



**Mwangi v Wanyoike t/a Between Us Bar & 2 others (Civil Suit  
264 of 2012) [2024] KEELC 4526 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4526 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 264 OF 2012  
LL NAIKUNI, J  
MAY 30, 2024**

**BETWEEN**

**DAVID NDIRANGU MWANGI ..... PLAINTIFF**

**AND**

**ANN WAITHERA WANYOIKE T/A BETWEEN US BAR ..... 1<sup>ST</sup> DEFENDANT**

**JACINTA WANGUI T/A SILVER BUTCHERY ..... 2<sup>ND</sup> DEFENDANT**

**CATHERINE NJOKI T/A BACK STREET PUB ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment by this Honourable Court pertains a suit instituted through filing of a Plaint dated 16<sup>th</sup> November, 2012. It was amended on 3<sup>rd</sup> July, 2017 and filed on 4<sup>th</sup> July, 2017 by Mr. David Ndirangu Mwangi, the Plaintiff herein against M/s. Ann Waithera Wanyoike t/a. Between US Bar, M/s. Jacinta Wangui t/a. Silver Butchery and M/s. Catherine Njoki t/a. Back Street Pub, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.
2. Upon service of the pleading and Summons to Enter Appearance dated 19<sup>th</sup> November, 2012 issued against the Defendants, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant filed a Memorandum of Appearance dated 26<sup>th</sup> November, 2012. Later on, while opposing the suit filed a Statement of Defence dated 17<sup>th</sup> December, 2012 respectively. The 2<sup>nd</sup> Defendant filed a Statement of Defence dated 6<sup>th</sup> November, 2017 which apparently was not on record by the time of penning down this Judgement. However, the Honourable Court will be dealing with all the issues raised indepth thereof at a later stage of this Judgement.



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

3. The Plaintiff was described in the Plaint as a male adult of sound mind and understanding, working for gain in Ukunda within the Republic of Kenya. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were described as female adults of sound mind and understanding residing in Ukunda within the Republic of Kenya.

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

4. The Honourable Court on 23<sup>rd</sup> March, 2022 scheduled the hearing of the main suit on 28<sup>th</sup> July, 2022 where the Plaintiff proceeded with his case and testified as PW - 1 after which through his Counsel marked his case closed. The matter was adjourned on numerous times after and on 6<sup>th</sup> March, 2023, the Honourable Court set the Defence hearing on 17<sup>th</sup> July, 2023 where the sought another adjournment and the hearing was rescheduled to 13<sup>th</sup> October, 2023. On 13<sup>th</sup> October, 2023 the matter was taken out due to a site visit and the Court rescheduled the hearing to 18<sup>th</sup> October, 2023 where the Defendants called DW - 1 (2<sup>nd</sup> Defendant herein) and marked the close of their case through their Counsel. After which parties were directed on the filing of their submissions.
5. This matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witnesses (PW – 1) and Defendants (DW - 1) testifying in Court on 28<sup>th</sup> July 2022 and 18<sup>th</sup> October, 2023 respectively.

## **IV. The Plaintiff’s Case**

6. From the filed pleadings, the Plaintiff’s Case was that he purchased and is the registered proprietor of all that parcel of land known as Kwale/Ukunda/2848 and all the developments thereon situated within Ukunda Township in the South Coast of the Coast Province of the Republic of Kenya (Hereinafter referred to as “The Suit Land”). After he purchased the land he was lawfully issued with a valid Certificate of Title Deed on 8<sup>th</sup> October, 2001. He had not sold any premises on the said property or sanctioned any sub - divisions, excisions of or surrendered his interests or rights over any portion of the suit land to any person.
7. The suit land was held by the Plaintiff absolutely under a valid registered Title Deed and that he continued to receive demands for and continues to pay the requisite statutory levies to the Kwale County Council. According to the Plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had separately been in trespass and unlawfully carrying on business on the sold premises thus unjustly depriving him of the user of the land. The Defendants had started digging trenches and accumulating building material on the land with intention of putting up illegal structures on the property. Unless stopped by an order of this Court the Plaintiff averred that the Defendants actions would continue to unlawfully interfere with the same and deprive the Plaintiff of his rights, interests and title and interfered with his ability to develop and utilize his property.
8. The Plaintiff averred that despite constant demands and notices the Defendants had refused and declined to depart and move out of the Plaintiff’s land. Therefore, the Plaintiff sought an order of eviction to issue against the Defendants. The Plaintiff averred that there was no suit pending and that had never been any previous proceedings in any court of law between the Plaintiff and the Defendants over the same subject matter. The Plaintiff submitted to the jurisdiction of the Court.
9. The Plaintiff prayed for Judgment to be entered against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants for jointly and severally for:-



- a. A Declaratory Order that parcel Kwale/Ukunda/2848 and all the developments thereon is the lawful property of the Plaintiff and that the Defendants are Trespassers thereon and should be evicted therefrom
  - b. A Permanent Preservatory Order of Injunction do issue directing the Defendants do stop any renovations and or constructions on the land Plot No. Kwale/Ukunda/2848 and remove all the unauthorized and illegal structures on the suit premises.
  - c. An Order of Eviction do issue against the Defendants so as to evict and remove the Defendants from the Plaintiff's parcel of land Plot No. Kwale/Ukunda/2848 and restore possession to the Plaintiff at the Defendants' costs.
  - d. Such further or better relief this Honorable Court may deem just in the circumstances.
  - e. Costs of this suit
10. On 28<sup>th</sup> July, 2022 the Plaintiff testified as PW - 1 as follows:-

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

11. PW – 1 was sworn and testified in Swahili language. He identified himself as Mr. David Ndirangu Mwangi, the Plaintiff herein. He told the court that he was born on 1<sup>st</sup> January, 1965 and his identification was issued on 19<sup>th</sup> February, 2020. He was a business man and also did farming. He recorded his witness statement which was filed on 12<sup>th</sup> March, 2014. Further, that he filed a list of documents on 20<sup>th</sup> March, 2014. He wished to rely on them as his evidence in chief in support of this case. He informed Court that the title to the suit land was issued in his name on 8<sup>th</sup> October, 2001. The land was transferred to him by M/s. Fatuma Rama Matano a holder of the national identity card bearing numbers 4618631/67 on 8<sup>th</sup> October, 2001. He produced a duly executed transfer form. There was an application to the Land Control Board Msambweni by the Vendor. Subsequently, the seller obtained a Letter of Consent dated 5<sup>th</sup> September, 2001 from the Land Control Board, Msambweni office. PW – 1 produced a sale agreement terms and conditions stipulated thereof duly executed between M/s Matano and himself dated 3<sup>rd</sup> May, 2001 for a consideration of a sum of Kenya Shillings Seven Thousand (Kshs. 700,000/-) which was paid in two instalments of being a deposit of Kenya Shillings Three Hundred Thousand (Kshs. 300, 000.00/=) upon execution of the agreement and final balance of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400, 000./=) upon completion of the transaction.
12. PW - 1 told the court that the land measured 0.06 Ha or thereabout in size. He was going to call M/s. Matano as a witness. He acknowledged that the Defendants were his neighbours and that they had trespassed onto his land. According to the witness, Ann, the 1<sup>st</sup> Defendant and Jecinta, the 2<sup>nd</sup> Defendant operated bars while Catherine, the 3<sup>rd</sup> Defendant sold eggs. They were all illegally there as they had no title deeds to the land. They had neither filed any title nor a copy of any title.
13. PW - 1 stated that he needed his land back. He urged Court to grant him the prayers sought out in the Plaintiff.

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

14. The witness reiterated that he wanted the eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from the suit land. He refuted having testified that they were tenants. Instead, they had trespassed onto his land. There was no building called Agrarian on the suit land. Although there were several buildings there but he was not aware of that particular building.



15. According to PW - 1 there were several rooms, hotels – one was called Maasai Hotel which belonged to him and Chania Bus officers which were all in the front side of the suit land. They were on Maasai Building which he had put up. He used to see the 1<sup>st</sup> Defendant who carried out business in that building. She had a business called Between US bar where she sold soft drinks. He told the court that when he bought the building she was already there. The 2<sup>nd</sup> Defendant was not operating her business by then. She was selling eggs on the same land. His advocates wrote to the Defendants and other tenants to vacate the suit land as they were not paying rent. Many of them obliged and vacated. He never instituted any proceedings against them before Business Premises Rent Tribunal (BPRT).
16. He confirmed that his only prayers were for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to leave the premises. He recalled filing a case in Kwale Court Principal Magistrate (PM) No. 172 of 2002 – the Defendant was Ann Wanyoike – the same 1<sup>st</sup> Defendant. From the same Court he was seeking to have her evicted. The case was never concluded. It was transferred to Mombasa High Court. He had no knowledge of whether there was an order for transfer or withdrawal of the suit. From his supporting affidavit sworn at Kwale the contents were that he bought land and structure which was formerly known as Agrarian building. He admitted that the signature in the document was his but he did not know the contents of the affidavit. He did not attend court at Kwale. He denied that the plot was as a result of sub – division.

### **C. Re - examination of PW - 1 by Mr. Opolu Advocate.**

17. PW - 1 confirmed that he had filed a Notice of withdrawal of the Principal Magistrate Court Suit No. 72 of 2020 Kwale. Hence the case at the Kwale Court was withdrawn. At no particular time, had the three Defendants been his tenants. He had never received any rent from the Defendants. Within this building, they had offices, rooms, Mobile money transaction (MPESA) shops, wines and spirits etc. The Defendants were there when he bought the building. They had had many meetings with the occupants where fifteen (15) participants were in agreement while four (4) of them refused to co - operate. The Property was situated in Ukunda.
18. From the witness statement by PW – 2 filed in Court on 12<sup>th</sup> March, 2014, she stated that she was the one who sold the suit property together with the development on it to the Plaintiff. She held having been paid the whole consideration. She underwent the whole process of obtaining the Consent from the land Control Board and the transfer of the land. He was then issued with a Certificate of Title Deed.
19. On 28<sup>th</sup> July, 2022 the Plaintiff through its advocate marked the close of his case.

### **V. The 1<sup>st</sup> Defendant's case**

20. The 1<sup>st</sup> Defendant relied on the statement of defence dated 17<sup>th</sup> December, 2012 where the Defendants averred that they were strangers to the allegations made in Paragraph 3 of the Plaintiff. In answer to the averments made in Paragraph 4 of the Plaintiff, the Defendants stated that the Plaintiff was untruthful and concealing material facts. The Defendant shall at the hearing of this suit crave the leave of the court to refer to the pleadings and proceedings in Kwale Principal Magistrate's Court Civil Case Number 172 of 2012 where the Plaintiff herein sued the 1<sup>st</sup> Defendant and later withdrew the suit which was struck out and dismissed.
21. The allegations made in Paragraph 5 of the Plaintiff were unknown to the Defendants. The Defendants could not therefore admit the same. The Defendants denied the allegations contained in Paragraph 6 of the Plaintiff. In further answer to the allegations contained in Paragraph 6 of the Plaintiff, the Defendants stated that they shall in limine raise as preliminary objection that:-
  - a. This suit was “res judicata”;



- b. This suit was scandalous, frivolous and vexatious and should be struck out;
  - c. This suit raised no cause of action.
22. The 1<sup>st</sup> Defendant further averred that the Plaintiff had not paid the costs as ordered by the court in Kwale PMCC No. 172 of 2012 where similar and/or identical claim filed by the Plaintiff against the 1<sup>st</sup> Defendant was withdrawn, struck out and dismissed. Accordingly this suit was unsustainable in law. In further answer to the allegations made in Paragraph 6 of the Plaintiff the Defendants averred that they had been in use and occupation of the premises since about the year 1995 and had discharged all her contractual and legal obligations for occupation thereof and were a protected tenant under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301 Laws of Kenya (Hereinafter referred to as Cap. 301”). The Defendants denied the allegations contained in Paragraph 7 of the Plaintiff and stated that the order sought therein could not be granted by this Honourable Court.
  23. The 1<sup>st</sup> Defendant averred that there had been previously filed by the Plaintiff against the 1<sup>st</sup> Defendant Kwale PMCC No. 172 of 2012 in respect of the same subject matter as in this suit and which suit was withdrawn, struck out and dismissed. The Defendant craved the leave of the Court to refer to the said suit. The jurisdiction of the Honourable Court was admitted. Save as otherwise expressly admitted herein the Defendants denied each and every allegation of fact contained in the Plaintiff as if the same were herein set out and traversed seriatim.
  24. The 1<sup>st</sup> Defendant prayed that the suit be struck out and dismissed with costs.

#### **VI. The 2<sup>nd</sup> Defendant’s case**

25. The 2<sup>nd</sup> Defendant relied on the statement of defence dated 6<sup>th</sup> November, 2017 where she averred that she was a stranger to the allegations contained in Paragraph 5 of the Amended Plaintiff. The 2<sup>nd</sup> Defendant denied the contents of Paragraph 6 of the Amended Plaintiff. The 2<sup>nd</sup> Defendant was unaware of the allegations made in Paragraph 7 of the Amended Plaintiff. In answer to Paragraph 8, the 2<sup>nd</sup> Defendant averred that she had been in lawful occupation of the premises which she occupied as a protected tenant under the Cap. 301 of the Laws of Kenya. The 2<sup>nd</sup> Defendant denied the allegations contained in Paragraph 9 of the Amended Plaintiff. The 2<sup>nd</sup> Defendant denied that there had been demands and notices to depart and averred that she was in lawful and legal occupation as a tenant duly protected under the Cap. 301 of the Laws of Kenya and could not be evicted as sought by the Plaintiff from the premises.
26. She averred that she was aware that there had been previous proceedings between the Plaintiff and 1<sup>st</sup> Defendant in a suit instituted at the Principal magistrate at Kwale in respect of the same subject matter as in this suit. It was the Business Premises Rent Tribunal that had jurisdiction to hear and determine this dispute. The 2<sup>nd</sup> Defendant prayed that the Plaintiff’s suit against her be dismissed with costs.
27. The Defendants on 18<sup>th</sup> October, 2023 called DW - 1 (The 2<sup>nd</sup> Defendant herein) who testified as follows:-

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

28. DW – 1 testified under oath in Swahili language. She identified herself as M/s. (Jacinta Wangui Mbiriri, the 2<sup>nd</sup> Defendant herein. She told the court that she was a business lady selling meat at Silver Butchery. She knew David Ndirangu Mwangi, the Plaintiff herein. He was a neighbor at her business premises. She worked from the house of the late Mwafrika who had since passed on. he was the locational Chief of the location. The house was known as Agrarian as the Agrarian Bank used to be situated there and



operated from there. Mr. Ndirangu operated a business from there – a bar/ restaurant business i.e. a night club. DW – 1 saw an advertisement for a place to let. Through this she was able to locate the owner of the building – Chief Mwafrika. The building was at Ukunda Posts – within Kwale County.

29. She told the court that she started leasing out the premises. By that time there were three tenants. At the time of her testimony the number of tenants were two. It was in the year 2007 when she commenced operating the meat business for that time until the time of her testimony. She used to pay rent. By then it was a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) per month. Even after the Chief died she continued paying rent to the children of the deceased.
30. According to her the Plaintiff claimed she was a trespasser. She denied the allegations, as she had not leased the premises from him neither did she have any relationship with him. She had a right to be on the premises from the lease agreement she had with Mr. Mwafrika. The Plaintiff was just a neighbor and she had never received any notice from the Plaintiff or anybody else.
31. She reiterated that she had filed a defence dated 6<sup>th</sup> November, 2017. Further, she had recorded a witness statement dated 30<sup>th</sup> September, 2023 which she produced/ relied on as per of her evidence in chief in support of her case.

#### **B. Cross examination of DW - 1 by Mr. Opolu Advocate.**

32. The witness was referred to the list of documents by the Plaintiff dated 10<sup>th</sup> March 2014 where she denied receiving a notice to terminate tenancy dated 10<sup>th</sup> February, 2021. She knew M/s. Fatuma Rama Matano. She was still alive. DW – 1 did not know if M/s. Matano was related to Mr. Mwafrika in any way. She had an agreement between Hassan Mwafrika although she did not have it in court. She did not know the reference number of the land where she had leased her business. She knew that all such the premises and land had reference numbers and certificate of title. She was referred to a Certificate of title for Fatuma Rama Matano for Land Reference Kwale/Ukunda/2848. She stated that she did not know it.
33. With reference to the transfer of land on 8<sup>th</sup> October, 2001 from Fatuma Rama Matano to the Plaintiff, she stated that she was not aware of it. With reference to another title deed in the name of David Ndirangu Mwangi registered on 8<sup>th</sup> October, 2001 for Land Reference No. Kwale/Ukunda/2848, she admitted to it. She stated that she knew people normally have to enter into agreements.
34. DW - 1 reiterated that she was not aware of when Mr. Mwafrika died but it could have been over 10 years ago. She was paying rent of a sum of Kenya Shillings Fifteen Thousand (Kshs. 15,000/-) per month as rent to Mr. Ali as at the moment, on the basis of being the duly appointed Legal administrator to the estate of the deceased. However, she did not have any documents to that effect. Mr. Ali had always been among the children of Mr. Mwafrika. All the business were in one building. She had known Mr. Mwafrika for 17 years as she had occupied the building for that long. She started her business in the year 2007.

#### **C. Re - examination of DW - 1 by Mr. Asige Advocate.**

35. DW - 1 told the court that she was not concerned with the title deed of the place where she carried on business. Neither was she concerned with the legal owner of the building she used to pay the deceased and still paid rent to his family. With reference to Notice dated 10<sup>th</sup> January, 2011 she had never seen it neither was she served with it.
36. On 18<sup>th</sup> October, 2023 the Defendants through their Counsel marked the close of their case.



## VII. Submissions

37. On 18<sup>th</sup> October, 2023 after the Plaintiff and Defendants marked the closure of this case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Parties complied accordingly and on 19<sup>th</sup> February, 2024, the Honourable court reserved a date to deliver its Judgement on 27<sup>th</sup> May, 2024.

### A. The Written Submissions by the Plaintiff

38. The Plaintiff through the Law firm of Messrs. Opolu & Company Advocate filed his written submissions dated 1<sup>st</sup> March, 2024. Mr. Opolu Advocate commenced his submissions by providing a brief background of the subject matter. He stated that the suit was instituted by way of filing a Plaintiff filed on 16<sup>th</sup> November, 2012 and amended on 6<sup>th</sup> October, 2016 (the court notes that the same was dated 3<sup>rd</sup> July, 2017) the Plaintiff sued the Defendants for a Declaratory Order over the suit property Kwale/Ukunda/2848 and for the eviction of the Defendants evictions as trespassers plus any other order deemed fit. The Defendants filed a Defence and pleaded that the suit was “Res judicata” as there existed another Civil suit over the same subject matter and same parties being - PMCC 172 OF 2012. It was averred that the 1<sup>st</sup> Defendant Anne Wanyoike had been in occupation of the suit property from the year 1995 and had discharged her legal and contractual obligations as a protected tenant under the Cap. 301. They averred that the suit was withdrawn, struck out and dismissed. According to the Learned Counsel, by their own averments the suit was withdrawn and therefore the plea for res judicata could not be attracted. The court has jurisdiction under Order 36 Rule 1 of the *Civil Procedure Act*, 2010.
39. The 2<sup>nd</sup> Defendants filed a Statement of Defence on 9<sup>th</sup> November, 2012 (the Court notes that the 1<sup>st</sup> Defendant filed her statement of defence dated 17<sup>th</sup> December, 2012 and the 2<sup>nd</sup> Defendant dated 6<sup>th</sup> November, 2017 which was not on the court record but the 2<sup>nd</sup> Defendant referred to it in her testimony) reiterating the contents of the earlier Defence filed on record and contends that the jurisdiction therein lies in the Business Premises Rent Tribunal as she was a Protected tenant and could not be evicted. Witness Statements were filed by the parties and all the pre - trial documents. During trial the Plaintiff called 2 witnesses David Ndirangu Mwangi and Fatuma Rama Matano. The Defendants called one witness Jacinta Wangui. The parties adopted all their statements and documents.
40. The evidence of PW - 2 Fatuma Rama Matano was to the effect that the suit property Kwale / Diani /2848 was initially registered in her name as registered Proprietor. She sold the suit property to the Plaintiff on 8<sup>th</sup> October, 2001. A title was produced in her name before she transferred it to the Plaintiff. A new title after Transfer to the Plaintiff was issued in his name. It was parcel No. Kwale/ Diani /2848 measuring 0.06 Ha. PW - 1 DAVID NDIRANGU MWANGI testified and produced all exhibits in the list of documents duly filed in court. They were not contested. The Plaintiff acquired the suit property from PW - 2 Fatuma Rama Matano who was the registered owner of the property from July, 1994. There was no contests that the Plaintiff had all the proprietary rights over the suit property as the registered owner. Transfer, Sale Agreement Land Control Board Consent and receipt for payment of purchase price were produced in evidence.
41. On the issues for determination, the Learned Counsel relied on the following three (3) issues. Firstly, Whether court has jurisdiction to hear and determine this Case. Secondly, whether any land lord tenant relationship existed between the Plaintiff and the Defendants. Finally, what were the appropriate reliefs in the circumstances. The Learned Counsel averred that the acquisition and ownership of the property by the Plaintiff was not in issue. The 2<sup>nd</sup> Defendant in her Witness Statement claimed that



she had been in lawful occupation of the premises which she occupies as a protected tenant under the Landlord and Tenant Act. She claimed she had always paid rent to the Landlord, the late Chief Hassan Hamadi Mwafrika and his estate and legal representatives on 27<sup>th</sup> July, 2023 the Defendant served documents without listing or pagination. They were assorted documents. Part of these documents was an agreement purportedly executed on 1<sup>st</sup> June, 2007. The agreement was between Anne Waithera Wanyoike as Tenant and Mr. Hassan Hamadi Mwafrika. There were various documents annexed purported to be receipts for rent payment. The said documents did not reveal which property the agreement related to. The Agreement was between Ann Wanyoike Waithera the first Defendant who never testified.

42. Therefore, the Defendants' claimed to be a Protected Tenant in the suit premises by virtue of the Agreement with a Mr. Hassan Hamadi Mwafrika (Deceased). The Defendants conceded that Mr. Hassan Hamadi Mwafrika died and that she was dealing with his Estate. No evidence was provided to demonstrate that there was an Administrator Grant of representation to the estate. The Defendant was not an Administrator of that Estate. No rent payment evidence was produced in respect of the premises to any person related to the estate. They were not named and therefore the Court never had the benefit of discerning the veracity of this claim. No body testified for the estate and laid claim on the suit property. The Defendants conceded that the land was purchased by the Plaintiff in the year 2001 from PW - 2 – M/s. Matano. In evidence the Plaintiff produced a Transfer of land dated 8<sup>th</sup> October, 2001 from M/s. Matano to himself, Mr. Mwangi.
43. The Learned Counsel submitted that a title document was also produced in her name dated 11<sup>th</sup> July, 1991 and another title after Transfer to the Plaintiff in the year 2001. A Sale Agreement was produced between the Plaintiff and PW - 2. It was not in doubt therefore that the Plaintiff has been the registered owner of the suit property from 8<sup>th</sup> October, 2001 up to date. The Defendants purported to have leased the suit property from a stranger Hassan Hamadi Mwafrika who was now deceased. There was no evidence to demonstrate the legal nexus between the Plaintiff and a Mr. Hassan Hamadi Mwafrika (Deceased). Hassan Hamadi Mwafrika (Deceased) was not a tenant of Mr. Mwangi and he did not have any legal rights to create a tenancy on the Plaintiff's land with the Defendant.
44. By a Notice dated 10<sup>th</sup> February, 2011 the Plaintiff gave Notice to the Defendants in the following terms.

“you are illegally and unlawfully in possession of a portion of the premises on Plot No. Kwale/Diani /2848 without any valid Lease Agreement. The registered owner of the Kwale/ Ukunda /2848 is Mr. David Mwangi Ndirangu.”

We are instructed to give you Notice that your occupation on this plot is unlawful and illegal. That you are trespassing on our client's property. We demand expressly that you vacate the property and give vacant possession to our client forthwith.

45. The Defendants in response to the Notice from the Plaintiff reacted as hereunder in a letter dated 14<sup>th</sup> February, 2011.
- “1. Our clients are not in unlawful possession of a portion of Plot No. Kwale / Ukunda /2848 as alleged. Our clients occupy the premises legally. The premises were let to them by the landlord Hassan Hamadi Mwafrika. In addition our clients are protected Tenants under the Landlord and Tenant Act.
  2. Mr. David Ndirangu is not the owner of the premises let to our client. Our clients have been in the premises they occupy for over 15 years and your client



has been and is aware of their occupation all along. Entirely without prejudice let us have evidence of your clients alleged ownership of the premises.”

46. The letter from the Defendants went on to state that the Defendants shall not sign any Lease Agreement with the Plaintiffs. Simply put they said that their legal occupation and possession shall subsist in affront of the Plaintiffs rights of proprietorship evidenced by title deed produced in court.
47. According to the Learned Counsel, the Agreement produced by the Defendant as evidence of their Tenancy was dated 7<sup>th</sup> May, 2007. This was contradiction to their assertion that they had been occupation for over 15 years from year 1995. The date of the Plaintiff's notice is 10<sup>th</sup> February, 2011. This was about 4 years of occupation. No evidence was produced to show occupation from the year 1995. According to the Learned Counsel it was a lie.
48. He reiterated that Mr. Mwafrika (Deceased) was a stranger to the Plaintiff. He was not a tenant of the Plaintiff and could not therefore validly create any legal landlord - tenant relation in respect to the suit premises owned and registered in the Plaintiff's name. Both Mr. Mwafrika and the Defendants were trespassers on the suit property. They were not leased the property by the Predecessor in title PW - 2 M/s. Matano who sold and transferred the property to the Plaintiff in 2001. The Defendants were trespassers and the purported Lease by a Mr. Mwafrika was an illegality ab initio.
49. On jurisdiction, the Learned Counsel submitted that under the provision of Order 36 Rule 1 of the Civil Procedure Act, Cap. 21 it is provided that:-

“Order 36 Rule 1.

1. In all suits where a Plaintiff seeks Judgement for
  - (b) The recovery of land, with a claim for rent or mesne profits by a Landlord from a tenant whose term has expired or been rent or for breach of covenant, or against a trespasser when the Defendant has appeared but not filed a Defence, the Plaintiff may apply for Judgment for the amount claimed, or part thereof, and interest or for recovery of the land and rent or mesne profits.”

50. The Learned Counsel submitted that in the Plaint herein, the Plaintiff prayed for:-
  - a. A Declaratory Order that parcel Kwale/Ukunda/2848 and all the developments thereon are the lawful property of the Plaintiff and the Defendants are trespassers thereon and should be evicted.
  - b. A permanent preservatory Orders of injunction do issue directing the Defendants do stop any renovations and constructions on the land Plot No. Kwale/Ukunda/2848 and remove all the unauthorized and illegal structures on the suit premises.
  - c. An Order of eviction do issue against the Defendants so as to evict and remove the Defendants from the parcel of land Plot No. Kwale/ Ukunda/2848 and restore possession to the Plaintiff at the Defendant's costs.
  - d. Such further or better relief this Honourable court may deem fit in the circumstances.”



51. To buttress on this point, he relied on the case of “Nandal Jivraj Shah & 2 others (all trading as Jivraj Agencies – Versus - Kingfisher Properties Limited) Civil Appeal No. 35 of 2015 [2015]eKLR”, the court of Appeal held:
- a. As earlier discussed the High Court had jurisdiction to entertain the eviction proceedings and its jurisdiction in this regard was not a triable issue since there was no longer a Land Lord /Tenant relationship between the parties.”
52. The Learned Counsel stressed that there had never existed any Landlord/Tenant relationship between the Plaintiff and the Defendants nor with a Mr. Mwafrika (Deceased). It was not the Defendants’ case that Mr. Mwafrika (Deceased) or his estate have any Landlord/Tenant relation with the Plaintiffs as tenants or in any other capacity. In fact they categorically denied that the Plaintiff was the owner of the lands. (see Paragraph 9 above). The said Mr. Mwafrika (Deceased) was not a tenant in the suit property. His estate if at all had no interest in the suit property. No evidence was tendered to the effect that the Defendants or the said Mr. Mwafrika (Deceased), his estate or administrators or beneficiaries had ever paid the Plaintiff any rent or anything in terms of rent from the year 2007 up to date 2024 a period of 17 years.
53. The Landlord Tenant Act did not therefore apply to the cause of action herein. The Learned Counsel on this point cited the case of:- “Risper Kerubo Onsare – Versus - Vijay Kumar Saidha & 2 others [2012]eKLR”, the court made the following orders:-
- i. The 1<sup>st</sup> Defendants continued occupation of the Plaintiff’s LR NO. Kisii Town/Block III/128 after expiry of notices dated 5<sup>th</sup> April, 2018 is illegal.
  - ii. The Defendants shall vacate the suit premises within 30 days.
  - iii. If the Defendants fail to vacate the said suit premises the Plaintiff shall be at liberty to evict the Defendants, their agents and or servants from the Plaintiff’s premises.
  - iv. The Defendants shall have costs of this suit.
54. The Learned Counsel argued that the Defendants continued occupation of the Plaintiff’s suit property was illegal. They had no right and were not tenants in any nature, form or colour. The Plaintiff had painfully been denied his rights over the suit property by strangers who were trespassers. There was no evidence from any party that the Plaintiff – Mr. Mwangi ever accepted any rent payment from any party from the time he purchased the suit property. He never created any tenancy agreement expressly or by implication and as such the parties herein could not seek refuge in the landlord Tenant Act for solace. It was not available to them. As they were not tenants in any way.
55. The Plaintiffs prayed for the suit to be allowed with costs and mesne profits under prayer (d) any further or better relief this Honourable court may deem fit in the circumstances.

## **B. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

56. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the Law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed their written submissions dated 8<sup>th</sup> May, 2024. Mr. Asige Advocate submitted that the Plaintiff’s claim was that by an amended Plaint dated 3<sup>rd</sup> July, 2017, the Plaintiff sought 5 orders as already set out above. According to the Learned Counsel, the Plaintiff further filed witness statements, list of witnesses and list of documents dated 10<sup>th</sup> March, 2014 and a further statement, list of witnesses and list of documents on 26<sup>th</sup> September, 2017. In support of his claim the Plaintiff produced a bundle of documents being a list of documents dated 10<sup>th</sup> March, 2014 and 26<sup>th</sup> September, 2017. In addition



the Plaintiff testified on 28<sup>th</sup> July, 2022 in support of the Plaintiff's claim. The Plaintiff did not call any witness and closed his case.

57. On the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' defence, the Learned Counsel submitted that the 1<sup>st</sup> Defendant filed her defence dated 17<sup>th</sup> December, 2012 on 18<sup>th</sup> December, 2012; Defendant's witness statement, Defendant's list of witnesses and Defendant's list of documents dated 17<sup>th</sup> July, 2015 on 20<sup>th</sup> July, 2015. The Learned Counsel further stated that the 2<sup>nd</sup> Defendant filed her statement of defence dated 6<sup>th</sup> November, 2017 on 9<sup>th</sup> November, 2017 and 2<sup>nd</sup> Defendant's witness statement dated 30<sup>th</sup> September, 2023. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also produced their List of Documents dated 17<sup>th</sup> July 2015 and produced the same as 1<sup>st</sup> and 2<sup>nd</sup> Defendants Exhibit Numbers 1, 2, 3, 4, 5, 6 and 7.
58. The Learned Counsel averred that in addition the 2<sup>nd</sup> Defendant testified on 26<sup>th</sup> January 2023 and both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants adopted their statements and their case was closed. The Learned Counsel reiterated and adopted the evidence produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in support of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants defence opposing the Plaintiff's claim.
59. On the issues for determination, the Learned Counsel relied on the following issue - Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were protected tenants under the provisions of Landlord & Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya and had been in continuous and uninterrupted occupation of the portion of the building let to them by the late Chief Hassani Hamadi Mwafrika and his estate and legal representatives and the consequential order of costs. For this matter, the Learned Counsel relied upon the following grounds, inter alia:-
- i. That there was an existing landlord tenant relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and late chief Mwafrika and his estate and legal representatives since the year 2007 (see Defendants' List of Documents item no. 3 and marked as Defendants' exhibit no. 3);
  - ii. That the 1<sup>st</sup> Defendant is a lawful tenant occupying the business premises known as Between Us Bar let to her by the late Chief Mwafrika and his estate and the legal representatives since the year 2007 (see Defendants' List of Documents item no. 3 and 6 and marked as Defendants' exhibits no. 3 and 6);
  - iii. That the 2<sup>nd</sup> Defendant is also a lawful tenant occupying the business premises know as Silver Butchery let to her by the late Chief Mwafrika and his estate and legal representatives since the year 2007;
  - iv. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had always paid rent to the late Chief Mwafrika and his estate and legal representatives (see Defendants' List of Documents item no. 4 and marked as Defendants' exhibit no. 4);
  - v. That the internal renovations and maintenance of the premises the 1<sup>st</sup> and 2<sup>nd</sup> Defendants occupy was the responsibilities of the tenants who were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> Defendant was not constructing or renovating but merely digging a toilet sewage facility hole within the compound of the premises let to her by the late Chief Mwafrika and his estate and legal representatives. The toilet facility hole carried out within the premises would not waste and/or run down the land. The toilet facility hole was a requirement by the [Public Health Act](#) in respect of the bar business she ran. The 2<sup>nd</sup> Defendants alleged renovations were mere routine maintenance works of the business premises and refurbishment and repair of a toilet urinal which maintenance was under the obligation of the tenant who was the 2<sup>nd</sup> Defendant.



60. According to the Learned Counsel submitted that due to the above the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in lawful and legal occupation as tenants duly protected under Cap 301 Laws of Kenya and they were not trespassers thus could not be evicted as sought by the Plaintiff from the premises.
61. The Learned Counsel on the case of the Plaintiff's case, submitted that the Plaintiff testified and adopted his Witness Statement and Further Witness Statement and produced a bundle of documents. The Learned Counsel submitted that the question of ownership of the suit land was not an issue in this suit. The issue in this suit was whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were protected tenants within the meaning of the provision of Section 2 (1) (a) (b) and Section 4 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301 Laws of Kenya. He asserted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants tenancy was protected under the foregoing provisions of the Landlord and Tenant Act.
62. The Learned Counsel further contended that the Plaintiff acknowledged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were protected tenants under Cap 301 Laws of Kenya as demonstrated by the evidence tendered by the Plaintiff as follows:-
- i. In Paragraph 8 of the Amended Plaintiff it is pleaded:-
 

“The Plaintiff avers that.....the Defendants have been separately in trespass and unlawfully carrying on business on the said premises.....”
  - ii. In the Plaintiff's Original Witness Statement filed on 10<sup>th</sup> March 2014 the Plaintiff states at Paragraph 4 that:-
 

“The Defendant has been in the trespass and unlawfully carrying on business on the said premises.....”
  - iii. In the Plaintiff's Further Witness Statement filed on 26<sup>th</sup> September 2017 at Paragraph 5, the Plaintiff stated:-
 

“After I was issued with title deed, I issued all Defendants notice of termination of tenancy and vacant possession with an option they could enter into a new tenancy agreement with me as the owner with new terms if they so wished but they declined. The Defendants have been in trespass and unlawful carrying on business on the said premises.....”
  - iv. The Plaintiff further served the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with identical notices of termination of tenancy and vacant possession both dated 10<sup>th</sup> February 2011 produced as Plaintiff's Exhibit No. 1. In Paragraph 4 of the notices of termination of tenancy, the Plaintiff stated:-
 

“We give you Notice that within (7) DAYS of the date herein our client shall carry out extensive,rigorous and thorough inspection of the state of the building you illegally occupy.....”
  - v. The Plaintiff had previously filed in the Principal Magistrate Court at Kwale Civil Case No.173 of 2012 against the 1st Defendant seeking eviction of the 1<sup>st</sup> Defendant from the premises she occupied as a tenant and occupied a business known as the “Between Us Bar”. Upon the withdrawal of that case by the Plaintiff it was dismissed with costs. Thereafter the Plaintiff fled this suit against the three Defendants in which he sought eviction orders against the Defendants' from the premises in which they operated their business as aforesaid.



63. Accordingly, for the foregoing it was incontestable that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were tenants operating business in a building and/or premises situate on the suit land. The Plaintiff unequivocally had acknowledged that the 1st and 2nd Defendants are protected tenants as stipulated in the Cap 301 Laws of Kenya. In the case of “Speaker of National Assembly – Versus -James Njenga Karume (1992) KLR 21” the Court of Appeal that:-

“Where there is a clear procedure for redress of any particular ground prescribed by the Constitution or aft Act of Parliament, that procedure should be stretchy followed. Accordingly, the special procedure provided by any law must be strictly adhered to stance there are good reasons for such special procedure.”

64. The decision was followed and applied in “Mombasa ELC Const. Petition No. E006 of 2023 Abdulhakim Ahmeo Bayusuf & 4 Others - Versus - Marble Developers Limited & 2 Others”.

65. The Learned Counsel submitted that there was a special procedure provided for termination of business tenancies. That procedure had to be strictly adhered to. The Plaintiff had ignored to adhere to the strict statutory procedure provided for under the Cap. 301 in seeking to evict the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from business tenancies. The suit should be dismissed with costs. In addition, the Learned Counsel opined that the Plaintiff had failed to prove his claim on a balance of probability and the Orders sought in the Amended Plaint dated 3<sup>rd</sup> July 2017 should be dismissed with costs.

66. They respectfully submitted that a trespasser was someone who had entered into someone’s land without permission. These was not the case in this suit as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were protected tenants of the late Chief Mwafrika and his estate and legal representatives and all along had always been paying rent to the said landlord. Very strangely and significantly the Plaintiff (a stranger to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants) was now claiming to be the Landlord and wanted to evict the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were protected tenants under the Cap. 301 Laws of Kenya.

67. In conclusion, the Learned Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not trespassed on the suit property as pleaded in the Amended Plaint or at all. The Plaintiff’s claim of the Orders sought in the Amended Plaint dated 3<sup>rd</sup> July 2017 herein were eminently misconceived and incompetent and should be dismissed with costs. The Plaintiff herein had not proved his case on a balance of probability therefore the Plaintiff was not entitled to any of the reliefs sought in the Amended Plaint dated 3<sup>rd</sup> July 2017.

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

68. This Honourable Court has keenly assessed the filed pleadings by both the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

69. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following six (6) issues for its determination. These are: -

- a. Whether this Court has jurisdiction to hear and make a final determination on the subject matter herein.
- b. Whether the suit is res judicata by virtue of the civil Case - Kwale PMCC No. 172 of 2012.
- c. Whether the Plaintiff is the sole proprietor of the suit property?
- d. Whether the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are trespassers on the Property;



- e. Whether the Plaintiff is entitled to prayers sought.
- f. Who bears the costs of the suit

**Issue No. a). Whether this Court has jurisdiction to hear and make a final determination on the subject matter herein.**

70. Under this Sub title, an issue of law was raised by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Defendants hold that the Honourable Court lacks the Jurisdiction to entertain the matter on two pronged aspects. Firstly, that the Defendants had a Landlord – tenancy agreement with the estate of the late Chief Mwafrika for the suit property and therefore they were controlled tenants under the provision of Sections 4 and 12 of the Cap. 3010. To them, the Plaintiff ought to have filed this suit before the proper legal forum being the Business Premises and rent Tribunal (Hereinafter referred to as “The Tribunal”) rather than before this Court. Secondly, taking that there has already been instituted before the lower Court thus it offends “the doctrine of Res Judicata” under the provision of Section 7 of the Civil Procedure Act, Cap. 21. The Honourable Court wishes to commence dealing on the aspect of Jurisdiction of this Court. Indeed a number of Courts hold that jurisdiction is everything and without it, the Court must down its tools as guided in the now famous case of “Owners of Motor Vessel “Lillian S” – Versus Caltex Oil Kenya, Limited (1989) eKLR where the Court held thus:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

71. The ELC is a creature of the Constitution under the provision of Article 162 (2) (b) of the Constitution of Kenya, 2010. Without belabouring the point, the ELC Court draws its legal mandate from the provision of Sections 3 and 13 of the ELC Act, No. 19 of 2011. Its from these provisions of the law that clothes this Court with the Jurisdiction to deal and adjudicate on this matter. However, from the surrounding facts and inferences pleaded and adduced by the parties herein although the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claim to have had a Land – Lord – Tenancy relationship with the Chief Mwafrika, there was no empirical evidence to that effect. To worsen the situation, there was no such relationship with the Plaintiff at all. Hence, the quickest conclusion is that there existed no LandLord – tenant relationship between the Plaintiff nor the deceased and the Defendants. In essence, there would be no suit to be initiated before the BPRT for that matter pursuant to the provision of Sections 2, 6 and 12 of the Act whatsoever to deny this Court from hearing and entertaining the issues before it.

72. For clarity sake, the provision of Section 2 of Cap. 301 defines controlled tenancy is defined under the Act as follows:-

“Controlled tenancy” means a tenancy of a shop, hotel or catering establishment-

- (a) which has not been reduced into writing; or
- (b) which has been reduced into writing and which -
  - (i) is for a period not exceeding five years
  - (ii) contains provisions for termination, otherwise than for breach of covenant, within five years from the commencement thereof;”



Undoubtedly, the BPRT is clothed with the legal mandate to deal with all issues of controlled tenancy as donated by the provision of Section 12 (1) of the Act and which the Learned Counsel for the Defendant has articulated with extreme elaboration. However, the major issue for consideration before this Court is one on trespass and encroachment of the suit land and not Land - Lord – Tenancy relationship and hence the provisions of the Cap. 301 do not apply at all in the given circumstances hereof. Sir. Arthur Conan Doyle in his captivating novel of Sherlock Holmes stated as follows:

“Once you eliminate the impossible, whatever remains, no matter how improbable, must be the truth.”

73. From the foregoing, therefore, the only legal forum to deal with this matter is this Honourable Court clothed with full legal mandate to do so. On that front and stand alone point, I discern that the objection raised by the Defendants must fail.

**Issue No. b). Whether the suit is res judicata by virtue of the withdrawal of Kwale PMCC No. 172 of 2012**

74. Under this sub title the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their defenses and DW - 1 have vehemently and indeed made a meal out of it, contended that the Plaintiff had instituted Kwale PMCC No. 172 of 2012 which was later withdrawn and therefore the matter before the Honourable Court offended “the doctrine of Res Judicata”. Undoubtedly, there are two aspects that are not contested – firstly there was a suit instituted at the lower Court and secondly, the said suit was withdrawn and/or discontinued. Therefore, this Court will analyze the effect of withdrawal and whether parties are allowed to reinstitute the matter.

75. With regard to the issue of the doctrine of Res – Judicata is codified at the provision of Section 7 of the Civil Procedure Act, Cap. 21 which provides as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

76. For a suit to be declared res-judicata, the following must be proved;
- (i) The former suit must have been decided.
  - (ii) The competence of a court which decides the former suit must be determined irrespective of any provision as to right of appeal.
  - (iii) The former suit must have been alleged by one party and denied or admitted expressly or impliedly by the other party.
  - (iv) Any matter which might and ought to have made a ground of defence or attack in the former suit shall be deemed to have been directly and substantially in issue in the former suit.
  - (v) The parties litigating must be the same.
77. Additionally, for res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See “The Independent Electoral and Boundaries Commission – Versus -Maina Kiai (Supra); “John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR”. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See “Maithene Malindi Enterprises Limited – Versus - Kaniki Karisa Kaniki & 2 others [2018] eKLR”.
78. Res judicata operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In case of:- “John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others” the Court of Appeal stated:

“..... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson – Versus - Henderson [1843] 67 ER 313: -

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ....”



.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.”

79. In the case of:- “Henderson – Versus - Henderson (1843-60) All ER 378 the court stated as follows:

“.....where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

80. Clearly, from these elaborate legal principles, the surrounding facts and inferences of the instant case do not apply at all to them. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have failed to demonstrate how this suit offends “the Doctrine of Res Judicata” and thus it should not succeed.

81. With reference to withdrawal and/or discontinuance of a suit. At common law a Plaintiff has an absolute right to discontinue his suit at any stage of the proceedings prior to verdict or Judgment. This right has been declared to be substantial. (per C. J. Taft in the matter of Skinner and Eddy Corporation, (1924) 68 Law Ed 912 at p. 914). It is this right that has been given statutory recognition through Order 25 of the Civil Procedure Rules, 2010. The Court of Appeal in the case of:- “Beijing Industrial Designing & Researching Institute – Versus - Lagoon Development Limited {2015} eKLR” stated:-

“As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in Abayomi Babatunde – Versus - Pan Atlantic Shipping & Transport Agencies Limited & others, SC 154/2002 identified those circumstances to include where:

- (i) a Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant,
- (ii) a Plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,
- (iii) where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
- (iv) a Plaintiff may possibly retain the right to re - litigate the claim at a more auspicious time if necessary.



82. Additionally on the same point, the Supreme Court in the case of:- “Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 7 Others SC APP. NO. 16 OF 2014”, held that:-
- “a party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
83. It is useful to reproduce the provisions of Order 25 of the Civil Procedure rules, 2010 which provides for withdrawal, discontinuance and adjustment of suits. It reads: -
1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
  - 2.(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
  - (2) Where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
84. Thus, withdrawal of a suit is itself its end. The right of a Plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by the operation of law under the provision of Order 25 of the Civil procedure Rules, 2010. Critically speaking, there is no right that is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the Plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal.
85. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. The provision of Order 25 Rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit.
86. The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect. The overarching obligation to ensure that justice is done applies equally to the Plaintiff and the Defendant. After the suit was withdrawn, the Defendant organized its affairs knowing that the litigation had come to an end. That being the position, it would require good cause for the court to reinstate a suit. The first hurdle which the Plaintiff failed to surmount is the fact that the rules do not expressly permit reinstatement of a suit upon being withdrawn. The second hurdle is to demonstrate to the court that this is a deserving case for the court to exercise its inherent jurisdiction.
87. As stated above, the provision of Order 25 provides in clear terms three circumstances upon which a Plaintiff can withdraw his suit. Had Parliament desired a reinstatement, it could have provided so in clear terms.



88. In this instant case, the Plaintiff has acknowledged there existed another suit in Kwale. The Plaintiff acknowledged that he filed a case in Kwale Court Principal Magistrate (PM) No. 172 of 2002 – the Defendant was Ann Wanyoike – the same 1<sup>st</sup> Defendant in this suit. From the same Court he was seeking for her to be evicted. Accordingly, the case was never concluded. It was transferred to Mombasa High Court but did not produce an order for the transfer of the same. He had no knowledge of whether there was an order for transfer or withdrawal. When PW – 1 was re - examined he confirmed that he had filed a Notice of withdrawal of the Principal Magistrate Court Suit No. 72 of 2020 Kwale hence the case was withdrawn.

89. I am persuaded by the case of “George Mwangi Kinuthia – Versus - Attorney General [2019] eKLR” which held:

“It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of Order 25 Rule 4 of the Civil Procedure Rules, 200. The order and rule herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit has been withdrawn there is nothing that can be sought to be reinstated.”

90. I am further soothed by the case of “Priscilla Nyambura Njue – Versus - Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR” which cited the case of “Smt. Rais Sultana Begam – Versus - Abdul Qadir & Others” where the court held:

“The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court, if he withdraws only a part of the suit that part goes out of the jurisdiction of the court and it is left with only the other part. This is a natural consequence of the act; a further consequence imposed by sub rule (3) is that he cannot institute a fresh suit in respect of the subject-matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court.

It stands reason that when on withdrawal the Plaintiff ceased to be a party and the Court ceased to have jurisdiction over the suit and thus became functus officio nothing but a fresh suit can again invest the Court with jurisdiction over it. As far as the withdrawn suit is concerned the suit is at an end and no further proceedings can be taken in it; the suit and the Plaintiff do not exist and no application such as an for revoking the withdrawal can be made in the suit or by the Plaintiff.”

91. In conclusion, I am of the view that the import of a withdrawal of a suit, by whichever of the three options mentioned in paragraph 26 above seals the fate of that suit or the part of that suit that is withdrawn forever in so far as that suit is concerned. Its life goes into oblivion: a bottomless pit from where it can never be recalled into existence in that very withdrawn suit. Only a fresh one can be instituted if the law permits it; which is the case in this instance therefore I shall proceed to analyzes the rest of the issues.

92. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants further stated that the suit was res judicata by virtue of the withdrawn suit in Kwale. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as “bulb”. Once the either the light or the bulb



cease to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new. In regard to the Procedure relevant to the facts of this case, then, the only recourse an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her. The withdrawal of the suit does not activate the bar of the Doctrine of Res judicata as per the provision of Section 7 of the Civil Procedure Act, Cap. 21. Therefore, it is my considered view that, the objection raised by the Defendants has no bearing on the present suit and hence reiterate that it must fail on arrival like doodle.

**Issue No. c). Whether the Plaintiff is the sole proprietor of the suit property**

93. Under this Sub heading, the Honourable Court notes with glee that the Learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants has already conceded that the contestation herein is not one of the legal ownership of the suit land but on the fact that the Defendants were controlled and thus protected tenants under the provisions of Cap. 301.
94. Be that as it may, for avoidance of doubt and on abundance of caution the Honourable Court still insists on laying out legal facts straight herein on this aspect. In saying so, the Court has noted some discrepancies from the pleadings filed and the evidence adduced. Despite of the above admission by the Learned Counsel for the Defendants, the Court has taken cognizance that the Defendants in a thin membrane and veil seem to be challenging the ownership of the suit property by the Plaintiff stating that it belonged to Chief Mwafrika. The building was at Ukunda Posts – within Kwale County. The house was known as Agrarian as in the Agrarian Bank used to be situated there and operated from there. According to DW - 1 stated the Plaintiff claims that she was a trespasser, which she denied as she had not leased the premises from him neither did she have any relationship with him.
95. The Plaintiff was just a neighbor and she had never received any notice from the Plaintiff or anybody else. She knew Fatuma Rama but she did not know if she was related to Mwafrika in any way. She had an agreement between Hassan Mwafrika and her but she did not have it in court. She did not know the reference number of the land where she had leased her business all she knew were the premises and land had reference numbers and certificate of title. She referred to a Certificate of title for M/s. Matano for Land Reference Kwale/Ukunda/2848, stating that she did not know it.
96. DW - 1 reiterated that she was not aware of when Mwafrika died but it could have been over 10 years. She was paying rent of a sum of Kenya Shillings Fifteen Thousands (Kshs 15,000/-) per month as rent to one Mr. Ali as at the moment, on the basis of being the duly appointed administrator. She did not have any documents to that effect. Mr. Ali had always been among the children of Mwafrika. All the business were in one building. She had known Mwafrika for 17 years as she had occupied the building for that long. She started her business in 2007.
97. The current land regime is set out in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012. It is evident that the right to own and acquire property in Kenya is premised under the provision of Article 40 of the Constitution of Kenya, 2010. The said Article provides as follows:-
  - “(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.
  - (2) Parliament shall not enact a law that permits the State or any person--



- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- ...”

98. Further, a certificate of title is ‘prima facie’ held to be conclusive evidence of ownership of the stated land. The effect of registrations bestows legal and absolute proprietorship and indefeasible title, interest and rights to the registered owner of the land. This is provided for under the provision of Sections 24, 25 and Section 26(1) of the *Land Registration Act*. The rights of a proprietor are also set out in Section 26 of the *Land Registration Act*, which provides as follows:-

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

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

99. The Court of Appeal in “Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239, of 2009”, held that: -

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



100. While the rules of procedure, as funded under the provision of Sections 107, 108 and 109 of the Evidence Act Cap 80 of the laws of Kenya, require that the burden of proof rests on the person who alleges, such burden may shift. The Plaintiff tendered evidence of ownership of the suit property and his evidence and the title document to the suit property. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on the other did not produce any document to prove that the purported property they ran their business in was not the suit property neither did they produce any evidence of a lease with a third party – the Estate of Mr. Mwafrika or its appointed Legal Administrator, one Mr. Ali other than the Plaintiff. Therefore, under this sub title, I discern that from the evidence adduced, it remains uncontroverted that the Plaintiff is the legal and absolute proprietor of the suit property with all the indefeasible rights, title and interest vested in him by law.

**Issue No. c). Whether Defendants are trespassers on the Property.**

101. Under this sub – title the Honourable Court will not belabor on the issue of trespass so as it has already been dealt with above. Suffice to say, the concept of trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923. In the case of “Gitwany Investments Limited – Versus - Tajmal Limited & 3 others [2006] eKLR”, it was held that title to land carries with it legal possession. I have made a finding that the Plaintiff is the absolute and registered proprietor of the suit property. Therefore, it follows that the Plaintiff was at all material times entitled to quiet enjoyment of the suit property. Once the Plaintiff established that he is the lawful proprietor of the suit property, the burden of proof shifted to the Defendants to justify their entry and occupation of the suit property. As I mentioned earlier in the judgment, the Defendants did not produce any documentary evidence to show their right to be in the property neither did they produce the title of the alleged landlord to prove that the properties were different. None of the 1<sup>st</sup>, 2<sup>nd</sup> nor 3<sup>rd</sup> Defendants provided any good cause or reasonable justification for their entry and continuous occupation of the suit property. The defence of being controlled tenants has been found to be baseless and no legal support at all as there exists no Land Lord – tenancy relationship with the Plaintiff as required by law. In the absence of any such legal justification for the Defendants’ occupation of the suit property, it is my finding that they are trespassers on the suit property.

**Issue No. d). Whether the Plaintiff is entitled to prayers sought**

102. On the last issue, I am satisfied from what I have stated above that the Plaintiff has proved her case against the Defendants and as such he is entitled to the reliefs sought in his amended Plaintiff. The Plaintiff sought for a declaration, a permanent preservative order and an order of eviction. From the above analysis above, I find that the Plaintiff is entitled to the orders sought.

**Issue No. e). Who bears the costs of the suit**

103. It is now well established that the issue of Costs is the discretion of Court. Costs means the award that a party is granted at the conclusion of any legal action or proceedings in any litigation. The Black Law Dictionary defines “Cost” to mean:--

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

104. The proviso under the provisions of Section 27(1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. By the event it means the result or outcome of the legal action. In the case of: “Reids



Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

105. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the Plaintiff herein has successfully established his case against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. Thus, he is entitled to Costs for the Plaint thereof to be paid by the said Defendants severally and jointly.

### **IX. Conclusion and disposition**

106. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff has established his case against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein in terms of the amended Plaint dated 3<sup>rd</sup> July, 2017 and filed on 4<sup>th</sup> July, 2017 in its entirety.
- b. That a Declaratory Order be and is hereby that parcel Kwale/Ukunda/2848 and all the developments thereon is the lawful property of the Plaintiff and that the Defendants are Trespassers thereon and should be evicted therefrom.
- c. That a permanent preservative order of injunction be and is hereby issued directing the Defendants do stop any renovations and or constructions on the land Plot No. Kwale/Ukunda/2848 and remove all the unauthorized and illegal structures on the suit premises.
- d. That an order of eviction, strictly governed by the provision of Section 152E of the [Land Act](#), No. 6 of 2012 be and is hereby issued directing against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants so as to evict and remove the Defendants from the Plaintiff's parcel of land Plot No. Kwale/Ukunda/2848 and restore possession to the Plaintiff at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' costs.
- e. That the costs of the Plaint is awarded to the Plaintiff thereof to be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant jointly and severally.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

.....

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

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**Judgement delivered in the presence of:-**

- a. M/s. Firdaus Mbula – the Court Assistant
- b. Mr. Opollu Advocate for the Plaintiff.



c. Mr. Asige Advocate for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

