



REPUBLIC OF KENYA



**Attorney General (Suing on Behalf of the Ministry of Education to Defend  
the Public Property of Mrima Secondary School) v Mwapotu (Civil Suit  
176 of 2021) [2024] KEELC 4517 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4517 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CIVIL SUIT 176 OF 2021**

**LL NAIKUNI, J**

**MAY 28, 2024**

**BETWEEN**

**THE ATTORNEY GENERAL (SUING ON BEHALF OF THE MINISTRY  
OF EDUCATION TO DEFEND THE PUBLIC PROPERTY OF MRIMA  
SECONDARY SCHOOL) ..... PLAINTIFF**

**AND**

**SWALEHE MWAPOTU ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to the filed Plaint dated 26<sup>th</sup> August 2021 by The Honourable Attorney General (suing on behalf of the Ministry of Education to defend the public property of Mrima Secondary School), the Plaintiff against Swalehe Mwapotu, the Defendant herein.
2. Upon service of the pleadings and Summons to Enter Appearance, the Defendant filed a Statement of Defence dated 28<sup>th</sup> March, 2022 filed in court on 30<sup>th</sup> March, 2022.
3. The Plaintiff is described in the Plaint as a public education institution, offering free public education to the public under the Ministry of Education Science and Technology and operates under the Laws of Kenya and the Defendant is described as a male adult of sound mind residing and working for gain in Mombasa town.
4. Nonetheless, on 17<sup>th</sup> November, 2022, the Honourable Court fixed the mention date on 24<sup>th</sup> April, 2023 for Pre – trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. On the material date, all parties having fully complied, the suit was fixed for full trial on the 4<sup>th</sup> May, 2023.



5. The matter proceeded on for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witness (PW – 1) testifying in Court on 4<sup>th</sup> May, 2023. On 11<sup>th</sup> October, 2023 the Plaintiff called PW - 2 to testify and closed the Plaintiff’s case. Subsequently, the Defendant summoned DW - 1 on the same day and closed their case.

## **II. The Plaintiff’s case**

6. From the filed pleadings, the suit property at all material time been reserved by the Mombasa Municipal Council for Mrima Mixed Secondary School in accordance with the Trust *Land Act*, Cap. 288 (Now repealed). The same was pending registration and issuance of a certificate of lease in favour of the Plaintiff. The Plaintiff is in occupation of the said parcel of land whose beacons were well defined in different instruments thus the boundaries of the property was clear and known to the Defendant.
7. The Plaintiff is a public school with teachers posted to the school by the Teachers Service Commission and it had a student population of more than nine hundred students. Despite Paragraphs 5, 6 and 7 above, the Defendant had continued to encroach on the suit property. The same was unlawful, fraudulent and greatly interferes with the mandate of the Plaintiff to provide its constitutional mandate to the public.
8. The Plaintiff relied on the following particulars of fraud and illegality:-
  - a. Encroaching on the suit property without any iota of right to do so.
  - b. Developing a property on the property of the Plaintiff and proceeding with the same even after the warning.
  - c. Interfering with the mandate of the Plaintiff to provide free education to the public.
  - d. Infringing on the rights of learners to free secondary education.
  - e. Facilitating an illegal transaction.
  - f. Fraudulently building a property on the suit property and interfering with a conducive learning environment.
9. According to the Plaintiff there was a genuine apprehension that the actions of the Defendant and others like him would lead to the wasting away of the suit property as the Plaintiff’s ability to perform its constitutional mandate would be greatly impacted by the said encroachment activities, unless the Defendant was restrained by the court. The Plaintiff being a public institution offering free education, had no option but to turn to courts to defend it from the illegal and vicious actions of the Defendant against the suit property. Despite demand having been made to the Defendant, he had refused to vacate the Suit Premises.
10. There was no other suit pending and there had been no previous proceedings in any court between the Plaintiff and the Defendant on the same subject matter. This cause of action arose within the jurisdiction of this Honourable Court.
11. The Plaintiff prayed for Judgment against the Defendant for:-
  - a. An order of injunction restraining the Defendant, whether by himself, his agents, employees, servants and/or otherwise howsoever, from entering, occupying, residing on, remaining on or otherwise claiming title or interest whatsoever in the Suit Property or any part thereof pending the hearing and determination of this suit.



- b. A permanent injunction restraining the Defendant, whether by himself, his agents, employees, servants and/or otherwise howsoever, from entering, occupying, residing on, remaining on or otherwise claiming title or interest whatsoever in the Suit Property or any part thereof or otherwise interfering with the rights of the Plaintiff in relation to the Suit Property.
- c. An order of injunction restraining the Defendant, whether by himself, his agents, employees, servants and/or otherwise howsoever, from selling, disposing of, leasing, charging pledging alienating or in any other manner whatsoever dealing with the Suit Property pending hearing and determination of this suit.
- d. A permanent injunction restraining the Defendant, whether by himself, his agents, employees, servants and/or otherwise howsoever, from selling, disposing of leasing, charging pledging alienating or in any other manner whatsoever dealing with the Suit Property or any part thereof.
- e. An order for vacant possession of the suit property against the Defendant in favour of the Plaintiff.
- f. An order for specific performance, directing the defendant to demolish at their own costs to demolish any of their structures illegally and unlawfully erected on the Suit Property and remove all debris, building materials or structures on the suit Property.
- g. A Declaratory order that the Defendant is a trespasser on the Suit Property.
- h. A Declaratory order that the Plaintiff is the rightful owner of all of parcel of land known as MOMBASA/(MAINLAND SOUTH)/3036.
  - i. Special damages for Kshs 500,000/-against the Defendant for encroaching on the suit property.
  - j. General damages.
  - k. Costs of this suit together with interest at court rates.
  - l. Any such other or further relief as this Honourable Court may deem just and fit to grant.

12. As such, PW - 1 testified as follows:-

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

13. PW – 1 was sworn and testified in English language. She identified herself as being M/s. Repher S. Mutuku. She told the he was born on 1963 and his identification card issued on 26<sup>th</sup> February, 2020 with all particulars. She was the Principal of Mrima Secondary School and Secretary Board of Management to the School. PW – 1 was posted there in 20<sup>th</sup> May, 2021 by Kilifi County to Mombasa County. She recorded a statement on 25<sup>th</sup> August, 2021 and she wished to have it produced as her Plaintiff Exhibit Numbers 1 to 13 dated 26<sup>th</sup> August, 2023.
14. She had been tasked to manage a school with 583 students of both boys and girls. The enrollment had gone upto 1030 pupils. According to her, the land measured more than  $\frac{3}{4}$  acres. However, the land survey had revealed that there had been encroachment by others people which included the



Defendants. They could not put a toilet as there was some bad relationship. They needed to restrict the illegal structures on the land. They needed to allow them to have space which they had been allocated.

15. The witness stated that they never had a title deed. Instead, they had allotment number. They had a Certificate of Registration issued to them in the year 2013 as a duo stream school. The space measuring  $\frac{3}{4}$  acres was what was fenced. PW – 1 testified that the encroachment of the land was based on the fact that the land was ancestral. It went to where the Defendant’s house was. She prayed that they be allowed to have space which they had been allocated.

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

16. PW - 1 told the Court that she was aware that the land where the school was donated by Mr. Omar Aballa Kaaga. She did not know the Defendant – Mr. Swalehe Mwapoja personally. She was the one who swore the Affidavit. She got the names of the occupants of the land from the Chief of the location who was a former member of the Board of Management. They had Chief Halima and ex chief Mwarima. They never gave the notice to the Defendant. They had not sued the wrong party. She refuted the allegations that it was the school that was encroaching onto other people’s land. She referred the Honourable Court to the minutes dated 8<sup>th</sup> August, 2016.
17. PW - 1 informed the court that Mr. Omar Abdalla Kaaga was now deceased, though he was mentioned under Minutes 2/2015. He was mentioned as a neighbor. Mr. Swalehe Mwapoja had a house with a red roof. She did not know the beacons of their land were in the house. PW – 1 confirmed that Mr. Swalehe was right there when they established the beacons. She did not know where the beacon was situated. The surveyor told them where the beacon were. They were inside the house of the Defendant. The Defendant had partially encroached into their land – belonging to the school. They did not lodge a complaint with the Land Registrar being a boundary dispute.
18. On 11<sup>th</sup> October, 2023 the Plaintiff called PW - 2 who averred as follows:-

**A. Examination in chief of PW - 2 by Mr. Waga Advocate.**

19. PW – 2 was sworn and testified in English language. He identified himself as being Mr. Nyamawi Mwajoto Nyamawi. He told the court that he was a Land Surveyor by profession at Coast region. He studied land survey and specialized in Hydrographic – being study on the water/ocean. He informed Court that there were mountains and valleys under the ocean. He had been a surveyor since the year 1998. He prepared the land survey report dated 21<sup>st</sup> July, 2021.
20. He remembered on 15<sup>th</sup> July, 2021 the principal of Mrima Secondary School Likoni assigned him to identify/re - establish the beacons defining the boundaries of their land. They undertook the task on 19<sup>th</sup> July, 2021. From the land surveying exercise, they found an iron sheet church on the North Western boundary – partly encroached onto the school. On the Eastern boundary had been encroached by a Primary School – a Public Institution. On the Southern side there were two incomplete structures and one was complete. They had partially encroached onto the school. They could not place the beacon due to the already existence of the church. The rest of the beacon were placed. He produced the report. He wished to have it produced as Plaintiff. Exhibit No. 12.

**B. Cross Examination of PW - 2 by Mr. Atancha Advocate.**

21. PW - 2 told the court that Plot No. 3030 never existed, as alleged but it was on the Survey Plan. The principal gave them verbal instructions. He never got any document to indicate the ownership of the land – neither from any person. The land was not under the Land Adjudication section. He was aware of the Land Settlement Committee.



22. According to the witness, by the time they reached there the title deed had already been issued. Hence, the Land Settlement had been dissolved. He did not know whether the school had a title or not. He was a hydrographic surveyor. He only dealt with water survey. He agreed that the suit land was not inside waters.
23. According to PW - 2 there were other Land Surveyors within the Ministry of Land who could have taken up the task. However, he also had the training in ordinary land survey. He also had the training in ordinary land survey knowledge. He did not just deal with waters. He did not over step his jurisdiction by going to dry land. He was not doing anything illegal. From the report, he had indicated he relied on the map. He attached the maps to the report. The secondary school was not encroaching on anyone's land. It was one land.

### **C. Re- examination of PW - 2 by Mr. Wagah Advocate.**

24. He confirmed that he had a Higher Diploma in Land Survey from KISIM. He then attended Japan Hydrographic College and attained Part B in Hydrographic Survey. He stood by the findings on the Surveyor's report.
25. On 11<sup>th</sup> October, 2023, Mr. Wagah Advocate for the Plaintiff marked the close of the Plaintiff's case.

### **III. The Defendant's case**

26. The Defendant entered appearance and filed his statement of defence dated 28<sup>th</sup> March, 2022 where the Defendant averred that he denied the contents of Paragraph 3 of the Plaint and further averred that the attorney general had no capacity to institute the instant suit. He further denied the contents of Paragraph 4 of the Plaint and further averred that there did not exist such land known as MOMBASA/ MAINLAND SOUTH/ 3036. In the alternative and without prejudice to the foregoing the Defendant averred that if at all there existed such land then the same was acquired by fraud or misrepresentation and contrary to the known legal and lawful procedures towards acquiring the land.
27. The Defendant denied the contents of Paragraph 5 of the Plaint and further averred that the contents therein were false and misleading. He averred that he was a stranger to Paragraph 7 and denied Paragraphs 6, 8, 9 10, and 11 of the Plaint. The Defendant admitted the jurisdiction of the court.
28. The Defendant prayed that for the Plaintiff's suit to be dismissed with costs. On 11<sup>th</sup> October, 2023, the Defendant called DW - 1 who testified as follows:-

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

29. DW – 1 was sworn and testified in English language. He identified himself as Mr. Swalehe Mwapofu. He stated that he was the Defendant. His profession being in the engineering field. He knew of Mrima Secondary School and fully understood the issues in the case. He lived in Likoni in his Uncle – Swalehe Ibrahim's house. His plot was No. 3209.
30. When referred to the contents of Paragraph 8 of the Plaint, the witness confirmed that he knew his uncle had been given the land. He had a concrete perimeter wall on Plot No. 3209. He was not concerned nor involved with the plot where the school was situated. He adopted his witness statement as his evidence in support of the case.



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

31. DW – 1 confirmed further that he was a metal welder. It as in his statement where he had started that he associated himself with all the contents of his defence. He lived at Plot No. 3029. There was a distance from the school. The school claimed the house belonging to his uncle was in the school. His uncle was still alive but he lived in Nairobi. His uncle knew there was a case in court. He had not brought any document to demonstrate the land was his nor to show whose land it was. When the land was being surveyed, he never saw the land surveyor. They had not brought any document to show that the uncle was the owner of Plot No. 3029; nor joined him in the case.
32. He stated that from his statement, he had not indicated that he was not the owner of the land.

### **C. Re-Examination of DW - 1 by Mr. Atancha Advocate.**

33. DW - 1 told the court that he had never seen the Land Surveyor called Nyamwai Mwajoto. The issue of the demolition of the structures never affected him.
34. The Defendant through his advocate Mr. Atancha Advocate marked the close of the Defendant’s case on 11<sup>th</sup> October, 2023.

### **IV. Submissions**

35. On 11<sup>th</sup> October, 2023 after the Plaintiff and Defendant marked the close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Parties complied accordingly and on 5<sup>th</sup> February, 2024, the Honourable court reserved a date to deliver its Judgement on 23<sup>rd</sup> April, 2023

### **V. Analysis and Determination**

36. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
  37. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -
    - a. Whether the Plaintiff has legal rights to the suit property and is the rightful owner to the suit property
    - b. Whether the Defendant had trespassed into the suit property;
    - c. Whether the Plaintiff was entitled to damages.
    - d. Who bears the costs of the suit?
- ISSUE No. a). Whether the Plaintiff has legal rights to the suit property and is the rightful owner to the suit property
1. Under this sub heading, the Honourable Court deciphers that the issues on land ownership to the suit land and the aspects on encroachment were critical in this matter. Ideally, these formed the main substratum of the case. the onus is on the Plaintiff or any other Claimant to prove the position he/she claims on a balance of probability.



2. From the surrounding facts and inferences of the case, the burden of proof is from the parties making the claim. I am guided by the provision of Sections 107, 108 and 109 of the Evidence Act, Cap. 80 which provides as follows:-

“Section (107); Burden of proof.

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

(2); When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section (108); Incidence of burden.

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

Section (109); proof of particular fact.

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

38. It will be observed that among the documents produced by the Plaintiff was a copy of the Letter of Allotment to the suit land. PW - 1 was certain that they had not been issued with a Certificate of title document though never managed to produce it in Court to demonstrate ownership. The provision of Section 24 of the Land Registration Act, 2012 provides as follows:-

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

39. The provision of Section 25 (1) of the said Act further provides that:-

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

40. Additionally, the provision of Section 26 of the same Act provides that:-

“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 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 grounds of fraud, or misrepresentation to which 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.”



Based on the provision of Section 26 above, the Certificate of Title is be taken as “prima facie’ conclusive evidence that the person named therein is the proprietor of that land. While the provision of Sections 24 and 25 above, in essence, do provide for the legal and absolute proprietorship, indefeasible rights, title and interest over the land vested in law. More importantly, on umpteenth times, the Court of Appeal has authoritatively held that as it was merely an offer, a Letter of Allotment did not and could not confer any legal interest/right until and when it was accepted, its conditions were fulfilled, and a title was issued upon registration. In saying so, I seek refuge from two important decisions being the case of:- “Wreck Motor Enterprises – Versus - Commissioner of Lands & 3 others [1997]eKLR”:

“In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N. K. Arap Ng’ok – Versus - Justice Moijo ole Keiwua &4 Others, Civil Application No. NAI.60of 1997 (unreported).

41. Additionally, recently the Supreme Court stated in the case of:- “Dina Management Limited – Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021)[2023] KESC 30 (KLR)” where the Supreme Court held that:-

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

The Supreme Court went further and held that:-

“.....We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The Appellant ought to have been more cautious in undertaking its due diligence.”

42. However, even while according the Plaintiff the benefit of doubt, they not only failed to demonstrate ownership to land by producing the same but also a Certificate of Title deed to substantiate their claim on the suit land. The Plaintiff in the suit claimed that the Plaintiff is in occupation of the said parcel of land whose beacons are well defined in different instruments thus the boundaries of the property is clear and known to the Defendant. Despite knowing this, the defendant has continued to encroach on the suit property. The same is unlawful, fraudulent and greatly interferes with the mandate of the Plaintiff to provide its constitutional mandate to the public. The Plaintiff relied on the following particulars of fraud and illegality:-
- a. Encroaching on the suit property without any iota of right to do so.
  - b. Developing a property on the property of the Plaintiff and proceeding with the same even after the warning.
  - c. Interfering with the mandate of the Plaintiff to provide free education to the public.



- d. Infringing on the rights of learners to free secondary education.
  - e. Facilitating an illegal transaction.
  - f. Fraudulently building a property on the suit property and interfering with a conducive learning environment.
43. According to the Plaintiff there was a genuine apprehension that the actions of the Defendant and others like him will lead to the wasting away of the suit property as the Plaintiff's ability to perform its constitutional mandate will be greatly impacted by the said encroachment activities, unless the Defendant is restrained by the court. The Plaintiff being a public institution offering free education, has no option but to turn to courts to defend it from the illegal and vicious actions of the Defendant against the suit property. Despite demand having been made to the Defendant, he has refused to vacate the Suit Premises. According to the minutes referred to the Court by the Plaintiff, the name of the neighbor was Omar Abdalla Kaaga.
44. The Defendant has refuted these claims in his pleadings and testimony stating that there did not exist such land known as MOMBASA/ MAINLAND SOUTH/ 3036. In the alternative and without prejudice to the foregoing the Defendant averred that if at all there existed such land then the same was acquired by fraud or misrepresentation and contrary to the known legal and lawful procedures towards acquiring the land. He stated that he was the Defendant, his profession being in the engineering field. He knew of Mrima Secondary School and fully understood the issues in the case. He lived in Likoni in his Uncle – Swalehe Ibrahim's house. His plot was No. 3209. When referred to Paragraph 8 of the Plaintiff, the witness he confirmed that he knew his uncle had been given the land. He had a concrete perimeter wall on Plot No. 3209. He was not concerned nor involved with the plot where the school was situated.
45. According to the Defendant he lived at Plot No. 3029. There was a distance from the school. The school claims the house belonging to his uncle is in the school. His uncle was still alive but he lived in Nairobi. When the land was being surveyed, he never saw the land surveyor. They had not brought any document to show that the uncle was the owner of Plot No. 3029; nor joined him in the case.
46. The Plaintiff's claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. They have not produced any documentary evidence in form of a title deed or the Letter of allotment over the suit land in their name as proof of ownership.
47. Therefore, the Courts mandated by statute to consider a title document as "prima facie evidence" of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In this present case, I hold that the Plaintiff has failed to prove this ownership of the said land and how the Defendant encroached the said suit property.

ISSUE No. b). Whether the Defendant has trespassed into the suit property

48. Under this sub title, the Honourable Court shall examine if the said trespass by the Defendant was proved by the Plaintiff. The provision of Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”



49. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. As discussed above the Plaintiff has not shown the court that it is the rightful proprietor of the suit property which begs the question can they plead trespass by the Defendant.

50. To support its claim,, the Plaintiff called PW - 2 who told the court that he had conducted a survey and produced a Land Survey Report marked as Plaintiff No. 7. From the said report, it stated in part as follows:-

“The beacon D23 which as not placed was found to be falling inside a building used as a church on the north western boundary of the school. The Primary School wall is encroaching on the plot on the entire eastern boundary. A house still under construction and the other complete are partly encroaching on the southern boundary.”

51. The Honourable Court takes cognizance of the fact that the report was filed in court on the same date as the Plaintiff and the Plaintiff adopted the same as an exhibit. Further, that it was produced by PW - 2 in support of its case. However, despite of all the details contained from the said report, it fails to mention the Defendant as the person encroaching the suit property. This was such a fundamental detail that the surveyor ought not to have overlooked at all.

52. For these reasons, I find that the Defendant herein from the minutes and the report is not guilty of encroaching and trespassing into the Plaintiff's land parcel and as such any prayer on trespass and encroachment of the suit land fails.

ISSUE No. c). Whether the Defendant has trespassed into the suit property

53. Under this sub title, it is evident that the dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiff in the Plaintiff filed herein is for eviction orders to issue against the Defendant herein. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court.

54. Having established that the Plaintiff has not proved its case as against the Defendant on a balance of probabilities and being that the Plaintiff has not proved to this court that they have a legal right to the said property, the Plaintiff fails on the prayers sought and its claim as against the Defendant as it did not show nexus between it, its land and the Defendant.

ISSUE No. d). Who bears the costs of the suit.

55. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

56. In the present case, the Plaintiff has not been able to establish its case as pleaded from the filed pleadings consequence of which their claim against the Defendant has failed. Therefore, I proceed to award the Defendant the costs of this suit.



## **VI. Conclusion and Disposition**

57. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff has not established its case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. THAT Judgment be and is hereby entered in favour of the Defendant dismissing the case by the Plaintiff as pleaded in Plaint dated 26<sup>th</sup> August, 2021.
- b. THAT the Plaintiff's claim against the Defendant fails.
- c. THAT the costs of this suit are awarded to the Defendant to be paid by the Plaintiff.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....28<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. Kemei Advocate holding brief for Mr. Wagah Advocate for the Plaintiff.
- c. No appearance for the Defendant.

JUDGMENT: ELC NO. 176 OF 2022 Page 8 of 8 **HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)**

