



Hakimu (Suing on Behalf of the Estate of Joseph Hakimu Chifu) v Abdalla (Sued as the Legal Representative of the Estate of Mohamed Hamed Abdalla) (Environment & Land Case 132 of 2020) [2024] KEELC 842 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 842 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 132 OF 2020
LL NAIKUNI, J
FEBRUARY 14, 2024

BETWEEN

ELIZABETH JOSEPH HAKIMU (SUING ON BEHALF OF THE ESTATE OF JOSEPH HAKIMU CHIFU) PLAINTIFF

AND

NASSOR MOHAMED ABDALLA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MOHAMED HAMED ABDALLA) DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Elizabeth Joseph Hakimu (Suing on behalf of the Estate of Joseph Hakimu Chifu) the Plaintiff herein through an Amended Plaint dated 28th March, 2023 and filed on court on same day against the Nassor Mohamed Abdalla (Sued as the Legal representative of the Estate of Mohamed Hamed Abdalla) Defendants herein.
2. The Plaintiff as per the Plaint is described as a female adult of sound mind, residing in Kaloleni within Mombasa County in the Republic of Kenya suing above-named Defendant in this suit in a representative capacity as the legal representative of the Estate of the late JOSEPH HAKIMU CHIFU (as per the Grant of Letters of Administration herein attached). Whilst the Defendant is described as a male adult of sound mind residing and working for gain within the Republic of Kenya being sued in a representative capacity as the legal representative of the Estate of the late MOHAMED HAMED ABDALLA.



3. Upon service of the Plaint and Summons to Enter appearance, dated 13th October, 2020 the Defendant filed both their Memorandum of appearance and subsequently a Further Amended Defence and Counter Claim dated 28th March, 2023 on the same day.
4. On 19th May, 2022 upon all parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010 as regards conducting of the pre - trial conference, the case was fixed for full trial on 31st October, 2022 and 18th November, 2022 respectively.
5. It is instructive to note from the consensus of all the parties, on 19th January, 2024 a Site visit (“Locus in Quo”) was conducted by Court pursuant to the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. Accordingly, a report was prepared and it has been attached onto this Judgement for ease of reference thereof.

II. The Plaintiff’s case

6. Based on the filed pleadings by the Plaintiff and the Plaint the brief facts of the case are that the said deceased one JOSEPH HAKIMU CHIFU is and was at all material times the duly registered owner and his heirs entitled to the possession of the property known as Land Title no.7995 Plot no. 313/MN/VI situate at Mainland North within Mombasa County (“the Suit Property”). On or about the 1st September 2020, the Defendant wrongfully entered and took possession of the suit Property and have thereafter, wrongfully remained in possession thereof and have thereby trespassed and continue to trespass thereon.
7. By virtue of the Defendant’s trespass and wrongful occupation of the suit Property, he had misused, damaged, wasted, destroyed, polluted and/or degraded the suit Property by reason of which, the Plaintiff had been deprived of the use and enjoyment of the suit Property. By virtue of the Defendant’s said trespass, there have been constant confrontations between the Plaintiffs family and the Defendant in respect of the suit Property. Accordingly, the Plaintiff averred that the Defendant never enjoyed or had ever enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit Property and as such, had not and/or could not claim any colour of right to the suit Property.
8. Furthermore, the Defendant threatened and intended, unless restrained by this Honourable Court, to continue to remain in wrongful occupation of the suit Property and to trespass thereon. Despite pleas by the Plaintiff to the Defendant to stop trespassing, the Defendant had persisted in the said trespass and continued in his wrongful occupation of the suit Property. By reason of the matters aforesaid, the deceased’s estate had suffered loss and damage.
9. The Plaintiff relied on the following particulars of loss and damages:-
 - a. The Plaintiff and her fellow heirs had been deprived of the use and quiet enjoyment of the suit Property.
 - b. The Defendant’s misuse of the suit Property, including erecting of permanent structures on the suit Property had occasioned detriment to the estate of the deceased.
 - c. Further, the Defendant had prevented the Plaintiff from accessing the suit Property by erecting a perimeter boundary wall thereon construction of which was still ongoing.
 - d. The Defendant had threatened the Plaintiff and her agents with physical violence whenever she or her agents attempt to enter the suit Property.
 - e. The Defendant’s erection of the said perimeter boundary wall fence on the suit Property was an eye sore and had therefore defaced and devalued the suit Property.



10. According to the Plaintiff, despite demand and notice of intention to sue having been issued to the Defendant, the Defendant has refused, neglected and/or otherwise failed to vacate the suit Property. The Plaintiff averred that there was no other suit pending in any Court between the Plaintiff and the Defendant in respect of the subject matter of this suit.
11. The Plaintiff subscribed to the jurisdiction of the Honourable Court. The Plaintiff prayed for Judgment against the Defendant for:-
 - a. A declaration that the Estate of JOSEPH HAKIMU CHIFU (DECEASED) is entitled to exclusive and unimpeded right of possession and occupation of the suit Property.
 - b. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is wrongfully in occupation of the suit Property and is accordingly, a trespasser on the same.
 - c. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is not entitled to remain on the suit Property.
 - d. A permanent injunction restraining the Defendant, whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit Property.
 - e. Vacant possession of the suit Property.
 - f. General damages for trespass.
 - g. 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.
 - h. Any such other or further relief as this Honourable Court may deem appropriate.
12. The Plaintiff summoned eight (8) witnesses to support her case thereof. PW – 1 testified on the 31st October, 2022 as follows:

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

13. PW – 1 was sworn and testified in Kiswahili language. She introduced herself as Elizabeth Joseph Hakimu. She lived at Kaloleni. She was bearing the national identity card bearing numbers 4608135. She was born in the year 1954. She was a business lady and the owner of the suit land. She told the Court that she was married in the year 1968 at Chaani to her husband Joseph Hakimu Chifu on that land. He was an employee of a British man for a while but he left back to his Country. Her husband used to live on the land. She had recorded a statement dated 18th September, 2020 which she adopted as part of the evidence. She had a list of sixteen (16) documents dated 17th September, 2020 which she produced as her Plaintiff Exhibit Numbers 1 to 15 in the order that were listed. The land was theirs as they had lived there with her husband.
14. She sort for assistance from her Parliamentarians. She made reference to Plaintiff Exhibits Numbers 4 and 5 of the Plaintiff bundle of documents. These were letters dated 1st December, 1994 and 21st April, 1995 written to the Town Clerk of Mombasa by the offices of the Attorney General for assistance over the land. She di this as the land had started getting problems. Although she went to Hon. Amos Wako as the Attorney General but never got any assistance. She had sued the Defendant as he had started building a perimeter wall on her land. Upon the death of her husband he was buried at Kaloleni, They



then got the certificate of death and the chief gave them a letter upon which they engaged an Advocate for assistance.

15. According to her, she never knew the Defendant yet they lived on the land from the years 1968 up to 1984 - although she could not remember clearly. They lived there with the whole family. There was an Arab who would be harassing them. When they left the land, there were some people who remained there. There were many people who died while they lived on the suit property and were buried on the land. There were about 10 cemeteries. She wished to get back her land so that she would stop suffering. That was all.

A. Cross examination of PW - 1 by Mr. Matheka Advocate

16. She told the Court that she lived in Kaloleni with her family during the hearing. They had left the land and moved to Kaloleni before her husband died. Her husband was buried at Kaloleni. Before his death her husband was an employee – the care taker of the suit property. The Municipal Council of Mombasa demanded for the rates of the land to be paid. They were looking for the money to pay for the rates but before they could pay the rates, the Arab approached them demanding for the ownership of the land and hence her husband filed the case before the Court.
17. According to her, the Arab said that he had bought the land from the Municipal Council of Mombasa. Up to date they had not received a title for the land. On the land there were many people who were brought in by squatters together with her two children. They left to Kaloleni. The squatters had invaded the land and they build semi - permanent structures on the land. She did not have any documents to show that she attempted to evict the squatters. From the year 1994, she had never been in possession of the land as she feared for her life. She had no knowledge of whether the Arab had been trying to remove the squatters from the land as she was never there.

A. Re – examination of PW - 1 by Mr. Kungu Advocate

18. She reiterated that the Municipal Council officials came and demanded to be paid the land rates. Her husband had filed the suit as they were on the land. She did not know who brought the squatters to the land. She asked the Honourable Court to be given the whole of the suit property.
19. The Plaintiff called its second witness on 31st October, 2022.

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

20. PW – 2 was sworn and testified in Kiswahili language. She introduced herself as Rose Lessoni Salim. She was a holder of the national identity card bearing numbers 5313244, She was born in the year 1950. She informed the Court that she was virtually impaired and she lived at Miritini. Currently unemployed. She was in Court for the case concerning land reference Number CR 7995/1, belonging to her brother Joseph Hakimu Chifu. She told the Court that she was born on the land. Her brother used to work for a foreigner who went back to his country. The foreigner left him the land in the year 1943. According to her, she left the suit land in 1965 when she got married and relocated to Bamburi within the County of Mombasa.
21. She confirmed that since they lived in the suit land, she had never seen anyone coming to evict them. Some of their relatives died while on the land. They were buried on the suit property. Her mother Alice was buried on the suit property so was her brother's son John in the year 1984. According to the witness Joseph Hakimu Chifu's wife Mary Shupu died and was buried on the suit property plus many others including the deceased. She knew Simeon who used to take care of Joseph on facilitating the case. He was a Civic leader. She also knew the Defendant Mohamed Ahmed Abdalla, he was sued as



he went to the Municipal Council and bought the suit property. They had sued him as the land was not his. The land belonged to her brother.

B. Cross examination of PW - 2 by Mr. Matheka Advocate:-

22. She confirmed to the Court that she had studied at Mazeras up to the fifth grade. During the holidays she would stay at her brother's place. She heard that the Arab bought the land which was a mistake as her brother worked for the European/ Foreigner as a shamba boy. But out of old age he left the country and he offered her brother the land. The foreigner gave her brother the documents to the land in that effect in the year 1943.
23. She reiterated that she recorded a statement on 3rd May, 2022 and she confirmed that most of the matters were not recorded on her statement. The issue of Simeon Msechu was not in her statement. She was married while at age of 15 years. There was no where she objected to having the Arab from getting the land. Before the year 2006 when she became blind she would visit the land and she would see the cemeteries/burial sites. It was her brother who went to Court over the suit land.

C. Re - examination of PW - 2 by Mr. Kungu Advocate.

24. She stated that she had not brought photos of the burial sites. She lived with her aunt at Mazeras and during vacations. She would visit her brother's place in Mikindani.
25. On 1st November, 2022, the Plaintiff called PW - 3, the Witness told the Honourable Court that:-

D. Examination – in – Chief of PW - 3 by the Mr. Kungu Advocate

26. PW – 3 was sworn and testified in Kiswahili language. The witness told the court that she was Florence Joseph G. She was a holder of the national identity card bearing numbers 5379728. She was born in the year 1959. She lived in Mariakani and was a business lady. She had recorded a statement on 3rd May, 2022 which she adopted as part of her evidence. According to her she was in Court because of the suit property which belonged to her father, the late Mr. Joseph Hakimu Chifu. She was his child from the second wife – Mary S. Hakimu and she was buried on the said land. She knew Juma Athman Hassan who she stated was her brother in law.
27. According to the witness Juma buried her cousin Saumu on the land in the year 2005. They had child called Kibibi. They separated. While living on the suit property there was no one who came to land to claim it and demanding for them to vacate it.

E. Cross examination of PW - 3 by Mr. Matheka Advocate

28. She confirmed that while living in the suit property, there was nobody who came to claim the land and ask them to vacate. She lived in the suit property up to year 1973 when she got married. She had never testified in this matter. From her identification card, her location indicated that she was from Kinango District. In her statement she never wrote anything on Mr. Juma Athman.

F. Re - examination of PW - 3 By Mr. Kungu Advocate:-

29. The witness reiterated to the Honourable Court that her advocate asked her whether she knew Juma Athman and she confirmed that she knew him.

G. Examination in chief of PW - 4 by Mr. Kungu Advocate.

30. PW – 4 was sworn and testified in Kiswahili language. He told the Court that he was Francis Kamanza Hakimu. He was a holder of the national identity card bearing numbers 5467656. He was borne in



the year 1963. He was a security guard by profession and was in Court that he was Court concerning a land that belonged to his father, Joseph Chifu Hakimu. He was born on in the year 1963 at Chaani Mombasa and he lived there until the year 2000. He recorded a statement dated 3rd May, 2022 which he adopted as part of his evidence.

H. Cross examination of PW - 4 by Mr. Matheka Advocate.

31. The witness told the Court that he was born at Chaani although his identification card showed that he was from Samburu, Kwale District. He was born in the year 1963. He attended Chaani Primary School. He lived in the suit land until he was in 37 years old. By the time Alice was buried, he was 16 years old and his mother died when he was 19 years old. He had not brought the burial permits to court.
32. He witnessed the land dispute his father had. He inquired from his father what had happened and the father told him that the dispute was with an Arab. He used to have a title deed. He knew Rose. She was his cousin sister. His father was a shamba boy and had not bought the land.

I. Re - examination of PW - 4 by Mr. Kungu Advocate.

33. The witness confirmed that it was his father who used to keep the documents. They were taken to his advocate. They had never been evicted from the land for the 37 years that they lived on it.

J. Examination in Chief of PW - 5 by Mr. Kimondo Advocate.

34. PW – 5 was sworn and testified in Kiswahili language. The witness told the Court that she was Mary Julius Karisa, born in Chaani in the year 1975. She was a holder of the national identity card bearing numbers 20685942. She was born in the year 1977. She was in Court with regards to her father's land. She went to Chaani Primary School for her education. She had recorded a witness statement on 3rd May, 2022 which she adopted as part of her evidence.
35. According to the witness her father had had a land dispute and he went to her for them to travel to Nairobi to pursue the matter. In the year 1993, she was pregnant and her child Alfred Msafiri was born. In the year 1995, she got married and relocated to Kaloleni where her husband resided. All the period they lived on the suit land she had never heard of any demand for eviction.

K. Cross examination of PW - 5 by Mr. Matheka Advocate:-

36. She reiterated that her identification card indicated that her location of origin was Kilifi District; Shimo la Tewa Sub – Location. According to her, Chaani was in Magongo, Mombasa. She knew Francis. He was her brother who was from Msambweni where he had bought land. By the year 1995, when she got married she left her parents in the suit land who later left to their ancestral land in Kaloleni. When they left the suit property there was no one else on it. The last time she got to the property was in the year 1997 when she went to bury her sister. She was aware of the squatters although according to her they lived outside the suit property. There were people who may have been family relations who also lived there.

L. Re - examination of PW - 5 by Mr. Kimondo Advocate.

37. She told the Court that she got her identification card after marriage.

M. Examination - in - Chief of PW - 6 by Mr. Kimondo Advocate.

38. PW – 6 was sworn and testified in the Kiswahili language. He told the Court that he was Moses Guni Hakimu. He was a holder of the national identity card bearing numbers 9631448. He was born on 6th



May, 1969 in Mikindani Chaani and he lived in Chaani. Joseph Hakim Chifu was his father and he was in Court due to the land dispute between the parties. He left the land in the year 2005 to Kaloleni Kwa Nyundo. In all these years they had never been evicted.

N. Cross examination of PW - 6 by Mr. Matheka Advocate.

39. According to the witness, from his identification card he was from Kaloleni District. The details were from where he got his identification card. When he left the suit property he was 38 years old. He was from the Giriama tribe. He did not have burial permits for all the people who had been buried in the suit land. It was not true that there had been demands for them to vacate the suit property, as for his he left out of his own volition leaving behind his two sisters and many other family members. There were three to four temporary houses. From the time left he never saw anybody but he later on heard that there was an Arab who alleged to have bought the land.
40. He was the 1st born of the deceased but could not assist his father as he had no means. His father left the suit property and relocated to his ancestral land. The land belonged to his father and the deceased was buried at Kaloleni.

O. Re - examination of PW - 6 by Mr. Kimondo Advocate

41. He confirmed that they lived in temporary structures on the suit land. Hakim left the suit property in the year 1999.

P. Examination - in - Chief of PW - 7 by Mr. Kimondo Advocate.

42. PW – 7 was sworn and testified in Kiswahili language. He told the Court that he was Joshua Ngaza Hakim. He was a bearer of the national identity card bearing numbers 29220771. He was born on 5th June, 1991. He lived in Kaloleni. He left the suit property in the year 1999. He was in Court because of the suit property which belonged to Joseph Hakim Chifu. When he left the suit property he was 8 years old.

Q. Cross examination of PW - 7 by Mr. Matheka Advocate.

43. He confirmed that he left the suit land when he was 8 years old.

DIVISION - P. Re – Examination of PW – 7 – NIL

Q. Examination in Chief of PW - 8 by Mr. Kimondo Advocate.

44. PW – 8 was sworn and testified in Kiswahili language. He told the Court that his name was Alfred Maligidi Guni. He was a holder of the national identity card bearing numbers 30744922. His date of birth was on 23rd December, 1993. He was not on any formal employment. He was in Court because of his grandfather's land Mr. Joseph Hakim Chifu. He was born in Chaani, on his grandfather's land and left the property in 2020 upon the disagreement with the Arabs. There were claims that the land belonged to the Arabs. His grand father and his mother had vacated the land. He lived with his mother Alice Mulongo and the uncles and aunties.
45. According to him his disagreement with the Arabs was that he was refusing to vacate the land. The others had agreed to vacate and they were paid the sum of Kenya Shillings Twenty Thousand (Kshs 20,000/-) to leave the suit land. There were people who came to live in the suit land from the neighbouring communities and they started building semi - permanent houses on his grandfather's land. The land was called Maarani.



46. He had been told by Mzee Ndovu, the squatters were brought on the land. It was Juma (Alias Bilo) or Babake Kibibi who would be bringing in squatters into the land from the years 2018, 2019 and 2020. He would see people coming into the land to settle. They said that they also would be brought on the land by Mzee wa Mta, Mr. Jacob Mutua who approached him asking him to be paid to leave the suit land peacefully but he refused. He was not to be paid by the Arab because the Arab wanted vacant possession. But he refused the offer.
47. He told the Court that one time he was selling sweets, nuts in the streets he saw two motor vehicles with Mr. Juma and the Arabs in it. They urged him to leave the land. They asked him to leave the land but he refused. The following day, he saw people digging holes and building a wall. He would be covering the holes and destroying the wall so the people visited him and he was beaten up. He threw a stone and it hit the screen and the Arab's phone.
48. He testified that he was arrested and taken to Chaani Police Station where he was later released. He went back to the land and the Arabs promised to assist him by giving him a sum of Kenya Shillings Fifty Thousand (Kshs 50,000/-). He left the suit property out of fear. He was the last one to leave.

P. Cross examination of PW - 8 by Mr. Matheka Advocate.

49. He told the Court that he had not mentioned Mr. Juma & Mzee Mutua in his statement. He never had any evidence to show how he protected the land. He never had any document to show that his grandfather was the registered owner of the land.
50. When referred to the Defendant's documents specifically the official search at page 2, the witness told the Court that it showed that the owner of the land was Mohamed Hamed Abdalla by 10th September, 2020 for land ref 313/VI/MN, title No. CR – 25459 in an area of 1.66 acres. According to him he left the land out of fear of the Arabs when he stoned the windscreen and the phone belonging to one of the Arabs. There were many people as squatters who would be paying a sum of Kenya Shillings Five Hundred Thousand (Kshs 500/-) per person to be allowed to build temporary houses or iron sheet roofs and mud walls (Mabanda duni). There was a perimeter wall and a gate. The only person inside the property was Juma Athman and his family.

P. Re - examination of PW - 8 by Mr. Kimondo Advocate.

51. When referred to the official search, the witness stated that the title number was 313/VI/MN; when referred to paragraph 4 of the Plaintiff the witness stated that it indicated L.R. No. CR 7995.
52. On 1st November, 2022 the Plaintiff through his counsel Mr. Kimondo marked the close of their case.

III. The Defendant's case

53. On 28th March, 2023, the Defendant filed its further Amended Defence and Counter - Claim dated the same day. In his defence, the Defendant denied the contents of Paragraph 3 of the Further Amended Plaintiff and that the Plaintiff is the legal representative of the estate of the late Joseph Hakimu Chifu. The Defendant denied that the deceased Plaintiff was the duly registered owner and his heir entitled to the possession of the property known as land title number C.R 7995 plot Number 313/MN/VI situate at Mainland North within Mombasa County (the suit property). The grant of representation dated 11th February 2014 was issued to Winnie M. Karu and Elizabeth J. Hakimu and therefore the Plaintiff lacked the requisite capacity to bring this suit.(The Defendant shall crave leave of this court to raise a preliminary Objection in limine).



54. The Defendant wholly denied the contents of Paragraphs 6-11 of the Plaintiff. The Plaintiff's allegations are factious, imagined and non-existent facts as shall be deconstructed as follows. The Defendant stated that he had been in occupation of the suit property since the 10th June 1994 when the Defendant purchased the same from value notice. The suit property was subject to a previous court case being "Misc. Civil Suit No.77 of 1993 (O.S) Joseph Hakimu Chifu – Versus - Mary Magaret Lindsay and Another which had been concluded. The Defendant averred that from this suit he obtained a decree in his favor dismissing the entire suit.
55. The Defendant further stated that the Plaintiff had no color of right in the property in that the case was heard and determined during the lifetime of the deceased. The order dated issued on 9th June 1994 by the deceased Plaintiff was set aside as the Plaintiff had only instituted the suit against the previous owners whilst the Defendant held the title of the property. The court set aside the order dated 9th June 1993 and allowed 29th March 1994 by allowing the Defendant to participate in the suit on 23rd June 1995. The Defendant further stated that the Plaintiff never raised any triable issue and ought to be dismissed with costs. The Defendant denied the contents of Paragraph 11 of the Plaintiff.
56. The Defendant denied that there was no other suit between the Plaintiff and stated that the Plaintiff willfully misled this court as to the existence of Misc. Civil Number 77 of 1993. (The Defendant shall crave the leave of the court to raise a Preliminary Objection at the hearing of the suit in limine). The Defendant admitted the jurisdiction of the Honourable Court.
57. In his Counter Claim, the Defendant averred that:-
- a. The Defendant reiterated the averments in the Defence and Counter - Claim against the Plaintiff.
 - b. The Defendant stated that he had been in possession of the property from the 10th June 1994.
 - c. The Defendant averred that it purchased the property for fair value from one Simeon Msechu vide a transfer dated 17th May 1994.
 - d. At the time he purchased the property, there were no squatters or persons in the property especially the Plaintiff herein.
 - e. After the purchase of the property, he discovered that there was a court case where the Plaintiff had been awarded the property by virtue of Adverse possession.
 - f. Fearful that he would lose the land, the Defendant successfully applied and was enjoined as a 3rd party in the matter on 25th June 1995.
 - g. It made an application to set aside the judgment which was granted on the 6th October 1995.
 - h. The Defendant still not satisfied then moved the court for dismissal and on 24th November 1998 the suit was struck out with costs.
 - i. The suit having been dismissed meant that all consequential orders obtained then were fully set aside, cancelled and/or revoked.
 - j. Sometime in the year 1997 after the general elections, there erupted skirmishes infamously known as "kayabombo" which displaced persons who sought refuge into the Defendant's property.
 - k. Due to humanitarian grounds, the Defendant allowed the squatters therein to temporarily stay on the property.



- l. On or about the year 2001, the Defendant commenced a civil suit in “HCC NO.314 OF 2001 Mohamed Hamed Abdalla – Versus - Hakim Chifu & 9 Others to evict the squatters who had refused to leave the premises.
 - m. After a long and torturous battle, the Defendant compensated the squatters who then vacated the property.
 - n. The Defendant was shocked when he was served with this court summons when he had just completed the perimeter wall.
 - o. He held an indefeasible title to the land.
 - p. The title document held by the Plaintiff was acquired through fraud, concealment of material of facts and unlawfully.
58. The Particulars of fraud/ concealment of material of facts and general unlawfulness:-
- a. Causing and obtaining a Provisional Certificate of the title in his name on the 18th October 2004 whilst knowing that the decree and suit had been dismissed.
 - b. Causing the registration of the decree on the 13th October 2004 when the decree had been set aside.
 - c. Causing the registration and issuance of a provisional title on a property that had a long-term lease.
 - d. Fraudulently acquiring a title to the property when he already knew the property belonged to another.
59. According to the Defendant when he acquired the property, he acquired a leasehold interest from the Municipal Council of Mombasa (MCM) as it then was. Upon acquisition of the leasehold interest, the same was registered in CR Number 25459 new C.R file. The original C.R Number 7995 ceased to exist or was discontinued after the issuance and registration of the long-term lease. Having purchased the property from Simeon Msechu, the first lessee he had acquired the property for a sum of Kenya Shillings Four Hundred (Kshs. 400,000.00/=) and therefore is an innocent purchaser for value without notice. At no time was he aware of the Plaintiff’s interest in the property till after he had purchased the same. The Defendant prayed that the Plaintiff’s suit be dismissed and Judgment be entered as follows:-
- a. A Declaration that the interest in the property is a leasehold interest by virtue of first registration on the 15th April 1994.
 - b. A declaration that the Defendant being the lessee is the registered owner of the property.
 - c. A declaration that the entries numbers 9 and 10 were entered unlawfully.
 - d. An order for the cancellation of entries numbers 9 and 10 dated 13th October 2004.
 - e. An order for the cancellation and/or revocation of the Plaintiffs provisional certificate of title issued on the 13th October 2004.
 - f. An order that the Defendant is the legal, registered and beneficial owner of the leasehold interest of the property known as MN/313/VI.
 - g. An order for the cancellation and removal of any orders issued by this or any other court inhibiting and prohibiting the Defendant from dealing with the property.



- h. Costs of this suit.
60. The Defendant summoned four (4) witnesses. On 28th March, 2023, the Defendant called his first witness DW - 1 who told the Court that:-

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

61. DW – 1 sworn and testified in the English language. He told the Court that he was Mr. Seif Mohamed Hamad Abdalla. He resided in Qatar. He recorded a statement on 27th October, 2022, they had 7 documents dated 19th October, 2020 and a supplementary list of 10 documents dated 27th October, 2022 which he adopted as part of his evidence and Defendants Exhibit numbers 1 to 17.
62. On the acquisition, the witness told the Court that the property was purchased from Simeon Msechu by his father – Mohamed Ahmed Abdalla. This was from the transfer executed on 19th May, 1994. He acquired it from the Municipal Council of Mombasa. There was a Letter of Allotment from the Mombasa Municipal Council dated 13th September, 1993. He was given a lease dated 8th March, 1994. The Municipality acquired the land from Mary Margaret and Lindsay Holton who had surrendered the land to the municipality as they were unable to pay the rates. The transfer was dated 13th April, 1994. It was presented to the Land Registrar on 15th April, 1994, the transfer to Msechu was effected on 13th September, 1993 a year earlier. He was given a lease on 8th March, 1994 and it was registered on 15th April, 1994.
63. On the issue of the court orders, the witness told the Court that back in year 1994, they realized that there was a court case concerning the suit property. When referred to the decree of the Civil Suit No. 77 of 1993 (OS), the witness told the Court that from it the property was obtained by Joseph Hakimu Chifu. There was an order of 6th December, 1995 setting aside the orders made on 29th March, 1994. There was an order to strike out the entire suit on 24th November, 1998 from that time they never did anything else (page 3) which read that it was issued on 5th July, 2017. According to the witness they went to the Land Registrar and wanted to do an Official search. He told them that the title had many entries and asked for the court order. And that was when it was issued on 5th July, 2017.
64. On the issue of the registration, the witness told the court when referred to the Plaintiff's document that it was called Provisional Certificate to CR 7995. When referred to a search by Mohamed Hamed Abdalla he stated that it was done on 10th September, 2020 for CR. No. 25459. The Plaintiff's title entry no. 7 was the transfer to Simeon R. D. Msechu on 13th April, 1994 and entry No. 9 which was a Provisional Title Certificate issued on 25th June, 2004 which was 10 years later.
65. According to the witness Entry No. 8 was the lease dated 8th March, 1994. The lease document bore the stamps registration number 7995/8 on 15th April, 1994. The entry No. 2 was cancelled – the number was 25459/1. They were given a lease for 99 years by the municipal council i.e. the leasehold title. The title number was 7995/9 which was a freehold title.
66. On the issue of possession, the witness told the Court that they took possession of this time they purchased the land to date. When they purchased it there was no one on the land. Joseph Hakimu Chifu was not on the land. They had squatters on the land, it follows after the elections was the first time they came and compensated them and they left (see Defendant Exhibit 16).
67. According to the witness, his father was approached by the local members and requested for people to occupy the land. But they left in the year 2021. In the year 2022 they constructed a perimeter wall to stop people from being on the land. It was not correct that they entered the land on 1st April, 2022. He averred that from the Plaintiff's witness they agreed that the Defendant had built a wall.



68. On the Counter - Claim, he stated that at Paragraph 33, were the particulars of fraud/concealment of material facts. The entry no. 9 and 10 had not been entered on the provisional title. It was wrong one can not issue a title and a lease at the same time. They had been on this matter for a long time. But when they started construction the property and the same was stopped. They had never had any problems. They had been on the matter for 30 years on the land dispute. They had a lot of legal expenses incurred on the matter they would like the suit to be dismissed and the Counter Claim allowed.

B. Cross examination of DW - 1 by Mr. Kungu Advocate.

69. He told the court that he was 39 years old. His father had acquired the title deed in the year 1994 when he was 10 years old. By then he could understand these issues as his father could never anything controversial. The matter was discussed on the table. He never witnessed the purchase of the land. He never lived on the property, none of his family members did.

70. He testified that there was a case of land adverse possession and there was a decree issued to Joseph Hakim Chifu. He referenced the decree and stated that 'the case no. Misc Civil Suit No. 77 of 1993 (OS). His father acquired the land in year 1994, which was in the pendency of the case. The Court case ended in year 1998 meaning that his father acquired the land while the case was on going. He stated that when the suit was struck out, from the decree there was nothing that declared that his father was the owner of the suit property. The allotment letter was dated 13th September, 1994. There was a transfer from Margaret Lindsay to the Municipal Council on 13th September, 1994 but was done to Simeon Msechu a year later before the Municipal Council got the land.

71. When referred to a letter dated 11th January, 1994, the witness told the Court that at page 9 of the supplementary affidavit to the Attorney General, he was the Counsellor. The transfer was signed by Mr. Francis John alias Francis Bowyer, the duly attorney of the vendor; power of attorney no. 6016. There were no signatures of the transferee.

72. The witness was domiciled in Qatar from the year 2015; so when the wall was being built he was away. He never paid the Plaintiff to get out of the land. They did not have any squatters as their witnesses. They agreed to compensate the squatters they did it out of good will as they were never compensated by the Government. It was to assist them for their relocation and fare. There were some people they paid to leave the land but there were others they sued.

73. When referred to the provisional title at Entry Numbers 8 and 9 the witness stated that Simeon Msechu and Joseph Hakim Chifu, his father were not in the title.

C. Re - examination of DW - 1 by Mr. Matheka Advocate.

74. The witness told the Court that from the Court decree, his father was a Respondent. On the lease, it was to start for 99 years from 1st September, 1993 this was before it was allocated to Simeon Msechu.

75. On 13th July, 2023 the Defendant called DW - 2 and DW - 3 who told court that:-

D. Examination - in - Chief of DW - 2 by Mr. Matheka Advocate.

76. DW - 2 was sworn and testified in English language. He was called Ben M. Valasa. He was a holder of the national identity card bearing numbers 7034511. He was born on 6th November, 1965. He the Locational area Chief bearing designation no. C08AJ. He stayed at Chaani. He started as an Assistant Chief and in year 2016 he became the Location Chief of Chaani. He knew the sons of Mohamed Hamed Abdalla and he identified them in Court. He was aware of the property No. MN/313/VI. In 2013 the area MP Omar Mwinyi moved from the subsequent adjacent plot and he was told they



moved onto the plot as squatters. They were advised not to build permanent structures on the suit property. In the year 2020 Chifu went to him and said that he wanted to build a permanent wall. The Plot was called 'YA MWARABU'. They agreed to move the people out upon being paid some stipends through MPESA.

77. The witness stated that after that the squatters left the suit property. He was told that there was a court order stopping the owners from carrying out any construction on the land. he had not seen any other Court order and had never heard of any other complaint of persons having been evicted from the suit premises.

E. Cross examination of DW - 2 by Mr. Kungu Advocate:-

78. DW – 2 testified that he did not know Mohamed Hamed Abdalla hence they never interacted. He also had no familiarity with Joseph Hakimu. He came to know the Defendant's sons in the year 2020. He did not know of any dispute as the land was occupied by squatters. In the year 2020 Aseif came to him after they built the perimeter wall and he had the land surveyed which was after the year 2020. He indicated that he wanted the squatters out of the land but he would compensate them. The Plot was known as 'Kwa Mwarabu'. When they went to him, they never produced any documents as there was no dispute whatsoever.
79. He stated that he knew there were squatters brought onto the land. He assumed they were squatters as they did not know the owner of the land. The year 2020 was when the suit was filed. There was no forceful eviction.

F. Re - examination of DW - 2 by Mr. Matheka Advocate.

80. He told the court that the evictions were not forceful. None of the squatters had made a claim of having been forcefully removed from the land.

G. Examination in Chief of DW - 3 by Mr. Matheka Advocate.

81. DW – 3 was sworn and testified in Kiswahili language. The witness told the Court that he was Juma Athman Hassan. He was a holder of the national identity card bearing numbers 9967000. He was born on 28th April, 1968. He lived in Chaani and worked as a laborer. He knew Mohamed Hamed Abdalla (the deceased) who was since deceased. He gave him work. He knew Aseif and Nassir who were the children of the deceased. He recorded a witness statement. He knew Joseph Hakimu Chifu. By the time he was on the land, they never got nor was Mr. Hakimu on the land.
82. In the year 2020, the sons came and spoke with the squatters. He agreed that they wanted to build a perimeter wall and they started building it. After they building it they agreed to had to have them move out peacefully after being paid some stipends. Before that the squatters had been brought in by the former Member of Parliament to settle them there temporarily; they were advised not to build any permanent structures and the same was agreed upon. So upon the agreement with the two brothers, the squatters agreed to move out peacefully.

H. Cross examination of DW - 3 by Mr. Kimondo Advocate.

83. DW – 3 confirmed that he came to the land in year 1999. By then the plot was vacant. But there were other squatters. He followed Mzee Abdalla to give him work as a laborer at the plot. He would be talking to the squatters and have them paid. Therefore, he became the caretaker of Mzee Abdalla who paid him a sum of Kenya Shillings Seven Thousand (Kshs 7,000/-) per month. Currently, he was being paid by the son Aseif. He was the only one living on the suit property with his family; his wife and four



children. Mzee Abdalla never told him of any issue with a third party. Saumu Badari, was his former lover and they had a child together. They lived on different plots.

84. He confirmed that the land belonged to Mzee Mohamed Hamed Abdalla as he paid the squatters and also paid him for being the caretaker. On being referred to Paragraph 1 of his witness statement, he confirmed it indicated that he had been living on the suit land since the year 1999.

I. Re - examination of DW - 3 by Mr. Matheka Advocate.

85. The witness reiterated that Saumu Badari was his former lover. She was not the daughter of Hakimu. When he got there he found squatters.

J. Examination in Chief of DW - 4 by Mr. Matheka Advocate.

86. DW – 4 was sworn and testified in the English language. He was Nassir Mohamed. The deceased - Mohamed Hamed Abdalla was his father. He was a holder of the national identity card bearing numbers 27512273. He was born on 14th June, 1986. He was a business man and he had a Power of Attorney to sign all the pleadings. He also signed the witness statement and he had the Grant Letters of Administration.
87. There was neither cross examination nor re examination of DW – 4. On 13th July, 2023, the Defendant through his advocate Mr. Matheka marked his case closed.

IV. Submissions

88. On 13th July, 2023 the Honourable Court in the presence of all the parties gave directions on the disposition of the Amended Complaint dated 28th March, 2023 by way of written submission. Pursuant to that on 11th October, 2023 after the Honourable Court confirming compliance set the Judgment date on 8th February, 2023.
89. At this juncture, the Honourable Court wishes to sincerely express its utmost appreciation to the Learned Counsel Mr. Kungu and Mr. Kimondo Advocates for the Plaintiff and Mr. Matheka Advocate for the Defendant in the professional manner, resilience devotion, dedication and diligence the handled the case all the way through. I pray they sustain that spirit even in other matters they will be called upon to render services on behalf of their clients.

A. The Written Submissions of the Plaintiff

90. The Plaintiff through the Law firm of Messrs. Patrick Kung'u & Company Advocates filed her written submissions dated 19th September, 2023. Mr. Kungu and Mr. Kimondo Advocates commenced their submissions by stating that they would tackle it as follows:-
- a. Brief background of the matter
 - b. Possession and occupation of the suit property
 - c. Mohamed Hamed Abdalla's claim on the Suit Property
 - d. Mzee Joseph Hakimu Chifu Estate's claim on the suit property.
 - e. Conclusion
91. According to the Learned Counsels, the brief facts of the matter were that the late husband to the Plaintiff - one Joseph Hakimu Chifu passed away on 25th October, 2009. In the year 1943, the said deceased was employed as a home caretaker by one Miss. M.G.L Allan who was the proprietor of land



registered as Land Title no. 7995 plot no. 313/MN/VI situated at Mainland North within Mombasa County (“the suit Property”). Later as fate would have it, the said Miss M.G.L Allan passed away in the year 1956 and her heirs Mary Magretta Lindsay and Joanne Agnes Lindsay Dalley relocated to Canada and left the late Mzee Joseph Hakim Chifu on the suit property. Mzee Joseph Hakim Chifu continued living on the suit property, while looking after it and keeping off illegal intruders without pay for years. In the 1985, the Mombasa Municipal Council officers came along demanding land rates arrears and interest of the same for the suit property. Since the late Joseph Hakim Chifu did not know what to do, he sought help from one gentle man who went by the name Morris Mwendar, who they believed was or is an Advocate of the High Court. The said Morris Mwendar on 4th December, 1985 wrote a letter to the Canadian High Commissioner using his letter head with the initials ‘M.M Mwendar Esq’. In the said letter, the Mr. Mwendar explained that Mzee Joseph Hakim Chifu’s situation and sought help in tracing the heirs of the late Miss M.G.L Allan. The said letter was produced and marked as Plaintiff Exhibit number 4 and appears as document number 4 on the Plaintiff’s list of documents dated 17th October 2020.

92. Apparently, the said letter did not help much and so after waiting for a few years, the late Mzee Joseph Hakim Chifu sought help from his leaders i.e. Hon. Simeon R.D Msechu his area Councilor and Hon. Ali Abdi his area Member of Parliament who was the then Assistant Minister of Home Affairs and National Heritage. Hon. Ali Abdi as he then was, wrote to the Attorney General on 8th July, 1992 explaining Mzee Joseph Hakim Chifu’s situation and sought assistance in having Mzee legally acquire ownership of the suit property. It was important that the court notices the contents of Paragraphs 4 and 5 of the said letter dated 8th July, 1992 by Hon. Ali Abdi to the Attorney General which was marked as Plaintiff Exhibit number 5 and appears as document number 5 on the Plaintiffs list of documents dated 17th September, 2020. In the said Paragraphs, the good M.P stated that the said Mr. Mwendar had tried to swindle the said property from Mzee Joseph Hakim Chifu by tricking him to sign a Special Power of Attorney with the former as the donee but the latter realized the treachery in time and never returned the said Special Power of Attorney. He also stated that he had referred Mzee Joseph Hakim Chifu to two Advocates who demanded a portion of the suit property in exchange for their legal services and this did not sit very well with Mzee. This left them with no other option but to seek help from the Country’s Chief Legal Officer the Attorney General.
93. On 4th August, 1992, the office of the Attorney General responded to Hon. Ali Abdi’s Letter dated 8th July, 1992 and advised that Mzee Joseph Hakim Chifu should go to court and apply for Land Adverse Possession for him to legally acquire ownership of the suit property. The Attorney General went further to advice on the procedure that Mzee Joseph Hakim Chifu should follow under the Civil Procedure Rules since he was a pauper. The said letter by the office of the Attorney General was marked as Plaintiff Exhibit number 6 and appears as document number 6 on the Plaintiff’s list of documents dated 17th September, 2020. As advised, Mzee Joseph Hakim Chifu went to Mombasa High Court and filed a civil suit “Misc. Civil Suit number 77 of 1993(OS). On 29th March, 1994, the court issued orders declaring him the proprietor of the suit property and directing the Registrar of Lands to effect registration of the same in Mzee Joseph Hakim Chifu’s name. On 9th June, 1994 a decree was issued. The said decree was marked as Plaintiff Exhibit number 7 and appears as document number 7 on the Plaintiffs list of documents dated 17th September, 2020.
94. After getting the said decree, Mzee Joseph Hakim Chifu faced difficulties executing the same. He was informed by the then Mombasa Town Clerk that the suit property was registered in the name of one Mohamed Hamed Abdalla the deceased Defendant herein. Mzee Joseph Hakim Chifu was forced to go back to the Attorney General for assistance and a letter from the latter’s office dated 16th December, 1994 was written to the said town clerk wherein he was reprimanded for illegally allocating



- the suit property to the said Mohamed Hamed Abdalla. The said letter by the Attorney General dated 16th December, 1994 was marked as Plaintiff Exhibit number 8 and appears as document number 8 on the Plaintiffs said list of document. The said letter was later followed by another letter to the said town clerk by the Deputy Solicitor General dated 21st April, 1995, letting the said town clerk know of their intention to institute contempt of court proceedings against him for failure to revoke the illegal allocation of the suit property to the said Mohamed Abdalla. The said letter by the Deputy Solicitor General dated 21st April, 1995 was marked as exhibit number 9 and appears as document number 9 on the Plaintiff's said list of documents.
95. The Learned Counsel went further to state that the said Mombasa Town Clerk soon thereafter saw the light and wrote to Mzee Joseph Hakimu Chifu on 22nd May, 1995 instructing him to go and take possession of the suit property and that any claims that the said Mohamed Hamed Abdalla may have had on the said property should be referred to the Council. The said letter by the Mombasa Town Clerk dated 22nd May, 1995 was marked as exhibit number 10 and appears as document number 10 on the Plaintiff's said list of documents.
96. The Mombasa Senior Registrar of Titles then wrote to the said Mohamed Hamed Abdalla on 22nd March, 1999 instructing him to surrender any title document to the suit property in his name for cancellation to enable the same to be registered in the name of the rightful owner Mzee Joseph Hakimu Chifu. The said letter by the Mombasa Registrar of Titles dated 22nd March, 1999 was marked as exhibit number 11 and appears as document number 11 on the Plaintiff's said list of documents. On 21st November, 2003, the Mombasa District Commissioner wrote to the Commissioner of Lands at Ardhi house referring Mzee Joseph Hakimu Chifu's case to him for issuance of land title. Mzee Joseph Hakimu Chifu struggled until he got his decree registered on 13th October, 2004 and a provisional title certificate was issued to him. The said provisional certificate was marked as exhibit number 14 and appears as document number 14 on the Plaintiff's said list of documents.
97. On the possession and occupation of the suit property, the Learned Counsel submitted that in the case of "Sirya & 9 others – Versus - Karani (Environmental and Land Originating Summons 60 of 2020(2023)KEELC 16689(KLR))" the court held that actual possession meant the physical use of the land as property owner would, in accordance with the type of property, location and uses. Mzee Joseph Hakimu Chifu lived on the suit property since 1943 when he was employed by M.G Allan as a caretaker. He lived on the suit property with his family and even buried some of therein. During the hearing of the Plaintiff's case, one Rose Lesseni Salim who adopted her statement dated 3rd May 2022, testified that she was sister to Mzee Joseph Hakimu Chifu. She was born on the suit property and lived therein with his brother and the rest of the family for fifteen years before she got married. She also testified that a total of four (4) family members who passed away were buried on the suit property. The said family members were:-Alice Mlongo (Mother to Mzee Joseph Hakimu Chifu) who died in the year 1965. John Mloleni (Son to Mzee Joseph Hakimu Chifu) who died in the year 1984. Mary Shubu (2nd wife to Mzee Joseph Hakimu Chifu) who died in the year 1992. Alice Mlongo Hakimu (Daughter to Mzee Joseph Hakimu Chifu) who died in the year 1997.
98. The Defendant claimed that Mohamed Hamed Abdalla immediately took possession of the suit property after having the same transferred to him. The question then arises, if he was in actual possession, why did he then allow the burial of the said Alice Mlolongo Hakimu who was buried on the suit property in the year 1997 which is after Mohamed Hamed Abdalla allegedly acquired it? Moses Guni Hakimu a son of the late Mzee Joseph Hakimu Chifu testified that he was born in the year 1969 on the suit property. He lived there for thirty-six (36) years. He stated that his father left the suit property in the year 1999 for his ancestral home in Malamweni - Kaloleni in Kilifi County after he started having some health issues. Moses Guni Hakimu was left on the suit property together with



his brother Francis Kamanza Hakim, his sister Alice Sikukuu Hakim and nephew Alfred Malgidi Guni. He later in the year 2005 left for Kaloleni to start a new life living behind the said sister Alice Sikukuu Hakim and his nephew Alfred Malgidi Guni on the suit property.

99. Mr. Alfred Malgidi Guni on his part testified that he was born in the year 1993 on the suit property and lived therein until September 2020 when the Defendant started building a perimeter wall on the suit property. He protested the same, was threatened and got arrested but was never charged in Court. This led to the Plaintiff filing the suit herein wherein she got injunction orders to stop further construction on the suit property. It was as clear as day light that Mzee Joseph Hakim Chifu's family had been in actual physical possession of the suit property since the year 1943 when he was employed by the said Mr. M.G.L Allan. The Defendant was never in actual possession of the suit property and he adduced no evidence to prove the same. Unlike the Plaintiff's family, the Defendant never lived on the suit property and they never adduced evidence to prove that they were in actual possession of the same.
100. The Defendant brought a witness (DW - 2) named Mr. Ben Barasa. The said witness testified that he started working as an Assistant Chief in Chaani Location in the year 2008. He also stated that he did not know Mohamed Hamed Abdalla and that he only knew his sons Mr. Nassor Mohamed Abdalla and Mr. Aseif Mohamed whom he came to know in the year 2020 when they came to inform him that they wanted to build a perimeter wall on the suit property and needed his assistance in getting rid of the squatters who were living on the suit property. Of the suit property, he testified that he came to know about it in the year 2013 after some squatters were brought to live there by the area Member of Parliament. He could not testify as to the ownership of the suit property since he did not know the owner of the same. It was therefore correct to state that the suit property was never in possession or occupation of the Defendant or his family and that they only attempted to possess the same in September 2020 by initiating the building of a perimeter wall but the Plaintiff rushed to court and on 22nd September 2020 got injunction orders restraining the former from proceeding with the construction of the said perimeter wall.
101. The Defendant also brought another witness Mr. Juma Athman Hassan (DW - 3). He testified that he was employed as a caretaker by Mohamed Hamed Abdalla earning a salary of Kenya Shillings Seven Thousand (Kshs. 7,000.00/=) per month. His credibility was called into question by Plaintiffs' Counsel during cross examination after he stated that he did not live on the suit property while in his statement dated 27th October 2022 he clearly stated that he lived therein. His credibility was further questioned after he admitted that he had a relationship with Saumu Bada and sired a child named Kibibi Juma Athmani. The said Saumu Bada was a niece to Mzee Joseph Hakim Chifu and the Plaintiff's witnesses testified that the said couple lived with the rest of Mzee Joseph Hakim Chifu's family on the suit property before separating and Juma Athman Hassan left. The sole purpose of the said witness was to try and mislead the court that Mzee Joseph Hakim Chifu and his family never lived on the suit property which he failed miserably.
102. The Learned Counsel submitted on the issue of Mohammed Hamed Abdalla's claim of owning the suit property that the Defendant filed his Defence dated 16th October 2020 together with a list of documents also dated 16th October 2020. In the said list of documents, the Defendant introduced documents that Plaintiff never knew existed. Amongst the said documents was a copy of a decree dated 24th November 1998 striking out Mzee Joseph Hakim Chifu's suit no.77 of 1993 for failure to adhere to court orders issued before by the said court. Relying on the said decree, the Defendant filed an application dated 16th October 2020 in the suit herein, seeking its dismissal on the grounds that the matter was Res Judicata. This Court in its ruling delivered on 19th May 2021 dismissed the said application with costs and based the same on the fact that the said suit no. 77 of 1993, although it was struck out, the issues raised therein were not addressed and finally determined by the court.



Another document that they introduced was a transfer document for the suit property dated 13th April, 1994 which was received and stamped by the District Land Registrar of Mombasa on 15th April, 1994. The purported transfer was signed by one John Francis Bowyer as the duly appointed Attorney of the Vendor one Mary Margaret Lindsay Holton the daughter and heir of the late M.G.L Allan who had employed Mzee Joseph Hakim Chifu. The said purported transfer was transferring the suit property from the said owners to the Municipal Council of Mombasa. The interesting thing is that the said purported transfer was only signed by the said John Francis Bowyer, was never signed by the Transferee i.e., the Municipal Council of Mombasa. The Defendant also introduced a Letter of Allotment dated 13th September 1993 by the Municipal Council of Mombasa allocating the suit property to one Simeon R.D. Msechu. Another suspicious fact that should raise the Courts tentacles was that the said allotment was done before the Municipal Council of Mombasa had the suit property transferred to it by the said Mary Margaret Lindsay Holton. It was also important for the court to note that the Plaintiff's witnesses testified that the said Simeon R.D Msechu was Mzee Joseph Hakim Chifu's area Councilor in the said Municipal Council of Mombasa. They testified that Mzee Joseph Hakim Chifu approached the said Simeon R.D Msechu seeking assistance in his quest to legally own the suit property. They also testified that Mzee would go to the said Councilor to get fare to travel to the Attorney General's office in Nairobi. It was therefore not unreasonable to infer that the said Simeon R.D Msechu took advantage of; his position as a Mombasa Municipal Council member, Mzee Joseph Hakim Chifu's ignorance and pauperism to have the suit property irregularly transferred to him behind the latter's back. The said inconsistencies speak for themselves.

103. According to the Learned Counsel, the Defendant also introduced a letter dated 11th January 1995 purportedly written by the Clerk of the Municipal Council of Mombasa wherein on the first paragraph it confirmed that indeed Mr. Simeon R.D. Msechu was a Councilor. While still on the said letter dated 11th January 1995 which was document number 7 on the Defendant's Supplementary List of documents dated 27th October, 2022, they asked the Honourable Court to take a keen look at the purported signature of the author i.e., D. J. Randu the Town Clerk as he then was. The Learned Counsel sought for the Court's indulgence to compare the said signature with the ones on:-
- i. The letter by the said D.J. Randu the Town Clerk dated 16th November 1994 which was document number 6 on the Defendant's supplementary list of documents dated 27th October, 2022,
 - ii. The above-mentioned Letter of Allotment by the said D.J. Randu the Town Clerk dated 13th September 1994 which was document number 5 on the Defendant's list of documents dated 16th October, 2020,
 - iii. The transfer document from Simon Msechu to Mohamed Hamed Abdalla dated 8th March 1994 signed by the said D.J. Randu the Town Clerk and which was document number 6 on the Defendant's list of documents dated 16th October, 2020,
 - iv. The above-mentioned letter by the said Mombasa Town Clerk to Mzee Joseph Hakim Chifu dated 22nd May 1995 which was document number 10 on the Plaintiff's list of documents dated 17th September, 2020.
104. According to the Learned Counsel, the above listed documents were all signed by the said D.J. Randu the Mombasa Town Clerk and even a casual look of the signatures on the said documents one would conclude that they were signed by one and the same person. However, the signature on the said letter dated 11th January 1995 which was document number 7 on the Defendant's supplementary list of documents dated 27th October, 2022, left one with the impression that it was signed by a different



person and not the said D.J. Randu the Mombasa Town Clerk who was supposed to have signed it. This also was suspicious and should raise the courts tentacles.

105. It was the Learned Counsel's submission that the title that the Defendant claimed to have was not absolute and indefeasible since the allocation was neither; legal, proper nor regular. To buttress on this point the Learned Counsel cited the case of:- "Funzi Development Limited & Others – Versus - County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 (2014) eKLR", the Court of Appeal stated that:-

“.....a registered proprietor acquires an absolute indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”

106. As herein above stated, the allocation of the suit property to Simeon R.D Msechu was done on 13th September 1993 and the Transfer of the same from the Mombasa Municipal Council to him was done on 8th March 1994. This was before the suit property was transferred to the said Mombasa Municipal Council since the transfer transferring the same from Mary Margaret Lindsay Holton the daughter and heir of the late M.G.L Allan was dated 13th April 1994 and was stamped by the District Land Registrar of Mombasa on 15th April 1994. Therefore, the Mombasa Municipal Council allocated and transferred the suit property to the said Simeon R. D Msechu before the same was transferred to it by the original owners. It did not get more illegal, improper and irregular than that.
107. The Mombasa Municipal Council transferred a property that it did not own to its Council Member Simeon R.D Msechu who in turn transferred it rather quickly to Mohamed Hamed Abdalla via transfer dated 17th May 1994. It was very suspicious that the said Council member transferred the suit property to the Defendant just one (1) month after acquiring it. It would therefore not be farfetched to infer that he knew the allocation of the suit property to him was irregular and that was why he was quick to dispose it as fast as he did.
108. Whether the said Mohamed Hamed Abdalla was an innocent buyer in good faith or not really did not matter. The provision of Article 40(6) of *the Constitution* (2010) is very clear that the rights to own property do not extend to any property that has been found to have been unlawfully acquired. The provision of Section 26 (1) (b) of the *Land Registration Act* no.3 of 2012 also states:-

“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, easement, restriction and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

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



109. Further, the Learned Counsel cited the Case of:- “Alice Chemutai Too – Versus - Nickson Kipkurui & 2 others (2015) eKLR”, the court held that:-

“For Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors i.e., fraud etc. The title of an innocent man is impeachable so long as the title was obtained illegally, unprocedurally or through corrupt scheme.”

110. They proceeded on to refer this Honourable Court to the Supreme Court case of:- “Dina Management Limited – Versus -County Government of Mombasa & 5 others (Petition 8 (E010) of 2021)[2023] KESC 30(KLR)” where the Supreme Court held that:-

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.”

111. The Counsels averred that the Supreme Court went further and held that “.....We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.”

112. The Learned Counsels humbly submitted that Councilor Simeon R.D Msechu had no valid legal interest to pass to Mohamed Hamed Abdalla, and that since the suit property was very close to the port of Mombasa and bound to be attractive and lucrative, the said Mohamed Hamed Abdalla ought to have been more cautious in undertaking his due diligence before purchasing the suit property from the said Councilor.

113. On the issue of Mzee Joseph Hakim Chifu Estate's claim of on the suit property, the Learned Counsels submitted that one thing that was certain and had not been challenged, was the fact that Mzee Joseph Hakim Chifu had lived on the suit property for more than twelve (12) years which led to him getting the Adverse Possession orders he got in 29th March 1994. The Defendant introduced a copy of Orders made on 6th October 1995 that set aside the said Adverse Possession Orders and a copy of a Decree issued on 24th November 1998 purportedly striking out Mzee Joseph Hakim Chiu's suit. The suspicious thing about the said copy of decree was that it reads:- “That the originating summons dated the 12th January 1994 be and hereby struck out with costs.”

114. It was the Learned Counsel's submission that the said Decree could not be referring to Mombasa High Court Misc. Civil Suit No.77 of 1993, wherein Mzee Joseph Hakim Chifu was the Plaintiff since as the citation reads, his suit was a 1993 suit and not a 1994 suit. As herein above stated, the Mombasa Municipal Council allocated and transferred the suit property to its council member before the same was transferred to it by the original owners, thus making the said process illegal, improper and irregular. This flawed process was what led to the said Mohamed Hamed Abdalla acquiring the title he claimed to have, which as they herein above submitted, was void ab initio since the said Mombasa Municipal Council did not own the suit property at the time it was allocating and transferring it to the said Councilor, who in turn transferred it to Mohamed Hamed Abdalla.

115. They argued that the irregular and improper documents used in the above stated transactions were the ones used by the said Mohamed Hamed Abdalla to have Mzee Joseph Hakim Chifu's decree of Adverse Possession set aside. The Court had found Mzee Joseph Hakim Chifu as fit to be granted the said Adverse possession Orders, before the same were set aside upon the court's reliance on illegally,



improperly and irregularly acquired documents which were not rebutted for reasons that were going to be hereinunder stated.

116. The Learned Counsel averred that as hereinabove stated, the Defendant introduced a copy of a Decree issued on 24th November 1998 purportedly striking out Mzee Joseph Hakim Chifu's suit which they highly doubt for the reasons hereinabove stated. Be that as it may, the Plaintiff in her Replying Affidavit dated 3rd November 2020 annexed a letter dated 26th August 1998 marked as "EJH1". In the said letter, Mzee Joseph Hakim Chifu the Plaintiff's late husband was expressing his dissatisfaction to the Attorney General about the conduct of his advocate in the said suit Mombasa HC Misc. suit no. 77 of 1993. The Hon. Attorney General had referred the deceased to the said advocate for representation in the said matter. In the said letter, Mzee Joseph Hakim Chifu was complaining to the Hon. Attorney General that once they went to court for hearing, the said advocate never addressed the court which led to the Hon. Judge summoning Mzee and asking him why he had not engaged an advocate despite having prior knowledge of the hearing date. Mzee Joseph Hakim Chifu was ordered to pay court adjournment fees and the Defendant's Advocate's costs of the day. It was quite clear from the said letter that Mzee Joseph Hakim Chifu's legal representation was wanting and this may have been the reason behind his failure to comply with court orders, which led to the alleged striking out of his suit.
117. The Learned Counsel further submitted that from the exhibits the Plaintiff produced in court, it was clear to see that the late Mzee Joseph Hakim Chifu was a pauper and relied on the good will of the Hon. Attorney General and other public office holders to help him seek justice. From the said letter, it would not be unreasonable to conclude that it was the lack of finances to get proper legal representation which led to the purported striking out of his said suit. From the exhibits produced by the Plaintiff particularly the letter dated 4th December 1985 marked as Plaintiff's exhibit 4, Mzee Joseph Hakim Chifu started living on the suit property in the year 1943. The late Mohamed Hamed Abdalla, according to the documents produced in court particularly the lease dated 8th March 1994, the transfer to him from Councilor Simeon R.D.Msechu was registered on 10th June 1994. By the year 1994, Mzee Joseph Hakim Chifu and his family had lived on the suit property for fifty-one (51) good years. Even after the illegal transfer to the said Mohamed Hamed Abdalla and the setting aside of the Adverse Possession decree, Mzee Joseph Hakim Chifu and his family continued living on the suit property uninterrupted for another twenty-six (26) years until September 2020 when the Defendant commenced building the suit property.
118. Immediately the said construction commenced, the Plaintiff rushed to court and on 22nd September 2020, obtained injunction orders stopping further construction. All this time Mzee Joseph Hakim Chifu's family namely Alfred Malgidi and Alice Shikukuu Hakim were still living on the suit property. Even after serving the said interim injunction orders upon the Defendant and the OCS Chaani Police Station. The Defendant totally disregarded the said orders and continued with the said construction and evicted the remaining family members of Mzee Joseph Hakim Chifu. The Plaintiffs wrote to the OCS Chaani Police Station on 19th October 2021 seeking to understand why he was turning a blind eye to the Defendant's disregard of Court Orders while the same Court Orders gave him/her the duty and responsibility to enforce them and make sure they were complied with. The said letter was annexed to the Plaintiff's supplementary affidavit dated 12th January 2022 and marked as "E1".
119. According to him Mzee Joseph Hakim Chifu's family had been in actual physical possession and occupation of the suit property for seventy - seven (77) good years uninterrupted until the year 2020 when the Defendant evicted the remaining family members in occupation of the same in total and blatant disregard of the said Court orders. To support their point, the Learned Counsel cited the case



of:- “Aloys Adiango Olande – Versus - Samuel Amon Siaji & 3 others (2018) eKLR”, this court held that:-

“Sub - division, change of description, and change in proprietorship, does not constitute any interruption of the possession of the land by the plaintiff.”

120. Additionally, in the case of:- “Sirya & 9 others – Versus - Karani (Environmental and Land Originating Summons 60 of 2020)(2023) KEELC 16689”, the Court held that:-

“It was the Plaintiff’s case that they have been on the suit land since 1978 and that the suit property was transferred to the Defendant. It was further the Plaintiff’s case that their forefathers also lived on the suit land and have buried 5 of their relatives without any opposition from the Defendant...It follows that the transfer of the suit land did not interrupt the Plaintiff’s possession and further that the said transfer was effected in 1978 which is still within the statutory period of limitation. The Plaintiffs have therefore been in occupation for a period more than 12 years.”

121. It was the humble submission of the Learned Counsels, and they really emphasized on it, that the illegal transfer of the suit property to the Mombasa Municipal Council and subsequently to Councilor Simeon R. D. Msechu then to Mohamed Hamed Abdalla did not in any way interrupt Mzee Joseph Hakim Chifu and his family’s possession and occupation of the suit property. Therefore, the estate of Mzee Joseph Hakim Chifu was entitled to be registered as the owner of the suit property by way of adverse possession.

122. The Learned Counsels contended that for the Court to have issued Mzee Joseph Hakim Chifu with the Adverse Possession orders back in the year 1994, it must have been convinced that he had been in actual notorious and open possession, continuous and exclusive use of the suit property for more than 12 years. As herein above stated, the said orders were set aside after the said Mohamed Hamed Abdalla challenged them using the said illegally, improperly and irregularly acquired land documents which Mzee Joseph Hakim Chifu was unable to rebut due to the reasons herein above stated. Even after the setting aside of the said orders, Mzee and his family continued to live on the suit property and the Plaintiff’s witnesses testified to the same. The Defendant apart from claiming ownership which as they had herein above stated, was acquired irregularly, provided no evidence of possession of the suit property apart from the building of the perimeter wall in September 2020 which was stopped by Court through injunction orders given in favour of the Plaintiff, orders which he blatantly disregarded. The Defendant through his supplementary list of documents dated 27th October 2022 introduced two letters authored by the Mombasa Town Clerk one D.J Randu. One was dated 16th November 1994 and the other dated 11th January 1995 (which they herein above questioned its authenticity due to the purported peculiar signature of the said author). The said letters tried to justify how the said Mohamed Hamed Abdalla became the purported owner of the suit property. However, as herein above stated, the said clerk on 22nd May 1995 wrote to Mzee Joseph Hakim Chifu advising him to take possession of the suit property since he had been advised by the Attorney General to do so. The said letter was produced by the Plaintiff during trial and marked as Plaintiff’s exhibit number 10 which appeared as document number 10 on the Plaintiff’s list of documents dated 17th September 2022.

123. The Attorney General is the Chief legal adviser of the government, and before advising the said Mombasa Town Clerk, he must have looked keenly at all the documents relating to the suit property. It was their submission that the Attorney General realized that the suit property, was irregularly transferred to the Mombasa Municipal Council which in turn transferred it to Councilor Simeon R.D Msechu, who subsequently transferred it to Mohamed Hamed Abdalla. Upon realizing this,



the Attorney General wrote to the said Mombasa Town Clerk on 1st December 1994 wherein he reprimanded him for the said illegalities committed and instructed him to cancel the illegal allocation to Mohamed Hamed Abdalla (which he never did), then facilitate the registration of the suit property in Mzee Joseph Hakimu Chifu's name. The said letter was produced by the Plaintiff as her exhibit number 8 and appears as document number 8 on the said Plaintiff's list of documents. It may be argued that in her Complaint, the Plaintiff never prayed for adverse possession orders which was true, but she did pray for the estate of her late husband to be declared the legal proprietor of the suit property. The provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 provides that:-

“Justice shall be administered without undue regard to procedural technicalities.”

124. Additionally, the provision of Section 3 A of the *Civil Procedure Act*, Cap. 21 provides as follows:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process of the court.”

125. The Learned Counsel therefore submitted that this Honourable court is clothed with the necessary authority to make a declaration that the suit property should be registered in the Plaintiff's name as the duly appointed Legal Administrator of the estate of her said late husband because that was what justice demanded. After all, even the Bible in the book of Job 12:22 states:-

“Learn to do right, seek justice, correct oppression, take up the cause of the fatherless, plead the case of the widow.”

126. In conclusion, the Learned Counsels reiterated that they believe they had been able to show the Court when and how Mzee Joseph Hakimu Chifu came to be in possession of the suit property. They had also shown the immense struggles he went through fighting for the same. It was now apparent that his representative at the Mombasa Municipal Council Councilor Simeon R.D Msechu whom he had sought help from abused his position, went behind his back and fraudulently orchestrated the illegal transfer to the Mombasa Municipal Council, then to himself and finally to Mohamed Hamed Abdalla. They had also demonstrated that the family of Mzee Joseph Hakimu Chifu had been in occupation of the suit property since the year 1943 when Mzee was employed by the original owner and took possession of the same in the year 1956 when the original owner passed away and her heirs relocated to Canada. They continued occupying and being in possession of the suit property until late year 2020 when the Defendant in blatant disregard of court orders finished building the said perimeter wall and kicked the remaining family members out of the suit property using the same police who were supposed to make sure the said court orders were adhered to.

127. They had demonstrated how the Defendant illegally, improperly and irregularly acquired the title he claimed to have over the suit property. The Defendant never proved possession of the suit property. It was quite evident that an injustice was done to Mzee Joseph Hakimu Chifu and his family in trying to fraudulently take away the suit property from them just because they were paupers.

128. The Learned Counsel beseeched the Honourable Court to see that justice demanded that the estate of the late Mzee Joseph Hakimu Chifu be declared as the legal proprietor of the suit property and the title held by the Defendant be revoked all the way back to and including the title purportedly transferred to the Mombasa Municipal Council. They also submitted that this Honourable Court should invoke its powers granted by the provision of Section 80 (1) of the *Land Registration Act* No. 3 of 2012 and order for the rectification of the land register accordingly. It had been a long and torturous struggle for



the late Mzee Joseph Hakim Chifu and his family fighting for justice, and this court should end their said struggle by doing what was just and ruling in their favour. The good sacred scriptures in the book of Amos 5:24 state: “But let Justice roll on like a river and righteousness like a never-failing stream.”

A. The Written Submissions of the Defendant

129. On 27th October, 2023, the Defendant through the Law firm of Messrs. Wandai Matheka & Co. Advocates filed their written submissions dated 23rd October, 2023. Mr. Matheka Advocate commenced his submission by stating that the instant suit was vide a Plaint dated 17th September, 2020 and filed on 22nd September, 2020 and an Amended Plaint dated 28th March, 2023 which only amended the parties subject to the death of the original Defendant Mohamed Hamed Abdalla and in both, the Plaintiff sought for the afore – stated prayers.
130. The Defendant filed his Defence dated 16th October 2020 and filed on 19th October, 2020, a list of witnesses and witness statements all dated 27th October, 2022, a list of documents dated 15th October, 2020 filed on 19th October, 2020 and a supplementary list of documents dated 27th October, 2022 and filed on 31st October, 2022. On 18th May, 2022, the Defendant filed Amended Defence and Counter claim dated 18th May, 2022 and later on 28th March, 2023, filed a further amended defence and counter claim dated similar date, pursuant to the Death of the original Defendant, Mohamed Hamed Abdalla. The Defendant prayed for the prayers as stated above.
131. The Learned Counsel averred that they would like the Honourable Court to take note that from the Plaint, no particulars of fraud and/or illegalities regarding the Defendant’s title had been pleaded and further, that no claim for adverse possession had been advanced, and if at all raised, the same would not be properly before this Honourable court.
132. According to the Learned Counsel, this Honourable court, on its part, was itself bound by the pleadings of the parties. The duty of the court was to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounted to a determination made without hearing the parties and led to denial of justice.
133. According to the Learned Counsel the legal position was further reaffirmed by the Court of Appeal in the case of:- “David Sironga Ole Tukai – Versus - Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014 [2014]eKLR” thus:-

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The Purpose of the rules of pleading is to ensure that parties define succinctly the issues as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”
134. In response to the assertions in the Plaintiffs’ submissions dated 19th September, 2023, the Learned Counsel contended that the Defendant’s issues for determination, the Learned Counsel first replied to the submissions. As earlier stated, parties were bound by their own pleadings. The Plaintiffs in their



- submissions had raised a number of new issues that were never pleaded but which the Plaintiffs had submitted.
135. The Learned Counsel wished to have the same disregarded by the Court and that the determination of the issues in the matter be restricted to the pleadings on record. As such, they urged the Honourable Court to disregard the following new issues introduced by the Plaintiffs but which were never pleaded.
136. At page 16 lines 20 - 21 of the Plaintiffs' submissions, the Plaintiffs submitted verbatim that:- "therefore, the estate of Mzee Joseph Hakimu Chifu is entitled to be registered as the owner of the suit property by way of adverse possession." The Learned Counsel contended that the Plaintiffs submission in respect of adverse possession ought to be regarded for reason that the same had not been pleaded. Further, not even the overriding objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 and/or Article 159 (2) (d) of the Constitution which enjoin the court to do substantive justice without being shackled by technicalities of procedure could save that claim, arguing that procedural rules were an integral part of the overall administration of justice and could not be ignored.
137. According to the Learned Counsel, if at all the Plaintiffs wished to prefer an adverse possession claim, it was trite that procedure follows under the provision of Section 38 of the Limitations of Actions Act and Order 37 (7) (1) of the Civil Procedure Rules, 2010. In that regard, the Learned Counsel relied on the Court of Appeal decision in the case of:- "Mania Njuguna – Versus - Paul Njuguna Mwangi Nairobi Civil Appeal No.151 of 1999 [2000] eKLR" where the court stated as follows:-
- " this means that the usual way of instituting a suit is by way of a plaint but there are also other ways which can be prescribed for instituting suits. Orders XXXVI Rule 3D (now Order 37 Rule 7) of the Civil Procedure Rules prescribe the way for starting a suit for adverse possession under section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya). Such a suit is to be started by way of an originating summons supported by an affidavit and a copy of the title to the land".
138. According to the Learned Counsel a casual perusal of the Plaintiffs' submissions would reveal that the Plaintiff's kept alleging illegality in regard to the acquisition of the Defendant's title. Similarly looking at the Plaint, no particulars of fraud or illegality had been pleaded. They reiterated that their submission above that parties were indeed bound by their pleadings. The Plaintiffs seemed to be hiding under the guise of illegalities despite the overwhelming evidence by the Defendant regarding the procedure followed therein. For this reason, the Learned Counsel submitted that the same ought to be disregarded, bearing in mind that this court, on its part, was itself bound by the pleadings of the parties.
139. According to the Learned Counsel, the Defendants submissions to the Plaint was that the Plaintiff vide their submissions filed on 25th September 2023 tried to convince the court through innuendo, theory, and an outright distortion of facts that their claim was indeed genuine and that the Honourable Court should find in their favor, yet they conveniently forgot to demonstrate any shred of evidence to support their claim. It was a matter of law and practice that whoever alleges must prove the facts and he who provided the most evidential facts must win a suit.
140. In a nutshell, the Learned Counsel held that the late Mohamed Hamed Abdalla purchased the property from one Mr. Simon R. D. Msechu. see page 19 of the Defendant's bundle of documents was a copy of the transfer and page 27 invoice receipt from the law firm of Messrs. Sachdeva & Company; Defendant Exhibit Numbers 6 and 10 respectively. The interest being purchased was a leasehold interest with the municipal council being the Head Lessor. As a result, the lease issued to Simon Msechu dated 8th March 1994, (see exhibit 6(a)lease(b) transfer at pages 13 and 19 respectively) was now transferred



to Mohamed Abdalla. The documents having been prepared, executed, and witnessed by all relevant parties (see exhibit 4 and 5 at pages 28 - 30 of the Defendant's bundle of documents) the Defendant moved in and occupied the property.

141. The Learned Counsel urged the Honourable Court to take note and bear in mind that at no point at all during the pendency of this suit or any other time had the Plaintiff alleged, intimated, or even hinted that they had ever been evicted from the premises. At all times, no such allegations had been professed or even through oral evidence with all the Plaintiffs witnesses, had anyone alleged that they had at one time been evicted. According to the Learned Counsel, the Defendant professed that at all material times in this and any other suit he had been in peaceful, lawful, and open possession of the property and never at any time evict or forcefully remove any person on the property. Sometimes in the year 1994, the Defendant was made aware of the Plaintiff's claim to the property and that there had been an illegal allotment to the Municipal Council who in turn transferred to Msechu who transferred to him. This was contained in the letter dated 16th November, 1994 in which he was copied (exhibit 13 at page 31 of the Defendant's bundle of documents). Immediately, he then instructed his Counsel who then approached the court where the decree emanated from and applied to have it set aside (see exhibit 9 at page 26 of the Defendant's bundle of documents).
142. The said decree was later on set aside by the court on 6th October 1995, which was during the lifetime of the deceased. There was no subsequent action by the Plaintiff to appeal or review the order and by then, the Plaintiff was represented by a Counsel one Ben Sihanya Advocate thus they could not assume that he did not know what to do. In fact, the opposite could be inferred in that the Plaintiff knowing that a 3rd Party had come into the suit claiming ownership, he went silent and did not participate in the suit. Needless to say, the Defendant pursued his claim in the suit and ultimately the suit was dismissed for non-attendance on 24th November 1998. Since then, no claim had been made on the suit property until 17th September 2020 when this suit was filed again as a result of the Defendant constructing a perimeter wall on the property.
143. The Learned Counsel submitted that having recounted the history according to the Defendant and in response to the Plaintiffs submissions and pleadings, they believed that the four (4) issues for determination to be as follows:-
- i. Whether the decree dated 29th March 1994 bestowing the suit property capable of enforcement?
 - ii. Was the Plaintiff even on the land?
 - iii. Whether the Defendant had a valid interest in the property?
 - iv. Did the Defendant acquire a valid title to the land?
144. Firstly, on whether the decree dated 29th March 1994 bestowing the suit property capable of enforcement. The Learned Counsel submitted to the negative submitting that it was no valid for enforcement. The Learned Counsel gave a brief outline in response to the discrepancy the Plaintiffs had raised in their submissions. (refer to page 10 lines 21-22 and page 11 lines 1-13 of the Plaintiffs' submissions dated 19th September 2023) The genesis of how the Defendant came to hold title in favor of the suit property begun when the original registered proprietor of the suit property Marguerita Gordon Lindsay Allan (deceased) passed away and the suit property fell into rates and rent arrears. Subject to rent and rates arrears, the representatives of the estate of the deceased proprietor surrendered the suit property to the defunct Municipal Council of Mombasa.



145. According to the Learned Counsel, being that this was bureaucratic process, the record showed that vide letter dated 13th September 1993, the late Simeon Msechu received a letter from the defunct Municipal Council of Mombasa, allowing his application and therefore allocating the said suit property to him. It was true that the transfer to the defunct municipal council was done on 13th April 1994, and that the lease to Simeon Msechu was made on 8th March 1994. However, it was important to note that the said transfer to the municipal and the lease to Mr. Msechu were registered on 15th April 1994. It was evident that the lease in Simeon Msechu's name was never registered until the property was legally and procedurally in the names of the Municipal Council.
146. The Plaintiff at pages 11 lines 8-11 of their submissions alleged that:- “the Mombasa municipal council transferred a property that it did not own to its council member Simeon R.D. Msechu who in turn transferred it rather quickly to Mohamed Hamed Abdalla via transfer dated 17th May 1994.” The Defendant wished to dispute the said allegation because evidence tendered by the Defendant clearly showed that the lease to Simeon Msechu was registered after the municipal acquired title. A letter informing an applicant that their application for allocation of council land had been approved never in any way infer that a transfer has automatically happened or that a lease had automatically been made and registered.
147. The Honourable Court granted the correspondence from Government offices before simultaneous registration of the transfer and the lease. He submitted that consistent evidence showed that the suit property was surrendered in lieu of unpaid land rates and rents and that the later narrative by the Plaintiffs in their submission was not credible. Instead it was but a bare faced attempt to justify a non-existent adverse possession claim. It was only after registration of the transfer to the municipal and the lease to the late Simeon Msechu, that a transfer to the Defendant was effected. Nothing from the foregoing indicated illegalities as alleged by the Plaintiffs and as such, thus he opined that the Plaintiffs' suit ought to be dismissed. Consequently, he informed Court that the said order of 19th March 1994 was an order granting adverse possession to the Plaintiff which at the time of its issuance, the property had already been surrendered back to the Government in lieu of land rates and rents, and later on a leasehold interest created in favor of the Municipal council.
148. The Learned Counsel asserted that from the above conclusion, it became plainly obvious that the argument that the defunct Municipal Council of Mombasa allocated to Simeon Msechu private land which it never had power to allocate under the Government Lands Act was but a red herring. The evidence showed that the personal representatives of Marguerita Gordon Lindsay Allan (deceased) the registered owner of the suit property, namely Title number C.R.7995 surrendered the same to the Government for the express purpose of failing to pay land rates and rates.
149. The Learned Counsel further submitted that there was nothing illegal or irregular in the registered proprietor of property surrendering it for allocation, where it was unable to settle the accrued rates and rents. The true basis of the Plaintiffs' claim was the voluntary surrender of that parcel by the personal representatives of the registered owner, not the ‘approval’ or concurrence by the defunct municipal council of Mombasa thereafter. According to the Learned Counsel, the required elements to prove adverse possession were enumerated in the case of:- “Kisumu Civil Appeal No. 27 of 2013;-Samuel Kihamba – Versus - Mary Mbaisi [2015] eKLR” where the court held:-

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner. These elements are contained in



the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”.

150. To the Counsel these ingredients were never fulfilled by the Plaintiff. Further, the Learned Counsel referred Court to the provision of Article 62(1) of *the Constitution* which outlines the various categories of public land and under Article 62(1)(b) public land includes:-

“Land lawfully held, used or occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease.”

151. The provision of Article 62(2) of *the Constitution* provides as follows:-

- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-
 - (a) clause (1) (a), (c), (d) or (e); and
 - (b) clause (1) (b), other than land held, used, or occupied by a national State organ.

152. The Learned Counsel submitted that it was a common ground that at the time the Plaintiff obtained the orders of adverse possession in their favor, the suit property was public land within the definition of public land under *the Constitution* of Kenya. The land had a leasehold interest created in favor of the defunct Mombasa Municipal Council. Under the repealed Government Lands Act, County and Municipal Councils could allocate market plots to individuals under certain conditions.

153. The Local Government authority acted within the purview of the law in the said transfer. The provisions of Section 12 (3) of the Local Government Act empowered the municipal council to acquire, hold or alienate land. Quoted verbatim, the section reads:-

“Every Municipal Council shall under the name the Urban Council' be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued and acquiring, holding, and alienating land.”

154. The Plaintiff only held a court order, meaning that the leasehold title was still in the name of Mombasa Municipal Council and therefore time could not run as they were not yet registered as the owner of the suit property. He cited the provision of Section 41 of the *Limitation of Actions Act* provides as follows:-

This Act does not

- (a) enable a person to acquire any title to or easement over
 - (i) Government land or land otherwise enjoyed by the Government.
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act or any Act repealed by that Act.

155. To buttress his point, the Learned Counsel relied on the case of:- “Francis Kangogo Cheboi – Versus - Vincent Kaino & 4 Others (2013) eKLR” the court held as follows:

“It will be seen from the above, that the *Limitation of Actions Act*, does not apply inter alia to land vested in the County Council (except for land vested in it by Section 120(8) of the Registered *Land Act* which was repealed in 1972). It follows therefore that one cannot



claim the reliefs provided for in the *Limitation of Actions Act*, including the relief of adverse possession, for land vested in County Councils. The plaintiff cannot therefore claim the suit land by way of adverse possession”.

156. The property that was available for adverse possession did not exist as at the time the order was given, and that order was never presented for registration at any time. The property had two reference numbers. The original freehold title was found under CR 7995 which is the original title that was offered for sale to the municipal council in lieu of outstanding rates (see transfer at page 9 of the Defendant’s list of documents dated 15th October 2020). Upon acquisition of the property, a leasehold interest was created and the same was available for lease to the public. The Municipal Council of Mombasa thereafter created a lease over the property and subsequently a new coast registry file (CR) number was granted to wit is CR 25459, hence the new reference number, and the first registered lessee was Simon Msechu and the second lessee was to the late Mohamed Hamed Abdalla, the Defendant herein.
157. At no time at all was the decree presented for registration not was it acted upon before it was set aside. Subsequently the suit was dismissed. He referred Court to the Plaintiffs submissions at page 4 lines 20-21 and page 5 line 1 where they had outrightly admitted that “Mzee Joseph Hakimu Chifu struggled until he got his decree registered on 13th October, 2004 and a provisional title certificate was issued to him.” On this aspect, the Learned Counsel observed that the record shows that this was seven (7) years after the Decree was set aside and after the late Mohamed Hamed Abdalla acquired the property from Simeon Msechu. If anything, the Plaintiffs were guilty of misleading the Land Registrar to register an unlawful order and/or decree, and further, the Honourable court by relying on the said documents which was bad in law. Lastly, on this limb, the Counsel averred that the Honourable Court was being asked to declare that the Plaintiff had an absolute indefeasible title to the property vide the Plaintiff.
158. The only way this court could make such an order was if there were allegations of fraud, coercion, intimidation and/or unlawful acts. None had been presented and certainly none were proved. No evidence had been led by the Plaintiff to prove that they were entitled to the property be it by adverse possession or fraudulent transfer. They were relying on the decree obtained ex-parte and when it was challenged they disappeared. The Plaintiffs had admitted at page 1 of their submissions that in the year 1943, the late Mzee Joseph Hakimu was employed by the then proprietor of land registered as Land Title No.7995 plot no. 313/MN/VI, until the year 1956 when the registered proprietor died. This debunks the assertion that the Plaintiffs was entitled to that piece of land, yet they were only there in their capacity as employees. The close proximity between themselves and the deceased proprietor Marguerita Gordon Lindsay Allan, makes their contention a sheer smokescreen that was easy to see through. It was difficult to believe that from their vantage positions in this matter, they were unaware that the suit properties were specifically surrendered in lieu of rates and rents, having admitted that indeed the defunct Municipal Council of Mombasa even paid them a visit in that regard.
159. On the issue of whether the Plaintiff was ever on the land. The Learned Counsel submitted on the negative. All allegations showed that somehow the Plaintiff was aware that the land was vacant and available for adverse possession right around the time the Administratrix of the land was transferring the property to the municipal council. Indeed, all witnesses who testified in court as children of the deceased, stated that Plaintiff never resided in the area and were born outside the general location of the property. Add to it that none including the deceased when he was alive, alleged that they had been evicted means that the property was vacant. If it was vacant and if the Plaintiff had a genuine claim to the property he would at the very least have pursued his claim to its logical conclusion.



160. The Learned Counsel reiterated that having failed to satisfy the elements of adverse possession, with continuous possession being at the forefront, the Plaintiffs claim could not stand. At no point had there been an eviction on this property against the Plaintiffs. There was no singular person who testified that they had been forcefully removed and/or displaced from the said property. The instant suit was brought because the Defendant constructed a perimeter wall and not because of the alleged eviction. The Learned Counsel moved the Honourable Court to question then could the Plaintiffs suddenly change and say that they were on the suit land yet such a claim was never pleaded in the pleadings or stated in any testimony on the stand?
161. On the question of whether the Defendant had a valid interest in the property as opposed to the Plaintiff, the Learned Counsel contended on the affirmative stating that the Defendant acquired a leasehold interest in the property from the seller i.e., Simon Msechu who was the first registered lessee of the property. The property was currently owned by the defunct Municipal Council (now County Government of Mombasa) who were the registered lessors having acquired the title by way of outright purchase from the registered owners (see exhibit 4 at pages 9 - 11 of the Defendant's bundle of documents being a transfer in lieu of outstanding rates).
162. According to him this simply meant that at all times, the proprietor of the property was in total control of the same, aware of the value of the land and opted to sell it to the County in lieu of outstanding rates. Was the Plaintiff challenging or saying that that sale was void or voidable? Contrary to the Defendant: The Plaintiff claimed that he acquired the right to the property vide an adverse action which was awarded by a court order on 29th March 1994. The court order was never ever presented for registration and no title deed was procured by the Plaintiff and before he could legally claim ownership, the decree was set aside and later the suit was dismissed.
163. Further to this the Learned Counsel submitted that to date there was no order or decree awarding the property to the Plaintiff. There had been no claim for adverse possession by the Plaintiff in this suit. To what reason did he believe the court would cancel the sale of land to the Council (them) to the second registered owner and later to the Defendant?
164. The Learned Counsel emphatically acquiesced that the Defendant had acquired an indefeasible title to the suit property as opposed to the Plaintiff. Under the provision of Section 23 of the Registered Title Act, Cap. 281 of the Laws of Kenya (now repealed) and Sections 24 (a) and 26 (1) of the [Land Registration Act](#) No. 3 of 2012, a title could only be cancelled if it was proved that the registration was acquired illegally or fraudulently. Section 23(1) of the Registration of Titles Act provides as follows:-
- “23(1) The Certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”
165. Although the Registration of Titles Act together with other Acts were repealed following the enactment of the [Land Registration Act](#) No. 3 of 2012, Section 107 of the [Land Registration Act](#), 2012 provided that any right, interest, title, power, or obligation acquired, accrued, or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act.
166. On this front, the Learned Counsel submitted that they were persuaded by the case of: “Shimoni Resort – Versus - Registrar of Titles & 5 others [2016] eKLR” where the Court opined that:-



'The Petitioner's rights and interests to the suit property having been acquired before the coming into force of the Land Registration Act would therefore stand to be construed under the provisions of the Registration of Titles Act. Even the new Land Registration Act, No. 3 of 2012 under Section 26 (1) embodied the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration such that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to. Section 26 (1) of the Land Registration Act provides:-26 (1). 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;....
167. According to the Learned Counsel, in the instant suit, no particularization on the illegality or any fraudulent action had been brought or claimed against the Defendant. The Plaintiff had submitted through his advocate's submissions on a far-fetched theory on what could have happened but no witness ever said or spoke about the theory which was denied, let alone provide any evidence. The Plaintiff seemed to believe that by virtue of being on the land, he had a claim of adverse possession as he believed that the owners had lost interest in the property whereas, at the time, the Council was planning to purchase the property owing to the outstanding rates of which was buttressed by the sale of the property to the Council.
168. The Learned Counsel asserted that the sale, the transfer of the property to the Council, the creation of the lease in favor of the lessees had not been challenged by the Plaintiff and even if it had been challenged (which was vehemently denied) the only piece of evidence the Plaintiff was relying on was a decree that was set aside during his lifetime and later, the same dismissed again when he was alive and he never challenged either of them.
169. On the issue of whether the Defendant was entitled to the Counter claim. The Learned Counsel averred that the Defendant filed a Defence and Counterclaim to the Plaintiff's suit. The Counter - Claim sought for a declaration that the Defendant had a valid title and injunction against any interference by the Plaintiff or their perceived agents. He informed the Court that there was no Defence to the Counter - Claim in that the Plaintiff simply denied all the averments in the Counter Claim. Nonetheless, no explanation was offered by the Plaintiff, his witnesses, or documents as to the Defendant's claim. In fact, once they realized a third party (defendant) claimed the property, they simply abandoned all legal mechanisms they had previously utilized and vanished until the year 2020 when they filed this suit in response to the Defendant constructing a perimeter wall.
170. He contended that it was important to note that nowhere in the Plaintiff's testimony by the witnesses nor the documentary evidence adduced and produced in Court had they said that in the year 2020 or even before, they were forcefully evicted, removed, or banished from the property. The Plaintiff had failed to prove that the transfer from to the defunct Municipal Council of Mombasa and the transfer to the Defendant was fraudulent.
171. According to Black's Law Dictionary, 10th Edition fraud is defined as:-

“Fraud consists of some deceitful practice or willful device, resorted to with interest to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence it is always positive, intentional. Fraud as applied to contracts, is the cause of or



error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to one party or to cause an inconvenience to the other.....”

172. To further support his point, the Counsel referred Court to the case of:- “Gichinga Kibutha -Versus - Caroline Nduku [2018] eKLR”, the Court of Appeal stated thus:-

“Fraud is essentially a common law tort of deceit, and its essentials are: -

- (a) false representation of existing facts;
- (b) with intention that the other party should act upon it;
- (c) the other party did act on it;
- (d) the party suffered damage”

173. Also, in the case of “Christopher Ndaru Kagina – Versus - Esther Mbendi Kagina [2016] eKLR” the court stated that:-

“it is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.

174. The Learned Counsel further submitted that the Defendant got a good title. He was the lawfully registered proprietor of the suit property. He was able to explain the root of the title. The Plaintiff failed to prove any collusion between the Defendant and the officers at the Land Registry. The Defendant's title ought to be upheld. The allegation by the Plaintiffs at page 11 lines 13-15 of their submissions stated that:- “whether the said Mohamed Hamed Abdalla was an innocent buyer in good faith or not really does not matter,” actually matters. Having failed to plead, let alone prove fraud and/or illegality, it stood that the Defendant was a bona fide purchaser for value.

175. To this effect, the Learned Counsel relied on the case of “Embakasi Properties Ltd & Another – Versus - Commissioner of Lands & Another [2019] eKLR” where the court opined as follows:-

“Although it has been held time without end that the certificate of title is;

“...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”. It is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration act, 2012* though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner”.

176. The Learned Counsel urged the court to find that the Defendant was therefore entitled to the prayers in the Counter - Claim, for the reason that he was the bona fide purchaser for value. He sought guidance from the case of:- “Katende – Versus - Haridar & Co. Ltd [2008] 2EA 173” where the Court of Appeal of Uganda held that:-

“For the purpose of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it



wrongly. For a purchaser to successfully rely on the bona fide doctrine.....(he) must prove that:-

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud”.

177. The Black’s Law Dictionary, 8th Edition, defines a bona fide purchaser as:

‘One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.’

178. The Learned Counsel asked the question because it went to demonstrate possession of the property, who was in possession at all times, especially when this suit was filed? The Defendant had always been in possession of the premises since its purchase to date and thus was entitled to the property.

179. In conclusion, the Learned Counsel submitted that there was absolutely no evidence that there was a scheme by the defunct Municipal Council of Mombasa to take over for themselves the parcel of land that was surrendered in lieu of land rates and rents. The Defendant conducted due diligence and there was nothing to alert him that there was anything amiss with the title to the property he was purchasing. The Defendant paid good money as consideration being a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) refer to page 19 of the Defendant’s bundle of documents) and the transfer effected. There being no evidence that the Municipal Council of Mombasa or Simeon Msechu or even the Defendant were party to any fraud, misrepresentation or mistake in the registration of the impugned titles, he urged the Honourable Court to uphold the validity of the Defendant’s title, and pray that the Plaintiff’s suit to be dismissed with costs to the Defendant.

V. Analysis and Determination

180. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant being the Amended Plaint by the Plaintiff and Further Amended Defence and Counter – Claim by the Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

181. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has crystalized the subject matter into the following four (4) salient issues for its determination. These are:-

- a. Whether the suit instituted by the Plaintiff vide a Plaint dated 17th September, 2020 against the Defendant herein has any merit whatsoever.
- b. Whether the Counter Claim set out in the Further Amended Defence dated 18th May, 2022 by the Defendant is sustainable
- c. Whether or not the Plaintiff and the Defendant are entitled to the prayers sought?



d. Who will bear the Costs of suit and the Counter claim?

ISSUE No. a). Whether the suit instituted by the Plaintiff vide a Plaint dated 17th September, 2020 against the Defendant herein has any merit whatsoever.

182. Under this sub - title, the Honourable Court deciphers the main substratum herein is on the issue of legal ownership to the suit land and whether the Plaintiff and the Defendant have valid title, rights and interest over it in law whatsoever. From the very onset, Judicial notice will be taken to the fact that land in Kenya is extremely sensitive and emotive. Land is a source of livelihood and a lot of importance is bestowed on it. There has been plenty of disputes over the occupation, title and rights of land. According to [the Constitution](#) of Kenya, 2010 land is categorized into three – Private; Public and Community land.

183. With promulgation of [the Constitution](#) of Kenya, 2010, all the legal regime of land legislation were condensed into a few legal framework, Significant, after the repealin of several legislation, two of them were sustained being “The [Land Registration Act](#), No. 3 of 2012 and the [Land Act](#), No. 6 of 2016”.

It is instructive to note that the suit land was registered under the Registration of Title Act, Cap. 281 (now Repealed). As already correctly pointed out by the Learned Counsel for the Defendant, based on the provisions of Section 107 of the [Land Registration Act](#) No. 3 of 2012 provided that any right, interest, title, power, or obligation acquired, accrued, or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act. This Legal position finds grounding in the provisions Section 23 (3) (c) of the [Interpretation and General Provisions Act](#), Cap. 2 which provides:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed”

The said position was upheld in the cases of “Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR” and now “Shimoni Resort (Supra) cited by the Learned Counsel for the Defendant. Ideally, I wish to point out that the [Land Registration Act](#) makes provision on the effect and efficacy of registration of title and its indefeasibility. The provision of Section 24(a) of the [Land Registration Act](#) provides as follows:-

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

184. When a person’s ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of “Hubert L. Martin & 2 Others – Versus – Margaret J. Kamar & 5 Others [2016] eKLR”, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it



for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

185. Further to this, the Honourable Court is guided by the Court of appeal in the case of: "Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239 of 2009", the Appeal Court held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

186. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as 'the prima facie' conclusive evidence that the person named as proprietor of the land is the absolute and legal owner with indefeasible title, rights and interest on the land and the proprietor shall not be subject to challenge except – On the ground of fraud, mistake, omission or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

187. This court in considering this matter referred to the case of:- "Elijah Makeri Nyangw'ra – Versus - Stephen Mungai Njuguna & Another (2013) eKLR" where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of provision of Section 26(1) (a) and (b) of the Land Registration Act holds as follows:-

"-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."

188. Now turning to the issues from the instant case. The golden question and the elephant in the room here is simple and straightforward:- "Who between the Plaintiff and Defendant has certainly shown the root of their title?" To respond to this deep query, the Honourable Court would require more than the Solomonic wisdom anchored and founded from the Scriptures of 1 Kings 3 Verses 16 to 28 on the decision by King Solomon over the dispute of the parentage of the child being claimed by the two Harlots and the law. From the said scripture it upon King Solomon making the decision, it was stated that: "and all Israel heard of the Judgement which the King had rendered; and they stood in awe of the King, because they perceived that wisdom of God was in him, to render Justice..". That should be the case in this matter herein.

189. The Site Visit Report

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 132 OF 2020

ELIZABETH JOSEPH HAKIMU.....PLAINTIFF



VERSUS -

MOHAMED AHMED ABDALLA DEFENDANT

SITE VISIT REPORT HELD ON 19TH JANUARY, 2024 AT CHAANI LOCATION AT 11.60 A.M.

I. Coram

Justice L.L. Naikuni (ELC No. 3 - Judge)

M/s. Yumnah Hassan – The Court Assistant.

Mr. George Omondi – Bodyguard/Usher.

Mr. John Mwaniki – Assistant.

II. Plaintiffs

1. Mr. Patrick Kungu – Advocate for the Plaintiff.
2. Mr. Kimondo – Advocate for the Plaintiff.
3. M/s. Elizabeth Hakimu (2nd Wife of Hakimu) – the Legal Administratrix of the deceased – the Plaintiff.
4. Mr. Silvester Karisa.
5. M/s. Florence Joseph Hakimu (1st Wife for Hakimu)
6. Mr. Francis Kamanza Hakimu.
7. Mr. Moses Ngunyi (Elizabeth’s Son).
8. M/s. Rose Bada & 10 Other representatives.

III. Defendants

1. Mr. Matheka – Advocate for the Defendant.
2. Mr. Nassor Mohamed – Legal Administrator to the estate of the Defendant.
3. Mr. Juma Hassan - Caretaker
4. Mr. Ketak Patel – Family friend to Mr. Nassor.

IV. Security Operatives

1. Inspector Mwasiya Musyoka from Chaania Police station.
2. Corporal Onesmus Katana from the Chaania Police station.
3. Police Constable Cosmas Tsuma from the Chaania Police station. (Hereinafter referred as “The Team”).

V. The purpose for the Site Visit.

4. The purpose of the site visit was explained. It was pursuant to a court directive made on diverse dates of 13th July, 2023 and 11th October, 2023 to conduct the site visit. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, 2010 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”

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 to wit:-

40 (10) (1) “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 gathering further evidence on the above stated arising two (2) issues – of the alleged constructions and the settlements onto the suit land to assist it in its decision making functions and/or process. 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. 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. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the finalization of the case.

VI. The Methodology and procedure applied.

6. By consensus of the team, it was agreed that taking that none of the parties had engaged a Land Surveyor to be present during the Visit, there be physical walking round the suit land by the team. Essentially, the main objective for the walk was to identify the beacons on the suit land. Thus, it was agreed that the exercise be led by a representatives from both the Plaintiff and the Defendant herein. Further, it was agreed that the team be guided by the Map and the relevant survey documents which were already filed in Court. Therefore, the team conducted the site visit through going round the whole of the suit land.

VII. Observation

7. Based on the above stated walk around the Suit land, the team made the following observations. These were:-
- a. The suit property measured approximately 2 acres or thereabout. It was rectangular in shape. The team was informed that there were 4 beacons planted around the Plot. Unfortunately, the team could not identify any of the planted beacons due to the thick plantations on the land.
- b. The property had an 11 feet high concrete perimeter wall round the suit land and a single black metallic gate used for assessing into the land. The team was informed that on the Eastern side of the land, the wall was constructed by a neighbor known as Mr. Maranga. The team learnt that the wall formed part of his fence. The suit land only took advantage of this aspect. The team learnt that he was a livestock farmer.
- c. On both the Western and Northern side of the land, the team learnt that the wall was built by the Defendant. It was about 100 meters long . We also noted there existed a small gate on the Northern side. On the Southern side, the team was informed that the wall was build by the family of the former President of the Republic of Kenya His Excellence the Late Mwai Kibaki. The team was informed that the said family owned the adjacent Plot. The exact duration when that part of the 50 metres wall perimeter was constructed became a contentious issue.



According to the Plaintiff, they claimed it was done the year 2020 while the Defendant insisted that it was built on 2016 by the Late Kibaki's family.

- d. There was a stretch of a perimeter wall on the Eastern side it was from the gate measuring approximately 20 meters. It was built on 2020 by the Defendant. There were a few livestock such as goats, poultry in side the Plot.
- e. On the southern part of the suit land, there were a few structures. They were all close to each other perhaps for safety or to ensure maximum utilization of the land. They were four in number. Generally, the three of them were semi – permanent constructed using iron sheet which had turned rusty with time. The team was informed that the first structure belonged to the son of the Caretaker, one Mr. Juma..... It was next to an iron sheet goat paddock/shed. The second structure belonged to the caretaker himself. It was well kept and clean. There provisions of a pit latrine and bathroom. The Caretaker informed us that he lived there with his family. Some of them were present. The third structure was for another person called Ndombolo (Iron Structure). The fourth structure was a two well constructed permanent concrete building consisting of small 12 rooms of 8 feet by 7 feet cubicles intended for occupation for residential purposes. This building was all unoccupied. We found this aspect rather strange. It was depreciating and dilapidating so fast due the severe Coastal weather condition. The paint on the building was fading off fast. Generally, we observed that the walls and floor developing multiple cracks. The person who built the building was extremely contentious. On the one hand, the Plaintiff claimed it was built by the family of Joseph Hakim Chifu while on the other hand, the Defendant insisted that the structure was constructed by the original owner of the land – a Foreigner Lady (Mama Mzungu). The team decided to avoid being embroiled onto the argument and leave it to court to eventually make its own findings if it found the issue materially useful. The team was not able to access the fourth house/structure as it was closed.
- f. From the observation made, there were approximately 10 to 15 people who were currently occupying the suit land under the instruction of the Defendant. The Plaintiff and the representative appeared to have just come on land solely for the site visit.
- g. There were debris scattered all over the place. This was evidence of there having existed some structures but which were demolished. This fact was not disputed. It was a clear indication that there were numerous people who used to habit on this land but had somehow moved out to reside elsewhere with time. Perhaps these were the squatters all the parties frequently make reference to who had come from the adjacent plot and settled on the suit plot through the influence of the local Member of Parliament. What happened to them was unclear.
- h. There was one mango and 3 pawpaw trees grown by the sides of the structures.
 - i. The team was shown a place by the Plaintiff which they indicated and stressed had been set aside as cemetery and/or burial site for several people. The team was informed that several people were buried there upon their demise. Unfortunately, despite keen observation, apart from the bushy lantern plantations around the place there was no conspicuous nor empirical evidence or visible signs such as stones, markings, cross etc replica of graveyards. The Plaintiffs explained that this was the case as according to the Giriama customary and cultural rites, they only put stones on top of graveyards. They indicated that the stones or signs of the graves must have been removed with the passage of time. Indeed, some of the members for the Plaintiffs had even offered to assist the am by digging down the graves. Certainly, the team declined the said offer



as it was illegal and a Court order was required for such an exercise of exhuming of graves was required.

- j. In the middle of the land there was a huge and wild thicket of lantern plantations. It was unkempt and making the place rather too bushy all through. To the team, It appeared to be very dangerous and there were suspicion that there would be likelihood of reptiles such as snakes etc habiting inside there. Definitely there would be need to have the bush cleared for safety of human being and proper environmental management and standards.
- k. Right outside the gate for the Plot, there were some old and faded white paint – close to five three story residential apartments belonging to the Kenya Revenue Authority for their staff members.
- l. The team also visited the adjacent plot which was indicated belonged to the late first family. There were deep excavation of the ground going on. This was a clear indication that some development was in the offing. It was rounded using both iron sheet and concrete perimeter wall. A few huge metallic oil refinery tanks were visible at the horizon. The team learned that it had been habited by squatters mainly of the Giriama community but who were moved to the suit plot some times back using the assistance of the local member of parliament for the area.
- m. Situated on the southern part of the suit land, close to say five (5) kilometres away is the Kenya Ports Authority premises and the Indian ocean.

VIII. Directions

- 8. The Honourable Court shall furnish all the parties with a copy of the Site Report in due Course. As scheduled, all facts remaining constant, Judgement would be delivered on 8th February, 2024 at 9.00am through the Microsoft Teams Virtual means.
- 9. The site visit ended at 12.00 Noon with a Muslim word of prayer.

THE REPORT OF THE SITE VISIT MADE THIS29THDAY OF.....
JANUARY.....2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

PARA 190.

Be that as it may, prior to proceeding further, the Court wishes to state that on 19th January, 2024, with the consensus of the parties, and pursuant to the provision of Section 173 of the *Evidence Act*, Cap. 80 and Order 18 Rule 11 of the Civil Procedure Rules, 2010, the Honourable Court conducted a Site Visit (“Locus in Quo”). Below is the Site Visit report produced verbatim for ease of reference.

PARA 191.

According to the Plaintiff in her Complaint under Paragraph 4 holds as follows:-

“The said deceased one JOSEPH HAKIMU CHIFU is and was at all material times the duly registered owner and the heirs entitled to the possession of the property known as Land Title numbers CR 7995 Plot No. 313/MN/VI situate at Mainland North within Mombasa County”. This claim was backed up by the evidence adduced by all the Plaintiff’s witnesses and



documentary evidence adduced in support of the case. It was the Plaintiff's case that on or about the 1st September 2020, the Defendant wrongfully entered and took possession of the suit Property and have thereafter, wrongfully remained in possession thereof. Hence, the Defendant has thereby trespassed and continue to trespass thereon.

PARA 192.

Of great significance, the evidence of PW – 1, stated that although she told the Court that she lived in Kaloleni with her family during the hearing, but her husband lived on the suit land. In the Course of time, he was issued with a provisional title deed on 13th October, 2004. She admitted that they left the land and moved to Kaloleni before her husband died. It was her evidence that the deceased, her husband was buried at Kaloleni. Before his death her husband was an employee – the Care taker of a foreigner of Canadian nationality who was the registered owner of the suit property. From a letter written by one M.M Mwendar (believed to have been an Advocate for the Plaintiff) dated 4th December, 1985 addressed to the Canadian High Commissioner produced and marked as Plaintiff Exhibit Number 4 stated verbatim as follows:

“The Plot was the property of Miss M. G Allan (now deceased) and now inherited by Mary Magretta Lindsay Holton and Joanne Agness Lindsay Dalley of Townships of Nelson in County of Halton and Ancaster in the County of Wentworth in Ontario. Way back in 1943, a young man named JOSEPH HAKIMU CHIFU was a employed as a Caretaker of the deceased andhe has lived and got married, built a temporary house on itHis only parent mother who stayed with him died and (sic) buried her there. His first son also died and was buried on the plot. The young man now an old man ...is 59 years old and has nowhere to go, and has been threatened to be evicted. The Municipal Council of Mombasa is demanding rates arrears dating back to 1978 totaling Shs. 33, 000.00/= including interest. The old man has gone into no salary for 43 years (sic) since employed. He satiates that it will be about Shs. 103, 000/= for wages unpaid. The area is surrounded with illegal squatters and if it were not for the old man's efforts to stop the intruders there would by now nothing but illegal occupants.

I telephoned to kindly ask for your help to locate the above owners and draw their attention to this and see whether they would: i). Agree to sell the property to the old man so that he may settle all bills from Municipal Council and have the peace that the property is now his ii). Agree to pay all the outstanding amounts owing to the Council and the old man and retain ownership iii). Would appoint me to act on their behalf to see how best their property can be developed after consultation with them. If they agree to this then they contact me urgently through your offices or directly. Many thanks again. I am sorry for the trouble.

PARA 193.

It is unfortunate that this letter never elicited any responses. Suffice it to say, arising from the contents of the above letter, the Honourable Court was informed that the employer left the Country but it was not clear how the land was handed over. On the one hand the Plaintiff claims it was handed over to him while there is evidence to the effect that the land was re – possessed by the then Municipal Council of Mombasa as result of accumulation of unpaid and outstanding rates and rents. It has been stated here that the Municipal Council of Mombasa demanded for the rates of the land to be paid. While the Plaintiff were looking for the money to pay for the rates but before they could pay the rates, the Arab (meaning the Defendant) approached them demanding for the ownership of the land and hence her husband filed the case before the Court. She reiterated the Municipal Council officials came and demanded to be paid the rates. Her husband had filed the suit as they were on the land. She did not know who brought the squatters to the land. She urged the Honourable Court for the whole of the suit property.



PARA 194.

In the case of “Alice Chemutai Too – Versus – Nickson Kipkurui Korir & 2 Others [2015] eKLR” Justice Sila Munyao held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –Versus - Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

PARA 195.

I am in agreement with Munyao J. that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. The Plaintiff did not produce any documents to prove their ownership of the land instead they pleaded Adverse possession and that the Defendant had obtained the suit land through fraud and illegality.

PARA 196.

Taking that the claim of Land Adverse possession was never pleaded from the filed pleadings by the Plaintiff, but the this Honourable Court will proceed to examine it slightly and in passing.. This doctrine is governed by the provision of Sections 7, 13 and 38 of the [Limitation of Actions Act](#), cap. 22 of the laws of Kenya. Asike - Makhandia, JA described adverse possession in “Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR” as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#), which is in these terms:-



“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.”

PARA 197.

Indeed, Black’s Law Dictionary, Ninth Edition defines “adverse possession” thus:

1. The enjoyment of real property with a claim of right when the enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open and notorious.
2. The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specific period of time. [Emphasis supplied]

PARA 198.

The provision of Section 38 of the [Limitation of Actions Act](#) only specifies the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides as follows:

38. Registration of title to land or easement acquired under Act.

SUBPARA (1)

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

SUBPARA (2)

An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

SUBPARA (3)

....

SUBPARA (4)

The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

SUBPARA (5)

...

PARA 199.

The law presupposes that a claim of land adverse possession has to be initiated under the provision of Order 37 of the Civil Procedure Rules, 2010 through the Originating Summons. From the filed Amended Plaintiff filed by the Plaintiff no such claim has been made as already conceded by the Learned Counsel for the Plaintiff from their filed Submissions. Thus, this claim cannot be available from this suit. According to the evidence by PW - 2, he was a brother of the deceased. He used to work for a foreigner who went back to his country and the foreigner left him the land in the year 1943. According to her she left the suit land in the year 1965 when she got married and relocated to Bamburi. She confirmed that since they lived in the suit land, she had never seen anyone coming to evict them. Some of their relatives died and were buried on the suit property. Her mother Alice was buried on the suit property so was her brother’s son John in the year 1984. PW - 3 confirmed that



she lived on the suit property up to 1973 when she got married. PW - 5 told the Court that in 1995, she got married and relocated to Kaloleni where her husband resided. All the period they lived on the suit land she had never heard of any demand for eviction. PW - 6 told the Court that he had left the land in the year 2005 to Kaloleni Kwa Nyundo further telling the Court that Hakim left the suit property in the year 1999. PW - 7 confirmed leaving the property in the year 1999 when he was 8 years old.

PARA 200.

The person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of “Maweu – Versus - Liu Ranching and Farming Cooperative Society 1985 KLR 430” where the Court held;

“ Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

PARA 201.

Has the Plaintiff proved adverse possession? In the case of “Samuel Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No. 122 of 2001”, the Court of Appeal delivered the following dictum:

“ ...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

PARA 202.

According to the Plaintiff the suit property has been subject to a previous court case being “Misc. Civil Suit No. 77 of 1993(O.S) Joseph Hakim Chifu -Versus - Mary Magaret Lindsay and Another which has been concluded. According to the Defendant this case was dismissed for non - attendance. Indeed, a decree was produced to that effect and there was no appeal, setting aside nor variation was made to that effect as expected in law. The Plaintiff and his family vacated the land way before the Defendant bought it from the Municipal Council of Mombasa according to PW - 1 who told the Court that they moved out of the land to Kaloleni in the year 1994. She told the Court that the Municipal Council of Mombasa demanded for the rates of the land to be paid. They were looking for the money to pay for the rates but before they could pay the rates, the Arab approached them demanding for the ownership of the land and hence her husband filed the case before the Court.

PARA 203.

The evidenced produced by the Plaintiff, there is no “prima facie conclusive evidence to demonstrate that the Plaintiff was the legal and absolute registered owner of the suit property in accordance with the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 and Sections 7, 13 and 38 of the *Limitation of Actions Act*, Cap. 22 on land adverse possession. For these reasons, I therefore conclude that the Plaintiff did not hold a valid title or rights to the land through land adverse possession.



ISSUE No. b). Whether the Counter Claim by the Defendant is sustainable

204. Having found and held that the Plaintiff is not the bona fide legal owner of the suit property, under this sub title, the Honourable Court is going to examine if the title that the Defendant transferred from the Municipal Council of Mombasa was legal.
205. The Defendant who is also the Plaintiff in the Counter claim has pleaded that he has been in exclusive possession Land Reference No. CR 25459 situate at Mainland North within Mombasa County (the suit property). The Defendant further stated that the Plaintiff has no color of right in the property in that the case was heard and determined during the lifetime of the deceased. The order dated issued on 9th June 1994 by the deceased Plaintiff was set aside as the Plaintiff had only instituted the suit against the previous owners whilst the Defendant held the title of the property. The court set aside the order dated 9th June 1993 and allowed 29th March 1994 by allowing the Defendant to participate in the suit on 23rd June 1995. He has been in possession of the suit land from the 10th June 1994 as confirmed by DW - 3 who was the care taker of the suit property for the deceased.
206. The Defendant averred that the deceased purchased the property for fair value from one Simeon R. D. Msechu vide a transfer dated 17th May 1994. Unfortunately, Mr. Msechu could not testify as he is now deceased. At the time he purchased the property, there were no squatters or persons in the property especially the Plaintiff herein. After the purchase of the property, he discovered that there was a court case where the Plaintiff had been awarded the property by virtue of Adverse possession. Fearful that he would lose the land, the Defendant successfully applied and was enjoined as a 3rd party in the matter on 25th June 1995. He made an application to set aside the judgment which was granted on the 6th October 1995. The Defendant still not satisfied then moved the court for dismissal and on 24th November 1998 the suit was struck out with costs.
207. The Plaintiff in the Counter claim through DW - 1 stated that the Defendant had purchased the suit property from the Municipal Council of Mombasa. The Local Government authority acted within the purview of the law in the said transfer. The provisions of Section 12 (3) of the Local Government Act, Cap. 265 (now repealed) empowered the municipal council to acquire, hold or alienate land. Quoted verbatim, the section reads:-
- “ Every Municipal Council shall under the name the Urban Council' be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued and acquiring, holding, and alienating land.”
208. The Plaintiff only held a court order, meaning that the leasehold title was still in the name of Mombasa Municipal Council and therefore time could not run as they were not yet registered as the owner of the suit property. Section 41 of the [Limitation of Actions Act](#) provides as follows:
- This Act does not
- (a) enable a person to acquire any title to or easement over
 - (i) Government land or land otherwise enjoyed by the Government.
 - (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act or any Act repealed by that Act.



209. I make reference to the case of “Francis Kangogo Cheboi – Versus - Vincent Kaino & 4 Others (2013) eKLR” the court held as follows:

“It will be seen from the above, that the Limitation of Actions Act, does not apply inter alia to land vested in the County Council (except for land vested in it by Section 120(8) of the Registered Land Act which was repealed in 1972). It follows therefore that one cannot claim the reliefs provided for in the Limitation of Actions Act, including the relief of adverse possession, for land vested in County Councils. The plaintiff cannot therefore claim the suit land by way of adverse possession”.

210. I agree with the Defendant/Plaintiff in Counter Claim that the property that was available for adverse possession did not exist as at the time the order was given, and that order was never presented for registration at any time. The property has two reference numbers. The original freehold title is found under CR 7995 which is the original title that was offered for sale to the Municipal Council in lieu of outstanding rates (see transfer at page 9 of the Defendant’s list of documents dated 15th October 2020). Upon acquisition of the property, a leasehold interest was created and the same was available for lease to the public. The municipal council of Mombasa thereafter created a lease over the property and subsequently a new coast registry file (CR) number was granted to wit is CR 25459, hence the new reference number, and the first registered lessee was Simeon R. D Msechu and the second lessee is to the late Mohamed Hamed Abdalla.

211. The Defendant in the Counterclaim failed to show and produce any documents before this Court before this court or offer any evidence in support of her ownership of the land. The Defendant in the Counter claim had alleged that the registration of the Plaintiff in the counter claim was fraudulent and/ or illegal. At no time did they present the decree for registration or did they act upon the same before it was set aside and subsequently dismissed. The Plaintiffs at page 4 line 20-21 and page 5 line 1 of their submissions have outrightly admitted that “Mzee Joseph Hakim Chifu struggled until he got his decree registered on 13th October, 2004 and a provisional title certificate was issued to him.” The record shows that this was seven (7) years after the Decree was set aside and after the late Mohamed Hamed Abdalla acquired the property from Simeon R. D. Msechu. If anything, the Plaintiffs are guilty of misleading the Land Registrar to register an unlawful order and/or decree, and further, the Honourable court by relying on the said documents which are bad in law. Lastly, on this limb, the Honourable Court is being asked to declare that the Plaintiff has an absolute indefeasible title to the property vide the Plaintiff.

212. I also agree with the Defendant/Plaintiff that the only way this court can make such an order is if there are allegations of fraud, coercion, intimidation and/or unlawful acts. None have been presented and certainly none have been proved. No evidence has been led by the Plaintiff to prove that they are entitled to the property be it by adverse possession or fraudulent transfer. The burden of proof is well stated out under the provisions of Sections 107, 108 and 109 of the Evidence Act which provide as follows:-

“Section (107); Burden of proof.

- (1) Whoever desires any court to give Judgement as to any legal right or liability dependent on existence of facts which he asserts must prove 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.

Section (108); Incidence of burden.



The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section (109); proof of particular fact.

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence. Unless it is provided by any law that the proof of fact shall lie on any particular person.”

213. Thus, it is trite law that fraud must not only be pleaded but must also be strictly proved on a standard of proof above the ordinary balance of proof. In saying so, I seek refuge from the decision of:- “Central Bank of Kenya – Versus - Trust Bank Ltd & 4 Others (1996) eKLR”, where the Court had this to say:-

“The appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in any ordinary civil case.

In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence upon which the court would make a finding.”

214. It cannot be inferred from facts but must be substantiated as held in “Virjay Morjaria – Versus - Nasingh Madhusingh Darbar & another (2000) eKLR”, and in “Arithi Highway Developers – Versus - West End Butchery (2015) eKLR”. Again, where a party fails to offer testimony in support of its pleadings the pleadings, remain mere statements. The Defendant / Counter claimer averred that he purchased the land and paid consideration for it. None of these were pleaded nor testified in Court.

215. Black’s Law dictionary 10th Edition defines bona fide purchaser for value as

“someone who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor’s fraud against a third party and has a superior right to the transferred property as against the transferor’s creditor to the extent of the consideration that the purchaser has paid.”

216. In several Court of Appeal decisions inter alia “Elizabeth Wambui Githinji & 29 others – Versus - Kenya Urban Roads Authority supra” and “Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura Vs A. G. & 4 others” the court rendered itself thus;

“Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.

The Ugandan case of Katende v. Haridar & Company Limited (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:



- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

217. In this suit the Plaintiff in the Counter - Claim as indicated they acquired the suit property from one Mr. Simeon R. D Msechu and who had acquired it from the Municipal Council of Mombasa. Indeed, he has produced a title deed which under the provision of Sections 23, 24, 25 & 26 of the [Land Registration Act](#) 2012 is to be taken as prima facie evidence of ownership unless there is challenge based on fraud, illegality, misrepresentation or procurement through corrupt means. The Defendant in the Counter - Claim has raised issues on fraud and illegality.

218. However no substantiation of the said allegations have been made through evidence. It is this Honourable Court’s assertions that the Defendant has proved to be the bona fide legal owner of the suit land and therefore his counter claim is found to have merit and is allowed.

ISSUE No. c). Whether or not the Plaintiff is entitled to the prayers sought

219. Under this sub-title the we examine the prayers of the Plaintiff as per the amended plaint which are as follows:-

- a. A declaration that the Estate of JOSEPH HAKIMU CHIFU (DECEASED) is entitled to exclusive and unimpeded right of possession and occupation of the suit Property.
- b. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is wrongfully in occupation of the suit Property and is accordingly, a trespasser on the same.
- c. A declaration that the Defendant, whether by himself or his servants or agents or otherwise howsoever, is not entitled to remain on the suit Property.
- d. A permanent injunction restraining the Defendant, whether by himself or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit Property.
- e. Vacant possession of the suit Property.
- f. General damages for trespass.
- g. 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.
- h. Any such other or further relief as this Honourable Court may deem appropriate.



220. From the very onset, and based on the letter by Mr. Mwendar to the Canadian High Commission, there is an admission that the Plaintiff who was an employee of the original owner was not the owner of the land and that the Municipal Council of Mombasa were claiming outstanding rates arrears over the Plot. Hence, and as earlier stated in this Judgment the Plaintiff had no legal rights as against the suit property therefore prayers in the Plaint are not sustainable as one can only plead trespass and vacant possession on a property they own, the Plaintiff has not shown this Honourable Court any documentation to prove that he owned the suit property. The provisional certificate of title produced by the Plaintiff indicates a third party as the owner of the land and not the deceased Plaintiff. Therefore the Plaintiff is not entitled to any of the prayers sought in the Plaint.
221. On the other hand, whether the Defendant is entitled to the prayers sought. The Defendant prayed that the Plaintiff's suit be dismissed and Judgment be entered as follows:-
- i. A Declaration that the interest in the property is a leasehold interest by virtue of first registration on the 15th April 1994.
 - j. A declaration that the Defendant being the lessee is the registered owner of the property.
 - k. A declaration that the entries numbers 9 and 10 were entered unlawfully.
 - l. An order for the cancellation of entries numbers 9 and 10 dated 13th October 2004.
 - m. An order for the cancellation and/or revocation of the Plaintiffs provisional certificate of title issued on the 13th October 2004.
 - n. An order that the Defendant is the legal, registered and beneficial owner of the leasehold interest of the property known as MN/313/VI.
 - o. An order for the cancellation and removal of any orders issued by this or any other court inhibiting and prohibiting the Defendant from dealing with the property.
 - p. Costs of this suit.
222. Having proved that the Defendant have a bona fide right to the suit property, it is my considered view that the rights of the Defendant/ Plaintiff in Counter claim need to be protected. I therefore find that the Defendant/ Plaintiff is entitled to the same.

ISSUE No. e). Who will bear the Costs of suit and the Counter Claim

223. It is now well established that the issue of Costs is at the discretion of the Court. The Black Law Dictionary defines cost to means:-
- QUOTE{startQuote “}
- the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
224. In other words, Costs mean Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. 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.”

225. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
226. 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. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
227. 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 “*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.”
228. In this case, as this Honourable Court has opined above, the Plaintiff has failed to prove her case and therefore failed in her claim. On the other hand, there is no doubt that the Defendant has proved his Counterclaim to the required standards and is therefore awarded the costs of the suit and the Counter - Claim.

VI. Conclusion and Disposition

229. 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 her case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-
- a. THAT Judgement be and is hereby entered in favour of the Defendant herein as against the Plaintiff herein as per the further Amended Defence and Counter Claim dated 28th March, 2023.
 - b. THAT a Declaration be and is hereby made that the interest in the property is a leasehold interest by virtue of first registration on the 15th April 1994.



- c. THAT a declaration be and is hereby made that the Defendant being the leasee is the absolute and legal registered owner of the suit property.
- d. THAT a declaration be and is hereby made that the entries numbers 9 and 10 of the Lease title were entered unlawfully.
- e. THAT an order be and is hereby made for the cancellation of entries numbers 9 and 10 of the Lease title dated 13th October 2004.
- f. THAT this Honourable Court hereby makes an order for the cancellation and/or revocation of the Provisional Certificate of title by the Plaintiff issued on the 13th October, 2004.
- g. THAT this Honourable Court hereby makes an order that the Defendant is the legal registered and beneficial owner of the leasehold interest of the property known as MN/313/VI.
- h. THAT an order be and is hereby made for the cancellation and removal of any orders issued by this or any other court inhibiting and prohibiting the Defendant from dealing with the property.
- i. THAT the Defendant shall have the costs of the suit by the Amended Plaint dated 28th March, 2023 and the Further Amended Defence and Counter claim dated 28th March, 2023 to be paid by the Plaintiff.

IT IS SO ORDERED ACCORDINGLY.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS14THDAY OFFEBRUARY.....2024.

.....

**HON. JUSTICE MR. L.L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. M/s. Wanjiru holding brief fo Mr. Kungu & Mr. Kimondo Advocates for the Plaintiff
- c. Mr. Matheka Advocate for the Defendant

