



**Omedo v Said & another (Civil Appeal 37 of 2019)
[2024] KEELC 5725 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL 37 OF 2019
LL NAIKUNI, J
JULY 29, 2024**

BETWEEN

GERALD OTIENO OMEDO APPELLANT

AND

AMINA MOHAMED SAID 1ST RESPONDENT

FATUMA BINTI ALI KHAMISI 2ND RESPONDENT

JUDGMENT

I. Preliminaries

1. This Judgment pertains to an appeal lodged before this Honorable Court by Gerald Otieno Omedo – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 8th August, 2019 and a Record of Appeal filed on the same day against Amina Mohamed Said and Fatuma Binti Ali Khamisi, the Respondents herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.
2. The Appeal emanated from the final decision of the Lower Court - the Chief Magistrate’s Court at Mombasa Honourable F. Kyambia, Senior Principal Magistrate in CMCC NO. 1544 of 2004 dated the 19th July 2019. Based on the Affidavit of Service on record the Record of Appeal was properly served upon the Respondent.
3. Accordingly, on 6th February, 2024, directions on the disposal of the filed Appeal were taken pursuant to the provision of Section 79B of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010. Thereafter, the parties having fully complied with court’s direction it was slated for highlighting the written submissions which the parties discharged effectively.



II. The Appellant's case.

4. From the filed Memorandum of Appeal has been well summarized. The Appellant averred as follows:-
 - a. The Learned Trial Magistrate erred in fact and in law in ordering the Appellant to remove his house from the suit premises within 37 days without due regard to the fact that the suit premises besides being permanent in nature is inhabited by tenants.
 - b. The Learned Trial Magistrate erred in fact and in Law in making the compensation of the Appellant optional and discretionary.
 - c. The Learned Trial Magistrate erred in law and in fact in failing to make a finding on the value of the house.
 - d. The Learned Trial Magistrate erred in fact and in Law and in fact in holding that the Appellant has no equitable right capable of protection by the law.
 - e. The Learned Trial Magistrate erred in issuing an Order for the forceful eviction of the Appellant when no such prayer was made or canvassed.
5. In the long run, the Appellant prayed that this appeal be allowed with costs to the Appellant and the Judgment entered by the trial court against the Appellant in favour of the Respondents be set aside.
6. From the filed pleadings, the Judgment emanated from a claim filed by the Appellant in CMCC No. 1544 of 2004 vide an Amended Plaintiff filed on 29th November, 2005 against the Respondents herein. The Appellant in the Amended Plaintiff averred that he was the owner of the house without land on Plot No. 1680/VI/MN - Magongo having purchased the same from one Asmini Suleiman Muruga who was sued as the 3rd Defendant but her name removed following the Amendment of the Plaintiff as she was deceased. According to the Appellant at the time the Plot No. 1680/VI/MN was owned by the 2nd Defendant herein.
7. The Appellant went further to narrate in the Amended Plaintiff that at unknown date and time the said defendant sold the said parcel of land Plot No. 1680/VI/MN to the 1st Defendant who had threatened him with eviction and demolish of his house hence he stands to suffer irreparable loss and damage. In the Amended Plaintiff, the Appellant prayed for Judgment against the 1st and 2nd Respondents for:-
 - a. That the 1st and 2nd Defendants, by their agents, servants and/or assignees be restrained from interfering, evicting and demolishing the Plaintiff permanent house on Plot No.1680/VI/MN Magongo.
 - b. In the alternative a- sum of Kshs. 860,000/- being the value of the house in the suit plot.
 - c. A declaration that the Plaintiff is the legal owner of house without land situated on Plot No.1680/VI/MN Magongo.
 - d. Costs of the suit.
8. The 1st Respondent in the lower court in an Amended Statement of Defence filed on 16th June, 2006 stated that the legal owner of plot No. 1680/VI/MN was the 2nd Defendant (2nd Respondent herein) who sold the same to her and therefore any transaction between the Plaintiff, and one Asmini Suleiman Muruga was illegal and unexplorable in law. The Plaintiff therefore was a trespasser on the said Plot. The 1st Respondent in defence further stated that even if the Plaintiff bought the house without land on the Plot, the sale was illegal null and void for want of, her consent at and that of the 2nd Defendant



(2nd Respondent herein). The 1st Respondent had counter claimed against the Plaintiff, claiming vacant possession of the Plot No. 1680/VI/MN. The 2nd Respondent in the lower court pleadings was said to be deceased. There was no indication that the procedural requirements upon the demise of the 2nd Respondent as provided for under order 24 of the Civil cause procedure Rules was complied with hence the suit against the 2nd Respondent abated pursuant to the provisions of Order 24 Rule 3 of the Rules.

9. The Appellant/Plaintiff in his evidence told the court that he bought a house without land from Asmini Suleiman Muraga in July, 1994. He paid a sum of Kenya Shillings One Fourty Five Thousand (Kshs. 145,000/-). He produced sale agreement as exhibit. At the time he used to pay ground rent to the owner of the Plot the 2nd Defendant (2nd Respondent herein). Later sometimes in the year 1997 the 1st Defendant (1st Respondent herein) came and demanded: ground-rent from him. He-paid ground rent for the month of January to April 1997 but no receipts was issued. The 1st Respondent later refused to accept the ground rent. In the years 2004 the 1st Defendant (1st Respondent herein) wrote to him asking him to demolish the house within 14 days. The Appellant testified that when he bought the house the 1st Defendant (1st Respondent herein) was not the owner of the plot. In cross examination he told the court that he never sought the approval of the Landlord as per clause 5 of the sale agreement ('Plaintiff Exhibit No. -1). The 1st Defendant (1st Respondent herein) on her part told the court that she bought the Plot No.1680/VI/MN form the 2nd Defendant (hereinafter referred to as "The deceased") in the year 1999. Before she bought it she did search and confirmed that the same was registered in the name in the 2nd Defendant (2nd Respondent herein). She produced document of title to show that the plot who registered in the name of the 2nd Defendant (2nd Respondent herein). She also produced transfer and certificate of title to show that the plot was now registered in her name. She later learnt that the Appellant/Plaintiff was constructing in the Plot. This prompted her to instruct her advocate to demand that the Plaintiff do remove the structures and stop trespassing on her plot else she shall evict him within 14 days. This is what prompted the Appellant/Plaintiff to file the suit.

10. The Learned Magistrate opined himself in the Judgment delivered on 19th July, 2019 as follows:-

“From the material placed before the court, the plaintiff was given 14 days. This was a short notice and for the interest of Justice I am minded to enlarge the same. For the afore going reason I make the following orders in the Plaintiff suit and the 1st Defendant Counter - Claim.....:-

- a. The Plaintiff suit is dismissed with costs to the 1st Defendants.
- b. The 1st Defendants counterclaim for vacant possession by the Plaintiff from the suit land is hereby granted.
- c. The Plaintiff shall have a period of 30 days to remove the house and/or to vacate the suit land.
- d. In the alternative, to removal of the house and or vacating the suit land within 30 days the 1st Defendants may with the agreement of the Plaintiff pay to the Plaintiff such compensation for the value of the house as may be agreed between the parties.
- e. In default of (c) and (d) above the plaintiff be forcefully evicted and the 1st Defendant be at liberty to demolish the house at the Plaintiff costs.
- f. Costs of the counter claim are awarded to the Defendants.



III. The Submissions

11. As stated above, on diverse dates of 6th February, 2024 and 12th March, 2024 respectively, while in the presence of all parties were in Court the 112 pages Record of Appeal was admitted and directions given specifically. The Honourable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that, all the Counsels were granted ample opportunity file their written submissions. By the time of penning down this Judgement, the Honourable Court was only able to access the Submissions by the Appellant. Thus, the Honourable Court reserved to deliver Judgment on its merit on 25th June, 2024 but due to unavoidable circumstances was deferred to 29th July, 2024 accordingly.

a. The Written Submissions by the Appellant.

12. The Learned Counsel for the Appellant through the Law firm of Messrs. Obura J & Company Advocates filed their written submissions dated 20th June, 2024. Mr. Obura Advocate commenced his submissions by providing the Honourable Court with a brief background of the matter. He stated that the Appellant herein purchased a house without land on a plot known as Plot no.1680/VI/MN in the year 1994 from the 2nd Respondent. He proceeded to pay ground rent to the 2nd Respondent. Subsequently, in the year 1999, five years later on, the 1st Respondent purchased the land and even collected rent from the Appellant for sometime before stopping. The Appellant was later served with a notice requiring him to vacate the suit premises and demolish his house within 14 days giving rise to the claim in the trial court.

13. The Learned Counsel averred that the Appellant filed this Appeal and wished to submit as under on the grounds of Appeal:

- a. The Learned Trial Magistrate erred in fact and in law in holding that the Appellant had no equitable right capable of protection by the law. (This is ground no. 4 which he wished to argue with grounds numbers 1, 2, 3 and 5). The Appellant entered the suit premises with the permission of the Landlord then. At paragraph 5 of the Sale Agreement which was Plaintiff Exhibit No. 1 in the lower court. The Appellant was supposed to seek the consent of the Landlord. At page 32 of the Record of Appeal line 24 the Appellant stated thus during cross - examination:

“Yes, I obtained such approval from the Landlord. No, I have no agreement or any letter in writing to that effect. The Landlord signed the building plan for proposed change of ownership.”

14. The upshot of all this was that the consent of the Landlord then was obtained and she even continued receiving the ground rent. The question therefore was the Appellant having established that his presence on the suit land was legal. Thus, should he be evicted like a trespasser without any remedy? The Counsel humbly submitted that although he was, in the eyes of the law, a Lessee, a fact which was acknowledged by the 1st Respondent when she received two instalments of the ground rent, the law ought to treat this Leasehold interest different from the tenancy of one who was occupying a house as a monthly tenant.

15. The Appellant had a permanent building on the land with tenants. The house was not built illegally. This was the Appellant's investment. Should he then be evicted without any compensation when the landlord stood to benefit if the said house was left to him? He submitted that that amounted to a forfeiture when in reality equity abhors a forfeiture. Equity also delights to do justice. Therefore, he



humbly submitted that it was wrong for the trial court to ignore the Appellant's rightful interest which had been triggered by the change of ownership and proceed to dismiss him empty handed.

16. The Learned Counsel asserted that removing and/or demolishing a house was not like a tenant removing his things from a house. The Appellant needed sufficient time, at least six months if he had to move out, considering that he had tenants in the premises and compensation based on a valuation which was produced as Plaintiff's exhibit No. 4. He humbly submitted that the 1st Respondent having purchased the premises with the full knowledge that the Appellant had a house thereon the issue of compensation should not be discretionary and optional. It was the justice that equity upholds.
17. The Appellant submitted a valuation report by Metro Cosmo valuers, which was at Page 88 of the Record of Appeal. By the said report, it provided the value of the plot as being a sum of Kenya Shillings Eighty Sixty Thousand (Kshs. 860,000/-). His contention was that the trial Magistrate erred in law in failing to find this valuation as an accurate assessment of the value of the house and of any compensation.

b. On the issue of forceful eviction

18. The Learned Counsel submitted that the Trial Court never made a finding that the Appellant was illegally on the suit premises. Indeed the evidence on record showed that the Appellant entered upon the land legally. Any order to terminate the Lease relation should be premised on reasonable time and consideration. This the Respondent had not been given.

In conclusion, the Learned Counsel prayed that this Appeal be allowed.

IV. Analysis and Determination.

19. I have had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
20. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following two issues (2) salient issues for its determination. These are:-
 - a. Whether the filed appeal by the Appellant being aggrieved by the Judgment of the Chief Magistrate's Court at Mombasa [Hon. F. Kyambia] dated and delivered on 19th July, 2019 in Mombasa CMCC No. 1544 of 2004 is merited.
 - b. Who will bear the costs of the Appeal?

Issue No. (a) Whether the filed appeal by the Appellant being aggrieved by the Judgment of the Chief Magistrate's Court at Mombasa [Hon. F. Kyambia] dated and delivered on 19th July, 2019 in Mombasa CMCC No. 1544 of 2004 is merited.

21. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. This is a first appeal. In the case



of “Kenya Ports Authority – Versus - Kuston (Kenya Limited, (2009) 2 EA 212” this Court stated as follows regarding the duty of first appellate court:-

“This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

22. Similarly, in the case of “Peter –Versus - Sunday Post Limited 1958 E.A. 424” Sir Kenneth O’Connor P. rendered the applicable principles as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

23. Broadly speaking, the various powers of the Court on appeal, the provision of section 78 of the [Civil Procedure Act](#) are provided as follows:

“78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

- (a) To determine a case finally;
- (b) To remand a case;
- (c) To frame issues and refer them for trial;
- (d) To take additional evidence or to require the evidence to be taken;
- (e) To order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

24. The only issue for determination in the appeal is whether this Honourable Court can interfere with the Judgment of the lower court by finding that the claim by the Appellant to reverse the Judgment of the lower court in favour of the Respondents.

25. Proceeding to determine all the grounds at once, I will proceed to examine the issues in the lower court matter. In the lower court matter, it was the Appellants case that the plaintiff stated that he purchased the said house without land at a sum of Kenya Shillings One Hundred and Fourty Five Thousand (Kshs.145,000/-) from Asmin Suleinman Muruga and Further incurred a costs of a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) in renovation and improving the said house without land on the said parcel of land. He claimed to be the owner of a house without land on Plot No. 1680/VI/MN – Magongo. The plaintiff further averred that at the time the Plot No. 1680/VI/MN was owned by the 2nd Defendant herein.



26. For clarity sake, I reiterate that the Learned Magistrate opined himself in the Judgment delivered on 19th July, 2019 as follows:-

“From the material placed before the Court, the Plaintiff was given 14 days. This was a short notice and for the interest of Justice I am minded to enlarge the same. For the afore going reason I make the following orders in the Plaintiff suit and the 1st Defendant Counter - Claim.....:-

- a. The Plaintiff suit is dismissed with costs to the 1st Defendants.
- b. The 1st Defendants Counter - Claim for vacant possession by the Plaintiff from the suit land is hereby granted.
- c. The Plaintiff shall have a period of 30 days to remove the house and/or to vacate the suit land.
- d. In the alternative, to removal of the house and or vacating the suit land within 30 days the 1st Defendants may with the agreement of the Plaintiff pay to the Plaintiff such compensation for the value of the house as may be agreed between the parties.
- e. In default of (c) and (d) above the Plaintiff be forcefully evicted and the 1st Defendant be at liberty to demolish the house at the Plaintiff costs.
- f. Costs of the counter claim are awarded to the Defendants.

27. Once again, the concept of “House without Land” which is common parlance prevalent in the Coastal region of Kenya, is back before this Court. In coastal Kenya, a land tenure known as house without land is common. The concept has picked great credence in the legal sphere which cannot be ignored. This is where a person can own a house without owning the land upon which the house stands. Ideally, the owner of the house is different from the owner of the land on which it stands. In the case of:- “*Famau Mwenye & 19 others - Versus - Mariam Binti Said, Malindi H.C.C.C. No. 34 of 2005*” (Ouko, J.) (as he then was) described the concept of house without land as follows:

“The dispute arises from land tenure uniqueto Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as ‘house without land’. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* [meaning, ‘whose is the soil, his is also that which is above it’].”

28. Further, in the case of:- “*Christopher Baya and 2 Ors. – Versus - Philip Kiluko and Another Mombasa HC Civil Appeal No. 64 of 2004*”, Khaminwa, J. correctly understood the concept as follows:

“This arrangement is known as “House Without Land” meaning the right to build on another’s land under agreement which does not pass title to the land.”



29. It is noteworthy that in the coastal region one can own a house and not necessarily the plot on which the house stands. In the case of:- “Mariam Fadhili – Versus - Samson Maricho Otweyo & 3 others [2016] eKLR” this Court held:-

“Our land law regime is mainly dictated by statute and common law; both of which define land as not only the ground but the structures thereon. This is based on the Latin maxims ‘cujus est solem ejus et usque ad coelum et ad inferos’ which translates into ‘whoever’s is the soil, it is theirs all the way to heaven and all the way to hell’ and ‘quic quid planatur solo solo cedit’ (whatever is attached to the soil becomes part of it). From the two maxims, land has by and large been defined to mean the ground and all fixtures thereon. However, courts have taken judicial notice of the Mohammedan concept of ownership of ‘a house without land’ that is prevalent at the coast. This concept works on the premise that proprietorship of land and of the structures thereon can be mutually exclusive. A person may own one without necessarily owning the other. This proposition found support under the provisions of the Land Titles Act Cap. 282 (repealed) which governed land registration at the coast. Under the Act, interests in land required registration, with Section 55(b) recognizing houses and coconut trees as such interests or holdings whose proprietorship could be independent of the land. (See Muhiddin Mohamed – Versus - Jackson Muthama & 168 others [2014] eKLR. Upon registration, a certificate of registration would issue, which would act as proof of legitimacy of the proprietor’s interest.”

30. This Honourable takes note that the 1st Respondent in an amended statement of defence filed on 16th June, 2006 stated that the legal owner of plot No. 1680/VI/MN was the 2nd Defendant who sold the same to her and therefore any transaction between the Appellant, and one Asmini Suleiman Muruga was illegal and unexplorable in law. The Appellant therefore is a trespasser on the said Plot. The 1st Respondent further in the lower court stated that even if the Appellant bought the house without land on the Plot, the sale was illegal null and void for want of, her consent at and that of the 2nd Respondent. The 1st Respondent had counter claimed against the Appellant claiming vacant possession of the Plot No. 1680/VI/MN.
31. The Appellant in his evidence told the court that he bought a house without land from Asmini Suleiman Muruga in July, 1994. He paid a sum of Kenya Shillings One Fourty Five Thousand (Kshs. 145,000/-). He produced sale agreement as exhibit. At the time he used to pay ground rent to the owner of the Plot the 2nd Respondent. Later sometimes in the year 1997 the 1st Respondent came and demanded: ground - rent from him. He-paid ground rent for the month of January to April 1997 but no receipts was issued. The 1st Respondent later refused to accept the ground rent. In the years 2004 the 1st Respondent wrote to him “asking him to demolish the house within 14 days. The Appellant testified that when he bought the house the 1st Respondent was not the owner of the plot. In cross examination he told the court that he did not seek the approval of the Landlord as per clause 5 of the sale agreement (Plaintiff Exhibit No. 1). Accordingly to the 1st Respondent she testified that she had bought the Plot No.1680/VI/MN from the 2nd Respondent (deceased) in the year 1999. Before she bought it she did search and confirmed that the same was registered in the name in the 2nd Respondent. She produced document of title to show that the plot who registered in the name of the 2nd Respondent. She also produced transfer and certificate of title to show that the plot was now registered in her name. She later learnt that the Appellant was constructing in the Plot.
32. This Honourable Court has had an occasion of making several decisions on this aspects. I must admit that they all vary depending on the surrounding facts and inferences of each case. There is no



standard rule on them. For instance, I did make a determination in the case of “Changilwa – Versus - Kanangu (Environment and Land Appeal E042 of 2021) [2024] KEELC 4516 (KLR) (21 May 2024) (Judgment)”, where I held that:-

“The concept is only unique in the Coastal region of Kenya. It has picked great credence in the legal sphere which cannot be ignored. It is where a person can own a house without owning the land which the house stands. (See COA Civil No. 18 of 2017 - in the case of:- “Addalhrazak Khalifa Salimu – Versus – Harun Rashid Khator & Others (2018), In HCCC (Malindi) No. 34 of 2005 – Famau Mwenye & 19 others Versus - Mariam Binti Said” W. Ouko J describes it as “The dispute arises from land tenure unique to Mombasa which has baffled scholars, practineers and even jurist. The Land system is only referred to as “House without Land”. That is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin Maxim – “Cujus est Salum ejus est Usque ad coelum (meaning ‘Whose is the soil, his is also that which is above it”).”

33. The Court agrees with the case of “Famau Mwenye & 19 others (Supra)” above after the Learned Judge reviewed several decisions on the house without of land concept opined that the concept of the house without land was of the opinion that the concept of the house without land created lease agreement relationship. I agree with the trial court as well, the relationship between the Appellant and the 1st Respondent is a lease though not in any written form, but the terms were the periodic payment of ground rent which the plaintiff admitted in his evidence that he paid to the 1st Respondent until the 1st Respondent declined the same.

34. A lease can be determined by either effluxion of time or notice given by either party in accordance with the lease agreement or as stipulated by law in reference to the period in which rent is paid. Sections 106 and 108(h) of the Transfer of Property Act provided that:-

- “106. In the absence of a contract or local law or usage to the contrary, a lease
- (1) of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice.
 - (2) Notwithstanding anything contained in any other law for the time being in force, the period mentioned in sub-section (1) shall commence from the date of receipt of notice.
 - (3) A notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.
 - (4) Every notice under sub-section (1) must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.”



35. The provision of Section 108 (h) provides that:
- “ 108 (h) the lessee may, even after the determination of the lease, remove, at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth; provided he leaves the property in the state in which he received it.”
36. The law ownership of land and property is very simple and clear. It is trite and various superior courts have held that the prima facie evidence of ownership of land is a certificate of title. This fact is buttressed by the provision of Sections 24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012 which states as follows:
37. The provision of provides as follows:- Section 24 of the [Land Registration Act](#), 2012
- “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.”
38. 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.”
26. The certificate of title issued by the Registrar upon registration,
- (1) 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.”
39. It is trite law that the burden of proof is where he who alleges bears the burden of proving, see – “Jennifer Nyambura Kamau – Versus - Humphrey Mbaka Nandi [2013] eKLR”. To this end, the provisions of Section 107 of the [Evidence Act](#) stipulate that:-
- “Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.



40. While the provision of Section 109 there of further provides that:

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

41. 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. Having looked at the copy of the title deed, I am satisfied that the suit property indeed belongs to the plaintiff who is the registered proprietor. The registration and proprietorship of the 1st Respondent is, therefore, not in dispute and thus, the 1st Respondent remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use the property. Having carefully analyzed the totality of the evidence adduced in the lower court, I find and hold that the learned trial magistrate properly directed himself on the issues of law and fact that were before him. Hence, the appeal preferred by the Appellant must fail accordingly

42. However, having stated all the above, the only concession I accord the leases are to be treated in a humane and properly in accordance with the laid down and known international and domestic standards on human rights. This being a Court of Law and established under the provision of the Article 162 (2) (b) of *the Constitution* of Kenya, 2010, and also governed by several other statutes such as Sections 3 and 13 of the Environment and *Land Act*, No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012, the Honorable Court is informed by the fact that *the Constitution* is a living tissue. Just like all other living tissues, it has to be fed and watered. It breathes and without oxygen and freshness it will die. With the fullness of time, I have learnt that theses things are not just metaphorical. They are real. We all must know this fact. For a moment, this might sound rather academic but inevitable. The Courts of Law are guided by Jurisprudence, meaning knowledge of or skill in law, which was the first social science to be born. While making interpretation of Law, the Courts are guided by two broad philosophies. These are, firstly, “the Positivism” interpretation of Law, whereby it means that laws are mere commands of human beings with threats of force. It holds that law is valid notwithstanding its merits or demerits. In other words, law and morality are distinct. In a nutshell, positivists hold the view that it is not the business of lawyers and the Judges to say whether a law is good or bad. The business of rendering such moral verdicts is best left to Legislators, philosophers and the public. To them the works of Lawyers and Judges is to apply the Law ‘as it is”. Secondly, is “the natural” interpretation of the Law. Here it holds that law and morality cannot be divorced from each other. Like the siemese twins they are inseparable and intertwined. They hold that the law is based on basic human values that are universal and standard. It is based on values of intrinsic to human nature that can be deduced and applied independently of man – made law. Such values include the universal need to preserve human life and livelihoods. It is my intuition that these are the Core Values that the makers and the legal experts of *the Constitution* of Kenya, 2010 had in mind by enacting the provisions of Articles 2 (1), (2), (3), (4), (5) and (6) on the Supremacy of *the Constitution* and the fact that any international treaty or law that Kenya has ratified shall be part of the laws of Kenya; 10 (2) (b) on the Core values of human dignity, equity, social justice, equality, human rights, non – discrimination, protection of the marginised and sustainable development; Articles 43 (1) (b) on social and Economic rights – access to and adequate housing and decent standards of livelihood; 48 on access to Justice and Article 159 (2) (c) on Alternative Judicial System (AJS) currently being strongly advocated as a policy by the Judiciary in terms of resolving disputes amicably, justly, expeditiously and



cost effectively. It leaves parties as friends and ones sustaining brotherhood and good neighbourhood. This is as opposed to losing a case and followed by forceful eviction.

43. While at this point, the Honorable Court wishes to rely on the case of “Constitution Petition Numbers 65 of 2010 - Satrose Ayuma & 11 Others - Versus - Kenya Railways Staff Retirement benefits Scheme” where the Court adopted the General Comment No. 7 of the UN Commission on Human Rights and stated:-

“State Parties are obligated to use all appropriate means to protect the rights recognized in ICSECR and it recognizes that forced evictions are prima facie violations of the right to adequate housing, and that States should be strictly prohibited in all case, from intentionally making a person or community homeless following an eviction, whether forced or lawful. Paragraph 15 of the General Comment No. 7 also elaborates an appropriate procedural protection and due process to be in place to ensure that human rights are not violated in connection with forced evictions.” The term “Forced Eviction” was defined in the context of the definition accorded to it by the Committee on Economic, Social and Cultural Rights which defines it as:-

“The permanent removal against their will of individuals, families and/or communities from the homes which they occupy without the provisions of, and access to, appropriate forms of legal or other protection”.

The Court cited:- “The UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)” which have provided some guidelines to States on measures to adopt in order to ensure that development – based evictions, like the present one in this instant case, are not undertaken in contravention of the existing international human rights standards and violation of human rights. The Court held that:

“These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the rights to adequate housing for all those threatened with eviction, at all times. The Guidelines, inter alia, place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction, that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with the international human rights commitmentsthe Guidelines also provided conditions to be undertaken during the evictions as follows: that there must be mandatory presence of Government officials or their representatives on site during the eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to election, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.....



44. In this regard, the first step in an eviction is for the lawful owner to serve a notice of eviction in accordance with the law. The essence of serving an adequate and reasonable eviction notice lies in the need to give the persons affected an opportunity to seek relief in Court. I strongly hold that this must have been the rationale that informed and guided the Legislature in their wisdom to have caused the amendment into the Land Act, and inserted the provision of Section 152E of the Land (Amendment) Act, which provides:-

1. “If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on the person a notice, of not less than three months before the date of the intended eviction. is in occupation of his or her land without
2. The notice under Sub - Section (1) shall:-
 - a. In the case of a large group of persons, be published in at least two daily newspapers of national wide circulation and be displayed in not less than five strategic locations within the occupied land.
 - b. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - c. Be served on the Deputy County Commissioner in Charge of the area as well as the officer Commanding the Police division of the area”.

45. Following this lengthy deliberation, I wish to apply these principles to the instant case. It is imperative to appreciate from the pleadings that the Appellant herein purchased a house without land on a plot known as Plot no.1680/VI/MN in the year 1994 from the 2nd Respondent. He proceeded to pay ground rent to the 2nd Respondent. Subsequently, in the year 1999, five years later on, the 1st Respondent purchased the land and even collected rent from the Appellant for sometime before stopping. The Appellant was later served with a notice requiring him to vacate the suit premises and demolish his house within 14 days giving rise to the claim in the trial court. Essentially, the Appellant submitted that the Learned trial Magistrate erred in fact and in law in holding that the Appellant had no equitable right capable of protection by the law. The Appellant entered the suit premises with the permission of the Landlord then. In the interest of natural Justice, Equity and Conscience the Appellant should be accorded reasonable time within the parameters of law to peacefully remove all his property from the suit land or alternatively be allowed to dispose off the materials or the development to the Respondent at the current market rate.

Issue No b). Who will bear the costs of the Appeal?

46. The issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The Proviso of the provision of Section 27 (1) of the Civil procedure Act, Cap. 21 provides that Costs follow the event whereby by events it means the result of the said process, legal action or proceedings. In the instant case, I find that the Appellant having failed to establish his claim on the appeal the Respondents have the costs of the appeal.

V. Conclusion and Disposition.

47. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant lacks merit and is hereby dismissed.



Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

- a. That the appeal filed through a Memorandum of Appeal dated 8th August, 2019 and a 112 pages undated Record of Appeal herein be and is hereby found to lack merit and thus is dismissed in its entirety with costs.
- b. That the Honourable Court reserves the right to uphold Judgment of the trial court delivered by Honourable F. Kyambia, SPM in CMCC No. 1544 of 2004 on the 19th July 2019.
- c. That without prejudice to the foregoing orders, there be an order that the Appellant should not be forcefully evicted but instead be accorded proper treatment in conformity with the known International Conventions and Domestic statutes on Human Rights and in particular the provision of Section 152E of the Land Act, No. 6 of 2022 to remove all his property or be allowed to dispose them off to the Respondent or anyone else at the current market rate. _____
- d. That the Respondents shall have the costs of the appeal to be borne by the Appellant herein.

It is so ordered accordingly

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 29TH DAY OF JULY 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. Obura Advocate for the Appellant.
- c. M/s. Kimani Advocate for the Respondents.

