



**Mbarak v Freedom Limited (Civil Appeal E028 of 2022)
[2024] KECA 160 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KECA 160 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E028 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

OMAR AWADH MBARAK APPELLANT

AND

FREEDOM LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Nelly A. Matheka, J.) delivered on 19th January 2022 in E.L.C Case No. 358 of 2016)

JUDGMENT

1. This is the 1st appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Nelly A. Matheka, J.) delivered on 19th January 2022 in ELC Case No. 358 of 2016 in which the respondent claimed to be the registered proprietor of the property described as plot No. 1948 (Original No. 412/20) Section V Mainland North, and registered at the Land Titles Registry at Mombasa as CR 32564.
2. In summary, the factual background of the respondent’s suit against the appellant in ELC Case No. 358 of 2016 is that the respondent, through its counsel, applied to the Chief Land Registrar and to the County Land Registrar of Mombasa County on 15th May 2015 requesting them to issue it with an official certificate of search together with other particulars in respect of the title registered as CR 32664, but that it was not issued therewith, the title register presumably having been lost or destroyed.
3. Next, the respondent petitioned for various orders, including an order directing the reconstruction of the title register and, by a constitutional petition dated 30th October 2015 filed in the High Court of Kenya at Mombasa in HC Petition NO. 58 of 2015 – Freedom Limited (the petitioner and respondent in this appeal) vs. the Chief Land Registrar, the County Land Registrar, Mombasa County and the Attorney General– supported by the affidavit of Divyanshu Panchal, the respondent’s project manager, sworn on 30th October 2015, sought a declaration that failure by the the Chief Land Registrar



and the County Land Registrar, Mombasa County to supply to it with an official certificate of search together with the particulars requested in respect of the title registered as CR 32664 was a violation of, and an infringement upon, the respondent's rights under Article 35 of *the Constitution* and section 34 of the *Land Registration Act, 2012* (the Act); an order directed at the Chief Land Registrar and the County Land Registrar, Mombasa County in the petition compelling them to supply to the respondent by way of an official search all the information and particulars as provided in section 34 of the Act pursuant to its rights as prescribed in Article 35 of *the Constitution*; and costs of the Petition.

4. The grounds on which the respondent's petition was made were that the Chief Land Registrar and the County Land Registrar, Mombasa County were in breach of section 34 of the Act and Article 35 of *the Constitution* by failing to supply to the respondent an official search in respect of the said property containing all the particulars of subsisting entries in the Register relating thereto; that their action infringed upon the petitioner's unconditional and unqualified right to receive the information and the particulars sought with regard to the property comprised in the above-mentioned title; and that the two respondents' action was in further breach of Article 10 of *the Constitution*, which impelled them to discharge their duties in accordance with the principles of good governance, integrity, transparency and accountability.
5. According to the deponent, the respondent applied for an official certificate of search on 15th May 2015 but, for reasons known to them, the Chief Land Registrar unlawfully and wrongfully failed, refused or neglected to provide the information sought, and that the failure to discharge their duties infringed on the respondent's proprietary interests in the land comprised in the above-mentioned title.
6. Apart from a replying affidavit sworn by the Registrar of Titles Mombasa on 25th April 2016, the subsequent proceedings in the petition are not included in the record. Suffice it to observe that, in determination of the petition, the High Court decreed thus on 29th June 2016:

“UPON READING the Petitioner's Petition dated 30th October 2015 presented to this Honourable Court on the same day AND UPON READING the Replying Affidavit of J. G. WANJOHI, the Registrar of Titles Mombasa sworn on 25th April 2016 AND UPON HEARING Counsel for the Petitioner and Counsel for the Respondents, IT IS HEREBY DECREED THAT: -





- a. Order be and is hereby directed at the First and Second Respondents compelling them to supply to the Petitioner by way of an Official Search all the information and particulars as provided in Section 34 of The Land Registration Act 2012 pursuant to the Petitioner's right as prescribed in Article 35 of The Constitution of Kenya 2010;
- b. The Registry Records be and is hereby re-constructed on the basis of certified copies of the original title documents which the Land Registrar has inspected and confirmed he is satisfied therewith;
- c. Each party to bear its own costs.”
7. Armed with this order, and having facilitated reconstruction of the file in the land registry with documents supplied solely by the respondent to the exclusion of all other documents alleged to have gone missing, the respondent instituted proceedings against the appellant in the Environment and Land Court at Mombasa vide a plaint dated 28th November 2016 and filed in ELC No. 358 of 2016 – Freedom Limited vs. Omar Awadh Mbarak.
8. In its suit, the respondent prayed for:
- “(a) a declaration that the Defendant has no right or interest in or over the land comprised in the property known as Plot No.1948 (Original No. 412/20) Section V M. N. registered as C.R. No. 32564 which belongs to the Plaintiff.
- b. a permanent injunction to restrain the Defendant whether by himself or through his contractors, employees, servants and/or agents or otherwise howsoever from interfering with the Plaintiff's proprietary rights and quiet occupation and possession of the property known as Plot No. 1948 (Original No. 412/20) Section V Mainland North and registered at the Land Titles Registry, Mombasa as C.R. No. 32564 or in any manner howsoever else dealing with the said property under the pretext that he has any right or interest therein;



- c. Costs of and incidental to this suit;
 - d. Any other proper or other relief which this Honourable Court deems fit to grant.”
9. We need to point out right at the outset that, even though the respondent’s plaint, the Notice of Motion that accompanied the Plaint and the witness statement of Harji Govind Ruda, the property on which the respondent laid its claim was described as Original No. 412/20, while the documents relied on (namely, the Certificate of Title, the Sale Agreement with the three vendors, the Transfer in its favour, the Certificates of Postal Search and the series of correspondence by its advocates, and the respondent’s submissions in the trial court) described the parcel claimed as Original No. 412/10. In our considered view, even though the orders of the trial court matched the prayers in the Plaint and referred to the plot of land in issue as Original No. 412/20, reference thereto, as such, was in error, and the correct description should at all times have been Original No. 412/10 and we will henceforth refer as such.
 10. The respondent’s case against the appellant in the ELC was that it was the registered proprietor of plot No. 1948 (Original No. 412/10) Section V Mainland North registered at the Land Titles Registry at Mombasa as CR 32564; that it was in possession and occupation of the property; that in Mombasa High Court Petition No. 58 of 2015 the court affirmed its ownership and directed that the registry records be reconstructed on the basis of the documents and records in its possession; that the appellant was wrongfully and unlawfully purporting to assert a right to its property premised upon an alleged title, which had no bearing on the respondent’s land, and whose records were missing at the land’s registry; that the respondent was registered as proprietor of the suit property on 12th November 2010, the same having been transferred to it by Abdulghafar Sultanal Chaudhry, Mohamed Jaffer Abdulrasul Panju and Abdulmanan Abdul Rehaman Keher Qureshi, and that the original title in respect thereof had remained in its possession; that, since then, the respondent had enjoyed uninterrupted open possession and control thereof, and that it had exercised all its proprietary rights with regard thereto without interference or hindrance from the appellant; that its title was indefeasible, save as provided for in law; and that its proprietary and other rights were protected under *the Constitution*.
 11. In addition to the foregoing, the respondent averred that the appellant had and continued to wrongfully, unlawfully and maliciously interfere with its proprietary rights and interests, including the rights of possession and occupation by preventing dealings in and development with or on the suit property; and that by reason of the appellant’s conduct aforesaid, the respondent had suffered, and continued to suffer, loss and damage.
 12. It is noteworthy that the preceding averment contradicts in material particulars the respondent’s claim that it had exercised all its proprietary rights with regard thereto without interference or hindrance from the appellant.
 13. In his defence and counterclaim dated 16th November 2018, the appellant denied all the allegations contained in the plaint and averred that his late grandfather, Mbarak Awadh Salim, purchased all that parcel of land containing by measurement 983 acres or thereabouts and known as plot No. 287 of Section V situate in the Province of Seyidie at S.E. of Mazeras Station, and more particularly described and delineated on Deed Plan No. 21108 on 2nd August 1978 from the then registered owner, Mohamed Afzal Khan, for a consideration of KShs. 878,000; and that, on the same day, a transfer was executed by the vendor and witnessed by U. K. Doshi, Advocate.
 14. According to the appellant, the property purchased by his grandfather, namely CR 6302, had never been subdivided as it still contained by measurement 983 acres or thereabouts; that his grandfather died before formal transfer to him of the suit property, and that the appellant only became aware of



the transaction between his deceased grandfather and Mohamed Afzal Khan in the year 2012; that, upon discovery of the transaction, the appellant attempted to register the Transfer dated 2nd August 1978, but that the same could not be registered as he had not obtained letters of administration to the estate of the deceased; that the appellant applied for and obtained a Grant of Letters of Administration Intestate to the estate of his deceased grandfather in the Kadhi's Court at Mombasa Succession Cause No. 68 of 2013 on 18th June 2013; that he applied for the Grant to be registered against the title deed, but was unsuccessful because the land's office file could not be traced; that the respondent ought to have conducted due diligence at the time the suit property was allegedly transferred to it; and that the property was at the time still registered in the name of Mohamed Afzal Khan.

15. In conclusion, the appellant urged the trial court to dismiss the respondent's suit and allow his counterclaim in which he prayed for:

- “(a) A mandatory injunction to compel the Plaintiff by itself, its agents, servants and/or any other person under instructions of the Plaintiff to give vacant possession of the suit property and to demolish the structures constructed thereon and to remove all the materials falling and/or in the alternative the structures be demolished and removed at his cost.
- b. A declaration that the purported transfer effected on 12th November 2010 in respect of the sale of Plot No. 1948 (Original No. 412/10) Section V Mainland North registered as C.R. No. 32564 was fraudulent, illegal, null and void as Title Deed Number 6302 has never been sub- divided.
- c. A declaration that the title deed issued in favour of the Plaintiff is null and void
- d. That an order do issue directing the Land Registrar Mombasa to cancel the purported title issued to the Plaintiff in respect of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plan No. 21108.
- b. A declaration that the estate of the late MBARAK AWADH SALIM is the true, genuine and lawful owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station, more particularly described and delineated on Deed Plan No. 21108.
- c. A declaration that the estate of the late MBARAK AWADH SALIM is the beneficial owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Eighty Three (983) acres or thereabouts known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station more particularly described and delineated on Deed Plan No. 21108.
- b. Such other relief as this Honourable court may deem fit to grant.
- c. General damages.
- (i) Costs of this suit and interest at Court rates.”



16. In its reply to defense and defense to counterclaim dated 3rd December 2018, the respondent reiterated the contents of its plaint, denied the appellant's counterclaim and contended that the appellant had no legal capacity to make the counterclaim, and that the same should be struck out or dismissed in limine; that there was no basis or lawful justification for the appellant's claim; that the land registry office copy of the title relating to the subject property was at some stage missing and/or interfered with, and that it appeared that the appellant and/or the said Mohamed Afzal Khan had been complicit with the interference with the land registry records; that the said proceedings in the succession cause were a fraudulent sham intended to cover up and sanitise the fraudulent conduct of the appellant and/or Mohamed Afzal Khan; and that the appellant had been charged in Criminal Case No. 1278 of 2017 before the Principal Magistrate's Court at Mombasa for allegedly giving false information to a person employed in the public service, to wit, informing the Chief Kadhi that his grandfather was the owner of the suit property.
17. It is noteworthy, though, that the appellant was acquitted of the charge in that case; and that it is not for us to judge the genesis and objective of that criminal charge, or the reason for the respondent's contention that the appellant's pursuits in the succession cause relating to his deceased grandfather's estate was a sham.
18. The appellant's case was that Mohamed Afzal Khan sold the suit property to his grandfather, Mbarak Awadh Salim (Deceased), on 2nd August 1978 for a sum of KShs. 878,000; that the sale was evidenced by an agreement executed by the parties on even date, and as drafted and attested to by Mr. U. K. Doshi, then Advocate of Mombasa; that the parties also executed an instrument of Transfer of even date, whereupon the deceased took vacant possession of the property and lived thereon together with his family and workers until his demise in the year 2000; but that the formal instrument of Transfer was not registered during the deceased lifetime.
19. The appellant averred further that, following his deceased grandfather's demise in the year 2000, he became aware of the transaction sometime in 2012 and took steps to register the Transfer, but was unsuccessful because he had not obtained letters of administration to the estate of his late grandfather. To this end, he filed Succession Case No. 68 of 2013 in the Kadhi's Court at Mombasa, whereupon the court issued and confirmed the Grant vide an order dated 18th June 2013.
20. The appellant's case was that, when he took further steps to register the Grant against the title of the suit property, the same could not be registered because the file in the lands office could not be traced, an eventuality that raises more questions than answers in the present appeal in light of a series of subsequent transactions purported to have been carried out over the years following Mbarak Awadh Salim's demise.
21. According to the appellant, the deceased was at all times in vacant possession of the suit property, possession of the original Certificate of Ownership, the duly executed Sale Agreement and Transfer of the suit property. Further, the Certificate of Ownership contained 16 entries, including: the original allotment of the suit property to David Gibson; subsequent transfer to Mohamed Afzal Khan; sale and transfer to Mbarak Awadh Salim; numerous charges and discharges of charges; and the order confirming Grant of Letters of Administration Intestate to the estate of Mbarak Awadh Salim.
22. At the trial, the respondent called one witness, Harji Govind Ruda, one of its Directors, who adopted his witness statement as evidence and rehashed the averments in the Plaint, Reply to the appellant's Defence & Defence to the appellant's Counterclaim. He stated that the title to the suit property had 54 entries; that the suit property was sub-divided and a new title issued; that the appellant's title did not have a seal; and that they carried out investigations, whereafter, the appellant was charged, but released on bond. He highlighted the significant entries in the title in their possession, being the award



vesting 6.3 acres, the various transfers and subsequent surrender of 16.19 hectares to the Government of Kenya. He also stated that the official search attached to their supplementary affidavit sworn by him on 6th July 2018 showed that the respondent was the registered owner as at 3rd November 2016; that, as at 2013, the original title was not in existence and could not form part of the estate of Mbarak

Awadh Salim; that the appellant unsuccessfully tried to register a transfer, and was charged with giving false information in that regard.

23. On cross-examination, Mr. Ruda stated that he did not know why the entries in the title from No. 19 onwards did not begin with CR 6302 as it was a government document; that they were not aware if a certificate of sub-division was registered; that the same property was transferred to them and measured 973 acres; that Land Reference No. 1948 was not registered in the mother title, but that the Chief Land Registrar could explain why; and that the original title was superseded by the new title, specifically CR 32564. To our mind, the glaring disparities pose fundamental questions as what to make of the transactions reflected in entry Nos. 1 to 14 and the subsequent entry Nos. 15 to 54 (all inclusive).
24. Further, and in support of its claim, the respondent exhibited a copy of a Certificate of Ownership of property described as plot No. 287 Sec. V MN situate in the Province of Seyidie at S.E. of Mazeras Station and delineated on the Deed Plan No. 21108 and measuring 983 acres in the approximate. We take to mind that the Certificate of Ownership dated 26th October 1923 held by the respondent is identical in certain material respects to the original Certificate of Ownership in the appellant's possession. For instance, entry Numbers 1 to 14 (both inclusive) are identical and uncontested.
25. It is also noteworthy that the respondent's copy of the Certificate of Ownership produced in evidence contains the contested entry numbers 15 to 54, with entry No. 15 alluding to registration of a Discharge of Charge sometime in 1951, and entry No. 16 alluding to registration of a Charge by one Elizabeth Ward on 27th June 1951. Then follows entry Numbers 17 and 18 on 19th September 1952 in respect of a Grant of Probate to Nurali Ratanshi Rajan Nanji and Hussein Rajan Nanji to the estate of Ratansi Rajan Nanji, and a Charge in favour of Mohamed Ali Ratansi Rajan Nanji and Nurali Ratansi Rajan Nanji as guardians (under the will of Ratansi Rajan Nanji) (Deceased) of the minors therein named, but subject to the Charge registered in the above-mentioned entry No. 16.
26. Relevant among the remaining entries are entry numbers 28 – a caveat dated 11th May 1955 purportedly registered by the Registrar of Titles on behalf of the Government of Kenya claiming ownership by compulsory acquisition of 6.1 acres, being a portion of the suit property; entry No. 33 dated 10th April 1956 – an award vesting 6.3 acres (subdivision NO. 287/1 Sec. V and subdivision No. 287/2 Sec. V) in the Crown; entry No. 34 dated 4th January 1957 – a charge to Aniceto Dias and Charles Dias over plot No. 412 (Original No. 287/3) Sec. V measuring 973 acres in the approximate subject, however, to caveat registered in entry No. 28, and charges registered in entry numbers 16, 25 and 31; entry No. 35 dated 2nd August 1957 – a transfer to Aniceto Dias and Charles Dias as tenants in common in equal shares to the instant that the charge registered as entry No. 34 ..., but subject to caveat registered as entry No. 28 and charges registered as entry numbers 16, 25 and 31 (plot No. 412/3); entry No. 50 dated 15th July 1963 – a transfer to Ramji Jethabhai Limited, subject to entry No. 28; entry No. 53 dated 21st January 1972 – a transfer to Abdulghafar Sultanal Chaudhry, Mohamed Jaffer Abdulrasul Panju and Abdulmanan Abdul Rehaman Keher Qureshi as tenants in common in equal shares subject to entry No. 28; entry No. 54A dated 29th September 1983 – a caveat by Kenya Pipeline Limited claiming a grant of easement; and entry No. 54 dated 10th April 1991 – a surrender of the land in subdivision No. 1076 measuring 16.19 hectares to the Government of Kenya, which is now subdivided into plot Nos. 1077, 1078 and 1079.



27. Also on record is a copy of a Certificate of Title No. CR 32654 dated 25th August 1999 issued to Abdulghafar Sultanal Chaudhry, Mohamed Jaffer Abdulrasul Panju and Abdulmanan Abdul Rehaman Keher Qureshi as registered proprietors as tenants in common in equal shares. In the certificate, the land is described as measuring 376 hectares (929.116 acres or thereabouts) and being plot No. 1948 (Original No. 412/10) Section V Mainland North as delineated on Land Survey Plan No. 223946 dated 13th May 1999.
28. The fulcrum of the respondent's claim was that, by an Agreement for Sale dated 24th September 2009 allegedly made between Abdulghafar Sultanal Chaudhry, Mohamed Jaffer Abdulrasul Panju and Abdulmanan Abdul Rehaman Keher Qureshi (as vendors) and the respondent, Freedom Limited (as purchaser), the three allegedly sold and transferred to the respondent plot No. 1948 (Original No. 412/10) Section V Mainland North as delineated on Land Survey Plan No. 223946 dated 13th May 1999 vide an instrument of Transfer dated 12th October 2010. The "residual" property was allegedly sold and transferred to the respondent in consideration for the sums of KShs. 20,000,000 and US \$1,935,897. A certificate of postal search dated 30th March 2010 indicated the three vendors as the registered owners while a second certificate of postal search dated 12th November 2010 showed the respondent as the registered owner.
29. On his part, the appellant's claim was supported by one Ngome Gunya Nyawa, who stated that he worked for the deceased as a caretaker on the suit property, and that the deceased did not sell the property. In his undated witness statement filed in the ELC case in 2018, Mr. Nyawa averred that he had known the appellant's deceased grandfather for a very long time; that he knew him as the owner of the suit property, which had never been subdivided; that, early in 2018, the respondent paid them to demolish their houses, which they had put up on the suit property; that the respondent forcibly removed them and demolished their houses; that the respondent had interfered with their quiet possession of the suit property; and that it proceeded to put up a fence around the property.
30. On her part, Mongo Ngome Gunya adopted his witness statement, which was couched in the same terms and contents as that of Ngome Gunya Nyawa. As stated in her testimony, she lived on the appellant's grandfather's land with her husband and many other people for 25 years; that her husband looked after cows and goats; that Hasesh (of the respondent company) came and took possession of the land, claiming that he had bought it; that they were forcibly evicted; and that they were given KShs. 120,000 each to resettle elsewhere.
31. When cross-examined, Mongo Ngome stated that she knew the appellant's grandfather, and that she worked as a caretaker on the land; that she did not know when he bought it; and that she never saw any sale agreement relating to the suit property.
32. The pertinent issues raised in the pleadings, trial and the parties' submissions before the trial court were: whether Plot No. 287 was ever subdivided and, if so, the extent of the sub-division; whether Plot No. 1948 (Original No. 412/10) Section V MN registered as CR No. 32564 and/or Plot No. 412 originated from Plot No. 287 Section V registered as CR 6302; why entry Nos. 46 – 49 in the Certificate of Ownership referred to a title No. CR 7356; whether the Power of Attorney allegedly donated to one of the vendors, namely Dr. Naseem Chaudhry, was valid and therefore authorised him to execute the transfer to the respondent; and whether the appellant was the beneficial owner of Plot No. 287.
33. In its judgment dated 19th January 2022, the ELC (N. A. Matheka, J.) held that the respondent had proved its case on a balance of probabilities while the appellant had failed to prove his counterclaim



on a balance of probabilities. She allowed the respondent's suit as prayed and dismissed the appellant's counterclaim with costs to the respondent. In her judgment, the learned Judge had this to say:

“The deed plan numbers on both titles is the same No. 21108, both are in the Province of Seyidie District of Mombasa locality to S.E of Mazeras station. Both refer to Plot No. 287 Section V Mainland North and are certified by Phineas Earnest Wolf. The plaintiff adduced evidence that the suit property was compulsorily acquired by the Government in 1955 by a gazette notice dated 25th January 1955. All relevant entries were made in the plaintiff's mother title. The gazette notice clearly shows 6.1 acres of Plot 287 Section V Mainland North being acquired by the Government

The Defendant further states that property which was purchased by his grandfather namely CR 6302 (DEx3 is the certificate) and being Plot No. 287 of Section V has never been subdivided as it still contains by measurement 983 acres or thereabouts. The Defendant states that his grandfather died before the suit property could be formally transferred to him and that he only became aware of the transaction between his late grandfather and Mohamed Afzal Khan in the year 2012. What the court finds curious is that the defendant's documents state that his grandfather Mbarak Awadh Salim died in the year 2000. However, the plaintiff has attached a gazette notice stating that Mbarak Awadh Salim died on the 15th June 1967. If the latter is true then how did he enter into a sale agreement in 1978?

I find that the plaintiff has established the root of the title they hold and are bona fide purchasers. The acquisition was gazzetted way back in 1955 and the land subdivided hence the reason why the defendant still holds an original mother title. It is on record that after the file went missing in the registry the plaintiff filed petition No. 58 of 2015 Freedom Limited vs Chief Land Registrar & Others and the court issued the decree dated 29th June 2016 to reconstruct the Lands Registry records which was done”

34. Aggrieved by the decision of N. A. Matheka, J., the appellant moved to this Court on appeal on the following 9 grounds set out on the face of his memorandum of appeal dated 16th March 2022, faulting the learned Judge for erring in both law and fact: by not considering the issues raised by the appellant herein at the hearing of the suit; in failing to appreciate the testimony tendered by DW1, DW2 and DW3 during the hearing of the suit; in failing to consider and appreciate the documentary evidence tendered by the appellant during the hearing of the suit; in failing to appreciate that the appellant had demonstrated on a balance of probability that all that land known as Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station being CR Number 6302 had not been subdivided since the same had been purchased by the appellants' grandfather from the previous registered owner and remained intact; by failing to appreciate the facts laid down before her by the appellant but instead, proceeded to re-state her own version of facts in complete departure from the pleadings before her apparently with the aim of justifying her decision; in dismissing the appellant's Counter-claim despite overwhelming evidence presented before her by the appellant's witnesses in support of the appellant's Counter-claim; in finding that Plot No. 287 of Section V situate in the province of Seyidie at S.E of Mazeras Station being CR Number 6302 had been subdivided resulting in Plot No. 1948 (Original No. 412/10) Section V M.N registered as CR. No. 32564 yet there was no evidence of such subdivision was derived from the mother title tendered in evidence by the appellant; in failing to appreciate documentary evidence produced in Court in support of the appellant's Counter-claim and Defence; and in failing to consider and appreciate the submissions and the cited authorities submitted by the appellant's Advocates.



35. In conclusion, and on the grounds of appeal aforesaid, the appellant prayed that the appeal be allowed with costs; that the judgment delivered by Matheka, J. on 19th January 2022 be set aside and substituted therefor with an order dismissing the respondent's suit with costs to the appellant; and that an Order do issue allowing the appellant's Counterclaim with costs as prayed.
36. In support of the appeal, learned counsel for the appellant, M/s. Muturi, Gakuo & Kibara, filed written submissions and case digest dated 29th September 2023. Counsel cited 5 authorities, including this Court's decision in *Municipal Council of Thika vs. Elizabeth Wambui Kamicha* [2013] eKLR submitting that failure to consider an appellant's duly filed written submissions is an error of law; *Peters vs. Sunday Post Limited* (1958) 1 EA p.424; *M'Imanyara M'Murithi vs. Nkanata Murithi & Another* [2012] eKLR; *Abok James Odera T/A. A. J. Odera & Associates vs. John Patrick Machira T/A. Machira & Co. Advocates* [2013] eKLR; and *Fred Ben Okoth vs. Equator Bottlers Limited* [2015] eKLR, all for the proposition that in a first appeal, the appellate court is obligated to review the evidence, re-assess it and draw its own conclusions to determine whether the findings of the trial court would stand.
37. On their part, learned counsel for the respondent opposed the appeal and filed written submissions and case digest dated 11th October 2023. Counsel cited the decision in *Edward Ndung'u Wambui vs. Francis Kanyanjua Mwangi & 3 Others* [2021] KECA 144 (KLR) where this Court underscored the principle that the Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and that it should make due allowance in this respect.
38. On the authority of *Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others* [2018] eKLR, counsel highlighted this Court's holding that registration of surrender is evidence of surrender, and that a surrender could not be entered on the register without the registered proprietor returning the original title and Grant relating to the suit property.
39. In the highlights of their submissions, learned counsel cited the pivotal decision in *Bandi vs. Dzomo & 76 Others* [2022] KECA 584 (KLR) where this Court cited with approval the following principles:
- “It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership...”
40. We have considered the record as put to us, the grounds on which the appeal is anchored, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions.
41. In the case of *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:
- “Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”



42. Having carefully considered the record as put to us, the impugned judgment, the written and oral submissions of learned counsel for the appellant and for the respondent, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely: (i) whether the appellant's and the respondent's conflicting claims relate to one and the same property; (ii) if the answer is in the affirmative, what constitutes the suit property;
- (iii) on the fundamental conception of seisin in relation to the suit property, who as between the appellant and the respondent has established seisin as the root of title thereto; (iv) put differently, who, as between the estate of Mbarak Awadh Salim (under which the appellant claims) and the respondent company, has indefeasible proprietary right over the suit property; (v) whether the learned Judge was correct in allowing the respondent's claim and dismissing the appellant's counterclaim; and, (vi) finally, what orders ought we to make in determination of the appeal, including orders on costs?
43. On the 1st issue as to whether the appellant's and the respondent's conflicting claims relate to one and the same property, the appellant contends that the suit property, to wit, plot No. 287 Section V MN situate in "the Province of Seyidie" at S.E. of Mazeras Station measuring 983 acres in the approximate, and more particularly described and delineated on Deed Plan No. 21108, was registered at the Coast Registry in Mombasa as No. CR 6302/1 in the name of David Gibson (as the administrator of the estate of Sevi Mwangoma) vide a Certificate of Ownership dated 26th October 1923.
44. From the record as put to us, David Gibson sold and transferred the suit property to one Mohamed Afzal Khan on 6th July 1944. It is the momentous events that followed this sale and surrender of vacant possession of the suit property by Mohamed Afzal Khan to Mbarak Awadh Salim (deceased) that raises a multitude of questions, some of which remain unanswered to this day.
45. The appellant contends that there was no evidence that Plot 1948 claimed by the respondent emanated from Plot No. 287 Sec. V MN which, according to him, has never been subdivided.
46. On the other hand, the respondent submitted in the trial court that "... both plot numbers are referring to the same parcel of land located in the same area." According to the respondent, the "mother title" and the "title in possession of the defendant" (the appellant) refer to the same piece of land in that the two titles bear uncanny similarities in relation to the Deed Plan number; that both were certified by Phineas Ernest Wolffe; that the properties were both described as being in the Province of Seyidie in the District of Mombasa, and located in S.E. Mazeras Station; that both titles refer to plot No. 287 Section V Mainland North; and that the land is the same.
47. How two title numbers are said to relate to the same property remains unexplained. We have not been told how this can be in light of the glaring disparity in the original numbers, which ordinarily remains unaltered except, perhaps, by reason of irregularity or other misdealing or infractions in the management of, or mis-dealings in, records relating to the suit property. Yet those who ought to have explained these puzzling eventualities, such as the County Land Registrars and District Surveyors, did not testify in that regard or otherwise feature as parties to the proceedings leading to the impugned judgment.
48. Notably, learned counsel for the respondent, in answer to a question posed by the Court at the hearing of the appeal, submitted that, if all persons interested in or privy to the alleged transactions and management of the records in the Registry were joined as party to the proceedings, a different story might have been told in pleadings and evidence as a matter of course. That opportunity was lost to the detriment of the party in whose favour such information could have been provided.



49. Granted, we take note of the fact that, after close of the defence (the appellant's) case, Counsel for the respondent had made an oral application to re-open the plaintiff's case to call the Director of Surveys. Counsel for the appellant objected, stating that the appellant should not be ambushed after closing his case, and that the suit was a 2016 case. The court properly rejected the application and directed the parties to file their submissions.
50. What draws our further attention is the respondent's submissions in the trial court on what they termed: "missing components of the defendant's purported title documents" to wit the red seal ordinarily common for titles issued in the colonial era, as was the case in the suit property, but which was allegedly absent from the Certificate of Ownership; the Deed Plan, which did not accompany the Certificate of Ownership held by the appellant; and the missing entries in respect of transactions recorded as Nos. 15 to 54. Notably, the missing entries were made between 1951 and 10th April 1991, all of which the deceased and the appellant appeared not to have been aware or notified of despite actual possession and occupation of the suit property.
51. We tried to understand how this could have been the case, but found no answers to this momentous turn of events highlighted in the parties' submissions. Our curiosity is compounded by the trail of judicial proceedings initiated by the respondent, but from which those who would have testified in answer to these and other questions were either deliberately or inadvertently excluded from the proceedings as either parties or witnesses to the critical issues raised before the trial court. The question is: who but the County Land Registrar and the Surveyor could have dispelled or affirmed the authenticity of the chain of transactions, and of the title documents uttered by the appellant and the respondent in a competing claim of this magnitude?
52. In her decision on the similarity of the two title documents, the learned Judge observed that:
- "The deed plan numbers on both titles is the same No.21108, both are in the Province of Seyidie District of Mombasa locality to S.E of Mazeras station. Both refer to Plot No. 287 Section V Mainland North and are certified by Phineas Earnest Wolf."
53. It is clear to our mind that the suit property was originally described as Plot No. 287 Section V MN situate in "the Province of Seyidie" at S.E. of Mazeras Station. The property, as then registered, measured 983 acres in the approximate, and was more particularly described and delineated on Deed Plan No. 21108. It is not in contention that the suit property was first registered at the Coast Registry in Mombasa as No. CR 6302/1. It is apparent that the appellant and the respondent hold original copies of the Certificate of Ownership of the suit property dated 26th October 1923 as certified by one Phineas Ernest Wolffe. The only marked difference between the two Certificates is that the appellant's copy contains only the 1st fourteen (14) entries of the recorded transactions. On the other hand, the respondent's copy contains records of additional entries of transactions numbering 54 in all, including the fourteen entries recorded in the appellant's copy, the last of which was recorded on 30th January 1951, namely a discharge of charge whose particulars are not clearly legible from the record as put to us.
54. Suffice it to observe that the first allottee of the suit property was David Gibson (the then administrator of the estate of Sevi Mwagoma), who appears to have transferred the property to Mohamed Afzal Khan on 6th July 1944. Thereafter, various dealings and transactions took place that resulted in change of the title number and size of the property as presently in dispute. Accordingly, we agree with the learned Judge that the appellant's and the respondent's competing claims relate to one and the same property despite the unexplained disparity in the original number and the series of the alleged subsequent transactions on which the respondent's claim on the residual part thereof is founded. Put differently, the appellant's claim relates to the original parcel measuring 983 acres in the approximate and which,



- according to him, has never been subdivided, but which the respondent claims to have been partitioned leaving 973 acres on which it lays its claim, and the rest having been allegedly surrendered to the Government of Kenya.
55. Turning to the 2nd issue as to what now constitutes the suit property, the appellant's case is that the suit property has never been subdivided, and that it remains as originally registered as
- “Plot No. 287 Section V MN situate in “the Province of Seyidie” at S.E. of Mazeras Station” and measuring 983 acres in the approximate.
56. On its part, the respondent contended that:
- “In sum the current title over the suit land held by Freedom Limited being CR. 32564 plot no. 1948 (Original 412/10) Section/V/MN was issued by the Registrar deriving from the transactions of the mother title, particularly entry 53. These transactions include transfers, charges and compulsory acquisitions. The transactions on the Plaintiff's original mother title also demonstrate the connection between CR. 6302, plot number 287/Section/v/mainland north being the mother plot and that of the Plaintiffs being CR. 32564 plot no. 1948 (original no. 412/10) that was issued after the suit land underwent several subdivisions.”
57. Having analysed the evidence adduced by the parties, the learned Judge made the following findings:
- “The plaintiff adduced evidence that the suit property was compulsorily acquired by the Government in 1955 by a gazette notice dated 25th January 1955. All relevant entries were made in the plaintiff's mother title. The gazette notice clearly shows 6.1 acres of Plot 287 Section V Mainland North being acquired by the Government.”
58. Be that as it may, it is noteworthy from the record before us that the numerous subsequent transactions reflected on the Certificate of Ownership produced by the respondent, including: the alleged subdivision of the original title; compulsory acquisition of part thereof; an award allegedly vesting two of the three subdivisions of the property in the State; transfers of the 3rd subdivision to various individuals; charges; discharge of charges; further subdivision and surrender of one of the further subdivisions to the State; and grant of a Certificate of Title of the residual suit property to the three vendors, who are said to have sold the suit property to the respondent, raise pertinent questions whose answers remain unclear to us.
59. The foregoing transactions alleged to have been undertaken are recorded on the Certificate of Ownership in the respondent's possession. The entries point to the current identity of the property in issue, but of which the appellant appears not to have been aware. What that means is that, if those transactions ever took place as suggested, the same were carried out and the original number (No. 287 Sec. V MN) altered while the deceased and his household were in vacant possession thereof, but without their knowledge.
60. On the issue as to whether the suit property was ever subdivided, the record comprised of the original Certificate of Ownership speaks for itself. The 1st of such subdivisions of the suit property was carried out on 10th April 1956 resulting in three (3) subdivisions registered as: No. 287/1 Sec. V; No. 287/2 Sec. V; and No. 287/3 Sec. V, out of which No. 287/1 and No. 287/2 were awarded to the Crown. The 3rd subdivision No. 287/3 measuring 973 acres in the approximate remained the property of Mohamed Afzal Khan. This is the property more particularly known as Plot No. 412 (Original No. 287/3) Sec. V sold to and held by the deceased for 22 years before his demise in the year 2000. However, that did not



mark the end of the events leading to the purported change in the registration number and size of the original suit property, changes that the deceased and the appellant appeared not to have been aware of.

61. The record as reconstructed at the respondent's instance suggests that Mohamed Afzal Khan transferred Plot No. 412 (Original No. 287/3) Sec. V) to Aniceto Dias and Charles Dias on 2nd August 1957, and who, in turn, transferred it to Ramji Jethabhai Limited on 15th July 1963. Eight-and-a-half years later, the company allegedly transferred the same plot to Abdulghafar Sultanal Chaudhry, Mohamed Jaffer Abdulrasul Panju and Abdulmanan Abdul Rehaman Keher Qureshi on 21st January 1972.
62. Subsequently, the three allegedly surrendered 16.19 hectares of the said property to the Government of Kenya on 10th April 1991 whereupon they were issued with a Certificate of Title under the Registration of Titles Act (Cap. 281) over the remaining portion registered as CR 32564 and more particularly known as Plot No. 1948 (Original No. 412/10) Section V Mainland North as delineated on Land Survey Plan No. 223946 and containing by measurement 376 hectares or thereabouts (929.116 acres in the approximate).
63. According to the respondent, the resultant suit property being CR 32564 and more particularly known as Plot No. 1948 (Original No. 412/10) Section V Mainland North was the property allegedly sold and transferred to the respondent on 12th October 2010. It is the property the respondent company moved to protect in Mombasa HC Constitutional Petition No. 58 of 2015 (culminating with orders to reconstruct the records in the land registry) and in ELC No. 358 of 2016, which culminated in the impugned judgment.
64. No doubt, a great deal appears to have changed since 2nd August 1978, the date on which the appellant's deceased grandfather was said to have bought from Mohamed Afzal Khan the original property known as Plot No. 287 Section V MN measuring 983 acres in the approximate, and out of which CR 32564 and more particularly known as Plot No. 1948 (Original No. 412/10) Section V Mainland North was allegedly derived albeit after numerous subdivisions preceding its present registration. This plot is delineated on Land Survey Plan No 223946 and contains by measurement 376 hectares or thereabouts (929.116 acres in the approximate). In effect, the identity and size of the property to which the appellant lays his claim had long changed. It is different from that held by the respondent as registered proprietor.
65. We reach this conclusion fully cognisant of the fact that the respondent's title to Plot No. 1948 (Original No. 411/20) traces back to the original Plot No. 287 Section V MN which, to our mind, no longer exists in its original size and number in view of the registered subdivisions, award and surrender, which the appellant does not recognise. That said, the change from its original No. 287/3 to No. 412/10 is, to our mind, an irregularity that remains unexplained.
66. In conclusion, the property registered as CR 32564 and being Plot No. 1948 (Original No. 412/10) Section V Mainland North constitutes the suit property, whose original number was altered from Original No. 287/3, which the respondent sought to recover from the deceased's estate. The appellant's contention that the original property has never been subdivided or any subdivision thereof awarded to the State or otherwise surrendered puts into question the propriety of the entries in the Certificate of Ownership dangled by the respondent.



67. With regard to the issue of registration of the surrender in entry No. 54, we take to mind this Court’s decision in *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* (supra) where the Court held thus:
- “(ii) Guided by dicta in *Mwinyi Hamisi Appeal – v – Attorney General, Civil Appeal No. 125 of 1997*, we find that Registration of surrender is evidence of surrender and further guided by Sections 97(1) and 100 of the *Evidence Act*, no oral evidence is admissible to contradict or vary the contents of the documentary evidence indicating surrender.” [Emphasis ours]
68. Be that as it may, the foregoing dictum holds subject to proof of authenticity of any entry or entries in the Certificate of Ownership in that regard. The events leading to the suit in the trial court and the ensuing appeal before us raise fundamental questions as to the authenticity of the respondent’s Certificate of Ownership, and the propriety of the process by which it was adopted by the Registrar as constituting part of the reconstructed deed file to the property on the basis of documents supplied solely by the respondent company. Those events, as we gather from the record, culminated in the respondent’s Petition for an Official Search and Reconstruction of the register in respect of the suit property.
69. As previously observed, the respondent filed Mombasa High Court Petition No. 58 of 2015 seeking orders compelling the County Land Registrar Mombasa to supply it with an Official Search in respect of the property described as Subdivision No. 1948/V/MN registered as CR No. 32564. The grounds on which its petition was anchored were, inter alia: that on 15th May 2015, the respondent had applied for an Official Certificate of Search in respect of the suit property; but that the Land Registrar had failed, refused or neglected to comply with its request.
70. It is instructive that, in response to the respondent’s petition, Mr. J. G. Wanjohi, the Registrar of Titles at Mombasa, swore a replying affidavit dated 25th April 2016 stating that he was unable to issue the postal search as requested in view of the fact that the Deed File in respect of CR No. 32564 could not be traced at the registry; that he could only issue a postal search after reconstructing the deed file as required under Section 33(5) of the *Land Registration Act*, 2012; and that the respondent was invited to commence the process of reconstruction.
71. In addition to the foregoing, the Registrar of Titles deponed that he was aware that the original title of which the respondent’s title was allegedly a subdivision of (LR 287/V/MN CR 6302) was under investigation by the DCI, the outcome of which investigations is not disclosed in the record as put to us.
72. Also on record is a letter dated 5th May 2016 from the Director of Surveys addressed to the Chief Land Registrar inquiring of the registration status of MN/V/287/3 and MN/V/412. In that letter, the Director of Surveys stated that excision of roads from MN/V/287 resulted to MN/V/287/3; that they had received a request from the respondent’s surveyor to process a Deed Plan for a parcel MN/V/2028 which was as a result of several transactions on the land; and that they had also received a request to stop the processing of the Deed Plan from the appellant citing ownership of the suit property.
73. The subsequent proceedings in the respondent’s petition are not included in the record, save for a Decree dated 29th June 2016 indicating that the High Court, upon hearing Counsel for the parties, issued an order compelling the County Land Registrar to issue an Official Search to the respondent and an order that the registry records be re-constructed on the basis of certified copies of the original documents in the respondent’s possession. To our mind, the summary nature of the trial court’s



determination of the respondent's petition does not aid this Court in ascertaining the propriety of the title register as reconstructed.

74. Suffice it to take note of the events that led to the impugned reconstruction. By a letter dated 1st July 2016, the respondent's advocates then on record wrote to the County Land Registrar requesting for an Official Search and enclosing documents to enable the Land Register to reconstruct their file in terms of the orders contained in the Decree. They also sought clarification from the Land Registrar on the connection of Plot No. MN/V/1948 to Plot No.

MN/V/287. We find nothing on record to suggest that the glaring disparity in the original numbers of the suit property was ever explained by the Land Registrar to the Director of Surveys, or to the respondent's advocates as requested.

75. In our considered view, learned counsel's enquiry is suggestive of the respondent's own uncertainty in respect of the real identity of the property to which it lays its competing claim. In view of the foregoing, the connection between the two Plots registered as Original Nos. 287/3 and No. 412/10 remain unexplained, raising questions as to the propriety of the impugned subsequent entries reflected in the respondent's version of the Certificate of Ownership while the property remained in vacant possession of the deceased's estate.

76. With regard to the reconstruction of the title register, we find nothing on record to suggest that any Gazette Notice was ever published by the Registrar giving notice of the intended reconstruction. To our mind, such a notice would have invited all persons interested in the suit property, including the appellant, to submit their views and any original records (if any) in their possession in respect of the suit property. Instead, the reconstruction was undertaken at the respondent's behest and convenience, where it supplied the documents, raising further questions as to the integrity of the title register as thereby reconstructed. That explains the contents of the Certificate of Postal Search dated 3rd November 2016 indicating that the respondent was the registered owner of Plot No. 1948/V/MN (Original No. 412/10).

77. We also take to mind the mandatory provision of section 33(5) of the Land Registration Act, 2012 which states that:

33. Lost or destroyed certificates and registers

... ..

- (5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

78. From the foregoing, it is clear that the Registrar embarked on reconstruction of the record purely on the basis of copies of documents presented by the respondent; that the exercise was carried out without notice to any other party; and that this was done despite knowledge that ownership of the suit property was contested.

79. In this regard, we take the liberty to highlight the requirement under the Land Registration (General) Regulations, 2017 (, even though it came into force after the reconstruction in issue), but which sheds light on the basic steps that the Registrar ought, in all fairness, to have taken before embarking on reconstruction of the register. Regulation 29 reads:

29. Reconstruction of a land register



- (1) On loss or destruction of the land register, a person claiming to be a registered proprietor may apply to the Registrar for the reconstruction of the register in Form LRA 14 set out in the Sixth Schedule
... ..
4. An applicant under paragraph (1) shall provide an indemnity in Form LRA 17 set out in the Sixth Schedule to the Registrar.
5. Upon receipt of an application made under paragraph (1), the Registrar shall notify the loss by notice in the Gazette in Form LRA 18 set out in the Sixth Schedule.
6. After the expiry of the notice in paragraph (3), the Registrar shall obtain clarification on the parcel status from -
 - a. the office or authority responsible for survey;
 - b. the office or authority responsible for land administration;
 - c. any other office the Registrar may deem necessary.
7. Upon clarification under paragraph (4) and no objection has been raised against the application made under paragraph (1), the Registrar may reconstruct the land register.

80. The precautions that the Registrar is mandated to take in reconstruction of a lost or destroyed land register pursuant to section 33(5) of the *Land Registration Act* were also emphasized by Mbogo, J. in *Republic vs. County Land Registrar, Makueni Lands Registry Ex-Parte Philis Mwikali Kioko & 2 others* [2021] eKLR in the following words:

“22. My understanding of the above Section is that it deals with the powers of the Registrar to reconstruct any lost or destroyed land register. The Registrar is required to make enquiries as to the loss or destruction of the land register sought to be reconstructed. And after being satisfied of the loss or destruction, the Registrar issues a notice of Sixty (60) days in the Gazette and in any local newspapers of nationwide circulation before reconstructing the lost or destroyed land register.”

81. The very fact that the foregoing requisite precaution were never taken had the effect of shutting out the appellant and, possibly, other persons who may have had objections to raise with regard to the contents of the documents presented to aid in the reconstruction of the land register. Yet, it is the postal search obtained after such reconstruction that formed the basis of the trial court’s holding that the respondent was the bona fide registered proprietor of the suit property, all in disregard of the appellant’s claim and of the law.
82. That said, we can only conclude that, on the ground, the property subject of the appellant’s and the respondent’s competing claims is one and the same property, albeit bearing different Original Numbers, and comprised of different sizes (983 and 973 acres respectively). And that settles the 2nd issue.
83. Turning to the 3rd issue as to who (as between the estate of Mbarak Awadh Salim under which the appellant claims and the respondent company has the proprietary right over the suit property, we are guided by the fundamental conception of seisin in relation to the suit property weighed against the



- statutory test of sanctity and indefeasibility of title. Put differently, who as between the appellant and the respondent has established ownership and the root of title thereto.
84. The sanctity of title and the right to property have dominated our courts as the single most emotive subject of litigation and the administration of justice world over. The words of David Hume (1711-1776), the celebrated Scottish philosopher, historian, economist, librarian, and essayist, set the pace for the course of justice to which all jurists are deeply indebted to this day in their quest towards just determination of competing interests in land.
85. In his celebrated discourse titled “A Treatise of Human Nature (L.A. Selby-Bigge ed, Clarendon Press 1960) Part II, Section II at p.490, David Hume had this to say of the sanctity of property rights:
- “Our property is nothing but those goods, whose constant possession is established by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explained the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy. A man’s property is some object related to him. This relation is not natural, but moral, and founded on justice. Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property.”
86. Our determination of the intricate issues raised in the competing claims and interests at play in the proceedings before us culminating in the impugned judgment and, ultimately, the appeal to this Court are guided by the conception of justice and the right to property as postulated by David Hume, and as guaranteed and protected under [the Constitution](#) and statute law on land, whose purposive interpretation must not by any means elude, but tenaciously adhere to, the course of justice.
87. In principle, the guarantee and protection of the right to property to which all aspire finds meaning in the conceptions of justice and morality in pursuit of which it becomes imperative to peer beyond the often-deceptive facades of procedural formalities and improprieties in cases such as the one before us. Suffice it for the moment to underscore the cardinal rule that Article 40 of [the Constitution](#) on which the conflicting claims over the suit property to which this appeal relates and invariably hinges on, guarantees the right to property to which we will shortly return, and on which we purpose to pronounce ourselves shortly.
88. We hasten to observe that those rights invariably find meaning and protection by legislative and institutional frameworks that take cognisance of the trite law that “... all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin”. That is the eternal principle enunciated in this Court’s decision in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, which continues to hold sway to this day.
89. While it appears from the Certificate of Ownership and certificate of title in the respondent’s possession that the respondent was registered as proprietor of CR 32564 being plot No. 1948 (Original No. 412/10) Section V Mainland North on 12th November 2010, the disparity in the original number, compounded by the deceased’s household’s vacant possession and occupation of the suit property for a period spanning 22 years, and the disappearance of all records in respect of the alleged transactions, raise questions as to the propriety of those transactions, and of the respondent’s root of title thereto.
90. The evidence adduced by the appellant at the trial of his grandfather’s purchase and possession of the suit property were comprised of copies of a Sale Agreement, an unregistered Transfer and Certificate of Ownership in the seller’s name. We take to mind that their authenticity was questioned at the hearing



in the ELC as was the respondent's Certificate of Ownership, but on which we need not pronounce ourselves in the absence of evidence either way from competent authorities, who were not joined as parties to the respondent's suit against the appellant.

91. To determine the question as to who (between the appellant/the deceased's estate and the respondent) has the right of claim over the suit property, we begin by appreciating the principle enunciated by this Court in its decision in *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* (supra) where the Court observed that:

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.”

92. This, among other judicial decisions, underscores the sanctity of title to immovable property subject, however, to the provision of Article 40(6) of *the Constitution*, section 23 of the Registration of Titles Act (now Repealed), and section 26 of the *Land Registration Act*, 2012. Article 40 of *the Constitution* reads:

40. Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- a. of any description; and
 - b. in any part of Kenya
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

93. The sanctity of title to property under Article 40 of *the Constitution* was enunciated in the Supreme Court decision in *Rutongot Farm Ltd vs. Kenya Forest Service & 3 others* [2018] eKLR where the Court held that:

“... once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

94. In this regard, the decisive question that begs our inquiry is whether the deceased's estate under which the appellant claims proprietary interest in the suit property is liable to impeachment pursuant to Article 40(6) of *the Constitution* in the face of (i) documentary evidence of purchase and the duly executed, but unregistered, transfer; and (ii) the vacant possession and occupation by the deceased and his household of the suit property as of right for an uninterrupted period of 22 years, and on account of which the doctrine of seisin may be invoked.

95. Equally of interest to us is the question as to how it is that none of the parties named in the transactions recorded in item Nos. 15 to 54 in the Certificate of Ownership on which the respondent relies, ever stepped forward to claim or recover possession of the suit property from the appellant's deceased grandfather. It is noteworthy that it was only after his demise that: (i) the records in the land registry disappeared; and (ii) the respondent sought reconstruction thereof with documents which it provided



to the Registrar, to the exclusion of all other players whose participation in the exercise would have undoubtedly enriched the process with records that would have laid to rest any question as to the integrity thereof.

96. The sequence of events leading to the respondent's Certificate of title raise pertinent questions that call for answers in light of the test enunciated by this Court in *Embakasi Properties Limited & another vs. Commissioner of Lands & another* [2019] eKLR where the Court had this to say on the basis of which title to land may be impeached:

“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. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.” [Emphasis added]

97. Section 26(1) of the *Land Registration Act*, 2012 affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. The section reads:

26. Certificate of title to be held as conclusive evidence of proprietorship

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; or
 - b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. [Emphasis ours]

98. The golden thread that runs through the foregoing statutory and judicial authorities is that a certificate of title is prima facie evidence of ownership defeasible on evidence of illegality, irregularity in its acquisition or corrupt dealing. In effect, the sanctity of title to immovable property finds protection in *the Constitution* on the basis of a higher value – integrity and the rule of law, and not merely on formal registration of transactions on which a claim is founded.



99. Indeed, there is no paucity of authorities on the doctrine of sanctity of title and the grounds on which it may be impeached. Sichale, JA. in *Elizabeth Wambui Githinji & 29 others vs. Kenya Urban Roads Authority & 4 others* [2019] eKLR sheds light on this principle in the following words:

“... one of the greatest challenges faced by the Courts has been the doctrine of ‘sanctity of title’ as provided in Section 23 of the RTA, and Sections 28 and 143 of the RLA vis-à-vis unlawful and/or irregular acquisition of land...”

In *Chemei Investments Limited Vs. The Attorney General & Others* Nairobi Petition No. 94 Of 2005 At Para.64, This Court held:

‘The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milankumar Shah and 2 others vs. City Council of Nairobi & Attorney General* (Nairobi HCC Suit No. 1024 of 2005 (OS) where the Court stated as follows, ‘we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel (emphasis added) which schemed to disregard the applicable law and the public interest.’”

100. It must be borne in mind, though, that the right to immovable property is not entirely dependent on formal registration and issuance of a certificate of title thereto, particularly where the process is shown to have been tainted with irregularity. Whatever the case, possession carries the day as was held in the case of *Bandi vs. Dzomo & 76 others* (supra) reiterating the holding in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, where the court underscored the following principle: that all titles to land are ultimately based upon possession; that the title of the man seised prevails against all who can show no better right to seisin; that possession is nine-tenths ownership; and that the slightest amount of possession would be sufficient (see the Privy Council decision in Ghana of *Wuta-Ofei -v-Danquah* [1961] All ER 596 at 600).
101. In the same vein, the Privy Council held thus in *R.B. Wuta Ofei vs. Mabel Danquah* [1961] 3 All ER 596:

“...the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In these circumstances the slightest amount of possession would be sufficient. In *Bristow v. Cormican* [1878] 3 A.C. 641 at page 657 Lord Hatherley said:-

‘There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever- as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser.’”

102. In addition to the foregoing, section 116 of the *Evidence Act* states that:

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner”.



103. It is noteworthy that the transactions leading to the alleged formal registration of the transfer of the suit property to the respondent on 12th November 2010 as appears from the Certificate of Title was undertaken in the face of: actual possession and occupation by the appellant's deceased grandfather and his household; the absence of records to ascertain the root of title other than those supplied by the respondent; the failure to Gazette the commencement and conclusion of the reconstruction process as required by law; the exclusion of all persons reflected in the respondent's title document from the process of reconstruction of the records; the absence of testimonies from the relevant officers to authenticate the documents adduced by the respondent as proof of ownership; and lack of evidence to show that any person named in the Certificate of Ownership held by the respondent had done anything to challenge the deceased's occupation of the suit property. Moreover, we find nothing to suggest that the deceased's occupation of the suit property for 22 years extinguished his right of claim merely on the ground that he failed to present his Transfer of the original plot for registration before the year 2000 when he rested in death.
104. We also find nothing to suggest that the multiple entries allegedly made in the respondent's Certificate of Ownership and registration of various transactions, whether in the absence or existence of official records in the land registry, defeated the effect of the doctrine of seisin, which applied in favour of the deceased's estate. On this account, we find that the learned Judge was at fault in upholding the respondent's title to the suit property in the circumstances of this case.
105. Turning to the question as to whether the respondent's root of title stands, we call to mind the more recent case of *Dina Management Limited vs. County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) in which the Supreme Court held that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value, and had this to say:
- “ 94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...
-
110. 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...
111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”
106. In the same vein, this Court in *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR held that:
- “ We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
107. We also take to mind the fact that the three vendors who allegedly sold the suit property to the respondent could only have obtained their Certificate of Title No. CR 32564 under the Registered Titles Act (Cap. 281) if, but only if, the suit property was brought under Cap. 281. However, we



- find no evidence of any endorsement in that regard on the two Certificates of Ownership held by the appellant and the respondent. Those certificates were issued under the Land Titles Ordinance, 1908.
108. The change aforesaid could only have been effected on formal application for the land to be brought under the repealed Registration of Titles Act as required under section 6 of the Act, which provides that:
6. What land and on application by what persons can be brought under Act.
- Land which was alienated or agreed to be alienated in fee or for years by or on behalf of the Government before the commencement of this Act, and has been surveyed and land in respect of which a certificate of title (other than a certificate of interest) has been issued by the Land Registration Court, may be brought under the operation of this Act on an application in form A in the First Schedule, which application may be made by any of the following persons—
- a. the person claiming to be the owner of the fee simple or term of years;
- b. persons who collectively claim to be the owners of the fee simple or term of years;
109. Section 16 (1) of the Registration of Titles Act (Cap. 281) (repealed) provides for cancellation and disposal of prior title deeds after issuance of the certificate of title in the following words:
16. Cancellation and disposal of prior title deeds.
- (1) Upon registering a certificate of title, the Registrar-General shall endorse and sign upon the last in date of the documents registered under the *Registration of Documents Act*, the Land Titles Act or the Government Lands Act as have been lodged in support of the application a memorandum that the land included in the document has been brought under this Act, and, if the documents lodged relate to any property other than the land included in the certificate, the Registrar-General shall return them to the applicant or to the person lodging them; otherwise the Registrar-General shall stamp each of them as cancelled, and after he has so stamped them shall retain them in the office.
110. If the suit property was indeed brought under the repealed Registration of Titles Act and the three vendors issued with a certificate of title, the question as to why the Registrar did not either sign a memorandum on the Certificate of Ownership indicating that the land was brought under the Registration of Titles Act, or stamp the Certificate of Ownership as cancelled and retain the same, is also unanswered. The apparent irregularity in that regards also casts doubt on the already-questionable root of the respondent's title.
111. In so far as the deceased's agreement for sale and the accompanying instrument of transfer remained unregistered, they were not necessarily bereft of legal effect as against the transactions registered as entry numbers 15 to 54, and culminating in the alleged transfer to the respondent of a subdivision of the original suit property. Indeed, the original property to which those entries relate, and on which the appellant lays claim on behalf of his deceased grandfather's estate, did not cease to exist in consequence of the various questionable subdivisions and surrenders shown on the two original title documents as aforesaid.
112. Turning to the 5th issue as to whether the learned Judge was correct in allowing the respondent's suit and in dismissing the appellant's counterclaim, we hasten to observe that her decision was made in error. With tremendous respect to the learned Judge, the record as put to us manifests exclusion or misinterpretation of evidence. For instance, the learned Judge's basis for finding that the respondent had proved its case on a balance of probabilities was her finding that the Gazette Notice dated 25th



January 1955 produced by the respondent showed that 6.1 acres of Plot 287 was acquired by the Government; and that the respondent produced another Gazette Notice showing that the appellant's grandfather died on 15th June 1967 thereby casting doubt on the appellant's contention that his grandfather entered into a sale agreement in 1978.

113. To our mind, the learned Judge clearly misinterpreted the intent and purpose of the two Gazette Notices. The 1st Gazette Notice dated 25th January 1955 was merely a declaration that part of the property was required for a public purpose, while the 2nd Gazette Notice related to an application by one Mohamed Afzal Khan of Mombasa for grant of letters of administration intestate of the estate of one Mohamed Afzal Khan of Eldoret, who died on 15th January 1967. It is also of concern that, the learned judge did not query the lack of transactional documents such as the existence of charges, or transfers or documents of surrender to support the different entries. In addition to the foregoing, the learned Judge failed to pronounce herself on the other issues raised in the suit and, in the circumstances, we reach the inescapable conclusion that the learned Judge erred in allowing the respondent's claim in the suit and dismissing the appellant's counterclaim in the face of the fundamental doctrine of seisin.

114. With regard to this doctrine, we fully agree with counsel for the respondent, whose highlights of the judicial decisions relied on included the pivotal decision in *Bandi vs. Dzomo & 76 Others* (supra) where this Court cited with approval the following principles, which we take the liberty to recite as hereunder:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership...” [Emphasis added]

115. In view of the foregoing, the record as put to us leaves no doubt to our mind that the deceased and his household after him had continuous and uninterrupted vacant possession of the suit property after purchase thereof, and within the meaning of the doctrine of seisin, until the respondent moved in to evict the beneficiaries on the strength of: (i) a title document backed by dubious reconstruction of the title register at its behest; (ii) claim over property whose particulars of registration substantially differ from the original title held by the deceased on which the suit property was described as comprised of Original No. 287/3; the impugned judgment made in error of law and fact as aforesaid; and (iv) in breach of the constitutional right to property.

116. Having carefully considered the record of appeal, the impugned judgment, the written and oral submissions of counsel for the appellant and for the respondent, the cited authorities and the law, find as a fact and hold:

- a. that the deceased, Mbarak Awadh Salim, purchased the suit property described in the original Certificate of Ownership and on the attached Deed Plan as Plot No. 287 Sec. V Mainland North measuring 983 acres in the approximate from one Mohamed Afzal Khan on 2nd August 1978 at KShs. 878,000;
- b. that he took vacant possession thereof and lived thereon together with his household and workers for 22 years before his demise in the year 2000;
- c. that the deceased held the original Certificate of Ownership, the duly executed and attested Sale Agreement and Transfer dated 2nd August 1978, but which were not registered in his lifetime;
- d. that no satisfactory evidence was adduced to prove that the suit property was never subdivided and that, even if it were subdivided without the deceased's knowledge as claimed, the resultant



portion subject of the competing claims herein (after surrender of portions said to have been ceded to the Crown) was registered as Plot No. 412 (Original No. 287/3) Sec. V measuring 973 acres in the approximate;

- e. that change in that number to Plot No. 1948 (Original Number 412/10) Section V Mainland North as shown in the certificate of title under which the respondent claims raises questions as to the propriety of the alleged and unverifiable transactions;
- f. that, in ordinary cases, the original number of a parcel of land remains unaltered despite subsequent subdivision(s) and transfer or surrender, as the case may be;
- g. that the apparent change in the original number of the suit property from 287/3 to 412/10 remains unexplained, thereby raising pertinent questions as to the propriety of the respondent's root of title;
- h. that the title register in respect of the suit property was lost or destroyed, and that reconstruction thereof was undertaken pursuant to an order of the court issued by the High Court of Kenya at Mombasa in HC Petition NO. 58 of 2015 on the respondent's application, but without the requisite Gazette Notice inviting interested persons to respond and record their views either in support of, or in objection to, the intended reconstruction in accord with due process;
- i. that the respondent's suit culminating in the impugned judgment was founded solely on the decree issued in the petition aforesaid in disregard of known competing claims by the deceased's estate;
- j. that the respondent alone supplied the documents used to reconstruct the title register, including a Certificate of Ownership containing 54 entries reflecting a series of transactions some of which were allegedly carried out during and after the deceased's lifetime;
- k. that, up to the date the respondent claims to have purchased the suit property in 2010, the deceased and his household remained thereon in peaceful possession in accord with the doctrine of seisin, and that none of the parties named in the certificate of title in the respondent's possession ever challenged the deceased's occupation thereof;
- l. that the Registrar's averment that those transactions were under investigation by the DCI raises questions as to their propriety, questions that remain unanswered to this day;
- m. that, from the Certificate of Ownership held by the respondent, the identity of the suit property was altered to read Plot No. 412 (Original No. 287/3) on account of alleged subdivisions and surrender of portions thereof, leaving 973 acres or thereabouts to which the appellant and the respondent lay their competing claims;
- n. that, consequent upon purchase and vacant possession by the deceased and his household, the suit property was not available for sale without rescission of his agreement for sale and purchase;
- o. that the transactions alleged to have taken place as reflected in documents that only the respondent had supplied to the Registrar to facilitate reconstruction went against the grain of the doctrine of seisin, and of the deceased's constitutional right to property;
- p. that, as seisin constitutes 9/10 of ownership as conceded by counsel for the respondent, the right of claim by the estate of the deceased against which the appellant claims supersedes that



of the respondent, whose Certificate of Ownership differs in material particulars, including apparent unprocedural entries contrary to statute law;

- q. that on the balance of probabilities, the respondent's root of title is untenable; and
 - r. that the learned Judge erred in law and in fact in dismissing the appellant's counterclaim, and in granting the reliefs sought in the respondent's suit in ELC Case No. 358 of 2016, the impugned decision having been founded on (i) misapprehension of facts relating to the date on which the deceased died; and (ii) the alleged surrender of portions of the suit property, both of which were misunderstood to have been the subject of the Gazette Notices mentioned above.
117. Finally, turning to the appellants claim for general damages, we form the view that the circumstances of the case call for compensation as prayed. The principles that guide an award of compensation in similar cases were set out in the case of Kenya Power & Lighting Company Ltd vs. Ringera & 2 others [2022] KECA 104 (KLR) in the following words:

“ 38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:

- i. Halsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
- ii. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.” [Emphasis added]

118. To our mind, the respondent's forceful eviction of the deceased's household in deliberate disregard of their rights over the land with the object of making a gain by its unlawful conduct invariably occasioned loss for which the deceased's estate is entitled to compensation by an award of general damages, which we assess at KShs. 5,000,000.



119. Accordingly, we reach the inescapable conclusion that the appeal succeeds and hereby order and direct that:
- a. the appeal be and is hereby allowed as prayed;
 - b. the judgment and decree of the Environment and Land Court of Kenya at Mombasa (Nelly A. Matheka, J.) delivered on 19th January 2022 in ELC Case No. 358 of 2016 be and is hereby set aside and substituted therefore:
 - i. an order dismissing the Respondent's suit with costs to the Appellant;
 - ii. an Order allowing the Appellant's Counterclaim dated 16th November 2018 in terms as hereinafter specified:
 - c. it is hereby declared:
 - i. that the purported transfer of the suit property to the respondent on 12th November 2010 pursuant to the alleged sale to it of Plot No. 1948 (Original No. 412/10) Section V Mainland North and irregularly registered as C.R. No. 32564 is null and void and of no effect;
 - ii. that, in view of our declaratory order in (c) (i) above, the certificate of title purportedly issued in favour of the respondent is likewise null and void; and
 - iii. that the estate of the late MBARAK AWADH SALIM is the beneficial owner of ALL that piece or parcel of land containing by measurement Nine Hundred and Seventy-Three (973) Acres or thereabouts and known as Plot No. 287/3 Section V situate in the province of Seyidie at S.E of Mazeras Station and more particularly described and delineated on Deed Plan No. 21108;
 - d. in view of, and pursuant to, our declaratory orders aforesaid, it is further ordered and directed that –
 - i. the appellant be at liberty to seek cancellation of the certificate of title purportedly issued to the respondent on 12th November 2010 in respect of the suit property, to wit, Plot No. 1948 (Original No. 412/10) Section V Mainland North and irregularly registered as C.R. No. 32564; and
 - ii. consequently, the appellant is entitled to registration of the suit property in favour of the estate of Mbarak Awadh Salim (Deceased), and to pursue the issuance of a certificate of title to the deceased's estate in respect of all that piece or parcel of land containing by measurement Nine Hundred and Seventy Three (973) Acres in the approximate and known as Plot No. 287/3 Section V Mainland North, and situate in the province of Seyidie at S.E of Mazeras Station, and more particularly described and delineated on Deed Plan No. 21108;
 - e. a mandatory injunction be and is hereby issued to compel the respondent, its servants or agents or anyone claiming under it, to relinquish to the estate of the late Mbarak Awadh Salim (under which the appellant claims) vacant possession of the suit property, to wit, Plot No. 287/3 Section V situate in the province of Seyidie at S.E of Mazeras Station and more particularly described and delineated on Deed Plan No. 21108 and, further, to demolish or remove all or any surrounding walls, buildings and structures erected by the respondent and being thereon



within 45 days from the date hereof, failing which the appellant shall be at liberty to undertake the demolition or removal thereof at the respondent's cost;

- f. an order of injunction be and is hereby issued restraining the respondent, its servants or agents from hereafter entering into (otherwise than for the purpose of complying with the order and direction in paragraph (e) above), taking possession of, or otherwise interfering with the quiet possession of, or dealings in, the suit property by the appellant or other beneficiaries of the estate of the late Mbarak Awadh Salim (Deceased);
- g. the respondent do pay to the appellant general damages in the sum of KShs. 5,000,000;
- h. the respondent do bear the costs of the appeal together with interest thereon at court rates.

Those are our orders.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original.

Signed

DEPUTY REGISTRAR

