



**Mwabungare v Mohamed & another (Environmental and Land Originating
Summons 178 of 2020) [2025] KEELC 1057 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 178 OF 2020
LL NAIKUNI, J
FEBRUARY 28, 2025**

BETWEEN

MOHAMED MOHAMED MWABUNGARE PLAINTIFF

AND

BINTI OMAR MOHAMED 1ST DEFENDANT

SULEIMAN KUWEAH GAKURIA 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. Mohamed Mohamed Mwabungare the Plaintiff/ Applicant herein instituted this suit against Binti Omar Mohamed and Suleiman Kuweah Gakuria, the Defendants/ Respondents herein by way of Originating Summons on the 8th October, 2020 filed on the same day premised under the provision of Sections 7, 13, 17, 37 and 38 of The *Limitation of Actions Act*, Chapter 22, Laws of Kenya, Section 1A,1B,2,3 & 3 A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, under Order 1 Rules 11,12, 13, 14, Order 5 Rule 17, Order 37 Rules 7, 8, 11, 13, 14, 15, 16, 17, 18 & 19 of the Civil Procedure Rules 2010 Act, Cap. 21 of the Laws of Kenya and all other enabling Provisions of the Law.
2. Upon filing of the Originating Summons the Defendants/ Respondents responded through the Replying Affidavit sworn on 17th December, 2020 and filed on 22nd December, 2020.
3. It is instructive to note that this matter is closely related to another Civil matter “ELC No. 134 of 2021 – Suleiman Kuweah Gakuria & Another – Versus – Douglas Mwangi & others”. However, for one reason or the other these matters were never consolidated taking that they were on the same subject matter, But for ease of hearing and management them, they proceeded along side. Additionally, upon the request by the parties, by consent on 6th December, 2024 the Honourable Court conducted a site visit (“Locus in Quo”) and prepared a report for that matter. Indeed, for ease of reference the said report has been attached and it part of this Judgement for ease of reference hereof.



II. Court directions before the hearing

4. On 18th September, 2024, after confirming that all parties had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 3rd December, 2024. The Plaintiffs/Applicants called PW - 1 and PW - 2 on the same day and closed his case thereafter. The Defendants/Respondents called their witnesses DW - 1 and DW - 2 on 4th December, 2024 after which they closed their case.

III. The Plaintiff/ Applicant's case

5. The Plaintiffs/ Applicants claimed entitlement of the suit property by virtue of Land adverse possession and therefore seek the following orders:-
 - a. That the Respondents' interest in all that piece of land situated in Mombasa County containing by measurement Decimal one Four Nought one (0.1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in the Land Titles Registry at Mombasa has been extinguished.
 - b. That the Registrar of Lands, Mombasa do delete entry in the title of the land described in paragraph 1 above or register appropriate discharge in respect thereof.
 - c. That the Applicant be registered as the proprietors of all the parcel land known as Plot measurement Decimal One Four Nought One (0. 1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in the Land Titles Registry at Mombasa in place of Binti Omar Mohamed and Suleiman Kuweah Gakuria By reason of the fact that the Applicant has become entitled to the said land by adverse possession.
 - d. That the Registrar of Lands, Mombasa do issue certificate of title for the all the parcel land measurement Decimal One Four Nought One (0. 1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in the Land Titles Registry at Mombasa in the name of Mohamed Mohamed Mwabungare which is the applicant herein.
 - e. That the Orders referred to in Paragraphs 1, 2, 3 and 4 above be registered against the Title to all the parcel land in Mombasa County containing by measurement Decimal One Four Nought One (0. 1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in the Land Titles Registry at Mombasa in terms of Section 38 (2) of The Limitation Actions Act, Chapter 22, Laws of Kenya.
 - f. That the costs of this Originating Summons be provided for.
6. The Original Summons was based on the following grounds on the face of it and those of the 15 paragraphed supporting affidavit sworn by Mohamed Mohamed Mwabungare, the Plaintiffs/ Applicants sworn on the same day with the Originating summons where she averred: -
 - a. The Applicants had been in uninterrupted exclusive physical all the parcel land known as Mombasa/Mainland South/Block I/1808 measurement Decimal One Four Nought One (0. 1401) hectares or thereabout for a continuous period in excess of 40 years since 1970.
 - b. He had the physical possession of all that piece of land situated in the Mombasa County containing by measurement Decimal One Four Nought One (0. 1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in



the Land Titles Registry at Mombasa. Annexed and marked as ‘MMM - 1’ were copies of the photos.

- c. He had occupied the suit land for more than 40 years and no one had ever come up to claim ownership of the same save for recently he received a letter purportedly from the owners trying to stop me from constructing a toilet. Annexed and marked as “MMM - 2” was a copy of the letter dated 13th July, 2020 . But personally he had never met him or her.
 - d. He had lived on the suit land with his family and that was his only known home.
 - e. The deponent lived on the suit property, and developed it openly, by building both residential and rental houses on it without hindrance or interruption for more than 40 years. Annexed and marked as “MMM - 3” were the photographs of the buildings standing on the property.
 - f. The said property was registered in the name of Binti Omar Mohamed and Suleiman Kuweah Gakuria. Annexed and marked “MMM - 4” a copy of the title.
 - g. The Deponent did not have any other home to move to me and my family and shall be rendered destitute, landless and/or homeless.
 - h. The land now belonged to him since the owner has been absent and that he had stayed in the said land for over 12 years as per the Limitations of Actions Act (Cap 22).
 - i. The deponent had never seen the owners of the said parcel of land and he craved to be given the ownership of the suit land.
 - j. For all this period, the deponent and his family had peacefully exercised proprietary rights, like construction of houses. He had also cleared the land that was bushy and made stall where he sold his wares and other merchandise including rental shops for supporting his income and family.
 - k. The deponent stood to suffer irreparable loss, damage and rendered homeless if not heard and granted the suit property.
 - l. He had commenced this action for adverse possession by way of an Originating Summons as mandated by law.
7. The Plaintiff/Applicant called PW - 1 on 4th December, 2024 and he testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Ondieki Advocate:-

8. PW - 1 was sworn and testified in Swahili language. He identified himself as Mohamed Mohamed Mwabungare, a citizen of Kenya bearing the information in the national identity card shown to Court. He was a businessman. He had a witness statement dated 8th October, 2020 which he adopted and he filed three documents which he produced as Plaintiff Exhibit 1 to 3. PW - 1 used to live on the suit property but due to increase of the people. He moved out. PW 1 did not know the Defendants; he had never met them. He had been on the land and his father used to live on it. By then from the year 1980, there were commercial structures and before it was for cultivation. The Defendants never lived on it, he had never seen them. The initiation of the case was the Covid -19, hence the traders had no place for toilets. PW - 1 had a commercial shop and they converted to a toilet for use by the traders. The Government had wanted. PW - 1 prayed that the Honourable Court granted the reliefs sought in his pleadings.



B. Cross examination of PW - 1 by M/s. Jadi Advocate.

9. According to the PW - 1 was born in the year 1956. He was born in the hospital and he lived on that land. His father was illiterate – hence it had no numbers. Later on the land was taken away it was Government Land. PW - 1 told the court that he was in Court on his own behalf and he did not have any documents showing that his father never formally got the land. He lived at at Magongan. The land is for commercial, not residential. PW 1 had lived on the land from the year 1980s – close to 40 years. He had never pursued to be allocated the land from the Government.
10. On being referred to his witness statement, PW - 1 stated that he lived there with his family and it's the place he called home. However, he also had his own home elsewhere at a place called Mabogani Likoni. Instead, on the suit land, there were hawkers dealing with all sorts of businesses. He admitted that he was the one who kept them. According to the witness there were no documents. He did not charge the hawkers anything to take care of the land. What he knew, was that the suit property was his own, it was their land.
11. PW - 1 further stated that it was a small portion of land what he had occupied a small portion for the business, its 3 Feet 30 X 40 Ft. PW - 1 confirmed that he had a place of residence elsewhere; he knew Abdalla Mwadan his brother but had no knowledge of his suit against the Defendants. PW - 1 did not know the Defendants had a title deed. He did not know whether the Abdalla had had cases with the Defendants. That Defendants had a title deed and that it was an offence to give or allowhawkers to utilize it.

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

12. PW - 1 confirmed that he had come to court on his own behalf. They had lived on the land but after the crowd increased we moved from there. It had a commercial place. He was a traveler for long periods of time. He did not know his brother Mr. Abdalla had a case with the Defendants. The Defendants had never urged him to vacate the suit land. He urged for the orders to be granted as prayed.
13. On the same day the Plaintiff/ Applicant called PW - 2 who testified as follows:-

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

14. PW - 2 was sworn and testified under oath. He identified himself as Peter Karuga Kariuki a Citizen of Kenya bearing all the particulars as shown from his national identify card produced in Court. He recorded a witness statement dated 17th July, 2023 which he adopted stating that he was the 2nd Plaintiff.

B. Cross Examination of PW - 2 by M/s. Jadi Advocate.

15. PW - 2 confirmed that he got on the suit property. He told the court that he got there in in the year 2002. He was allowed to occupy and settle on the suit land by Mr. Mohamed Mwabagare. PW - 2 knew the suit land belonged to PW – 1 and so it was rightfully his own. He found out that it was Mr. Mohamed and his brother Abdalla Mwidau who were the owners of the land. There were numerous hawkers trading at the premises were not paying rent or any monies to the Plaintiffs.
16. PW - 2 told the court that he had constructed a semi-permanent structure for shops on the suit property. He applied for approval but he was asked to prove ownership. It was when the toilet was being constructed that he knew the 1st and 2nd Defendants. PW - 2 was seeking to be given land as he had invested substantially on the land. He was occupying ½ acre.



B. Re - examination of PW - 2 by Mr. Ondieki Advocate:-

17. PW - 2 confirmed that he allowed to get to the land. Mr. Mohamed was his in law. He was married to a daughter of PW – 1’s uncle. The structure they occupied had been there from that time to today.
18. On 4th December, 2024 the Plaintiffs through their legal counsel Mr. Ondieki marked their case closed.

IV. The Defendants/Respondents’ case

19. The Defendants/Respondents responded through a 20 Paragraphed Replying Affidavit of Hawa Abdul Mwasserah, previously known as Binti Omar Mohammed, the 1st Respondent herein, sworn on 17th December, 2020 and filed on 22nd December, 2020 with five (5) annexures averred that:
 - a. She was one of the registered owners of all that piece of land situated at Mombasa known as Plot No. Mombasa Mainland South/Block 1/1808. (Hereinafter referred to as “the Suit Property”) hence competent to swear this Affidavit.
 - b. The Affidavit was sworn with the Authority of the Second Defendant who was also a registered owner as per the attached authority marked as “BOM - 1”.
 - c. As confirmed by the Plaintiff, the 1st Defendant was a duly registered owner of the suit property herein together with the 2nd Defendant.
 - d. Being the registered owners, they had always enjoyed a peaceful and quiet enjoyment of the suit property until the year 2004 or thereabout when they noticed one Abdalla Mohamed Mwidau having trespassed on the suit property and had constructed a kiosk structure, thereon.
 - e. They filed a suit in Mombasa the same being Mombasa Chief Magistrates Case No.4178 of 2004 (hereinafter referred to as the Civil Case) which suit has been pending for several years and as can be seen from the plaint, the Defendant in the said case had invited an unknown people to the suit property and were operating their businesses thereon. She annexed and mark as “BOM - 2” were copies of the pleadings in the said suit.
 - f. On or about the month of May 2020, she noticed a permanent structure which she later learnt it was a public toilet, being constructed on the suit property and upon inquiry, he was informed by some traders who were operating on the suit property that one Mohamed Mohamed Mwabungare, the Plaintiff herein, was the one undertaking the construction.
 - g. Upon talking to the Plaintiff herein, he informed her, which was information she verily believed to be true, that he was taking over the suit property since the Defendant in the aforesaid civil case who was purportedly his uncle was now deceased and he was his only heir. That she informed the Plaintiff herein to stop the said actions which amounted to trespass and further required him to produce letters of Administration on behalf of the said deceased to prove his claim since the case she had with the said deceased had not been concluded.
 - h. Following her encounter with the Plaintiff, she held a meeting with her Advocate on record herein who wrote a demand letter to the Plaintiff, asking him to stop the illegal trespass and construction of the public toilet on her private property and further since the Plaintiff did not have any approvals from the County Government of Mombasa for construction of the same. The said letter was also copied to the County Government of Mombasa for their action and was annexed herewith as “BOM - 3”.



- i. The County Government of Mombasa did act on the said letter and as per the procedure, a notice was issued to the duly recognized registered owners to stop the said illegal construction which notice she served upon the Plaintiff herein and asked him to stop the construction which was being undertaken on a private property. The Plaintiff did not stop the said construction despite the said letters and notice. She annexed a letter from her Advocates dated 3rd November 2020 addressed to the Plaintiff as annexure as “BOM - 4”.
- j. Following due diligence, she did confirm that the Defendant in the Civil case was indeed deceased, she instructed her Advocates herein to withdraw the civil suit since it had since abated so that she could file a case at the Land Court against the Plaintiff herein and the other kiosk owners who had trespassed on the suit property. She annexed a copy of the said Notice of withdrawal of the civil case as “BOM - 5”.
- k. As she was still looking for funds to file a case at the Land Court, she was shocked to learn that the Plaintiff herein had filed the instant suit which was an afterthought and full of falsehoods since;
 - i. The Plaintiff had never been in occupation on the suit property for the last twelve (12) and /or forty (40) or so years as alleged and has never been in occupation or at all.
 - ii. The Defendants had always had an interest in the property and had filed the civil suit as demonstrated hereinabove which suit has been pending and was only withdrawn after she learnt of the death of the Defendant from the Plaintiff herein.
 - iii. There were no permanent residential houses on the suit property as alleged since what was present and as can be seen from the annexed photographs were small kiosks which are being operated by small business people who were well aware that the suit property belongs to the Defendants and is not public property but private land.
 - iv. The property did not have any residential houses but consists of the small mabati structures/kiosks and umbrellas which the small vendors operate their businesses on. The other permanent structures seen on the photos do not at all belong to the Plaintiff and were not on the suit property. The plaintiff was put to strict proof of the same.
 - v. The Plaintiff could not say that he did not have or did not know any home since there was no home on the suit property belonging to the Plaintiff. What was present were small kiosks and people who operate their business on umbrellas.
 - vi. The suit property was and had always been a commercial and/or business premises and the user thereof has never been changed to residential or at all. The Plaintiff was invited to strict proof of the same.
- l. If at all the Plaintiff herein has been on the property for over forty (40) years as alleged, which is denied , then one wonders why he has not filed any suit for adverse possession in all those years. The suit herein was an afterthought having been triggered by the demand letter to stop the illegal trespass and the demolition Notices from the County Government.
- m. The Plaintiff's occupation had never been calm hence the Plaintiff had failed to establish the principle of nec vi, nec calm, nec precario for the claim for adverse possession.
- n. The Plaintiff was put to strict proof of the open development of the suit property, the construction of residential and rental houses together with the building permits and plans which the Plaintiff ought to have annexed to support his claim for possession herein.



- o. The Plaintiff herein was a trespasser and a land grabber who had unlawfully grabbed the suit property and was being used by some business people and politicians who are eyeing the prime suit property for development purposes and want to frustrate her efforts to have physical possession of the same.
 - p. The Plaintiff had unlawfully frustrated his effort to have access to the suit property and has always threatened that he knew many people in authority who would help him get the land so that he can then sell the same to them at a good price and with the aim of unjustly enriching himself.
 - q. The suit for adverse possession was misplaced and ought to be dismissed with costs.
 - r. The affidavit in opposition to the Plaintiff's originating summons herein.
20. The Defendants/Respondents called DW - 1 on 4th December, 2024 who testified thus:-

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

21. DW - 1 was sworn and he testified in English language. He identified himself as Thomas Mokaya, a Citizen of Kenya bearing all the particulars as shown on his national identity card produced to court. He was a Senior Court Administrator based at Mombasa Law Courts. He had received Witness Summons to appear and produce a Court file of "the Civil Case No. ELC. No. CMCC 4178 of 2004 – Binti Omar Mohamed and Another – Versus - Abdalla Mwidau". Indeed, he brought and presented the physical file to Court. He stated that the last position on it was that it coming up for hearing 10th February, 2016 but on the material date it never proceeded further. He produced the original court file. – Defendant Exhibit – 6.

B. Clarification sought by Mr. Ondieki Advocate.

22. From the Court file there was no Notice of Withdrawal of the suit. He was shown a document – a Notice of withdrawal of the suit dated 3rd November, 2020. It bore an official stamp of court dated 4th November, 2020 – although it bore a genuine official stamp of the court, but it was missing from the court file. There had not been any hearing – no activity. There was no consent recorded nor adopted. The Court was dormant but active, since the year 2004 to date. Today after the case audit this would not be possible.
23. The Defendant also called DW - 2 on 4th December, 2024 who testified as follows:-

A. Examination in Chief of DW - 2 by M/s. Jadi Advocate.

24. DW - 2 was sworn and testified in Swahili language. She identified herself as being Hawa Badul Mwasserah, a citizen of Kenya bearing all the particulars as found on her national identity card produced in Court. She told the court that she used to be called "Binti Omar Mohamed" which was her maiden name. However, when she got married she had to change the names. She swore an affidavit and a Deed Poll to that effect. These were contained in the Kenya Gazette issue of 1st August, 2003 No. 5339. She recorded an undated witness statement – filed on 10th November, 2022. She filed documents (12) documents which were produced as Defendants Exhibits numbers 1 to 5, 7, 8 and 9. Exhibits No. 6, 10 and 11.



B. Cross Examination of DW - 2 by Mr. Ondieki Advocate.

25. DW - 2 confirmed that she lived at Kizingo Mombasa. She had never lived on the suit land. She only fenced the land, but she had never constructed anything on it. It was not a perimeter fence. She was issued with a Letter of Allotment dated 11th June, 1996. They applied to be allocated the suit land after they identified a vacant place. When the land adjudication exercise/process took place she was not on the ground. She did not have a copy of the formal application they used to apply for the land. They were allocated the suit land in the year 1996.
26. DW - 2 further stated that by that time they were being allocated that land, the area was vacant. She had not produced any topographical google map to show that the land was vacant. They were to have settled the suit matter amicably but as fate would have it Mr. Abdalla Mwindau died before they could have finalized the matter. She never went to court but her husband used to attend the proceedings. She never testified herself. The Defence for Mwindau was referred to in particular the contents of Paragraph 5 of the defence. Under it, he alleged the land was theirs. They had never had any civil case with Mohamed Mwabungare. She used to work for Mombasa Municipality at the Land and Survey Department.
27. She was referred to the Letter of Allotment dated 11th June, 1996 it did not show who was allocating the land. It was blank. She had not shown any letter or form of acceptance of the offer and payment. She did not have any receipt to show that she paid for the land. She never used her office to irregularly get the Letter of Allotment and hence the land. DW - 2 had not done any changes to the title deed from the names of Binti Omar Mohamed.

B. Re - examination of DW - 2 by M/s. Jadi Advocate.

28. DW - 2 reiterated that she had lived on the land. The land was commercial. They had fenced the land. There was a formal application for it to be given the land but it was not in court. The title had never been challenged. The civil suit No. 4178 of 2004 had never gotten ahead as Abdalla Mwindau died before this could have happened. In the defence he alleged it was family land and it was inherited but there were no documents to support that fact.
29. According to DW - 2 the land belonged to the Government and not the Municipal Council. The government land was under the Commissioner of Land who were based in Nairobi and not Municipality Land. Hence he would not have misused his office as alleged.
30. On 4th December, 2024 the Defendant herein through their Counsel M/s. Jadi marked their case closed.

V. Submissions

31. On 4th December, 2024, immediately after the closure of the Plaintiffs/Applicants' and the Defendants/Respondents, the Honorable Court directed the parties to canvass the originating summons dated 8th October, 2020 through written submissions.
32. Thereafter, on the 6th December, 2024, the Honourable Court was only able to access the written submissions by the Plaintiffs. Unfortunately, by the time of penning down the Judgement, the Honourable Court had not been able to access the ones for the Defendants despite checking even from the Court CTS. Pursuant to that, the Honorable Court reserved a date for delivery of Judgement on 28th February, 2025 on its own merit accordingly.



A. The Written Submission by the Plaintiff

33. The Plaintiff through the Law firm of Messrs. Kedeki & Company Advocates filed a written statement. Mr. Ondieki Advocate commenced his submissions by stating that what was before the Honourable Court for its determination was the Plaintiffs' Amended Originating Summons, dated 17th July 2023 against the Defendants herein jointly and severally. At this juncture, the Plaintiff sought for prayers 1, 2, 3, 4 and 5 as provided under the Amended Originating Summons plus costs and any other relevant order the Court may deem fit in the circumstances.
34. The Learned Counsel submitted that, at all material times of this suit the Plaintiffs were using, cultivating, living on the suit property. They were using and enjoying its physical occupation. Further, during the continued stay, no one had interrupted their occupation and use. They enjoyed the property for more than fifty years (50) in respect to the 1st Plaintiff and twenty two years (22) in respect to the 2nd Plaintiff. Therefore, they sought for a declaration that they had been in possession peacefully, openly and continuously without interruption.
35. To buttress its case, the Learned Counsel relied on the following issues which he wished they would be considered by Court.
 - a. Whether or not the Plaintiffs had acquired rights over the suit property
 - b. Whether the Defendants' rights jointly and severally over the suit property had been extinguished;
 - c. Whether the Plaintiffs had any other remedies available to them or not.
36. With regard to the first issue. The Learned Counsel averred that the Plaintiffs had been in occupation of the suit property for more than fifty years (50) in respect to the 1st Plaintiff and twenty two years (22) in respect to the 2nd Plaintiff. The 1st Plaintiff testified that from his childhood the portion was in their family possession and in the years 1960s and 70s the suit property was bushy and farming area with people cultivating their land and the 1st Plaintiff's family was the one cultivating. In his testimony, the 1st Plaintiff stated that the area around the suit property started developing as a trade center from late 1980s with shops and kiosks coming up around the area. That they entered the land without the consent of the Defendant and stayed on the suit property openly, freely and continuously, and even made developments thereon, including permanent buildings and/or shops. It was their submissions that the 1st Plaintiff's family was in possession and use of the suit property even before the Defendants got any title documents over the suit property and it's a bit questionable how they got title of a land they didn't occupy neither live and no documentations to show due process was rightly followed in acquiring the said title.
37. They contended that, the Honourable Court conducted a site visit on 6th December 2024 whereby it confirmed what the Plaintiffs had pleaded and proved in their pleadings that:-
 - a. They were in physical occupation of the suit property
 - b. The Plaintiffs had permanent buildings on the suit property;
 - c. The suit property had shops and used for business with an old house which was used as home converted to a shop.
 - d. The Defendants had nothing on the suit property and had never been in occupation of the suit property



- e. That the 2nd Plaintiff since the year 2002 after entering the suit property had invested on the suit property openly building shops using over a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-).
38. It was their submission that the Plaintiffs had acquired rights over the suit property. To support its position, he relied on the decision of:- “Teresa Wachuka Gachira - Versus - Joseph Mwangi Wachira Civil Appeal No. 325 of 2003, the Court emphasized the importance of following the prescribed procedure in adverse possession claims. Such claim is based on the fact that the suit property belonged to a registered owner, which evidence had to be provided, just as they had provided proof that the Defendant was the registered owner of the suit property vide a copy of the Certificate of Lease and search produced in evidence as Plaintiffs Exhibits numbers 1 and 2.
39. Additionally, the Learned Counsel referred Court to the case of:- “Kimani Ruchine – Versus - Swift Rutherford & Co Limited (1977) KLR, stated that the Plaintiff had to prove that they have been in occupation and use, the possession had to be continuous and not broken by any temporary purpose or endeavours. The Learned Counsel further cited the case of:- “Teresa Wachuka Gachira (supra) whereby it was stated that the proof of exclusive, continuous and uninterrupted use of the suit property was a must. Periodic use of the suit property did not amount to use that was inconsistent with the enjoyment of the land by the proprietor.
40. The Learned Counsel held that, the Plaintiffs gave evidence in support of their claim and showed that they had developed the suit property by building permanent buildings/shops on the suit land and this was exhibited by the Photostat of the developments on the suit property as attached on the supporting affidavit signed on 20th December, 2023 as per the annexure marked as “PKK – 1”. Also, this was demonstrated by the Court visiting the suit site and whereby it confirmed that the Plaintiffs were in occupation of the suit property with their shops and buildings, and were in use of land in a manner inconsistent with the rights of the registered proprietor (the Defendant herein).
41. It was their humble submission that the Plaintiffs by their continuous occupation and use of the suit property in exclusion of the Defendants who were the registered owners for more than fifty years (50) in respect to the 1st Plaintiff and twenty two years (22) in respect to the 2nd Plaintiff make them acquire overriding interest over the suit property to the Defendant hence ought to be the registered owners.
42. On the second issue. The Learned Counsel asserted that indeed the Defendants’ right over the suit property had been extinguished by the use and occupation of the Plaintiffs. The Defendants in their defence brought about their main issue and point of defence that the Plaintiffs had not been in occupation for more than 12 years stating that it’s a commercial area and not residential as claimed.
43. On whether the Plaintiffs were in occupancy and peaceful occupancy of the suit property. The Learned Counsel averred that the Defendants alleged in their testimony that they put a perimeter fence round their property after getting Certificate of Lease in the year 1997 and that the area was vacant with no occupants. The contention by the Learned Counsel was that this fact was impossible because by the year 1997 the suit property and its surrounding area had already been developed into a busy shopping center with very many shops established and there was no possibility of having a vacant plots then without occupants and/or hawkers.
44. It was the Plaintiffs’ testimony and evidence that even though the Defendants had the Certificate of Lease in their names, the likelihood of the 1st Defendant having used her position as an employee of the Mombasa Municipal Council under the department of lands and physical planning back then to obtain the title into their name was very high. The Plaintiffs submitted this because during cross examination the 1st Defendant confirmed her position before retirement as a Lands Officer with



the Mombasa Municipality as it was then, and she didn't have any formal application to the adjudication department nor any documents from the Land Adjudication Department Mombasa showing her as the rightful allottee of the suit property, neither did the Letter of Allotments had the party allotting the land; There was no plot number on the Letter of Allotment and lastly there was no receipt showing the payments for the Letter of Allotment. All these directing to an irregular acquisition of the Certificate of Lease issued to her.

45. The 1st Defendant had referred another case being CMCC No. 4178 of 2004 in their defence but during testimony she confirmed that the Plaintiffs herein were not a party in that suit, and the suit was withdrawn by them having no claim against the Defendant therein who was a brother to the 1st Plaintiff herein. The 1st Plaintiff in his testimony confirmed that they did not have title documents and they did not know that the Defendants had the title. This was until when he was reconstructing the toilet when he got a demand letter stopping him. Hence, it necessitated the filing of the suit herein, for prayers of being registered as the rightful owners having been in possession exclusively. It was their humble submission that the Court got a chance during the site visit to confirm all the buildings on the suit property was owned by the Plaintiffs. The Defendants did not have anything on the suit property.
46. For these reasons, he humbly submitted that this Honourable Court finds in favor of the Plaintiffs that they have proved their case. That they were the ones who had been in physical occupation for more than 12 years hence had acquired rights over the Defendant.
47. The Learned Counsel argued that the provision of Article 40 of *the Constitution* of Kenya, 2010 protects the right to property. The same Article was however silent on whether the right to ownership of property could be limited or not. It was his position that this then, it could be inferred that Parliament may enact laws to limit ownership of land, provided such limitation was not arbitrary or discriminatory in terms of the grounds set out in the provision of Article 27.
48. According to the Counsel, the provision of Article 24 (1) of *the Constitution* provides that the rights contained in the Bill of Rights shall not be limited, except by law and as long as such limitation is reasonable and justifiable in an open democratic society, taking into account all relevant factors including the purpose of the limitation. The provision of Article 60 (1) further provides that land is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable.
49. The *Limitation of Actions Act*, Cap. 22 served to limit the rights of land ownership in respect of adverse possession in this instance. To support his point, the Learned Counsel made reference to Judge Angote in the case of: "Kahindi Ngala Mwangandi – Versus - Mtana Lewa (2014) eKLR, land is a scarce resource and should not be allowed to lie abandoned in perpetuity. It was to be held, used and managed in a manner that is equitable, efficient productive and sustainable. The law on limitation in this regard was therefore to ensure that land was put in proper use at all times rather than lying abandoned.
50. The Learned Counsel averred that the Defendants left the land unused and unmanned for more than 12 years, which period the Plaintiffs had been in occupation of the suit property. In terms of the provision of Sections 7, 9, 13, 17, 37 and 38 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya, and the case of "Titus Kogro Munyi – Versus - Peter Mburu Kimani Civil Appeal no. 28 of 2014", the title of a registered owner of the land will be extinguished and vested in a 3rd party who proved he had been in occupation of the land continuously and uninterrupted for twelve years, such occupation had been open and notorious to the owner and without permission of the said owner, and that this 3rd party had asserted a hostile title and dispossessed the true owner. Therefore, it was his submission on this issue that the Plaintiffs had acquired rights over the suit property and the Defendants' rights over the suite property had been extinguished.



51. On whether the Plaintiffs had any other remedies available to them or not rather than the claim of land adverse possession. The Learned Counsel poised that the property herein was registered in the names of the Defendants. They saw no way the Plaintiffs could make any claim when in fact they were not registered as owner. Given, they have been in occupation for over 12 years but could not legally deal with the property, and even risks eviction unless the suit property is registered in the Plaintiffs' name. They relied on the doctrine of 'nemo dat quod non habet' to assert that the Plaintiff could not deal with the property. And could not bring suit or otherwise assert claim on the suit property, other than by this application for Adverse Possession. In view of the foregoing they prayed that their suit be allowed in toto.

VI. Analysis and Determination

52. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiffs and the relevant provisions of the law.
53. In this regard, for the Honourable Court to arrive at an informed, fair and Equitable decision, there are three (3) key issues for determination. These are:-
- a. Whether the Plaintiff has made out his claim of being granted the suit land through Land Adverse possession?
 - b. Whether the Plaintiff is entitled to the prayers sought?
 - c. Who meets costs of the suit

Issue No. a). Whether the Plaintiff has made out his claim of being granted the suit land through Land Adverse possession?

The Site Visit report

54. As indicated above, the Honourable Court conducted a site visit. Below is the 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 6th 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. Mohammed 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. Lisanza Advocate held brief for M/s Kideki Advocate for the Plaintiff.
2. Mohammed Mwabingare - the 1st Plaintiff.
3. Peter Kariuki – the 2nd Plaintiff.
4. Jackson Munene – the P.A to the 2nd Defendant.
5. Douglas Maina.

C. The Defendants

1. Mrs. Farida Jadi – the Advocate for the Defendant.
2. Mr. Mwinyi Gakuria- Brother to the 1st 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 forInspection 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.....16th
.....day ofJanuary2025.

.....

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

55. Under this sub – heading, the Honourable Court has deciphered that the main issue is whether the Plaintiff/ Applicant is entitled to ownership of all that parcel of land known as plot No. Mombasa/ Mainland South/Block I/1808 by virtue of adverse possession. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as “the Burden of Proof” and is encapsulated for by Section 107 of the *Evidence Act* Cap. 80 laws of Kenya which provides as follows:-

“107. Burden of Proof (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

56. The provision of Order 37 Rule 4 of the Civil Procedure Rules, 2010 pursuant to which the application was brought provides that:-

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgage.”

57. The Doctrine of Land Adverse possession is one on law wide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored in the provision of Sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

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



58. The provision of Section 13 of the *Limitation of Actions Act* provides:
- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.
59. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides;
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land
 - (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
60. And the provision of Order 37 (1) & (2) of the Civil Procedure Rules, 2010 provides:
- “(1) An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons
 - (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”
61. ON the jurisdiction of this Court, the provision of Article 162(2) of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act* and Section 38 of the *Limitation of actions Act* confer jurisdiction on this court to handle claims premised on adverse possession.
62. In the present case, the Plaintiffs averred that they had been in occupation and use in an exclusive physical possession of all that the parcel of land known as Mombasa/mainland South/Block I/1808 measurement Decimal One Four Nought One (0. 1401)hectares or thereabout for an uninterrupted and continuous period in excess of 40 years since the year 1970. It was emphatically held that the Plaintiffs had physically been in of all that piece of land situated in the Mombasa County containing by measurement Decimal One Four Nought One (0. 1401) hectares or thereabout and registered as Certificate of Lease Title No. Mombasa/Mainland South/Block I/1808 in the Land Titles Registry at Mombasa. He had occupied the suit land for more than 40 years. During this period they had constructed numerous semi and permanent structures in form of commercial kiosks and shops thus expended a colossal amount of finances to the tune of Kenya Shillings Ten Million (Kshs. 10, 000, 00/). They never got the permission by the Defendant to occupy the land. During all these period, no one had ever come up to claim ownership of the same. Indeed, they were in the process of constructing a



- pit latrine on the suit land when they got a demand letter. The letter was purportedly from the owners trying to stop them from constructing a toilet. But personally he had never met him or her.
63. In the case of:- “Kimani Ruchure – Versus - Swift Rutherfords & Co. Ltd (1980)KLR 10” Kneller J held that:
- “the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).”
64. In the case of “Gabriel Mbui – Versus - Mukindia Maranya [1993] eKLR” adverse possession was defined as
- “..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
65. PW - 1’s evidence and also based on the contents of the site visit report, he used to live on the suit property but due to increase of the people. He moved out. PW - 1 to live at Mgombani across the ferry and did not know the Defendants; he had never met them. He had been on the land and his father used to live on it. By then from year 1980, there were commercial structures and before it was for cultivation. The Defendants never lived on it, he had never seen them. The initiation of the case was the Covid - 19, hence the traders had no place for toilets. PW - 1 had a commercial shop and they converted to a toilet for use by the traders and hawkers selling all manners of macadernise item. The Government had wanted. PW - 1 prayed that the Honourable Court granted the reliefs sought in his pleadings.
66. In this instant case, the PW - 1 did not state nor demonstrate from which year he was in possession of the land. PW - 2 told the court that he got there in the year 2022. He was allowed by Mr. Mohamed Mwabagare, PW - 1. PW - 2 knew the land as his own. He found out that it was Mr. Mohamed and his brother Abdalla Mwidau were the owners of the land. They were hawkers, trading at the premises were not paying rent or any monies to the Plaintiff.
67. On the hand according to the Defendants, the 1st Defendant contended that she was one of the registered owners of all that piece of land situated at Mombasa known as Plot No. Mombasa Mainland South/Block 1/1808. As confirmed by the Plaintiff, the 1st Defendant was a duly registered owner of the suit property herein together with the 2nd Defendant. They filed a civil suit in Mombasa law courts - the same being “Mombasa Chief Magistrates Case No.4178 of 2004” (hereinafter referred to as the Civil Case). According to the testimony of DW – 1 the Senior Court Administrator was that suit had been pending for several years and as can be seen from the Plaintiff, the Defendant in the said case had invited an unknown people to the suit property and were operating their businesses thereon.
68. On or about the month of May 2020, she noticed a permanent structure which she later learnt it was a public toilet, being constructed on the suit property and upon inquiry, he was informed by some traders who were operating on the suit property that one Mohamed Mohamed Mwabungare, the Plaintiff herein, was the one undertaking the construction. Upon talking to the Plaintiff herein, he informed her, which was information she verily believed to be true, that he was taking over the suit property since the Defendant in the aforesaid civil case who was purportedly his uncle was now deceased and he was his only heir. That she informed the Plaintiff herein to stop the said actions which



amounted to trespass and further required him to produce letters of Administration on behalf of the said deceased to prove his claim since the case she had with the said deceased had not been concluded.

69. In the case of “M’ikiara M’rinkanya & Another – Versus - Gilbert Kabeere M’mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR”, the Court held that:-

‘...From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher – Versus - Donovan [1948] 2 All ER 11, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...

..as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in Lowsley – Versus - Forbes [1999] 1 AC 329 , consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

70. Further, in the case “Mbira – Versus - Gachuhi [2002] 1 EALR 137” the court stated as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

71. Therefore, to determine whether the Applicant’s rights accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?

72. On examination of the questions above, the Plaintiff has not indicated when he took possession of the land only claims that he had been on the land from the year 1980s without giving any specific dates. This evidence has been countered by that of the Defendants who Claimed that it was only in the year 2020 was when they noticed the construction of a building which was purported to be a toilet. This is a fact that was not disputed by the Plaintiff. The Plaintiff also claimed his nature of possession was through business therefore he did not prove that he lived on the suit land. The time of possession has not been ascertained by the Plaintiff.

73. In the foregoing, it is my finding from the above that the Plaintiff did not satisfy the requirements to be declared in Land adverse possession as he had not demonstrated to be in actual possession of the land. His claim therefore fails.



Issue No. b). Whether the Plaintiffs are entitled to the prayers sought

74. The Plaintiff sought for the ownership and entitlement of the suit property known as plot number Mombasa Mainland South/Block 1/1808 by virtue of Land adverse possession. Where a party has not satisfied the principles to be considered when granting a claim for adverse possession then the same fails. In this instant case, the Plaintiff is not entitled to the prayers sought. To this end I make a finding that the suit fails in its entirety and should be dismissed.
75. Furthermore, it was not in doubt that the Defendant was issued with a Letter of Allotment on 11th June, 1996. Subsequently, she acquired a Certificate of Title Deed to the land. Apart from the assertion by the Plaintiff in a bid to challenge the certificate of Lease issued to the Defendants, on the grounds that she may have acquired it arising from her influence as staff member of the department – the land officer attached at the land and Survey within the Mombasa Municipality; lack of the land adjudication department records were all assertion which could not be substantiated by the Plaintiffs based on the provision of Sections 107 and 109 of the *Evidence Act*, Cap. 80 on the burden of proof being on the and the civil suit number 4178 of 2004 which seem to have either been withdrawn based on the Notice of Withdrawal of suit dated 3rd November, 2020 which bore the official stamp of Court though missing from the Court file or better still must have abated upon the demise of the Plaintiff – Mr. Abdalla Mwidau the alleged Co – Owner of the suit land, based on the provision of Order 25 (1) and (2) of the Civil Procedure, 2010. Pursuant to that, based on the provision 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, the Defendant was conferred absolute and legal proprietorship to the suit land with indefeasible title, interest and rights vested on her by law. Certainly, the claim for land through Land Adverse Possession must fail outrightly. There will be need for the Plaintiffs and all the occupants of the suit land to be evicted legally pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012.

Issue No. c). Who bears the costs of the suit

76. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-
- “ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
77. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. Section 27 (1) provides as follows:-
- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order.”
78. By the event it means the result or the outcome of the entire legal action. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs



of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

79. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of:- “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

80. In this case, as this Honourable Court has opined above, the Defendants/ Respondents shall have the costs of the suit.

VII. Conclusion and Disposition

81. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has not established their case against the 1st and 2nd Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgement entered in that the suit by the Plaintiff/ Applicant as per the originating summons dated 8th October, 2020 filed on the same day fails in its entirety and thus be and is hereby dismissed.
- b. That there be eviction of the Plaintiffs and all persons on the suit land Within the Next Ninety (90) Days from the date of the delivery of this Judgement hereof pursuant to the provision of Section 152 E of the *Land Act*, No. 6 of 2012.
- c. That the costs of the suit to be awarded to the Defendant to be borne by the Plaintiff herein.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 28TH 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. Mr. Ondieki Advocate for the Plaintiff/Applicant.
- c. M/s. Jadi Advocate for the Defendants/Respondents

