



REPUBLIC OF KENYA



**Mohamed & another v Bader & 340 others (Environment & Land Petition
006 of 2021) [2024] KEELC 1 (KLR) (15 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 1 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 006 OF 2021**

AE DENA, J

JANUARY 15, 2024

BETWEEN

MBARUK KHAMIS MOHAMED 1ST PLAINTIFF

ZIREDI MBARUK 2ND PLAINTIFF

AND

FEISAL ABDALA BADER 1ST DEFENDANT

RAJAB HASSAN SIBETY 2ND DEFENDANT

KENNEDY GITHUNGURI NJENGA 3RD DEFENDANT

IBRAHIM MALAYA JUMADAR 4TH DEFENDANT

SAID SULEIMAN ATHMAN 5TH DEFENDANT

KASSIM SHIKELI KASSIM 6TH DEFENDANT

OMAR ABDURAHMAN LALI 7TH DEFENDANT

JUMA DALA ENEA 8TH DEFENDANT

SAID SULEIMAN BAMVUA 9TH DEFENDANT

BADI A ATHMAN 10TH DEFENDANT

SAIM WANJE [WANGOMA 11TH DEFENDANT

ALI SALIM SHUFA 12TH DEFENDANT

MOHAMED SAKIM ABDURAHMAN 13TH DEFENDANT

FAUD CHULA 14TH DEFENDANT

SHABAN MSHALE 15TH DEFENDANT

FADHILI IBRAHIM MALAYA 16TH DEFENDANT



BIASHA BADI SEFU	17 TH DEFENDANT
ABDALLA MTAWA [PEMBA	18 TH DEFENDANT
SAID CHALIA	19 TH DEFENDANT
SAID SULEIMAN BAMVUA	20 TH DEFENDANT
ABDUL HAMID DORMOHAMED	21 ST DEFENDANT
AMINA ALI MWAMUTWA	22 ND DEFENDANT
ATHMAN ALI SHEE	23 RD DEFENDANT
JUMA KASSIM MWATETE	24 TH DEFENDANT
TOM HAMISI MUMALASI	25 TH DEFENDANT
JUMA RASHID HAMADI	26 TH DEFENDANT
MWANASI MOHAMED BEGA	27 TH DEFENDANT
MOHAMED ALI DAHIR	28 TH DEFENDANT
OMAR ALI JUMA	29 TH DEFENDANT
HASSAN ALI NGOA	30 TH DEFENDANT
HAMAN MBENDU	31 ST DEFENDANT
ABDULAH ABDI ALI	32 ND DEFENDANT
SAKEFFY DOUGLAS KAZUNGU	33 RD DEFENDANT
SULEIMAN IBRAHIM MALAMA	34 TH DEFENDANT
SIAMINI OMAR HAMADI SHETI	35 TH DEFENDANT
MUSEMBI MUSILA MUOTIO	36 TH DEFENDANT
HAMADI SALIM SABURI	37 TH DEFENDANT
ALI MWASUDI MWACHIPI	38 TH DEFENDANT
SIASA PASHUA	39 TH DEFENDANT
HAMISI DARIGUE	40 TH DEFENDANT
ALI SALIM & 300 OTHERS	41 ST DEFENDANT

JUDGMENT

Plaint

1. This suit involves LR No 4513/41-57 (the suit properties). According to the Plaint dated October 19, 2021, the suit properties originally measuring 304 acres belonged to Mbaruk Bin Rashid Bin Salim and was registered in 1923 as title No.8528 CR No. 7339 situate in Kinondo location Gasi sub-location. That after the death of Mbaruk Bin Rashid Bin Salim the property was registered under a private *WAKF* for his children and his children for three generations. That there were several trustees



- appointed under orders of the Supreme Court in 1937, 1959 and 1973 culminating into Mbaruk Bin Mohamed Bin Mbaruk being a sole trustee as well as beneficiary and who is the plaintiffs' father.
- 2 The plaintiffs claim that after the death of their father in 1990, the plaintiffs were appointed vide court order in 1994 as joint trustees and remain the registered proprietors and trustees of the suit properties. It is stated they have at all material times been in possession of the suit properties which was sometime in the year 2004 duly subdivided into 17 portions (Kwale/Gazi/ 4513/45- 57) and title deeds issued under CR Nos. 38724 to 48740.
 - 3 The plaintiffs aver that the defendants, claiming a stake in the suit properties invaded the same in 2010, destroyed crops, torched houses, stole animals, erected structures therein and chased away the plaintiffs workers despite two restraining orders issued by the Court on 3/12/2010 and July 29, 2016. That to date the plaintiffs have been unable to occupy the suit premises leading to loss and damage which have been particularized under paragraph 16 of the Plaint. They seek orders of permanent injunction against the defendants and several heads of damages.

Defence and Counterclaim

- 4 The defendants in response to the above filed Defence and Counterclaim on December 15, 2021. The defendants admit to being the representatives of the people of Gazi and deny participating in the trespass, destruction of property and obstruction of the rightful owners of the suit property. The defendants aver that the plaintiffs registration as proprietors of the suit property was obtained through misrepresentation of material facts and collusion between the Commissioner of Lands in 1922 and the plaintiffs forefathers.
- 5 The defendants refute the allegation that the plaintiffs have been in occupation of the suit property and state that the said parties have not resided, cultivated or developed the same. The defendants state that they have lived on the suit property and depend on the same for over 100 years having been born and raised therein. For that reason, the suit property belongs to them the people of Gazi.
- 6 According to the defendants, they have developed the suit property and are engaging in various agricultural activities without any resistance from the plaintiffs. That the plaintiffs forefather Salim Bin Mbaruk El Mazrui on November 30, 1923 applied for a certificate of ownership of property in respect of Gazi land on behalf of his family, other Arab families and the people of Gazi. The title was however issued in the name of the said Salim Bin Mbaruk El Mazrui hence excluding the people of Gazi and other Arab families.
- 7 In response to the contents of the Wakf referred to by the plaintiffs, it is stated that the same is private and was registered after issuance of the first title in 1924 excluding the Gazi people. That the Mbaruk heirs have since then subsequently claimed rights over the suit property and other Gazi land which was subject of a communal claim. They deny trespassing on the suit property.
- 8 It is stated that the plaintiffs have not suffered any loss and damage to warrant grant of any orders sought in the plaint. Further that the plaintiffs have in collusion with the Land Control Board illegally subdivided the land into 17 portions. The defendants maintain that they are the legitimate owners of the suit property and are free to use it to the exclusion of the plaintiffs who have never owned the same.
- 9 The suit was heard on 11/10/22, 12/10/22 and 2/5/23.

Plaintiffs Evidence

- 10 PW1 Mbaruk Khamis Mohamed adopting his statement filed on 22/10/2021 and supplementary statement filed on 31/03/22. The plaintiffs documents were consolidated as MBK 1-42 running from



page 1-178 including those in the plaintiffs List of documents. PW1 informed the court that he was trustee of a shamba in Gazi measuring 304 acres where he has been undertaking farming and small crops farming such as bananas, tomatoes orange trees and chicken rearing. That in the year 2010 the 4th defendant informed him that the villagers had shares in the shamba and wanted to have a meeting to discuss the issue. He asked the 4th defendant to present evidence of those shares but he insisted on the meeting. In 2010 the villagers filed a suit and meanwhile kept on threatening the plaintiffs workers while he was away. He stated that about 7 people went for the meeting but he informed them that the land had restraining orders and they would not be allowed on it. That after this there was some calmness but on 26/12/2010 a big group from the village invaded the land, burnt the workers houses, crops and makuti from the stores and stole all chicken and produce from the stores. The witness stated that thereafter it was difficult for him to visit the land again. That he made reports to the police and several government agencies for the invasion to be investigated and stopped. That while some arrests were made the criminal proceedings in court just fizzled out.

- 11 The witness narrated the ownership history of the land from the year 1923 as stated in the Plaint and supplementary affidavit herein up to his appointment as trustee together with the 2nd Plaintiff. He further told the court that the East African Estates, measures about 37 acres and was where the villagers reside. That there existed land for a grave site and 11 acres was to remain with the plaintiffs but which the defendants have also built in. That the said East African Estates were housed in a building that belonged to Sheikh Mbaruk which still exists and seats on title 5010/2 a subdivision undertaken earlier. All the notices referred to by the defendants including the agreement herein relate to 5010/2 whose title was issued in 1936. He clarified that it is the agreement that subdivided the plots to 5010/1/2/3 and that the suit premises have never had any problem or legal claims. What was resolved in the agreement was in respect to property 5010 and not 4513.
- 12 On cross examination by Ms. Ogotti counsel for the defendants the witness conceded that Salim Bin Mbaruk was the plaintiffs forefather. He agreed that though he had produced the certificate of ownership he had not presented the attendant application for certification of the same. On being shown section 9 of the same document, he pointed that while the applicant was applying for the people of Gazi the description referred to parcel 5010 though he acknowledged that there is no mention of parcel 5010 in the application for certificate of title ownership. He reiterated the wakf predated the title issued to Salim Bin Mbaruk the applicant. He agreed that he had not produced it before court but insisted it was referred to in the supreme court orders which he produced in evidence.
- 13 PW1 admitted that the Gazi people at the village comprise of many tribes including kikuyu, Nandis as well as the Digo. He refuted the allegation that that the defendants are descendants of the indigenous people of Gazi and stated that they invaded the land when he was already in the land. That his forefathers who were of Arab descent, Mazrui Arabs did not find the locals in the land. He acknowledged that the 1938 agreement is signed by 5 people comprising English men and two Arabs with no locals. On re-examination the witness indicated that the application herein was in relation to where the East African Estate house was located thus parcel 5010 as per the notice filed by the defendants attached to the application by Salim Mbaruk which referred to “land on which the house of East African Estate is situated” .He stated that the WAKF was before the titles and since 1924 there is a court order in 1937 confirming the WAKF that was confirmed 5 consecutive times by the court after subsequent deaths ending with the 1994 orders that confirmed the plaintiffs.
- 14 PW2 PC Ronald Chemosit adopted his statement filed before court as part of his evidence in chief that vide OB.No 06/11/12/2016 Mbaruk Khamis Mohamed the Plaintiff reported that unknown people had trespassed into his 340-acre land with the intention of grabbing the same, started farming, cutting down trees for timber and demolished his house. He reported for police action again by OB



No 23/11/08/2020 and made a further report to Msambweni but the file got lost and another file No 322/117/2020 was opened. That he took over the matter from CPL Muli the lead investigating officer after he was transferred. That the ODPP Kwale recommended the culprits to be charged with trespassing upon private land and forcible detainer. The matter is pending at Msambweni court case no. E016 of 2020. On cross-examination the witness testified that the accused in the criminal proceedings are innocent until proven guilty.

- 15 PW3 Michael Safari Murungah a senior agricultural officer based at Tiwi ward Kwale County referred to his report dated 4/01/2018 produced as Exhibit MBK 20 which he had prepared regarding the invasion upon request by the DCIO. On cross examination he testified that the land was too big to take physical photos. That he only took photographs of a section where the damage was extensive. That the computation was guided by government guidelines.
- 16 PW4 Silas Tsuma a forest officer referred to the report dated 4/01/2018 produced as MBK 21” which he indicated he prepared on the request of the DCIO Msambweni. That he visited the scene and saw that some of the trees had been cut and removed to unknown destination. On cross examination he stated that he had not indicated the criteria to arrive at the cost as the same would entail alot of details. On reexamination he testified that he had used the commercial market value and did the report based on what he had seen on the scene.
- 17 With the above evidence the plaintiff’s case was marked as closed.

Defendants Evidence

- 18 DW1 Mzee Kagule Chula testified that he resides in Gazi village Kwale county and was in court on behalf of Gazi village whose occupants have been pursuing their land rights for over 100 years. He adopted his witness statement filed on 14/12/21 and produced the documents in the defendants list of documents dated 14/12/21 as well as documents attached in the Notice of Motion dated 30/1/23 as his evidence in court.
- 19 Referring the court to various paragraphs in ‘DEX4’ the witness demonstrated to the court one Nassoro a Gazi community member made a request for his family before Sheikh Mbaruk came to Gazi. That the Gazi people had agitated for their rights necessitating a meeting where they were advised to make one communal claim. That Salim Bin Mbaruk was appointed to consolidate and lodge the same as one claim. There was reference to the claim being made on behalf of Arabs and the people of Gazi (jamaa). More than 100 people were to be compensated. There was reference to the title which was issued as a Wakf to only one family leaving out the Gazi people and others. Reference to return of Mbaruk Salim to Gaza to handover chieftaincy implying there were already people living in Gaza. That all families were entitled to a share of the land. That some people were claiming the trees which the plaintiffs state belongs to them. That Salim was a man who could not be trusted as he cheated the people of Gazi. There was confirmation that Sheikh Dahalan was present and that the people of Gazi (jamaa) were on the land before the war between the British and Mazrui in 1895.
- 20 The witness told the court that the documents he was referring to while giving history of the suit property were from the Kenya National Archives and were accessible to anyone. He asked the court to grant the prayers sought in the Defence and counterclaim.
- 21 On cross examination the witness acknowledged that he is a member of the LCB at Msambweni and understood land matters. He conceded he did not have written authority from the people of Gazi. That the basis for one claiming a piece of land is that they were living there in accordance to the houses and their shambas. He admitted that the plots had numbers and Salim Mbaruk was applying for all the land. The witness insisted that the claim was communal. On being referred to page 1 &



- 2 of DEX 4 the witness conceded the document referred to plot 5010. On paragraph 6 (see page 8 of the DW4) he pointed there was civil Case No. 141/1935 where the defendants were sued for rent and a determination was made. On being referred to the agreement (MBK 38) he conceded plot 5010 initially measured 37 acres. He admitted he lives at Gazi 5010 and cultivates at plot 4513 today. He again stated that he lived in Msongani which for him was in 4513.
- 22 DW1 clarified in on re-examination that the entire Gazi village has been sued and he was before court as a resident. That the communal application for certificate of ownership did not specify any plot number but showed the boundaries of the entire land. That he lives in plot 5010 and farmed in 4513. That there are people who live in plot 4513.
- 23 DW2 Joshua Muthui regional archivist Mombasa confirmed that they had supplied to the defendants copies of exhibit "DEX 4". He produced the original of the same before court. That the same had been collected by the archivists from the creators for safe keeping.
- 24 On cross examination the witness testified that the documents contained land related matters including a will and confidential government of Kenya documents and court proceedings. He indicated page 1 of DEX4 was not supplied by them. That he was not the author of the court proceedings, his work is to keep government information collected from the public and retain them if they are found to be of historical and research value. That he could not vouch for the truth of the content of the documents.
- 25 With the above the defendants case was marked as closed. Thereafter parties filed and exchanged submissions.

Plaintiffs Submissions

- 26 The issues identified on behalf of the plaintiffs are highlighted as follows;

Whether or not the Plaintiff holds a good title to the suit property.

- 27 It is submitted that the plaintiffs provided title deeds in their names to the suit property and which were indefeasible by dint of section 24(a) and section 26 (1) of the *Land Registration Act*. That the plaintiffs thus became the absolute and indefeasible proprietors of the suit land as held by the Court of Appeal in the case of *Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua & 5 Others*.
- 28 That while the defendants challenged the titles they did not provide evidence linking the plaintiffs any malpractice, fraud or misrepresentation in the acquisition and registration of the titles. That the allegations raised against the first trustee Salim Bin Mbaruk Al Mazrui were unsubstantiated. That the evidence presented by the defendants related to Kwale/ Gazi/ 5010 which was not related in any way to the suit property.
- 29 It is submitted that even if the defendants had established any form of cause of action against the said Salim Bin Mbaruk, that the claim is barred by dint of section 4(2) and 7 of *Limitation of Actions Act*. That the claim is said to have been made in 1922 almost 101 years ago and the court therefore lacked jurisdiction to determine the counterclaim.

Whether or not the plaintiffs unlawfully acquired the suit property through misrepresentation, and/or collusion with Commissioner of lands and if so what is the effect.

- 30 It is submitted that the defendants did not lead any evidence of misrepresentation and collusion with the land commissioner to defeat the claimed ownership rights of the defendants in the suit property.
- 31 On misrepresentation, it is urged that while the defendants have not clearly alluded to fraud in their pleadings, their baseless assertions of misrepresentation by the Plaintiff's forefather in collusion with



the then land commissioner to have the suit property registered in their names points to a case of fraudulent misrepresentation. That fraudulent misrepresentation too must be corroborated by cogent evidence by strict proof. That no evidence was availed to prove that the Plaintiff's Certificate of title was acquired through fraudulent misrepresentation and collusion. Reference was made to the case of *David Mburu Kamau V National Industrial Credit Bank* Civil Suit 253 of 2007 [2010].

- 32 That consequently, the plaintiffs have absolute and indefeasible title fully protected under Article 40 of the *Constitution* of Kenya.

Whether the plaintiffs have suffered any injury and or loss

33. The plaintiffs submit that being the indefeasible owners they have had and continually have the rights to the suit properties in accordance with article 40 of the *Constitution*; the rights including but not limited to vacant peaceful possession, occupation, and use of the suit property as they wish, the size notwithstanding. That the plaintiffs have led evidence of arson, trespass, destruction of property, stealing, forceful detainer, illegal dispossession and threat to life committed by the defendants, their agents and assigns automatically depriving the plaintiffs opportunity to benefit fully from their absolute rights.

Whether the plaintiff is entitled to any orders and if so under what heads or nature of injuries

- 34 Counsel for the plaintiff submits that the Court has power under section 13(7) of the *Environment and Land Court Act* No.19 of 2011 to give all orders it deems necessary to return the injured parties to its previous position before the injury was committed and even give orders that bar further injury on the injured party. It is submitted that the defendants have illegally dispossessed the plaintiff and sent him away from his property since the year 2010. The plaintiff seek Kshs 20,196,800 compensation made up of Kshs- 3,665,800 for the coconut and mango trees; Kshs- 7,861,000 for the natural trees , Kshs-5,000,000 for the house they torched; Kshs-2,500,000 for the theft of cows, goats and chicken; KSHS-50,000 for the surveyor hospital bills; Kshs-340,000 for Kigoti's car repair and Kshs-780,000 for Surveyors lost land survey equipment and beaconing tools.
- 35 On damages for trespass it is urged that proof of damages is not necessary and once established the Court has the discretion to quantify damages. The court was invited to grant General damages of Kenya shillings One Billion.
- 36 On Contempt of court, it is submitted that two sets of court orders that have been willfully and deliberately dishonored by the defendants, who have had knowledge of the existence of these orders. A sentence of 6 months imprisonment and an appropriate fine as shall be deemed fit is proposed against the 1st to the 42nd defendants. The plaintiff prays that for good neighborliness the sentence be suspended and only take effect if and when any of the defendants or their proven agents or assigns are found to have trespassed, damaged or interfered with the plaintiffs peaceful occupation and enjoyment of the suit properties. That if and when the said future trespass, damage and or interference is proven then, the sentence granted for the future illegal acts on the suit property and or plaintiffs shall run consecutively.
- 37 The plaintiffs admit that they did not pray for orders of conversion and damages but state that the conversion having been admitted by the defendants the orders be granted under prayer (h). Referring to a valuation report submitted as part of their evidence the plaintiffs pray compensation for the value of property as at the time of conversion being Kshs. 2,500,000,000.
- 38 On exemplary Damages it is submitted that the object of general damages is to deter and for exemplary damages is to punish and deter. Reference is made to the case of *Ken Odondi & 2 Others v James*



Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR. That the defendants have flagrantly disobeyed three court orders stopping them from entering and continuing to destroy the plaintiffs property. The court is invited to grant exemplary damages of Kenya Shillings One Billion.

- 39 On the prayer for Permanent injunction the plaintiffs citing the guiding principles in granting an order of injunction as given in the case of *Giella vs. Cassman Brown Co. Ltd* it is submitted that the certificate of title registered in their name and its indefeasibility is prima facie case of ownership as against the defendants. That from these proceedings, it is clear that the plaintiffs have been in possession of the suit property and the defendants have trespassed and maliciously destroyed the plaintiffs' property and violently denied them access to their land, therefore proven that they are likely to suffer irreparable harm which cannot be adequately compensated by way of damages if the orders sought are not granted. It is submitted that this Court has the powers to grant the Permanent Injunction under sections 1A, 3 & 3 A of the Civil Procedure Act, 2010 if it feels the right of a Party has been fringed, violated and/or threatened. That it is therefore necessary that the defendants be permanently restrained from interfering with the plaintiff's rights.
- 40 As to cost of the suit, the plaintiffs place reliance on section 27 of the Civil Procedure Act and state that the plaintiffs deserve costs having been in and out of court for 12 years since the first act of infringement in the year 2010.

defendants Submissions

- 41 The defendants submitted on whether the plaintiffs have proved their case on a balance of probability to warrant a grant of the orders sought in the Plaint. They identify the applicable law as Article 40 of Constitution of Kenya and refer to the Court of Appeal case of Munyu Maina v Hiram Gatbiha Maina [2013] eKLR.
- 42 It is submitted that Article 40 of Constitution guarantees every person a right to acquire and own property of any description in any part of Kenya. That it also prohibits arbitrary deprivation of a person of such property or any interest or right over the property save where the property is required for public purposes or in the public interest and payment in full of just compensation has been made to the proprietor of the property. That the rights under the said Article do not extend to any property that has been found to have been unlawfully acquired.
- 43 The defendants submit that the evidence on record including the exhibits produced by the defendants show that indeed Salim Bin Mbaruk Bin Rashid submitted a communal application for certificate of ownership of Gasi Land. PW1 admitted this fact in his cross examination when he stated that Salim Bin Mbaruk Bin Rashid was his forefather who applied for a certificate of ownership of Gasi Land. That the said Salim Bin Mbaruk Bin Rashid when applying for a certificate of ownership in 1923, admitted that he was doing so for the Arab families and the people of Gasi.
- 44 The defendants submit that due to the communal application by Salim Bin Mbaruk Bin Rashid, the registered person on the resultant Certificate of Ownership would then be deemed to be holding the land in trust for the Arab families and the people of Gasi. That by a notice dated November 30, 1923 from the Recorder of Titles, Land Registration Court, East Africa Protectorate, it is clear that the Court was to hear the applications for certificates of ownership in respect of land on which house of E.A.E is situate, lands at or near Gasi which were claimed by Salim Mbaruk El Mazrui on December 27, 1923. By another notice dated February 7, 1924, the Court was to hear the applications for certificates of ownership in respect of land on which the house of E.A.E is situate, lands at or near Gasi claimed by Salim Mbaruk El Mazrui.



- 45 The defendants further submit that the Certificate of Ownership was first issued in 1924 and the plaintiffs' family has for years relied on the alleged WAKF of their forefather Sheikh Mbaruk Bin Mbaruk Bin Salim to deprive the defendants herein of their ownership rights over Gasi land which includes the suit property. That PW1 stated that the WAKF of Sheikh Mbaruk Bin Mbaruk Bin Salim was not registered after the issuance of the first title of Gasi Land in 1924 in the name of Salim Bin Mbaruk Bin Rashid. That the WAKF was before the first title was issued. If the WAKF was registered before the first title (Certificate of ownership) was issued, then the plaintiffs and their family ought not to have used the said WAKF to acquire registration of the suit property in their names.
- 46 It is submitted the plaintiffs never produced in court the WAKF of Sheikh Mbaruk Bin Mbaruk Bin Salim which concerns the Mbaruk Family and from which the plaintiffs' allege their proprietorship rights derive. That PW1 admitted during his cross examination that he had not produced the WAKF. Consequently, the plaintiffs have failed to discharge their burden of proving the existence or basis of the alleged WAKF.
- 47 The defendants further submit that they are the descendants of the indigenous Gasi Community and most of them have lived on and cultivated the Gasi Land which includes the suit property herein for many years. That the defendants, their families and forefathers have suffered historical injustices obtaining from the colonial era and which continued after independence. The worst of such injustices has been land dispossession to which the defendants have been subjected by the plaintiffs' family. That this Court must end these injustices that have occurred as a result of the alleged WAKF of Sheikh Mbaruk Bin Mbaruk Bin Salim from which his descendants including the plaintiffs herein have derived powers to deprive the defendants of their rights over their ancestral land.
- 48 It is contended that the defendants and their families depend on the suit property for survival and their only ancestral home. That the plaintiffs have neither lived on nor possessed the suit property even though they are the registered proprietors. That the title of the suit property registered in the names of the plaintiffs is held in trust not only for the descendants of Sheikh Mbaruk Bin Mbaruk Bin Salim but also for the people of Gasi. The defendants and their families are the People of Gasi.
- 49 That the plaintiffs have failed to prove that the suit property was exclusively owned by their forefathers under the WAKF. The defendants on the other hand have proved that they are the natives of Gasi Land which comprises the suit property and have been living thereon for many years as of right. They are the People of Gasi on whose behalf Salim Bin Mbaruk Bin Rashid applied for the certificate of ownership of the land on which the house of E.A.E is situate, lands at or near Gasi.
- 50 The defendants pray that their counterclaim be allowed with costs as prayed and place reliance on the holding in the Court of Appeal in the case of *Munyu Maina V Hiram Gathiba Maina* [2013] eKLR, where the court held that where a party has given history on acquisition of their land and ownership of the same, it is incumbent upon the opposing party to rebut that evidence and give their own account of the history and ownership.
- 51 The defendants lastly submit that they have an interest in the suit property, have lived and cultivated thereon for many years and they depend on the same for survival. That the Arab families and the People of Gasi had been living peacefully on the suit property until the plaintiffs' family began claiming exclusive ownership of the land. The defendants have no other homes other than the suit property and should this Honourable Court grant Orders as prayed in the Plaint, the defendants will be greatly prejudiced and their eviction will cause a dire humanitarian calamity.



Analysis and Determination

52 I have considered the pleadings being the Plaint, the Statement of Defence and Counterclaim, the plaintiffs response thereto, the evidence adduced by the witnesses, the submissions of the parties and the authorities cited. In my view the issues that arise for determination are; -

1. Whether the suit filed by the plaintiff is merited.
2. Whether the suit filed by the defendants by way of the counterclaim has been proved to the required standard.
3. Whether the parties herein are entitled to the reliefs sought from their pleadings filed.
4. Who will bear the costs of the main suit and the counterclaim.

53 The plaintiffs case is that sometime in the year 2010 the 4th to the 22nd defendants invaded the suit properties alleging a stake and demanded a meeting with the plaintiffs. They issued threats that no activities would be undertaken on the suit properties in the absence of the said meeting. That subsequently on October 26, 2010 the defendants invaded the suit properties destroyed crops, torched houses and trees, killed dogs, stole all the animals. The plaintiffs then obtained a court order on 3/12/2010 directing free access to the property by the plaintiffs without the Defendant's interference. That thereafter the villagers continued to rob the farm of its crops, harvesting timber for sale which persisted despite the plaintiffs complaints to local administration and the police. That the actions of the defendants continued and in the year 2016 the court again issued an order dated July 29, 2016 preserving the suit properties by restraining the 4th, 5th, 21st and 22nd defendants and their agents from trespassing or entering the suit properties and erecting any structures. That in disobedience to the order the said defendants entered the suit properties and threatened the plaintiffs workers and latter chased them away with the help of some villagers.

54 That the destruction continued into the year 2019 where some of the defendants built temporary structures thereon. That in September 2020 the 23rd – 37rd defendants were arrested and charged with Arson, threatening to kill, malicious damage, trespass, forcible eviction under Msambweni Criminal Case No. E016 of 2020. The plaintiffs attempt to return to the suit properties was met with violence by the 4th – 22nd defendants where his surveyor was assaulted and equipment destroyed and which was reported to the police. That since then the plaintiffs have not returned to the suit properties and has suffered loss including infringement of his right to property and seeks the intervention of this court to stop the same among other remedies.

55 From the foregoing this is substantively a claim about trespass into the plaintiffs land by the defendants though the defendants claim ownership. It will be useful to highlight some insights into the law on trespass at this point.

section 3(1) of the [Trespass Act](#) chapter 294 of the Laws of Kenya 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

56 It is clear from the above provision that there must be entry into another's land (private land), such entry must be without permission of the occupier of the land and or without reasonable excuse. Trespass also consists of any unjustifiable intrusion by one person upon land in possession of another (see [Clerk & Lindsell on Tort](#) (21st Edn) page 1345).



- 57 An occupier for purpose of the Act is defined under section 2 to mean; -
the owner or the person lawfully in occupation of private land, any manager or agent of such person and in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively’
- 58 The Act defines Private land as interalia land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or lease.
- 59 Constitution of Kenya also categorizes land into private, public, and community land. Article 64 defines private land as follows: -
Private land consists of: -
a. Registered land held by any person under any freehold tenure;
b. Land held by any person under leasehold tenure; and
c. Any other land declared private land under an Act of Parliament.
- 60 The court in the case of Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No.277 of 2018 observed as follows on trespass:
‘Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows: “Any unjustifiable intrusion by one person upon land in possession of another.” Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”The acts of putting up structures on the land and taking occupation of the same forcefully surely do amount to trespass.’
- 61 Guided by the foregoing I will proceed to look at the issue of ownership of the suit properties being one of the relevant issues. It is important at this early stage to clarify the subject matter of these proceedings. This should be discerned from the pleadings. The plaintiff commenced these proceedings by a Plaint dated 19/10/2021. Paragraph 3 refers to LR. No. 4513/41-57 (suit properties) and to which the plaintiffs claim to be the registered joint owners. The properties are stated to measure 304 acres. The importance of the identity will become apparent later in this judgement.
- 62 PW1 produced a bundle of the copies of the titles which formed part of his evidence in court LR. No. 4513/41-57 (see MBK 1- page 1-15). The court has had a chance to peruse the certificates of titles produced. They are dated 3/01/2005 and all show Mbaruk Khamis Mohamed and Ziredi Mbaruk Mohamed, the plaintiffs as trustees of the Wakf of Sheikh Mbaruk Bin Rashid (deceased) as being the registered proprietors as owners. A copy of a Certificate of Ownership under the Land Titles Ordinance was also produced which lays out several entries outlining the ownership of the property culminating to the subdivisions (see page 3 of the plaintiffs bundle). It is not in dispute that these titles are a subdivision of title 4513.Indeed, the DW1 alludes to this subdivision, though they term the same as illegal in his witness statement dated 14/12/21 and which he adopted as his evidence in chief. PW1 led evidence on the history of the property and how it evolved over a number of trustees duly registered upto and including the plaintiffs in the year 1995. Evidence was produced of a court order issued on 16/3/1995 by Wambiliyangah J appointing the plaintiffs as trustees of all the Wakf properties of Sheikh Mbaruk Bin Rashid Bin El Salim El-Mazrui with power to Manage the said Wakf properties.



63 The properties are registered under the Registration of Titles Act Chapter 281 of the Laws of Kenya. section 26 of the [Land Registration Act](#) provides as follows; -

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

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

64 From the foregoing there is prima facie evidence that the plaintiffs are the registered owners of the property. It is also evident that the suit properties are private land.

65 However it will be seen from the above provisions that title can be impeached on grounds of fraud, or misrepresentation, to which the title holder is a party, or where such title was obtained illegally, unprocedurally or through a corrupt scheme. This position has aptly been explained in several judicial authorities. In [Dr. Joseph Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others](#) cited by the plaintiffs the Court stated thus; -

section 23(1) of the [Act](#) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

Also see [Joseph Komen Somek Vs Patrick Kennedy Suter Suter](#) Eldoret ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR and [Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others](#) (2015) eKLR.

66 The defendants do not recognize the plaintiffs ownership. They plead in their Written Statement of Defence & Counterclaim filed on 15/12/21 at paragraph 3 that the registration was obtained through misrepresentation of material facts and collusion between the Commissioner of Lands in 1922 and the plaintiffs forefathers. This misrepresentation is further explained under paragraph 9 of the said Defence & Counterclaim that the plaintiffs forefather Salim bin Mbaruk El Mazrui on 30/11/1923 applied for a certificate of ownership in respect of the Gazi Land on behalf of his family, other Arab families and the people of Gazi. However, the title was subsequently issued in the name of Salim Mbaruk excluding the said Gazi people and other Arab families. This was reiterated by DWI in his witness statement dated 14/12/21 as well as during his oral testimony. The witness produced a copy of Salim Mbarak El Mazrui's application for certificate of ownership and a bundle of documents (DEX4) in support of these allegations.

67 It is now trite law that where a title is challenged then the holder or owner thereof must explain the root of the title – see [Daudi Kiptugen Vs. Commissioner of Lands & 4 Others](#) (2015) eKLR and [Samuel](#)



Odhiambo Oludhe & 2 Others Vs. Jubilee Juma Hardware & Ano. (2018) eKLR and *Munyu Maina Vs. Hiram Gatbiha Maina* Civil appeal No. 239 of 2009 (2013) eKLR.

68 To better appreciate the above application a brief history of the land registration system pre- 1923 is enumerated by Angote J in the case of *Federation of Women Lawyers (FIDA Kenya) & 4 others v Attorney General as Representing Commissioner of Lands & 2 others* [2016] eKLR thus; -

58. The Land Titles Ordinance required all persons who claimed interest in land along the coastal strip to lodge their claims with the Recorder of Titles. Any dispute that arose from those claims was dealt with by the Land Registration Court (See section 15 of the LTA).

69. Where the Recorder of Titles was satisfied that a claim was valid, a Certificate of Ownership would issue to the claimant.

70.

71. section 21 of the *Act* provides that every Certificate of Title issued by the Recorder of Titles shall be conclusive evidence against all persons (including the Government) of the matters contained therein, and the Certificate of Ownership shall be conclusive proof that the person to whom the Certificate is granted is the owner of the land.

69 It can be seen from the above dictum that the application for certificate of ownership referred to by the defendants was made under the provisions explained in paragraph 58 above.

70 This court had occasion to review the said application which is said to have been made not only for the Mbaruks but for other Arabs and the people of Gazi to wit the defendants. I noted that under the translation given in section 9 requiring disclosure of any rights over the parcel that may be held by other people, it is stated thatand remaining lands I claimed for arabs and people of Gazi. The description of the land is given in paragraph 4 thereof as Gasi and its shambas which are named and the boundaries are given under paragraph 5. In further proof of the fact that the application included arabs and people of Gazi and which was not adhered to at issuance of title, DW1 produced a bundle of documents (DEX 4). This document is paginated with pages 1-38 which DW1 informed the court served as a history of the suit properties. Page I is an alleged will of Mbaruk bin Rashid bin Salim dated 14/06/1909 on his properties.

71 The witness referred to and read out to the court a number of paragraphs which were highlighted by the defendants in pages 2- 38. According to DW1 these demonstrated that there existed complains about the land from the community even before the coming of Sheikh Mbaruk to Gazi. Meetings where people of Gazi agitated for their land rights in the suit properties and where they were advised to submit a consolidated claim as opposed to individual claims and pursuant thereto the appointment of Salim Mbaruk to lodge the same. Other pointers raised by the DW1 from this bundle was reference to the title being issued out as a Wakf where only one family was given rights thereof to the exclusion of others and the desired need of the then administration to rectify the error on the title; that people were living peacefully as a community and all the families had a share in the title. The court was referred to page 28 where it was pointed that there were already people claiming rights to the trees which negated the plaintiffs claim to the same; that Salim is not a man who could be trusted from which the defendants conclude the people of Gazi were therefore cheated. Further refence was made to page 38 which supported the defendants claim that the Jamaa (people of Gazi) lived on the land even before 1895.

72 Did the above evidence support the claims of misrepresentation and collusion by the plaintiffs forefathers to deny the people of Gazi their rights to land which their ancestors had a claim over? The plaintiffs reaction to the above evidence is that all that has been presented in proof refers to plot L.O



- 5010 and not the suit properties herein. Indeed during cross examination DW1 on being referred to MBK 38 which I will review later, agreed to the existence of plot 5010 initially measuring 37 acres and indicated that he lives in this plot but undertakes farming in plot 4513 to date. That he was aware that the plaintiffs were before court in respect of plot 4513.
- 73 Let me state that this court reviewed the documents marked DEX 4. The bundle of documents according to DW1 were obtained from the National Archives of Kenya. I have no doubt about their authenticity, DW2 having confirmed to issuing them except page 1 which is the will. Page 7 -8 of the bundle is a letter to the Attorney General by GHC Boulderson Provincial Commissioner enclosing correspondence and papers concerning L.O. 5010. It is this letter that refers to the one communal claim alleged by the defendants. This letter specifically states that the Mazrui Arabs and their people (jamaa) living in the area lived on L.O 5010. This seems to have been corroborated by DW1 who stated in cross examination he lives in LO 5010 but cultivates in plot 4513. To me this goes to show that these two plots are distinct. The letter also seems to confirm that pursuant to cause 6/1923 Salim Bin Mbaruk El. Mazrui was granted a Certificate of Ownership of LO 5010 (subject to the right of Government to occupy customs, police lines etc) although the original application for certificate of title of ownership mentioned in section 9 'and remaining lands I claimed for Arabs and people of Gazi'. The entire letter the court notes makes reference to L.O 5010. Attached to the defendants list of documents are notices by the Colony and Protectorate of Kenya under the Land Registration Court house all refer to land on which the house of East African states is situated claimed by Salim Mbarak El Mazrui. Also see the Memorandum of Encumbrances on MBK 39 page 159 of the plaintiffs bundle. It will also become apparent that this is further supported by the plaintiffs Exhibit MBK 38 which I will discuss later in this judgement.
- 74 On the other hand PW1 gave evidence on the root of the title. PW1 gave the history and chronology of how the plaintiffs acquired the title and which is confirmed by the issuing authorities in this case the recorder of titles and subsequently the Land Registrar. Copies of the titles were presented before court. In addition, documentary proof (see MBK 2, 3, 4, 6, 7 court orders) was presented showing how the land was transferred upon death of every trustee including Mohamed Bin Mbaruk on 2/7/1973 and thereafter the plaintiffs herein in 1995.
- 75 The court was invited by the defendants to make a finding that since the plaintiffs failed to produce a copy of the Wakf they have failed to prove ownership. I think this argument cannot hold any water. This Wakf is referred to in the bundle presented by the defendants. I agree with PW1 evidence during reexamination that this wakf was confirmed by 5 consecutive court orders. I have no evidence presented by the defendants that the orders were vacated by the courts that issued them. I have no evidence from the defendants to prove that the plaintiffs herein were party to the alleged misrepresentation as required by the law. In addition, none of the evidence referred to was substantiated. From the orders presented in court it is clear that the Wakf was not emerging for the first time with the plaintiffs application of 1994.
- 76 Based on the foregoing it is my finding that the plaintiffs did explain the root of their titles to the suit properties. This court also agrees with the Plaintiff that the documents presented by the Defendant and heavily relied upon by DW1 to support the claims of misrepresentation were in respect of LO 5010 and not the suit properties. The Defendant has therefore failed to discharge the burden of proof that the titles 4513/45- 57 were issued through misrepresentation. This court finds no basis for impeaching the titles to the suit properties.
- 77 I will now proceed to address the other ingredients of trespass. Firstly, the entire discussion foregoing goes to cement the fact that there was no justifiable cause for the defendants to enter the suit properties. This is also supported by the findings on the counterclaim which are discussed elsewhere in this judgement. Then there is need for there to be entry and which entry must be unlawful or made



without the permission of the owner or immediate occupier. The court has already established that the plaintiffs are the duly registered owners of the suit properties. The plaintiffs produced numerous correspondence he wrote to various authorities about the entry of the defendants into the suit properties property. None of them were controverted by the defendants. From PW1 evidence and the correspondence adduced it leaves no doubt that there was entry and which was not permitted by the plaintiffs. DW1 was very clear both in his evidence in chief, cross examination and re-examination that he undertakes farming in plot 4513. PW1 stated in cross examination that he knew Hamisi Dargo and Siasa who led the invasion into the property and were charged in court by the police. OB were produced of reports made to the police and which were confirmed by PW2 Police Constable Ronald Chemusit who was based DCI Kwale. He reiterated what PW1 had informed the court on how the suit properties had been invaded by the defendants, the timber harvesting. He informed the court that the investigation was forwarded to the DPP and who recommended the culprits to be charged with trespassing upon private land and forcible detainer. This is confirmed by a letter dated 22/9/20 (see Page 121 of MBK 31). PW2 confirmed Criminal proceedings were pending vide Case No. E016 of 2020 in Msambweni and which was not disputed by the defendants. The ground status report by the District Land Adjudication Officer dated 29/06/2011 produced by the defendants confirms the trespass and which is not justifiable. I noted that PW2 conceded in cross examination that the accused were innocent until proven otherwise and which I absolutely agree with. However, it is to be noted that the standard of proof required in civil cases is on a balance of probabilities. The fact that there were charges preferred should suffice for purposes of these proceedings and I'm emboldened that there was indeed trespass into the suit properties which I have already made a finding is private land.

78 The court being satisfied that the allegations of trespass have been proved on a balance of probabilities will proceed to the counterclaim. As stated elsewhere the defendants have raised a counterclaim, which also served as a defence to the allegations of trespass raised by the plaintiffs. They seek the following orders; -

- a. That this Honorable court does declare that the defendants are the bonafide owners of all that land registered as LR. No. 4513/41- 57
- b. That this Honorable court does declare that the Title Deed for LR. No. 4513/41- 57 in the names of the plaintiffs were issued through misrepresentation of facts, therefore null and void and the same should be surrendered to the Land Registrar Kwale for cancellation
- c. The defendants be awarded costs of the counterclaim and
- d. That any other relief as this Honorable court may deem just to grant

79 Let me state that largely the courts discussions on the issue of ownership and misrepresentation and the findings have also spoken to and or addressed the issues as raised in the counterclaim. It is clear it has no merit. However, I find it necessary to delve specifically into the counterclaim and render myself on the same for the avoidance of doubt. First this court must resolve some preliminary issues of law raised by Counsel for the plaintiffs based on the interalia the *Limitation of Actions Act*. It is submitted that even if the defendants had established any form of cause of action against the said Salim Bin Mbaruk, the same is a tort and the subject matter for recovery is land is barred by limitation. It is submitted on behalf the plaintiffs that this courts hands are tied down by section 4(2) as read in isolation or together with section 7 of Cap 22 of *Limitation of Actions Act*, that states that an action founded on tort may not be brought to court after the end of three years from the date on which the cause of action accrued and section 7 which provides 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. It is stated the court therefore lacked jurisdiction to determine the counterclaim.
- 80 section 7 of the *Limitation of Action Act* is to the effect that an action may not be brought by any person to recover land after the end of twelve years from the date on which right of action accrued to him or if it first accrued to some person through whom he claims, to that person. As can be seen in the pleadings and entire proceedings the defendants base their claim on the actions of the plaintiffs forefather Salim bin Mbaruk El Mazrui who on November 30, 1923 applied for a certificate of ownership in respect of the Gazi Land on behalf of his family and the arabs and people of Gazi and which never came to pass as the title was issued to the exclusion of the latter. Clearly the actions of Salim bin Mbaruk El Mazrui happened around 100 years ago in relation to the suit properties. In this regard I agree with the plaintiffs submission that the counterclaim as a suit is time barred.
- 81 Assuming I'm wrong on the above, the counterclaim would still not be sustainable by this court and considering the plaintiffs contention that the claims were resolved. My review of the bundle shows correspondence exchanged between the local administration Digo District, the Provincial Commissioner Coast Mombasa, Recorder of titles, the attorney General touching on the claims by various Mazrui arabs of Gasi over the Mazrui Wakf Lands and where the Mbaruk family took a position that the only people entitled were direct descendants of Sheikh Mbarak. The court saw minutes of barazas held in 1919 on the issue. The documents indicate the strong desire of the local administration to have the issue amicably resolved which then resonates with the Plaintiff contention that the matter was resolved. The plaintiffs case is that indeed the complains were amicably resolved as demonstrated by plaintiff's exhibit MBK 38. DW1 told the court he lived in 5010 and farmed in 4313 which position he reiterated in re-examination. This then drew me to the need to interrogate the presence of DW1 in 5010 vis a vis the claims that the land rights claims were resolved where the defendants were settled in plots 5010.
- 82 This court recalls that PW1 informed the court in his evidence in chief that the East African Estates, measures about 37 acres and this is where the villagers reside. That there existed land for a grave site and 11 acres was to remain with the plaintiffs but which the defendants have also built in. PW1 also told the court the said East African Estates were housed in a house that belonged to Sheikh Mbaruk which still exists and seats on title 5010/2 a subdivision undertaken earlier. He referred to an agreement (MBK 38) which he stated relate to LO 5010. I must now turn to the said exhibit MBK 38 which I took time to peruse as well.
- 83 Plaintiff EXH MBK 38 runs from page 146 to 157. I noted it relates to L.O. No. 5010 situate in Gazi and which is stated to contain 37 acres and which acreage DW1 confirmed in cross examination. The same was issued on condition that the government would occupy the existing police lines and customs house rent until such a time the buildings in question become inhabitable. The document seems to me to acknowledge the existence of the application for certificate of ownership herein as well as the communal application and the exclusion of the Arabs and Jamaa of Gazi. It further shows an agreement was reached between Mohamed Bin Mbarak and Rashid bin Zahran to subdivide LO 5010 into two portions, one containing the houses and dwellings of the inhabitants of Gazi and how the land was going to be administered by four trustees who included one arab resident and one native resident. There was a right to bury the dead in the cemetery within the said L.O 5010 which was to administered with the other portion under terms and conditions which are enumerated in the agreement. The agreement is dated December 27, 1935 signed by the parties and consented to by several people who I assume are some of the beneficiary residents of the village. It is also registered against the title.
- 84 Having noted the contents of the above document, I'm persuaded by the plaintiffs contention that the defendants claims were resolved vide the above agreement. The defendants are claiming ancestral rights



over the property and whose ancestors agreed to enter into an agreement which bound them. How can the defendants purport to be in a better position to speak on behalf of their ancestors who committed to the agreement which was entered after the issuance of the impugned certificate of ownership? Infact DW1 is a beneficiary of this agreement by dint of his admission that he resides in plot 5010. From the evidence led by the plaintiffs I think the plaintiffs were able to successfully rebut the defendants claim to entitlement of plots 4513/45-57. To me the defendants belong to plot 5010 as earlier stated and this is what they should be pursuing. All the same this suit is not about plot 5010 and I will not get into further discussion on the same.

85 The court has seen the defendants attempt to hinge their claim to historical injustices. It is submitted on their behalf that the suit property is the defendants' ancestral land. The defendants, their families and forefathers have suffered historical injustices which include violation and abuse of rights which has its roots in the colonial era and continued after independence. But let me discuss further the issue of historical injustices and ancestral claims. This court spent time to review judicial precedents and court trends in matters ancestral claims and some which touched on the Mazrui land and coastal strip as follows; -

86 In *Federation of Women Lawyers (FIDA Kenya) & 4 others v Attorney General as Representing Commissioner of Lands & 2 others* (supra) the court had this to say

85. It is with the above observations in mind that I agree with the 2nd Respondents submissions that the Petitioners are inviting the court on a flight of fancy by asking it to find that their ancestors were discriminated against and that the enforcement of the alleged infringed rights should be enforced now. If that were to happen, then almost all Kenyans will be entitled to that order considering that the whole country was colonised and a new legal system of land ownership was put in place.

87 *Justice Sila Munyao in Henry Wambega & 733 others v Attorney General & 9 others* [2020] eKLR discussed at length the issue of ancestral domain and where the court cited other court decisions. I will pick excerpts of his dictum.

61. Getting back to the law, I am not persuaded that in Kenya, there is any law that gives an individual a right to own land that was previously owned by his/her forefather.

52. I have seen no backing in our Constitution or in any law that would entitle the petitioners to the land that is now privately held by the 2nd - 7th and 9th respondents, even assuming that the said land was originally settled by the forefathers of the petitioners. I have seen no law that says that a person must be settled in land that was previously owned by his/her forefather, irrespective of whether that land is now privately owned

50. I do not think that the petitioners are correct in stating that the Government has not done its bit in enacting legislation to address historical land injustices. I have already set out the provisions of *Constitution* at Article 67 (e) and section 15 of the *NLC Act*. They are the response of the Government in addressing historical land injustices. In making these provisions, the people of Kenya had to balance the interests of those who are adversely affected by historical land injustices, and the interests of those that have title to land and expect the same to be protected. Thus, Article 40 of *Constitution* protects the right to property, and among the rights

55. A more or less similar issue arose in the case of *Charo Kazungu Matsere & 273 Others vs Kencent Holdings Limited & Another* (2012) eKLR. In that case, the petitioners who occupied land that was sold by the 2nd respondent to the 1st respondent, inter alia claimed that they had a first right to purchase the land because of their indigenous roots. This was dismissed by Tuiyott J.



The same result ensued in the case of *Parkire Stephen Munkasio & Others vs Kedong Ranch* (2015) eKLR. This was a case by persons of Maasai descent claiming historical rights to land owned by the 1st respondent. I happened to hear the case and I dismissed it. I found that it was immaterial that the land was previously owned by the Maasai as it had now become private land and the title needed to be protected. It is the same finding I will make in this case.

56. There is clearly agitation for land from people who claim to have faced historical injustices. The agitation is in fact most intense in the coastal region. There was certainly injustice caused by colonialism and people were displaced and their lives destabilized. But this did not just occur in the coastal region, it was countrywide. Persons were displaced in Central Kenya and Rift Valley, where the colonialists established the so called “White Highlands.” The Maasai were also displaced from a huge swathe of what would otherwise comprise their native land. So too the Nandi in Uasin Gishu, the Kipsigis in Kericho, and even the Taita at the Coast. Almost every community that had “good land” (in the eyes of the colonial settlers) was dispossessed to pave way for colonial occupation. We in fact had native reserves dotted all over the country where displaced indigenous persons were concentrated while the colonialists hogged all the prime land. Was it unjust? Yes. Was it fair? No. The fact of the matter is that almost every other person in Kenya has been affected by the historical accident of colonial occupation. If we all asserted that we have a right to be settled in the land that was originally occupied by our forefathers, we will only be opening a Pandora’s Box, and creating an even bigger problem, for there will be a massive displacement of persons which will be catastrophic. Even Nairobi itself, with its Maasai origin, would be overrun. How to move on from the dark colonial past does not lie, in the circumstances of this country, by making an order for people to cede their land so that the original native occupants, or their descendants, are settled in it. Neither does the solution lie in invading land that one believes belonged to his ancestor, for this would be a total negation of Constitutional right to property.
- 88 This court is persuaded, agrees with the above dictum and sees no special circumstances or any compelling reason for departing therefrom. I think I have said enough on ancestral claims to show why the defendants claim cannot be sustained. The suit properties are private land. The upshot of the foregoing is that the Counterclaim lacks merit and cannot stand for reasons given by this court and it is hereby dismissed.
- 89 The court is now left to determine whether the plaintiff is entitled to the reliefs sought in the Plaint. The plaintiffs seek for the following orders;
- I. A permanent injunction restraining the defendants whether by themselves or their servants or successors or agents or assigns and/or by their numerous aliases of “people of Gazi”, and/or “Gazi residents committee” and/or “the pentagon” and/or Gazi squatters, howsoever from dealing in, entering in, obstructing any activities in, and/or interfering with any person, agents, assigns, successors animals, plants or things authorized or related to and/or alienating, surveying, subdividing, occupying and/or continuing to remain in occupation of any part of or all of the suit properties.
 - II. The defendants be and hereby cited for contempt of court.
 - III. The county commissioner and county police commandant in charge be and hereby directed to enforce orders granted by this court.
 - IV. Special damages as tabulated herein above
 - V. General damages for trespass, unlawful destruction of property and loss of land use.



- VI. Exemplary Damages for repeat offending of the constitutional right to private property and contempt of court orders.
 - VII. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant
 - VIII. Any such other or further relief as this Honourable Court may deem appropriate.
- 90 What constitutes permanent injunction? In the case of *Kenya Power & Lighting Power Limited Vs. Shariff Malana Habib* (2018) eKLR the court stated thus;

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 defendants in order for the rights of the Plaintiff to be protected'

- 91 The court has already made a determination that the plaintiffs are duly the registered proprietors of the suit properties the defendants having been unable to convince this court to impeach the title. The right to own property in a private capacity is protected. The plaintiffs have a right under both the retired constitution and Article 40 of *Constitution* of Kenya 2010 to own property and enjoy quiet possession and use of the same. This is already seen by the extracts in *Henry Wambega* (supra). From the discussions it is clear the defendants have no legal right to the suit properties or to the use of the same in any manner. DW1 own admission is that he cultivates in plot 4513 todate. The correspondences produced by the Plaintiff leaves no doubt of the actions perpetrated by the defendants. PW1 was able to demonstrate how todate he has been kept away from the suit properties. There is even a ground status report by the District Land Adjudication Officer dated 29/06/2011 produced by the defendants in evidence which states thus;

a. Parcel No.4513

.....The parcel was inherited by Mr. Mbaruk Khamis and Zireidi Mbaruk Mohamed.....and subdivided the parcel in to 17 equal portions numbering from 4513/41 - 4513/57 respectively. Villagers in Gazi residing on parcel 5010 are claiming ownership of this land. They have guards on the land to bar any outsider to work on this land. Though not settled on this land, they are cultivating the land for subsistence'.

- 92 Based on the foregoing and the surrounding facts of this case and guided by the principles of granting an order of injunction as established in the case of *Giella Vs. Cassman Brown & Company* (1938) eKLR I find that the plaintiffs have met the threshold for the grant of the injunctive orders sought. And as I have already demonstrated in the dictum in *Henry Wambega*, invasion of private property is not a solution and must not be condoned by the court.

- 93 Let me state that some of circumstances surrounding the facts of this case reminds this court of the famous Waitiki land case in Likoni. From Civil Appeal Case No. 73 of 2016 filed in the Court of Appeal at Mombasa, *Evanson Jidraph Kamau Waitiki Vs. Kenya Power & Lighting Company Limited* (2017) eKLR though not the main suit under which the matter was litigated, I however managed to pick the following extract that describes what happened.

Then in 1999 came the infamous Likoni clashes whose result led to among other things, the forceful eviction of the appellant from the suit land. In the process raiders destroyed property, slaughtering



cattle and chickens. In the period subsequent to these events, squatters invaded and settled on the suit property. Even though the clashes ended soon thereafter, it has taken over 18 years for the appellant to get a relief, despite many court orders in his favor for vacant possession. Last year (2016) the Government reached an agreement with him to purchase the suit land from him for the benefit of those who had settled on it to avoid protracted law suits and future conflicts. The emphasis is mine for this will also influence the final orders issued in this judgement.

94 For me therefore of importance is the need for the plaintiffs to get free access into the suit property without the Defendant's interference, being barred by anybody, have quiet possession and enjoy the use of the suit properties for which this court has found rightly belong to the plaintiffs who are the registered owners in the manner they desire. For this to be realized the actions of barring the plaintiffs back into his property, barring his employees from working in the suit properties or even chasing workers away from his properties must be restrained by the court. Further for the plaintiffs to have quiet possession no one should remain in the suit properties except with the permission of the plaintiffs.

95 I have noted Defence counsel submissions that eviction from the suit properties will cause a dire humanitarian calamity. It is however noteworthy the legislature and the courts have put in place measures to mitigate this – see section 152E of the *Land Act* 2012 and the case of *Satrose Ayuma & 1 Others Vs. Kenya Railways Staff Retirement Benefits Scheme & 2 Others* Constitutional Petition Numbers 65 of 2020 (2013) KEHC 6003 (KLR)_. In addition, nothing stops those who live in the suit property without permissions to negotiate with the plaintiffs and or as seen in the Waitiki case above for the government to intervene. It is important however for the avoidance of doubt to clarify that the orders of permanent injunction do not apply to parcels 5010 which the plaintiffs have informed the court were subject of the agreement pursuant to which the people of Gazi were settled.

96 The court has been invited to grant special damages as well as General Damages for trespass. Under section 13 of The *Environment and Land Court Act* in the exercise of its jurisdiction has powers to make orders or grant relief such as Interim or Permanent preservation orders including injunctions, award of damages, compensation, specific performance, restitution, declarations and costs.

97 This court has already made a finding that the Defendant indeed trespassed into the defendants land and which actions denied the plaintiffs use, occupation possession and enjoyment of the suit properties. It is trite law that trespass is actionable perse. In the case of *Duncan Nderitu Ndegwa Vs. Kenya Power & Lighting Company Limited & Another* (2013) eKLR, cited by the plaintiff the court stated thus; -

Once a trespass to land is established it is actionable perse and indeed no proof of damage is necessary for the court to award general damages.

98 The Plaintiff has pegged general damages at Kshs. 1 billion without an explanation as to how the same was arrived. It is trite that the power to grant general damages is discretionary and this must be exercised judiciously. I note that the court in *Duncan Nderitu Ndegwa Vs. Kenya Power & Lighting Company Limited & Another* (supra) awarded Kshs.100,000/=as compensation of the infringement of the plaintiffs right to use and enjoyment of the suit property occasioned by the defendants trespass. Justice L.L Naikuni in the ELC Case No. 334 of 1996 *Halal Brothers Limited Vs Roy Rimba & 3 Others (suing on their own behalf and on behalf of all the people squatting on Plot Number Kilifi/Kijipwa/48)* awarded Kshs. 10,000,000 as general damages.



99. But what would be the guiding principle in measuring general damages? Justice Naikuni in the above case cited the dictum of E. Obaga J in 'Phillip Ayaya Aluchio Vs Crispinus Ngayo (2014) Eklr wherein the learned judge stated thus;

The plaintiff is entitled to general damages for trespass. The issue that arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff property immediately after the trespass or the costs of restoration whichever is less See Hostler Vs Green Park Development Co. 986 S.W 2d 500 (No..App.1999).

- 100 The Plaintiff produced a valuation report of the suit properties dated 5/4/22 prepared by one Agnes Ndambu, County Valuation officer. It purports to advise on the current market value of the suit properties for purposes of taxation. The same is given as Kshs. 3,520,000,000/- read Three Billion Five Hundred and Twenty Million. The report is lacking in details as to how the figure was arrived at. The witness was not called to elaborate on the contents. This is not a report that this court can confidently rely on for purposes of computing general damages. It is of no probative value.
- 101 Guided by the authorities above and considering the totality of the facts of this case I think an award of general damages of Kshs. 5,000,000/= read Kenya Shillings Five Million should suffice.
- 102 I now proceed to the claim of special damages and which has been tabulated at Kshs. 20,196,800. From the facts of this case clearly there was the destruction of trees as stated by PW1 and supported by PW4 who stated he visited the scene of destruction at Gazi and established that trees were cut and removed to unknown destination. However, it is trite that special damages must be proved. PW4 a forest officer produced a report dated 4/01/2018. The report is headed 'Valuation Report on Tree Destruction in Plot 4513/44 and 4513/43'. The report gave the species of the trees destroyed, the quantities and values totaling Kshs. 786,100. My problem with this report is that it is not supported by any evidence of how the values were arrived at and which the witness conceded in cross examination he had not indicated the criteria used to arrive at the cost. On reexamination he testified that he had used the commercial market value. No evidence such as to market survey was produced to show the commercial market values. I decline to entertain this report.
- 103 PW3 Michael Murungah an Agricultural Officer produced a report on Crop Damage Assessment and Valuation on Plot 4513/44, 4513/43' and 4513/45. The report shows old coconut trees and mango trees destroyed, quantities and rate applied in Kenya Shillings totaling Kshs. 3,665,800.00. From his evidence and cross examination, it is clear that what is given was just but a sample. While he stated that he used government guidelines to arrive at the figures the same were not produced. This report suffers the same fate as the earlier one by PW4 as I find no probative value in it. It is not enough for the Plaintiff to state the reports were not controverted by the defendants, as professionals and experts they ought to have known better.
- 104 With regard to Kshs. 5,000,000, Kshs. 2,500,000 for theft of cows, goats and chicken, Kshs.50,000 for the surveyor hospital bills, Kshs.340,000 for Kigotis Car Repair and 780,000 for surveyors lost equipment and beaconing tools, the Plaintiff failed to produce before court any documentary proof of the expenditure incurred or any information as to the livestock and chicken to enable the court assess their cost.
- 105 The upshot of the foregoing is that the Plaintiff has failed to prove the special damages prayed to the required standard.



- 106 I have noted plaintiffs Counsels submissions on conversion and I will not spend time on it. It is admitted that the same was not pleaded. It is trite that parties are bound by their pleadings – see *Independent Electoral and Boundaries Commission & Another Vs. Stephen Mutinda Mule & 3 Others* (2014) eKLR. I will let the matter rest.
- 107 On contempt of court orders issued in 2010 and 2016 the same were given under suits that have since been closed by dint of their dismissal. The claim ought to have been addressed within the suits the orders were issued. Clearly in these matters the court is functus officio.
- 108 The upshot of the above is that the Plaintiff has proved its case to the required standard. The court hereby enters judgement for the plaintiffs against the defendants jointly and severally and further invoking its inherent powers under section 3A of the *Civil Procedure Act* the judgement issues in the following terms; -
- a. That a permanent injunction restraining the defendants, whether by themselves, their relatives, or their servants or successors or agents or assigns, and/or by their numerous aliases of “people of Gazi”, and/or “Gazi residents committee” and/or “the pentagon” and/or Gazi squatters or any other person under instructions from the defendants howsoever from dealing in, entering in, obstructing any activities in, and/or interfering with any person, agents, assigns, successors, animals, plants or things authorized or related to and/or alienating, surveying, subdividing, occupying and/or continuing to remain in occupation of any part of parcel No. KWALE/ GAZI 4513/41, 4513/42, 4513/43, 4513/44, 4513/45, 4513/46, 4513/47, 4513/48, 4513/49, 4513/50, 4513/51, 4513/52, 4513/53, 4513/54, 4513/55, 4513/56, 4513/57.
 - b. That for the avoidance of doubt the above orders do not apply to Parcel No. Kwale/Gazi/5010 and its subdivisions.
 - c. That to save the defendants and or any of them and or any person in actual possession of the suit property or any part thereof without the permission of the plaintiffs from forceful eviction pursuant to order a) above and further noting the plaintiffs desire for good neighborliness, it is hereby ordered as follows;
 - I. The individuals above shall pursue amicable negotiations with the plaintiffs and at the plaintiffs discretion, for the sale and or purchase of the portions on which they are in actual occupation within six (6) months of the date of this Judgement. Failure to which and upon expiry of the said six months, the plaintiffs shall be at liberty to evict.
 - II. That any eviction above shall be undertaken in humanitarian manner.
 - d. That in view of the nature of this case all the above orders shall be enforced under the supervision of the Kwale County Commissioner and County Police Commandant in charge subject to orders (c) and (e).
 - e. That in the alternative to (c) above the Government of Kenya to set in mechanisms and facilitate the compulsory acquisition of the suit properties and or any part or portion thereof for the benefit of any genuine squatter in actual occupation of the said suit properties within six (6) months of the date of this judgement. Failure to which the plaintiffs shall be at liberty to evict as per order (c) above.
 - f. That General damages at the sum of Kenya Shillings Five Million (Kshs. 5,000,000.00) is hereby awarded to the plaintiffs.
 - g. That the counterclaim herein is dismissed with no orders as to costs.



- h. That due to the nature of this case and the public interest involved it is my view that each party should bear its own costs.

Orders accordingly

JUDGEMENT SIGNED, DATED AND DELIVERED THIS 15TH DAY OF JANUARY, 2024.

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A.E DENA

JUDGE

DELIVERED VIA EMAIL WITH THE CONSENT OF COUNSELS FOR THE PARTIES.

