has endeavored to make some salient findings in order to expedite the hearing and final determination of the case.

### IV. The observations made by the team

7. The team made the following observations.

#### A. Observations

The team made the following pertinent observations:-

It is such a congested place full of people and both permanent and semi permanent structures. The team was informed that it may be a security risk at certain hours.

The suit land has a power station as well as buildings and shops inside. There are also stalls selling traditional brew known as mnazi as well as a cohort of bars playing loud music during day time, shops, restaurants, fish mongers; cassava stands (Swahili viazi karae); bar & saloons shops, several cell phone shops; water selling points hawkers, the famous public toilet which customers pay for its use. It had been well maintained.

There were several boda boda stands ready to pick customers dropped from the nearby ferry.

The place draws its customers mainly from people using the ferry to and from the main land of Mombasa. Its really booming business but at a small scale.

The suit land allegedly belongs to the Mombasa County Government and over 200 hawkers allegedly pay their permits at the county government but they used to pay the plaintiffs.

There is also a dispute arising as to who is the chairman of all the businessmen in the suit land.



It was further established by the court that the portions each businessman occupies was allocated to them by the county government.

## V. Conclusion

8. Upon completion of the tour around the site, the Court made the following directions: -
- a. That the Honourable Court to prepare and share the Site Visit report with the parties accordingly.
  - b. That it would deliver its Judgement on Notice.

The site visit report prepared and dated at Mombasa on this 16<sup>th</sup> day of January 2025.

.....

Hon. Mr. Justice L.I. Naikuni,  
Environment & Land Court At  
Mombasa

89. Now back to the analysis of the issues under this sub title. The Honourable Court shall discuss the aspect on whether the Defendants had trespassed unto the suit property without the authority of the Plaintiffs. Before determining whether or not the Defendants trespassed unto the suit property, the effect of registration and the ownership of the suit property must be established. The provision of Section 24 of the [Land Registration Act](#) 2012 No. 3 of 2012 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.”

90. Similarly, the provision of 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.”

91. While Section 26 (i) of the [Land Registration Act](#) provides:-

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

92. From the pleadings and during the proceedings the Plaintiffs attached and indeed produced the original copy of the Certificate of Lease to the dispute land. Clearly, the legal instrument outlines the name of the registered owner, the land reference numbers, location, the date of registration and the acreage of the same. By this, they are vested with the indefeasible title, rights and interest onto the land. On the contrary, the Defendants failed in any way to produce any proof in form of documents to ascertain their legal rights, interest and title on the suit property. It is trite law that a Title Deed is a conclusive and



an indefeasible evidence of the ownership of land. Certainly, it is not in dispute that the Plaintiffs are the registered proprietors of the suit property. There has not been any challenge by the Defendants on the Plaintiffs' title by reason of fraud, mistake, omission or otherwise as envisaged under the provision of Section 26 (1) (a) and (b) of the *Land Registration Act*.

93. I have looked at the title deed for Mombasa/ Mainland/south/ Block 1/1808 and I am satisfied that the suit property indeed belongs to the Plaintiffs. The registration and proprietorship of the Plaintiffs was therefore not in dispute and thus, the Plaintiffs remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of their property.
94. For this reason, therefore, I find and hold that the Plaintiffs are the rightful registered proprietors of the suit land Mombasa/ Mainland/south/ Block 1/1808 measuring approximately 0.1401 hectares having been issued with the Certificate of Lease from 8<sup>th</sup> April, 1997 for 99 years. Thus, they are entitled to protection of the law.
95. Having stated that, now the Court will proceed to examination of whether the Defendants trespassed unto the suit land. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
96. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. In Halsbury Laws of England 4<sup>th</sup> Edition, Vol 45 at para 26, 1503, it is provided as follows:-
- (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 or 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
97. A continuing trespass is defined in Jowitt's Dictionary of English Law 2<sup>nd</sup> Edition as follows:-
- “ A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.
98. In Black's Law Dictionary 8<sup>th</sup> Edition, a continuing trespass is defined as:-
- “ A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.



99. Finally, in Clerk & Lindsell on Torts 16<sup>th</sup> Edition, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

100. This clearly means any unauthorized entry whether present or continuous is trespass. In the case of the Plaintiffs it is indeed a common ground that the Defendants entered into the suit premises without the permission of the Plaintiff. I therefore find that the Defendants have trespassed onto the suit property.

**Issue No. b). Whether there should be a permanent injunction issued against the Defendants**

101. Before proceeding further, it is significant to appreciate the great distinction between the prohibitory injunction as envisaged in the “Locus Classicus” case of “Giella – Versus - Cassman Brown, 1973 E.A. Page 358” and a Mandatory Injunction. The first authority on making this distinction was “Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case” in which Megarry J as he then was stated follows:-

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

102. It is trite that an order of permanent injunction fully determines the right of the parties before the Court and is thus a decree of the court. A permanent injunction is normally meant to perpetually restrain the commission of an act by the Defendants in order for the rights of the Plaintiff to be protected. The Court thus has, under the provisions of Sections 1A, 3 & 3 A of the Civil Procedure Code, powers to grant the said order of permanent injunction, if it feels that the right of a party has been fringed, violated and/or threatened.

103. I am persuaded by the holding of the High Court in the case of “Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018] eKLR” where it had been held inter alia as follows:-

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

104. According to the Plaintiffs the Defendants whether by themselves, their agents, servants and or employees, have without any colour of right unlawfully and illegally entered into the suit property and commenced acts of waste by continuing to erect permanent structures upon the said property and they have persistently remained thereon and continue to perform acts of waste in derogation of the Plaintiffs lawful title. The Defendants further continued wrongful acts have deprived them of their right to develop and fully utilize the suit property further to the Defendants constructing permanent



residential properties whereas the suit property is a commercial property with a change of user thereof having not been done thus the Plaintiffs stand to suffer irreparable loss and damage.

105. I have opined myself before in the case of “Bandari Investments & Co. Ltd – Versus - Martin Chiponda & 139 others[2022] eKLR” that:-

ermanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

39. It’s the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.

106. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR” as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

107. What is contested herein is the trespassing of the Defendants onto the land belonging to the Plaintiffs. For the reasons therefore, this Court finds that the Plaintiffs have demonstrated their case and meets the fundamental threshold on being granted Permanent Injunction as laid down in law.

#### **Issue No. c). Whether the Plaintiff is entitled to the orders sought in the Plaint**

108. Under this substratum we shall examine the prayers sought by the Plaintiffs. The Plaintiffs also sought for eviction of the Defendants. If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in



charge may serve on that person a notice, of not less than three months before the date of the intended eviction. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of “Park Towers Ltd – Versus - John Mithamo Njika & 7 others (2014) eKLR” where J.M Mutungi J., stated:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...”

109. I have already determined that the Defendants actions amounted to trespass to private land. It therefore follows and I do find that the Plaintiffs have suffered loss and damage, to wit: quiet enjoyment of his property through the unwarranted interference of his property by the defendant. No evidence is required before damages for trespass to land can be awarded.

#### **Issue No d). Who bears the costs of the suit**

110. 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.
111. 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 vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

112. In the present case, for the fact that the Plaintiffs proved their claim they shall have costs of the suit.

#### **IX. Conclusion and Disposition**

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



- a. That Judgment be and is hereby entered in favour of the Plaintiffs in respect to the Plaint dated 13<sup>th</sup> July, 2021 in its entirety with costs.
- b. That a Permanent injunction do and is hereby issued restraining the Defendants and or their agents, servants or employees or otherwise howsoever from entering into, trespassing, constructing and or continuing with any construction ,erecting any other structures and or doing any acts of waste or in any way interfering with the suit property being plot No. Mombasa/mainland South/block 1/1808.
- c. That an order of eviction do and is hereby entered against the Defendants, their servants, agents and or employees or otherwise howsoever and demolition and or removal of all the structures and debris erected by the Defendants on the suit property.
- d. That the Plaintiffs have the costs of the suit.

It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025.**

.....

**HON. MR. JUSTICE L.L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Muronji Advocate holding brief for M/s. Jadi Advocate for the Plaintiffs.
- c. Mr. Ondieki Advocate for the Defendants

