Soar v Ali (Environment and Land Case Civil Suit E001 of 2022)
[2024] KEELC 5460 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5460 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2022

LL NAIKUNI, J

JULY 16, 2024

BETWEEN

KULDIP SINGH SOAR ..... PLAINTIFF

AND

SAIDA ABDALLA ALI ..... DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains a suit instituted by way of a Plaint dated 13th January, 2022 and filed on the same day. It was by Kuldip Singh Soar, the Plaintiff herein against Saidi Abdalla Ali, the Defendant herein.

2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance through filing a Memorandum of Appearance dated 10th February, 2022 and a Defence dated 22nd February, 2022 and filed in court on the same day.

II. Description of the Parties in the suit

3. The Plaintiff in the Plaint was described as a male adult of sound mind residing in Mombasa. His address for service for the purposes of this suit shall be care of Messrs. Kasmani & Co. Advocates, First Floor, Tea Trade Center, Nyerere Avenue, P.O. Box 99236 - 80107 Mombasa.

4. The Defendant was a female adult of sound mind residing and working for gain in Mombasa. The Defendant's address for service for the purposes of this suit is care of Messrs. Idris Ahmed & Company, Advocates, Seventh floor, Furaha Plaza, Nkrumah road, and whose postal address is P.O. Box No. 81680 - 80100 MOMBASA.

III. Court directions before the hearing

5. Nonetheless, on 3rd April, 2024, the Honourable Court fixed the hearing dated on 5th April, 2024 with all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 with the Court proceeding for the same that afternoon at 9.30 am and the Plaintiff and the Defendant called their witnesses on 5th April, 2024. The Parties called their cases to a close on the same day.

6. This matter proceeded on for hearing by way of adducing "Viva Voce" evidence with the Plaintiff's witness (PW - 1) testifying in Court on 5th April, 2024. After which the Plaintiff closed her case. The Defendant called his witness (DW - 1) on 5th April, 2024.

IV. The Plaintiff's case

7. From the filed pleadings, the Plaintiff was the registered proprietor as owner for an estate in fee simple of all that piece of land known as Subdivision Number 4961 (original number 15/2/12) Section I Mainland North and comprised in title number C. R. 20538 (Hereinafter referred to as "the Suit Property"). The Defendant had been in occupation of the suit Property since the year 2018 and had failed and/or neglected to pay the rent made up as follows:

    a. Kenya Shillings Five Thousand (Kshs. 5,000/-) per month for the years 2018, 2019 and 2020 respectively.

    b. Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month from January 2021 up to and including the time of filing suit;

    c. The Defendant therefore owed the Plaintiff in access of Kenya Shillings Three Hundred and Four Thousand (Kshs. 324,000/-) as rental arrears.

8. The Property comprised a Swahili house which consisted of 8 rooms which the Defendant had rented out to unknown individuals without the consent of the Plaintiff. The Plaintiff through its Advocates on record gave to the Defendant a written notice to vacate and hand over possession of the Property to the Plaintiff. The Defendant had failed and or refused to vacate the Property and continued to occupy the Property without the consent of the Plaintiff as a result of which, the Plaintiff continued to suffer loss in terms of rental income.

9. According to the Plaintiff, there was no other suit pending and there had been no previous proceedings in any court between the Plaintiff and any of the Defendant over the subject matter of this suit. The jurisdiction of the court was admitted.

10. For these reasons, the Plaintiff prayed for the following orders against the Defendant:

    a. Delivery of vacant possession of the Property to the Plaintiff;

    b. Rent arrears in the sum of Kenya Shillings Three Hundred and Four Thousand (Kshs. 324,000/-) together with interest thereon at Court rates from the date of filing hereof to the date of full and final payment;

    c. Mesne profits at the rate of Kshs. 20,000/- per month from the date of filing hereof until the delivery of vacant possession;

    d. Costs of and incidental to this suit.

11. The Plaintiff testified as PW - 1 on 5th April, 2024 and stated as follows:-

A. Examination - in - Chief of PW - 1 by M/s. Kasmani Advocate.

12. PW – 1 testified under oath in English language. He identified himself as Kuldip Singh Soar. He held being a Citizen of Kenya holding the national identity card well with all the details well captured on record. He told the court that he was in the building and agriculture industry which he initially ran with his father but he was on his own at the time of his testimony i.e. Construction of buildings. In the mid year of 1980-1986 and 1987, he acquired the suit property. He had a Certificate of Title deed. He showed the court the original of the Certificate of title deed bearing CR No. 20538 and Sub - division No. 4961. Section I Mainland North. It was issued on 11th September, 1990.

13. According to PW - 1, on 13th January, 2022, he recorded a witness statement dated 13th January, 2022 which he relied on as his evidence in chief. On the same date, he filed a list of documents. They were 12 in number and which he produced. There was a small Swahili house of the suit property while the other part he used as for storage of building material for their works. When he acquired the property there was one Mr. Abdallah Noor. He lived there and had passed on. After that he met the daughter. He did not know the Defendant personally. She came to him and introduced herself as the daughter of the deceased - Mr. Abdallah Ali Amour.

14. PW - 1 further stated that they agreed with the late Abdallah, they would be paying land rent to him and he would use if for paying rates. Thereafter, the deceased's wife continued paying land rates but he had to ask them to vacate as he wanted more finances. He asked them to be paying a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month but they felt it was too much. Somehow they agreed on a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) per month but they still felt it was a lot. They stated they were not earning a lot from it. Instead, they proposed on paying a sum of Kenya Shillings (Kshs. 8,000/-) per year a figure they had discussed and somehow agreed with their father.

15. PW - 1 stated that the last time he got some money from them was on 15th October, 2020. He felt they were leasing out the Swahili House and they may have been receiving some rental income for a sum of Kenya Shillings (Kshs. 15,000/-) and that was why he asked them to be paying a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-). They never thought of putting things in writing between him and them. In the long run, PW - 1 asked them to vacate the suit property. When the mother was alive he offered to sell the property to them and she had been very happy with the said proposal but unfortunately she did not last long. His request to court was for vacant possession – rent arrears and mesne profits and costs.

B. Cross examination of PW - 1 by Mr. Ahmed Advocate.

16. PW - 1 reiterated that he acquired the main plot in the years 1986 – 1987 but he later on sub - divided it. He got the title deed in the year 1990 from Mr. Miran Razamohamed. When he acquired the property, Mr. Abdallah was there. There was a Swahili house; he was not told by Mr. Miran on the circumstances how Mr. Abdallah was there. They agreed with Mr. Abdallah that he would be paying them some money as rent. When referred to the Defendant's documents – lists of documents marked as DF-Identification 1 Letter dated 2nd July, 1990 – its acknowledgement of Mr. Abdallah's plot. He held it was a mistake, letter dated 20th March, 1991 – referring to it as his portions of the rate, they agreed on this agreement. It was a gentlemen's agreement. The idea was for him to live on it and they continue to pay – until they refused to pay. There was a time they sent him the money but he refused to receive it as it was not adequate, he insisted on them paying through his advocate. The Swahili house was big enough. He knew they were earning a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) and he asked them to pay him a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-).

C. Re – examination of PW - 1 by M/s. Kasmani Advocate.

17. PW - 1 reiterated that he had an agreement with Mr. Abdallah on the payment of rates. From the letter he meant his portion of land was the rate and rent of the land for the portion he was occupying. He refused to accept the money from them – it was from their advocates. He saw a departure from norm. His was advised by his advocate on record to collect the cheque.

18. The Court observed that the Defendant was occupying a little bit of half the portion of the land. The Plaintiff marked a close of his case on 5th April, 2024 through his Counsel M/s Kasmani.

V. The Defendant's case

19. The Defendant filed her defence dated 22nd February, 2022 where the Defendant denied contents of paragraph *3* where she stated that the Plaintiff was the registered owner but the beneficial ownership of the portion occupied by the Defendant on the land known as Subdivision Number 4961 (Original Number 15/2/12) Section I Mainland North together with the house built thereon ("the Suit Property") belong to the Plaintiff.

20. The Defendant further stated that the Suit Property was acquired by her late father Abdalla Ali Amour (deceased) sometime in the year 1973 from Miran Razamohamed (deceased) who sold the land on the understanding that as the land was not to be sub - divided the purchaser (Abdalla Ali Amour) would contribute a proportionate share of the Rates payable to the municipal authority (which was now the County Government). The Defendant stated that the Plaintiff purchased the parcel of land known as Land Reference Number 15/2 Section I Mainland North ("the Land") from Miran Razamohamed sometime in the 1980s which purchase was subject to the Defendant's late father's rights over the Suit Property.

21. The Defendant averred that sometime in the year 1990 the Plaintiff without disclosing to the Defendant or her late father proceeded to subdivide the plot and created Subdivision Number 4961 (Original Number 15/2/12) Section I Mainland North ("the Land") where the Suit Property lay. The Defendant denied contents of paragraph 4 of the Plaint and that she owed the Plaintiff a sum of Kenya Shillings Three Hundred and Twenty Four Thousand (Kshs 324,000/-). The Defendant averred that she had been diligently and promptly paying her portion of the Rates in respect of the Suit Property until sometime in the year 2020 when the Plaintiff refused to accept payments from the Defendant and unilaterally demanded that she pays a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) per month without any justifiable cause.

22. The Defendant further stated that she instructed her advocates on record to send the Plaintiff her payment for the share in Rates payable but the Plaintiff refused to accept the same and the Plaintiff's Advocates on record similarly refused to accept payment. The Defendant denied the contents of Paragraph 5 of the Plaint and stated that the Plaintiff has since acquiring the Land known that the house on the Suit Property was a residential rental property which the Defendant's father used to let out to 3rd parties which was still the current use of the Suit Property and the Defendant further reiterated the contents of paragraph *3* hereof.

23. The Defendant further stated that there was no requirement in law or contract for her to seek any consent from the Plaintiff as alleged or at all for purposes of renting out the Suit Property or any part of it. The Defendant admitted the contents of paragraph 6 of the Plaint only to the extent that a notice to vacate was issued to her but in response thereto stated that the said notice was fatally defective as it sought to terminate a relationship that did not exist between the parties herein. The Defendant

reiterated that she was not a tenant of the Plaintiff but owned Suit Property which included the land and buildings and she was only liable to remit a proportionate share of the Rates payable for the Land.

24. The Defendant further stated that she responded to the Plaintiff's notice through her advocates on record reminding the Plaintiff of the relationship the parties had. The Defendant denied the contents of Paragraph 7 of the Plaint stating that the purported notice was defective and nulland void ab initio as the Plaintiff had no right to demand that the Defendant vacated the Suit Property.In the alternative and without prejudice to the foregoing the Defendant averred that the Plaintiff's claim herein was time barred in law and the Defendant had acquired prescriptive rights over the Suit Property by adverse possession and as such the Plaintiff's suit was bad in law and an abuse of court process and should be dismissed with costs. The Defendant admitted to the contents of Paragraphs 8 and 9 of the Plaint.

25. For reasons whereof the Defendant prayed that:-

    a. The Plaintiff's suit be dismissed;

    b. A declaration do issue that the Defendant is the legal and beneficial owner of the Suit Property;

    c. The Plaintiff do conduct a sub - division to excise of the Suit Property from the Land and that the Suit Property be registered in the name of the Defendant; and

    d. Costs of this suit;

26. In his opening remarks, the Counsel for the Defendant, Mr. Ahmed stated as follows. The Defendant had been in occupation of the land. She was a beneficiary of the estate of the Defendant's father. The father acquired it in the year 1973 from one Mr. Miran RazaMohamed. The Plaintiff acquired the title from Mr. Miran Mohamed who was now deceased. The Defendant's father had the right over the property – through her father. They had made the claim from their filed Defence clause (b).

27. The Defendant testified as DW - 1 on 5th April, 2024 where she testified as follows:-

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

28. DW - 1 was sworn and testified in both Swahili and English language. He identified himself as Rukia Abdallah Ali. She was a citizen of Kenya and a holder of the national identity card bearing all the details on record. She was born in the year 1972 and lived in Mtwapa. She was the Defendant's sister and had been given authority and General Power of Attorney dated 28th July, 2023 through supplementary list of documents – Defence exhibit 23. She stated a statement dated 15th August, 2022 and had filed a list of documents with 22 documents defence Exhibit 1 to 22. The Swahili house belonged to their father which was 40 x 80 ft. He had gotten the land from Mr. Miran RazaMohamed and then constructed the house. He was not able to get the title deed because it was small. They agreed that Mr. Abdallah would be paying rate to Mr. Miran then they would be paying to the Municipal Council.

29. According to DW - 1 reiterated that later on the land was transferred to the Plaintiff and they continued with the same arrangement until their father died. Their mother would be paying a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-) but later on the Plaintiff refused and he insisted that they pay a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month so they decided to do so through his Advocate. They would be paying annually. The cause was the house without land. There were tenants who paid a sum of Kenya Shillings Three Thousand (Kshs. 3,000/-) per room. There were 7 rooms hence a total rental income for a sum of Kenya Shillings Twenty One Thousand (Kshs. 21,000/-) per month. The Plaintiff used part of the land for waste dump site of his building material to the extent tenant were complaining of air pollution and dust.

B. Cross examination of DW - 1 by M/s Kasmani Advocate:-

30. DW - 1 reiterated that in the year 1973, she was a one year (1) old. When referred to Paragraphed 3 of the witness statement, she stated that she would be conversant of the transaction between her father and Mr. Miran from the documents with the Advocate – this was a mere statement of opinion and not a fact. Her father died in the year 2014. She did not have a certificate of death in Court. She was not privy to what they were paying for the Plaintiff. They had made arrangements on the succession at the Kadhi and its completion. She did not know it would be needed herein. She had not presented anything to show the property was part of the Estate of Mr. Abdallah. She was aware that her father took any steps to ventilate the ownership of the property. They never wrote to the Plaintiff to show him they had ownership to the property and they were the beneficiaries to it.

C. Re – examination in DW - 1 by Mr. Ahmed Advocate.

31. DW - 1 told the court that she knew the relationship between Mr. Miran and Mr. Abdallah from documents. Her father would be paying for the rates for the Municipal for the use of the land. They applied for the grant for their father and she was one of the beneficiaries and legal administrators. After the refusal of acceptance of the rate by Plaintiff in 2020. They forwarded it to their Advocate for remittance to the Plaintiff.

32. The Defendant's case was marked close by her counsel on record Mr. Ahmed.

VI. Submissions

33. On 5th April, 2024 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 on 30th May, 2024, all the parties fully complied accordingly. Thus, the Honourable Court reserved a date to deliver its Judgement on 11th July, 2024 but eventually was read out on 16th July, 2024 thereof.

A. The Written Submission by the Plaintiff.

34. The Plaintiff through the Law firm of Messrs. Kasmani & Company Advocates filed their written submission dated 18th April, 2024. M/s. Kasamani Advocate commenced her submission by providing a brief background information of the case. She held that this matter revolved around the ownership rights of the Plaintiff and the Defendant over a portion of the Suit Property. Briefly, according to the Learned Counsel the Plaintiff purchased a piece of land sometime in the year 1980s. Thereafter, he undertook a sub - division of the same into smaller parcels. The Suit Property was one of the resultant sub - divisions. At the time he purchased the said land, there stood a Swahili house on a portion of what was now the Suit Property, which was occupied by a Mr. Abdalla Amour and his wife. The Plaintiff allowed the said Mr. Abdalla Amour to remain in occupation of the Swahili house on the same terms and conditions as those that they had with the preceding owner that was the obligation to pay a yearly amount to the Plaintiff as rent. Mr. Abdalla Amour continued to pay such sum until the time of his death.

35. Upon his death, his widow took over possession of the Swahili house and continued to pay the agreed amount to the Plaintiff. The Plaintiff proposed to sell the Suit Property to the widow of the late Mr. Abdalla Amour, an idea she seem to like. Unfortunately, Mrs. Amour passed away before the offer could crystalize into a contract. Upon her death, the Defendant took possession of the Swahili house. The Plaintiff had no objection to such occupation. However, he made it clear that the Defendant could not continue to occupy the Swahili house on the same terms and conditions that had been agreed upon

with her late parents. He proposed very reasonable rental amounts, which the Defendant denied to pay. The Plaintiff then demanded that they vacate the Suit Property and pay the outstanding rent, which the Defendant refused to do, thus necessitating this suit. Upon the filing of the suit, the Defendant claimed proprietary interest contending that her father had purchased the portion of the land he occupied from Mr. Miran Razamohamed.

36. The Learned Counsel submitted that there were four (4) issues for the determination by the Honourable Court. These were: Firstly, what rights, if any, did the late Abdalla Amour acquire in the Suit Property. According to the Learned Counsel the Plaintiff had produced to this Court the original Certificate of Title in respect of the Suit Property issued to him by the Registrar of Land Titles Registry, Mombasa. The Defendant never challenged the Plaintiff's legal ownership of the Suit Property and therefore, in line with of the provisions of Section 26 of the *Land Registration Act*, 2012, it was established that the Plaintiff are the unchallenged legal owner of the Suit Property. It was contended by the Defendant that at the time of the acquisition of the larger parcel of land from which the Suit Property was excised, the late Abdalla Amour had already purchased that portion of the land on which the Swahili house stood.

37. To support her point, she relied on the provision of the *Law of Contract Act* as it stood prior to the year 2003 as provided at the provision of Section 3(3). While the law has always provided that a contract for the sale of land must be in writing, where an agreement had not been reduced to writing, the qualifying provisos call for action on the part of a purchaser to enforce the agreement. The question that begged answer was what rights Mr. Abdalla Amour had over the portion he occupied in the larger parcel of land prior to its acquisition by the Plaintiff. The Defendant stated in her witness statement that Mr. Abdalla Amour purchased the Suit Property from Mr. Miran Razamohamed sometime in the year 1973 on the condition that Mr. Abdalla Amour would pay proportionate share of the rates because the portion of the land supposedly sold to him was below the minimum sub - division acreage applicable at the time. Ms. Rukia Abdalla recorded a similar statement. She further testified that she was only 1-year-old in the year 1973 and that while she had no factual knowledge of the terms and conditions of the transaction between Mr. Miran Razamohamed and Mr. Abdalla Amour, her assumptions were based on documents that she has sighted over time. However, it was imperative to note that she was unable to point out what documents it was that she was relying upon to make this assertion, indeed none had been submitted to this Court. The Plaintiff, on the other hand, stated and testified that at the time of acquisition of the larger parcel of land, Mr. Miran Razamohamed had informed him that Mr. Abdalla Amor was in possession of the Swahili house which now the comprised the Suit Property subject to the payment of a certain nominal amount as annual rent and the Plaintiff agreed to allow Mr. Abdalla Amour to remain in possession on the same terms.

38. The contention by the Counsel was that If Mr. Abdalla Amour had actually purchased that portion of the larger piece of land from Mr. Miran Razamohamed, why would he not object to the same parcel of land being re - sold to the Plaintiff? There was no evidence on record that showed that there was any action on the part of the late Abdalla Amour to assert his rights as a proprietor. In fact, after the sale of the land to the Plaintiff, he dutifully continued to pay to the Plaintiff, albeit irregularly and only upon demand, the sum agreed between them. The Defendant claimed that the payment being made to the Plaintiff by Mr. Abdalla Amour was for a portion of the rates of the Suit Property being the portion occupied by Mr. Abdalla Amour and not rent, and that this supposed payment of rates indicated that he was the owner of that portion of land. It was pertinent to note that the amount being paid by Mr. Amour to the Plaintiff during his occupation of the Swahili house was higher than the rates payable for the Suit Property. Mr. Abdalla Amour was paying a sum of Kenya Shillings Four Thousand (Kshs. 4,000/-) per year at the time of acquisition of the Suit Property by the Plaintiff and by the time of his death, he was paying a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-) a year, while the rates

payable for the Suit Property in the year 1991 was a sum of Kenya Shillings Eight Fourty (Kshs. 840/-) and has over time increased to a sum of Kenya Shillings Three Thousand Five Hundred and Twenty (Kshs. 3, 520/-). If Mr. Abdalla Amour would have been paying only towards a portion of the rates for the Suit Property, he would have been paying a much smaller amount. While in his letters of demand to Mr. Amour, the Plaintiff had termed the amount payable as a portion of the rates, clearly, the amount being paid was actually rent. It was important to note your honor, that Mr. Abdalla Amour, his widow and the Defendant only made payment when the same was demanded of her. The Plaintiff, on the other hand was the registered rate payer and had continued to pay the rates annually to the Municipal Council of Mombasa and later to the Country Government of Mombasa, regardless of whether or not payment was collected from Mr. Abdalla Amour, and later his wife and later the Defendant. Copies of the receipts for the payment of rates had been tendered as evidence by the Plaintiff. While it was acknowledged that the payment of rates never conferred proprietary rights on the payer, any prudent land owner would pay rates as and when they fall due to maintain ownership of property. During her testimony, Ms. Rukia Abdalla admitted that the last payment they made to the Plaintiff was in the year 2020. In fact, neither the Defendant nor any persons on whose account she claimed proprietary rights had ever bothered to find out what rates was being paid for the Suit Property and what their portion should have been. Surely, if you one was a property owner, even in part, he/she would want to find out this most basic information, especially when it was being demanded to pay what was assumed to be rates. The Swahii house stood on a portion of the larger piece of land that was purportedly below the sub - division acreage at the time. However, after acquisition of the larger piece of land, the Plaintiff proceeded to subdivide the said land. Even during this sub - division, your honor, Mr. Abdalla Amour continued to pay Plaintiff the sums agreed by and between them for his occupation of the Swahili house. There was not a shred of evidence that Mr. Abdalla Amour objected to the sub - division process or asserted ownership rights over the Suit Property or any portion thereof. If indeed the agreement between Mr. Abdalla Amour and Mr. Miran Razamohamed could not be regularized because the potion occupied by Mr. Abdalla Amour was below the minimum acreage, it would be expected that Mr. Abdalla Amour would at the point of this sub - division, want to vindicate his rights over the portion he purportedly purchased from Mr. Miran Razamohamed. Clearly, Mr. Abdalla Amour was aware that he was only a tenant at will. There was no evidence to support the assertion that Mr. Abdalla Amour purchased the Suit Property or any portion of it from Mr. Miran Razamohamed, not in writing and not by conduct, not expressly and not by inference. Upon his demise, his late widow continued to occupy the Swahili house. The Plaintiff made an offer to sell the Suit Property to her. Even at this point, Mrs. Amour made no attempt to assert any proprietary rights that Mr. Abdalla Amour purportedly acquired, not even through verbal discussion with the Plaintiff. Any prudent owner of land would take some action to defend their proprietary rights, especially where the loss of such rights was clearly foreseeable.

39. In this particular case, if Mr. Abdalla Amour had acquired any proprietary rights, he would foresee the loss of such rights when the land was sold to the Plaintiff and at the time of sub-division and again at the time when demand for payments were being made. Mr. Abdalla Amour's widow could have foreseen the loss of the purported rights at the time the Plaintiff made an offer to sell the Suit Property to her. The Defendant could foresee the loss of the purported proprietary rights at the death of her mother when the disagreement over the amount of rent payable to Plaintiff arose. None of them saw the need to take the matter up with the Plaintiff let alone take legal action against him. The assertion of rights usually such takes the form of legal action or making an effective entry into the land. Being already in occupation at the time when the Plaintiff purchased the land from which the Suit Property was excised, Mr. Abdalla Amour, later his widow and later the Defendant had only one option left to assert their rights over the Suit Property and that was to take legal action against the Plaintiff, which none of them did.

40. To buttress on this point, the Learned Counsel referred Court to the case of: "Githu – Versus - Ndeete [1984] KLR 776 where the Court held on "Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land".

41. Further, she cited the Malindi CoA Civil Appeal No. 29 of 2016:- in the case of:- "Peter Kamau Njau – Versus - Emmanuel Charo Tinga [2016] eKLR the Court held:-

> " in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land".

42. Additionally, the Counsel cited the case of:- *Amos Weru Murigu – Versus - Marata Wangari Kambi & Another H.C.C.C. No. 33 of 2002*(O.S) at Kakamega) the Court held:-

> " .....as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running."

43. In the case of:- "Stephen Mwangi Gatunge – Versus - Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022]eKLR the Court stated

> "....This Court finds that there was nothing that stopped time from running as the Respondent never took any plausible step to assert rights over the suit property....".

44. Since Mr. Abdalla Amour was already occupying the portion of the Suit Property under dispute at the time the Plaintiff purchased the larger piece of land, he only needed to file legal action against the Plaintiff to assert his alleged proprietary rights. His inaction, to the extent that he never ever even verbally addressed the issue with the Plaintiff, can only mean that he understood that he was not a proprietor, only a tenant at will of Mr. Miran Razamohamed and after him of the Plaintiff. It seemed that the Defendant's Counter - Claim is based entirely on the letters of demand from the Plaintiff where he erroneously demands for a "portion of the rates" instead of rent from the late Mr. Abdalla Amour and later his widow. Such letters did not by any stretch of imagination amount to admission of proprietary rights on the part of the Plaintiff.

45. Secondly, what rights flow down to the Defendant as the daughter of the Deceased? Upon her demise, the Defendant took over the property and a tussle ensued between the Plaintiff and Defendant over the issue of rent. The Plaintiff had stated that the arrangement between himself and Mr. Abdalla Amour was personal in nature and never extended to the Defendant. He demanded fair rent if she were to continue to occupy the Swahili house. In her letter of 23rd April, 2018, the Defendant never categorically asserted proprietary rights or deny payment of the sums demanded as rent, rather, by inference, she tries to negotiate the requested amount by stating that "there is no economic necessity which stipulates that the tenant remittance has to be hiked for more than 200%". A copy of this letter was tendered in support of the Plaintiff's case.

46. Even when being demanded to pay rent, the Defendant did not take assertive action to vindicate proprietary rights, not even a verbal discussion over the same with the Plaintiff. It was only when the Plaintiff filed suit for vacant possession that the Defendant seemingly recalled her supposed rights and Counter - Claimed against the Plaintiff. While it was alleged that the property of the late Abdalla Amour was the subject of succession proceedings in the Kadhi's Court at Mombasa, no documents had been provided before this court to support the said position. No documents had been provided that show that the potion of the Suit Property being claimed by the Defendant was actually taken to be part of the estate of the late Abdalla Amour. Clearly there was no document or action on the part of Mr. Abdalla Amour from which an inference could be drawn that he had purchased any portion of the Suit Property (or the parcel of land from which the Suit Property was excised) from the late Miran Razamohamed, and that he was aware and understood that he was only a tenant at will. Based on the foregoing, since Mr. Abdalla Amour possessed no proprietary rights, there was nothing to pass down to his children. The Counter - Claim should therefore be dismissed with costs to the Plaintiff.

47. Thirdly, does the Defendant owe the Plaintiff the amount claimed in the Plaint? The Plaintiff requested for a less than fair market rent of a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) only per month which the Defendant refused to pay. In fact, she purported to dictate to the Plaintiff the rent that he should be charging her for the occupation of the Swahili house. It was unconscionable for a tenant to occupy any part of land belonging to a proprietor without paying a fair rent for the same.

48. Finally, who should pay for the costs of this suit? Having established that the Defendant's Counter - Claim was baseless and should be dismissed, it was only fair that the Defendant be ordered to vacate the Suit Property and that the Plaintiff be allowed to regain possession of the same.

49. In view of Plaintiff's several unsuccessful attempts to negotiate with the Defendant for an amicable solution in order to avoid this suit, the Plaintiff prayed that the costs of this suit be awarded to him.

B. The Written Submission by the Defendant

50. The Defendant through the Law firm of Messrs. Idris Ahmed & Company Advocates filed her written submissions dated 9th May, 2024. Mr. Ahmed Advocate commenced the submission by stating that this suit was in regards to a portion of a parcel of land known as Subdivision Number 4961(Original Number 15/2/12) Section I Mainland North which parcel was registered in the name of the Plaintiff subject to rights held by the Defendant. The Plaintiff herein filed suit on 13th January, 2022 by way of a Plaint to which the Defendant filed a defence on 22nd February, 2022. The trial was conducted by viva voce evidence wherein both parties had one (1) witness each and produced documents in support of their respective cases.

51. On the facts and evidence, the Learned Counsel submitted that it was a common ground that the Plaintiff was the registered proprietor of a parcel of land known as Subdivision Number 4961 (Original Number 15/2/12) Section I Mainland North. This property was part of a larger parcel of land known as Plot Number 15/2 Section I Mainland North which the Plaintiff acquired from one Miran Razamohamed (deceased) sometime in the year1980s. It was also common ground that the said acquisition of Plot Number 15/2 Section I Mainland North by the Plaintiff was subject to the rights held by one Abdalla Ali Amour (the Defendant's deceased father) over a portion on which the said Mr. Amour had constructed a house.

52. The late Abdalla Ali Amour had purchased the portion of land measuring approximately 40 by 80 feet from the said Miran Razamohamed (deceased) sometime in the year 1970s and as at that time the land could not be subdivided to such a small portion due to minimum acreage requirements it was agreed that the title would remain in the name of Miran Razamohamed subject to the rights of Abdalla Ali

Amour and further that Mr. Amour would pay a proportionate share of the Municipal Rates levied on the land.

53. Sometime in the 1980s the Plaintiff acquired Plot 15/2 Section I Mainland North from Mr. Razamohamed and the said acquisition was subject to the agreement between Mr. Razamohamed and Mr.Abdalla Ali Amour.Indeed the Plaintiff did continue on the same terms until Abdalla Ali Amour passed away and the suit property which was a portion of his estate was subsequently vested in the Defendant by transmission. The Plaintiff sometime in the year 1990 without even notifying the late Mr. Amour proceeded to subdivide Plot Number 15/2 Section I Mainland North and Mr. Amour's house ended up on the new plot number being as Subdivision Number 4961 (Original Number 15/2/12)Section I Mainland North.

54. Despite the subdivision the arrangement that is i.e. in terms of payment of Rates continued which was dutifully done by Mr. Amour and later by the Defendant until sometime in 2018 when the Plaintiff unilaterally decided to change the terms of the agreement by demanding that the Defendant pays him a "rent" at a rate of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) monthly. This was unconscionable to the Defendant considering that she used to rent out the house and collected a sum of Kenya Shillings Sixteen Thousand (Kshs. 16,000/-) in rent per month. The Defendant declined to the proposed alteration of terms and thereafter the Plaintiff refused to receive any sums from the Defendant as was the regular arrangement between the parties. The Plaintiff even refused to receive the Defendant's payment of Rates when sent by the Defendant's advocates.

55. Further the Learned Counsel submitted that in summary they wished to rely of the following eight (8) issues for the Court's determination:-Firstly, on the issue of whether there was a valid contract between Miran Razamohamed and Abdalla Ali Amour over the suit property and if so what rights did the late Abdalla Ali Amour had thereunder. The Learned Counsel submitted that the Plaintiff was the current registered proprietor of the suit property however the same was subject to the oral agreement made between the original owner whom the Plaintiff acquired the land from (Mr. Miran Razamohamed) and Abdalla Ali Amour in the year 1974. This agreement provided that the title of the land shall remain in Miran Razamohamed's name and subject to the proprietorship rights of Abdalla Ali Amour and further that Mr. Amour would pay a proportionate share of the Municipal Rates levied on the land. This arrangement led to a resulting trust by Miran Razamohamed (deceased in favour of Abdalla Ali Amour (deceased). To buttress on that point, the Counsel cited the of: "NWK – Versus - JMK & Another ELC No.422 of 2011 (OS) (2013) eKLR", the Court referred to Halsbury's Laws of England,5th Edition Volume 72 which states:-

> " Subject to any express declaration of trust, where property is purchased in one party's name but both parties contributed to the purchase price the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price or alternatively may make a claim under a constructive trust..."

56. According to the Learned Counsel, whilst the late Abdalla Ali Amour never contributed to the purchase price of Mr. Razamohamed, he did acquire his rights for valuable consideration and therefore the title held by Mr. Razamohamed was partly in trust for him. According to him he relied on the provision of Section 28 of the *Land Registration Act* which provides that:-

> Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
>
> .....

(b) trusts including customary trusts;"

57. According to the Counsel, this provision clearly recognizes that late Abdalla Ali Amour's right as an overriding interest and therefore when the Plaintiff acquired the land from Miran Razamohamed the same could only be subject to the rights and liabilities that were already in existence which include Abdalla Ali Amour's rights. The Plaintiff had by his own admission confirmed that he continued with Abdalla Ali Amour in the same manner as Miran Razamohamed and only sought to unilaterally alter the terms of the agreement much later on after the demise of Abdalla Ali Amour. He further cited the provision of Section 3(3) of the *Law of Contract Act*, Cap. 23 applicable at the time when the agreement between Miran Razamohamed and Abdalla Ali Amour was entered into provided as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized b him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract

(i) Has in part performance of the contract taken possession of the property or any part thereof; or

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

58. To support his point, he referred Court to the case of "Peter Mbiri Michuki – Versus - Samuel Mugo Michuki [2014] eKLR" the Court of Appeal held as follows:

> " 25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/ respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in1991. It is our view that Section 3 (7) of the *Law of Contract Act*, makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the *Law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force. The proviso to Section 3 (3) of the *Law of Contract Act* applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the *Law of Contract Act*."

59. It was the Learned Counsel's humble submission that the late Miran Razamohamed and Abdalla Ali Amour had an oral contract in respect of the suit property. Furthermore it is not disputed that the Defendant is in current occupation of the suit property which was vested in her by transmission upon her father's (Abdalla Ali Amour) demise. The late Abdalla Ali Amour was in actual possession since the time he acquired the suit property from Miran Razamohamed a fact which isconfirmed by the

Plaintiff himself. This therefore squarely brings the contract between the late Miran Razamohamed and Abdalla Ali Amour within the ambit of the proviso to the above noted section 3(3) of the *Law of Contract Act*. Indeed the Courts in the case of "Githu – Versus - Ndeete [1984]KLR 776" held that:

> " Assertion of right occurs when the owner takes legal proceedings or makes entry into land."

60. The Defendant as well as her late father Abdalla Ali Amour by making entry and remaining in possession of the suit property to date asserted their legal right to the suit property.The next question would be what are the terms of the said agreement. The agreement being oral and both parties having already passed away it is a challenge to ascertain the terms thereof. The same can however be inferred or corroborated from existing evidence.The Defendant averred that the terms were for the purchase of the property subject to payment of a proportionate share of the municipal rates payable. This term of the oral agreement is ascertained and corroborated by the letters written by the Plaintiff to the late Abdalla Ali Amour where he has on repeated occasions been stating the fact Mr. Amour is the owner of a part of the land and is paying a portion of municipal rates. For instance in the Plaintiff's letter of 2nd July, 1990 (Defendant Exhibit Number 1) the Plaintiff states:

> " You are no doubt aware that the municipal rates in the in the past few years have been increasing constantly. The proportional rate paid by you for your portion of the plot has not been adjusted accordingly since 1986." (emphasis added)

61. A similar statement was made in the Plaintiff's letter of 20th March, 1991 (Defendant's Exhibit number 2)where he even refers to the suit property as Mr. Abdalla Ali Amour's plot when he states:

> " Your proportion of the rates for your Kongowea plot for the year 1991..."

62. According to the Learned Counsel, again the same was reiterated in the Plaintiff's letter of 23rd March, 1994 (Defendant's Exhibit number 4) where the Plaintiff makes a demand for payment of rates by stating:

> " Municipal Rates for your portion of the plot is Kshs. 5589.00. If Municipal Council increase these, we will need more from you."

63. Furthermore, the Plaintiff's receipts for payment of the Defendant's portion of the rates were also very clear on what they pertain to (see Defendant Exhibits Numbers 5, 6, 7, 9, 10, 11 and 13) they all confirm that the Plaintiff was receiving from Mr. Abdalla Ali Amour sums in respect of "rates for his portion of plot no. 4961/1 M.N" which was the suit property. It was therefore not in doubt that the payments that were made by the late Abdalla Ali Amour and subsequently the Defendant to the Plaintiff were a portion of Municipal Rates for Mr. Abdalla Ali Amour's parcel of land and not rent as is now being alleged by the Plaintiff.

64. The Learned Counsel submitted that the reason why the plot was not subdivided by the Late Miran Razamohamed for Abdalla Ali amour is because the size of the suit property being 40 by 80 feet (approximately 0.073 of an acre) the size was and still is too small and below minimum acreage for purposes of obtaining a title which currently stands at approximately 50 feet by 100 feet (approximately 0.125 of an acre) which figure was at a much reduced size to what the minimum acreage was at the time when the parties to the initial transaction engaged in the year 1970s.

65. Secondly, on whether the Defendant owed the Plaintiff the amount claimed in the Plaint. The Learned Counsel submitted that as had been proved above the Defendant's obligation to the Plaintiff was to pay a proportionate sum of the Rates levied by the municipal council (now county government) on the

land. The Plaintiff claimed that he ought to be paid a rent at a rate of a sum of Kenya Shillings twenty Thousand (Kshs. 20,000/-) monthly without giving any justification for the same. Even his allegation that it was the market rate had not been proved in fact it was worthy of note that the Plaintiff on cross examination confirmed that he does not know what the rent rates for that area are.

66. The Defendant had at all times been willing to pay the agreed sum which is a portion of the rates. She had indeed by the Plaintiff's own admission sent payment to the Plaintiff on several occasions including through her advocates however the same was not accepted by the Plaintiff. To ascertain what was due and owing to the Plaintiff as a reimbursement of the rates paid for the entire parcel of land from the year .2020 (when the last payment was accepted by the Plaintiff) to date then it should first be established what is the current rates payable for the land vis-à-vis the proportion owned by the Defendant and the sum can then be paid.

67. Thirdly, on what reliefs, if any the parties were entitled to, the Learned Counsel argued that the Plaintiff in this suit has prayed for:-

a. Delivery of vacant possession of the property to the plaintiff;

b. Rent arrears of Kshs 324,000/- together with interest

c. Mesne profits at a rate of Kshs 20,000/=per month; and

d. Costs of the suit

68. Fourthly, on the issue of delivery of vacant possession of the property to the plaintiff, the Learned Counsel submitted that the Plaintiff has failed to prove to this Honourable Court on a balance of probabilities that he is indeed entitled to vacant possession of the suit property. The Plaintiff has alleged that he solely owns the land and whilst it is true that his title is the registered owner of the suit property, the said ownership is in trust and subject to the rights of the Defendant over the property. The said rights held by the Defendant have been proved to exist and admitted in writing by the Plaintiff himself. The dye had already been cast and the ink was dry the Plaintiff and the Defendant were both successors in title to their respective predecessors Miran Razamohamed (deceased) and Abdallah Ali Amour (deceased) who entered into an agreement for the sale of the suit property.

69. The terms of the relationship between the two were agreed upon and therefore both the Plaintiff and the Defendant under the principle of pacta sunt servanda are bound to honour the terms which existed when they acquired their respective rights to the property. The Plaintiff cannot purport to unilaterally vary the terms of the aforesaid agreement. Indeed it is trite law that not even this Honourable Court can vary the terms of the agreement entered into by Miran Razamohamed (deceased) and Abdallah Ali Amour (deceased). On this end, the Learned Counsel cited the case of:- "Pius Kimaiyo Langat – Versus – Co - operative Bank of Kenya Ltd (2017) eKLR" the Court of Appeal held that:-

> "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

70. There had neither been an allegation, pleading or proof provided of any coercion, fraud or undue influence therefore for the Plaintiff to demand vacant possession without any regard to the Defendant's beneficial rights over the suit property would be a grave travesty of justice.

71. Sixthly, on the issue of rent arrears of a sum of Kenya Shillings Three Twenty Four Thousand (Kshs 324,000/-) together with interest and mesne profits. The Learned Counsel submitted that as had been seen earlier the Plaintiff was only entitled to payment by the Defendant of a proportionate share of the

municipal rates levied on the suit property. There was no justification for any demand for rent or mesne profits. Indeed it is trite law that special damages must be specifically pleaded and strictly proved. The Learned Counsel cited the Court of Appeal case in "Hahn – Versus - Singh, Civil Appeal No.42 Of 1983[1985]KLR 71Z, at P.717 and 721" the Learned Judges of Appeal-held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved..."

72. The onus therefore lied on the Plaintiff to plead the sums due and how the same were arrived at and to provide strict proof of the sums allegedly due. In this matter the Plaintiff had only alleged that there was a sum of Kenya Shillings Three twenty Four Thousand (Kshs. 324,000/-) that he was owed as rent. He has failed to prove that there was any agreement for payment of rent let alone rent at the rate he was claiming.Furthermore it was in bad faith that the Plaintiff would after refusing to accept payment from the Defendant now use the non-payment by the Defendant as the sole ground of this suit for possession and alleged rent arrears.

73. It was the Learned Counsel's submission that no rent or mesne profits was due to the Plaintiff from the Defendant. The Defendant further stated that the only sums due were the proportionate county rates for the years 2021 to 2024 which the Defendant was ready to reimburse the Plaintiff upon proof of the sums duly paid to the County Government.

74. Seventhly, on the costs of the suit. The Learned Counsel submitted that it was trite law that costs follow the cause. The cause in this matter showed on a balance of probability that the Plaintiff was indeed wrong and unwarranted in his actions to attempt to unilaterally vary the terms of the Defendant's rights over the Property and now maliciously evict the Defendant from her land. The Defendant therefore prays for costs of the suit be awarded to her.

75. According to the Learned Counsel, the Defendant had in this suit prayed for:-

    a. The Plaintiff's suit be dismissed;

    b. A declaration do issue that the Defendant is the legal and beneficial owner of the Suit Property;

    c. The Plaintiff do conduct a subdivision to excise of the Suit Property from the Land and that the Suit Property be registered in the name of the Defendant; and

    d. Costs of this suit

76. For the dismissal of the Plaintiff's suit, the learned Counsel submitted that the Defendant had demonstrated that the Plaintiff was not entitled to the prayers sought. This being the case then the Defendant prays that the Plaintiff's suit ought to be dismissed. On the declaration that the Defendant is the legal and beneficial owner of the Suit Property, the Learned Counsel submitted that in light of the evidence adduced before this Honourable Court as well as the unequivocal admissions made in testimony by the Plaintiff, it is clear that the Defendant does indeed have beneficial interest over the suit property and that the title to the suit property is held by the Plaintiff in trust. To avoid any future interference or disturbance with the Defendant's peaceful and quiet enjoyment of the suit property the Defendant prays that this Honourable Court do issue a declaration that the Defendant is the beneficial owner of the suit property with lawful rights over it that are enforceable.

77. Finally, on the issue of whether the Defendant should be granted an order that the Plaintiff do conduct a sub - division to excise of the Suit Property from the Land and that the Suit Property be registered in the name of the Defendant. The Learned Counsel submitted that the Defendant's rights to the property ought to be crystalized in a title if the same is possible. The Defendant does hereby pray to this Honourable Court to have the Defendant's right reflected on the register so as to avoid any future

conflict between the successor's in title of the parties herein. The same can be done by being noted on the land register in respect of the suit property upon an order of this Honourable Court. Furthermore should the minimum land acreage permit for the registration of a title the size of the suit property then the Plaintiff be ordered to conduct a subdivision of the property to excise off the Defendant's share and transfer the same to her.

78. In conclusion, the Learned Counsel submitted that for the above reasons the Defendant respectfully urged this Honourable Court to dismiss the Plaintiff's suit and to allow the Defendant's claim as prayed.

VII. Analysis & Determination

79. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the myriad of cited authorities by the parties herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

80. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

    a. Whether the Plaintiff is the bona fide owner of the suit property suit property?

    b. Whether the Plaintiff is entitled to the orders sought in the Plaint

    c. Who bears the costs of the suit?

ISSUE No a). Whether the Plaintiff is the bona fide owner of the suit property suit property

81. It is trite law, that the burden of Proof in the law of evidence is that he who alleges must prove his/her case. This is in accordance with the provision of Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. In a nutshell, it is clear from the facts of the case that there are two parties – the Plaintiff and the Defendant who are disputing on the legal ownership of the suit property which comprises of an 8 roomed Swahili house. Although the Honourable Court will deliberate on these facts in more indepth at later stage of this Judgement, but its significant to note that on the one hand, the Plaintiff claims to have acquired the suit property through purchase and while doing so the Defendant was already in occupation of it. Indeed, the Plaintiff wants the Defendant to vacate from it. On the other hand while the Defendant acknowledges that the Plaintiff is the registered owner to the property but holds that they were the beneficial ownership of the portion they occupied together with the Swahili house. To the Defendant, what they had been remitting the Plaintiff is their proportionate share of the rates of their portion of the suit land. Impliedly, they should be assumed to have been joint share holders to the suit land.

82. Having provided these brief factual exposes, the honourable Court now wishes to spend alittle bit of time on the legal provisions on legal proprietorship of property, the effects and efficacy of registration of land. It is instructive to note that the land was registered under the Registration of Titles Act, Cap. 281 (Now Repealed). However, based on the provision of Section 107 of the *Land Registration Act*, No. 3 of 2012 provides for the application of the statures to laws on transitional stage such as this one. Hence, the provision of Section 24(a) of the *Land Registration Act*, No. 3 of 2012 is applicable here and which provides as follows:

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

83. Further, the provision of Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 states as follows:

> " The Certificate of Title issued by the Registrar upon registration ... 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... 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."

84. It is trite that, the effect and efficacy of registration of land and the issuance of the certificate of title by the Registrar upon registration 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 with title, rights and interest vested to that proprietor by law and it shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.It is the burden of the plaintiff to prove that is owner of the suit property.

85. In the instant case, it was not disputed that the Plaintiff was the bona fide and absolute registered owner to the suit land. Indeed, he showed the court the original of the Certificate of title deed – CR No. 20538 sub-division No. 4961. Section I Mainland North issued on 11th September, 1990 produced as Plaintiff Exhibit Number 1 in his name to prove ownership. Consequently, this Court on being shown the original title deed it was satisfied that the Plaintiff has proved on a balance of probabilities that he is the lawful and registered owner of the suit property.

86. On the contrary, from the evidence adduced before the Court, I noted that the Defendant was unable to point out what documents it was that she was relying upon to make the assertion of her father having bought and/or acquired the suit land. The Plaintiff, on the other hand, stated and testified that at the time of acquisition of the larger parcel of land, Mr. Miran Razamohamed had informed him that Mr. Abdalla Amor was in possession of the Swahili house which now the comprised the Suit Property subject to the payment of a certain nominal amount as annual rent and the Plaintiff agreed to allow Mr. Abdalla Amour to remain in possession on the same terms. I fully concur with the contention by the Learned Counsel for the Plaintiff If at all Mr. Abdalla Amour had actually purchased that portion of the larger piece of land from Mr. Miran Razamohamed he would have objected to the same parcel of land being re - sold to the Plaintiff. There was no evidence on record that showed that there was any action on the part of the late Abdalla Amour to assert his rights as a proprietor. In fact, after the sale of the land to the Plaintiff, he dutifully continued to pay to the Plaintiff, albeit irregularly and only upon demand, the sum agreed between them.

87. Clearly, Mr. Abdalla Ali Amour has not been able to demonstrate that he was a joint share holder of the suit land. Additionally, there was no evidence to support the assertion that Mr. Abdalla Amour purchased the Suit Property or any portion of it from Mr. Miran Razamohamed neither in writing, by conduct, expressly nor by inference. If anything, he was aware that he was only a tenant at will. Upon his demise, his late widow continued to occupy the Swahili house. The Plaintiff made an offer to sell the Suit Property to her. Even at this point, Mrs. Amour made no attempt to assert any proprietary rights that Mr. Abdalla Amour purportedly acquired, not even through verbal discussion with the Plaintiff. I fully concur with the submissions by the Learned Counsel for the Plaintiff that any prudent

owner of land would take some action to defend their proprietary rights, especially where the loss of such rights was clearly foreseeable.

88. Be that as it may, and before proceeding to examine whether the Plaintiff is entitled to the prayers sought. Under the contents of Paragraph 14 of the Defence, it is instructive to note that in a very thin membrane, and in what one would loosely term as being "Counter – Claim"- the Defendant seem to be making a claim of title via the land adverse possession. It states verbatim:-

> "In the alternative and without prejudice to the forgoing, the Defendant avers that the Plaintiffs claim herein is time barred in law and the Defendant has acquired prescriptive rights over the Suit property by adverse possession and as such the Plaintiff's suit is bad in law and an abuse of Court process and should be dismissed with costs"

According to the Defendant, although in passing and as just a by the way, averred that the Plaintiff's claim herein was time barred in law and the Defendant had acquired prescriptive rights over the Suit Property by adverse possession and as such the Plaintiff's suit was bad in law and an abuse of court process and should be dismissed with costs.

89. In addition, I see no legal rights ("Locus standi") that flow down to the Defendant as the daughter of the Deceased. Upon the demise of both her parents, the Defendant took over the property and a tussle ensued between the Plaintiff and Defendant over the issue of rent. The Plaintiff had stated that the arrangement between himself and Mr. Abdalla Amour was personal in nature and never extended to the Defendant. He demanded fair rent if she were to continue to occupy the Swahili house. In her letter of 23rd April, 2018, the Defendant never categorically asserted proprietary rights or deny payment of the sums demanded as rent, rather, by inference, she tried to negotiate the requested amount by stating that "there is no economic necessity which stipulates that the tenant remittance has to be hiked for more than 200%". A copy of this letter was tendered in support of the Plaintiff's case.

90. Even when being demanded to pay rent, the Defendant did not take assertive action to vindicate proprietary rights, not even a verbal discussion over the same with the Plaintiff. It was only when the Plaintiff filed suit for vacant possession that the Defendant seemingly recalled her supposed rights and Counter - Claimed against the Plaintiff. While it was alleged that the property of the late Abdalla Amour was the subject of succession proceedings in the Kadhi's Court at Mombasa, no documents had been provided before this court to support the said position. There was no documents such as the Grand Letters of Administration nor Ad Litem under the laws of Succession, Cap 160 had been provided that show that the potion of the Suit Property being claimed by the Defendant was actually taken to be part of the estate of the late Abdalla Amour. Clearly there was no document or action on the part of Mr. Abdalla Amour from which an inference could be drawn that he had purchased any portion of the Suit Property (or the parcel of land from which the Suit Property was excised) from the late Miran Razamohamed, and that he was aware and understood that he was only a tenant at will. Based on the foregoing, since Mr. Abdalla Amour possessed no proprietary rights, there was nothing to pass down to his children. The Counter - Claim should therefore be dismissed with costs to the Plaintiff.

91. Suffice it to say, the Honourable Court loathes to be brushing the issue away as easily. On the contrary, in the interest of Justice, it has decided to expand a little bit of time to deliberate on it. What is adverse possession? The Limitations of Action Act Cap 22 does not define adverse possession. It commences in wrong and is aimed against a right of the true owner. The person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.

92. The law in respect to adverse possession is now settled. Has the Defendant proved adverse possession? Firstly, the suit ought to have been brought under the provision of Order 37 of the Civil Procedure Rules, 2010 as an Originating Summons. That never took place from the face value. Secondly, for one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of "Maweu – Versus - Liu Ranching and Farming Co - operative Society 1985 KLR 430" where the Court held:-

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

93. In summary, these ingredients are:

a. The Applicant having been in occupation and possession continuously and uninterruptedly.

b. The period of occupation should be for a period of over twelve years.

c. The occupation and the use of the land be without the permission of the owner. (Non – permissiveness).

Thirdly, as in the case of "Samuel *Miki Waweru – Versus - Jane Njeru Richu, Civil Appeal No. 122 of 2001*", the Court of Appeal delivered the following dictum:

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

94. In the case of "Wambugu – Versus - Njuguna (1983) KLR 172" the Court held;

> " Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".

The records shows that despite of the Defendant having been occupation of the suit land, there existed an implied contractual tenancy arrangement whereby they were to be remitting rent to the Plaintiff. Indeed, the Plaintiff knew of the possession of the property by the Defendant and the Defendant also acknowledges that they were paying rent for the suit property as at the time the Plaintiff bought the property. There is also evidence of the Defendant negotiated the increase of the rent and not ostensible rates payable to the Municipal Council. Why would they be negotiating on the rates? It clearly noted that the only point of disagreement was on the amount of the rent payable. Although the Defendant emphatically hold that they would be remitting their proportionate share of the rates for their portion of the land occupied by Mr. Abdalla Ali Amuor to the Plaintiff to be remitted to the Municipal Council of Mombasa. To her this was not rent for the land. Should that be the case, then one wonders why not just remit it directly to the Municipal Council. Furthermore, and this I fully concur with the arguments advanced by the Learned Counsel for the Plaintiff to that effect that Mr. Abdalla Amour was paying a sum of Kenya Shillings Four Thousand (Kshs. 4,000/-) per year at the time of acquisition of the Suit Property by the Plaintiff and by the time of his death, he was paying a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-) a year, while the rates payable for the Suit Property in the year 1991

was a sum of Kenya Shillings Eight Fourty (Kshs. 840/-) and has over time increased to a sum of Kenya Shillings Three Thousand Five Hundred and Twenty (Kshs. 3, 520/-). If Mr. Abdalla Amour would have been paying only towards a portion of the rates for the Suit Property, he would have been paying a much smaller amount.

95. From the surrounding facts and inferences, the Honourable Court is of the opinion that the Defendant had not acquired ownership of the suit property through land adverse possession. If anything, there existed tenancy contractual agreement between the Plaintiff and the Defendant herein.

ISSUE No. b). Whether the Plaintiff is entitled to the orders sought in the Plaint

96. Under this sub – title, if follows that the Plaintiff is the awful owner of the suit premises and he has a right to protection in terms of the provisions of Article 40 of *the Constitution* and Section 25 of the *Land Registration Act*. It therefore follows that the Plaintiff is granted prayer a.

97. On the issue of rent arrears, the Plaintiff averred that the Defendant had been in occupation of the Property since the year 2018 and has failed and/or neglected to pay the rent made up as follows:

    d. Kenya Shillings Five Thousand (Kshs. 5,000/-) per month for the years 2018, 2019 and 2020

    e. Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month from January 2021 up to and including the time of filing suit;

    f. The Defendant therefore owed the Plaintiff in access of Kenya Shillings Three Hundred and Four Thousand (Kshs. 324,000/-) as rental arrears

98. The provision of Section 8 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya states:

> " 8. An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due."

99. Black's Law Dictionary (Page 1694 -10th Edition) defines a periodic lease as follows;

> " A tenancy that automatically continues for successive periods – usu. month to month or year to year – unless terminated at the end of a period by notice. A typical example is a month-to-month apartment lease. This type of tenancy originated through Court rulings that, when the lessor received a periodic rent, the lease could not be terminated without reasonable notice. Also termed tenancy from period to period; periodic estate; estate from period to period; (more specif.) month-to-month tenancy (or estate); year-to-year tenancy (or estate); week-to-week tenancy (or estate)".

100. Periodic leases are provided for under the provision of section 57 of the *Land Act* as follows:-

> " Periodic leases
>
> 1. If in any lease-
>
>   a. The term of the lease is not specified and no provision is made for the giving of notice to terminate the tenancy, the lease shall be deemed to be a periodic lease;

b. The term is from week to week, month to month, year to year or any other periodic basis to which the rent is payable in relation to agricultural land the periodic lease shall be for six months;

c. The lessee remains in possession of land with the consent of the lessor after the term of the lease has expired, then-

i. unless the lessor and lessee have agreed, expressly or by implication, that the continuing possession shall be for some other period, the lease shall be deemed to be a periodic one; and

ii. all the terms and conditions of the lease that are consistent with the provisions of sub-paragraph *(i)* shall continue in force until the lease is terminated in accordance with this section.

2. If the owner of land permits the exclusive occupation of the land or any part of it by any person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy.

3. The periodic tenancy contemplated in subsection (1)(a) shall be the period by reference to which the rent is payable.

4. A periodic tenancy may be terminated by either party giving notice to the other, the length of which shall be not less than the period of the tenancy and shall expire on one of the days on which rent is payable."

101. Under the provision of Section 58 a periodic lease is defined as:-

"(1) A short term lease is a lease –

(a) ...

(b) that is a periodic lease; and

(c) to which Section 57(2) applies."

According to the evidence led by the parties the rent was payable monthly. It is not contested that the Defendant rented the said premises from the year 2018 up to December 2020 when the rent was at a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) and had intended for it to be at a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) from January 2021up to and including the time of filing suit. According to the Plaintiff through PW - 1 further stated that they agreed with the late Abdallah, they would be paying land rent to him and he would use if for paying rates. Thereafter the wife continued paying but he had to ask them to vacate as he wanted more finances. They never thought of putting things in writing between him and them. He asked them for an increment to a sum of Kenya Shillings twenty Thousand (Kshs. 20,000/-) but they felt it was too much. Somehow they agreed on a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-) per month but they still felt it was a lot. They stated they were not earning a lot from it. They proposed on paying a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-) per year a figure they had discussed and somehow agreed with the father. PW - 1 stated that the last time he got some money from them was on 15th October, 2020, he felt they were leasing the Swahili House and they may have been earning a sum of Kenya Shillings Fifteen Thousand (Kshs, 15,000/-) and that was why he asked them to be paying Kshs 5,000/-.

102. PW - 1 asked them to vacate the property. When the mother was alive he offered to sell the property to them and she had been very happy with the said proposal but unfortunately she did not last long. His request to court was for vacant possession – rent arrears and mesne profits and costs. There was a time they sent him the money but they refused as it was not adequate, he insisted on them paying through his advocate. The Swahili house was big enough – he knew they were earning Kshs. 20,000/- and he asked them to pay him Kshs. 5,000/- Indeed, the Defendant admitted having rented out the 8 rooms at a sum of Kenya Shillings Three Thousand (Kshs. 3, 000.00) thus a total of Kenya Shillings Twenty One Thousand (Kshs. 21, 000.00/=) per month.

103. The provision of Section 66 of the *Land Act* contains conditions implied in every lease between the lease and lessor. It provides as follows:-

> "(1) There shall be implied in every lease, covenants by the lessee with the lessor binding the lessee—
>
> a. to pay the rent reserved by the lease at the times and in the manner specified in the lease."

Based on this, this Honourable Court is persuaded that the evidence on record is sufficient that the Plaintiff is entitled the grant of prayer (b) in the Plaint on the rental arears in the Sum of Kenya Shillings Three Twenty Four Thousand (Kshs. 324, 000.00/=) together with interest.

104. On the prayer on mesne profits, the property comprised a Swahili house which consisted of 8 rooms which the Defendant has rented out to unknown individuals without the consent of the Plaintiff. The Plaintiff through its Advocates on record gave to the Defendant a written notice to vacate and hand over possession of the Property to the Plaintiff. The Defendant had failed and or refused to vacate the Property and continued to occupy the Property without the consent of the Plaintiff as a result of which, the Plaintiff continues to suffer loss in terms of rental income.

105. The provision of Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -

> "mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;"

106. While the provision of Order 21 Rule 13 of the Civil Procedure Rules, 2010 provides as follows:-

13.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

107. On this issue, I wish to rely on the Court of Appeal in the case of "Attorney General – Versus - Halal Meat Products Limited [2016] eKLR" considered when mesne profits could be awarded. The court stated as follows:-

> "It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42."

108. Furthermore, the court in the case of "Rajan Shah T/A Rajan S. Shah & Partners – Versus - Bipin P. Shah [2016] eKLR" had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

> "In Bramwell – Versus - Bramwell, Justice Goddard stated that "... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant." Similarly, in an Australian case, Williams & Bradley v Tobiasen it was stated that these words: "Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.
>
> The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant's possession, or right to possession, which has been interfered with.
>
> A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant's interest in the land has come to an end.
>
> Halsburys, op. cit, 4th, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.
>
> The Black's Law Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession between (2) two dates." The Concise Oxford English Dictionary defines mesne profits as: - "the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."
>
> The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.
>
> Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne

profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the Plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3rd March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

> " ..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential."

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterates by the apex court of Nigeria which stated:-

> " Because a claim for 'Mesne profits' is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for

use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes..."

109. The Learned Nyamweya J in the case of "Karanja Mbugua & another – Versus - Marybin Holding Co. Ltd [2014] eKLR" stated as follows with regard to mesne profits:-

> " This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*. The said provisions state as follows with regard to a decree for possession and mesne profits:
>
> "(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
>
> a. For the possession of the property.
>
> b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
>
> c. Directing an inquiry as to rent or mesne profits from the institution of such suit until:-
>
> i. The delivery of possession to the decree-holder
>
> ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
>
> iii. The expiration of three years from the date of the decree, whichever even first occurs.
>
> (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry."

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/ = per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance."

110. It is the humble opinion of the Court that the Plaintiff has tabled sufficient evidence before this Court and also on the admission by the Defendant to make a determination for the payment of mesne profits.

ISSUE No. c: Who bears the costs of this suit

111. The issue of Costs is the discretion of Court. Costs mean the award that a party is granted at the conclusion of the 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".

112. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events it means the result or outcome of the legal action of proceeding. In the case of: "Reids Heweet & 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....."

113. 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 their case and thus he is entitled to Costs for the Plaint to be paid by the Defendant.

VIII. Conclusion & Disposition

114. 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 Defendant 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 Defendant herein in terms of the Plaint dated 13th January, 2022 and filed on the same day in its entirety.

b. That an order do and is hereby issued and pursuant to the provision of Section 152E of the *Land Act*, No. 6 of 2012 directing the delivery of vacant possession of the Property by the Defendant to the Plaintiff.

c. That an order do and is hereby issued directing the Defendant to make payment of the rent arrear in the sum of Kenya Shillings Three Hundred and Twenty Four Thousand (Kshs. 324,000/-) together with interest thereon at Court rates from the date of filing hereof to the date of full and final payment;

d. That the Plaintiff be and is hereby awarded mesne profits at the rate of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month from the date of filing of this Suit hereof until the delivery of vacant possession;

e. That costs of the suit to be borne by the Defendant to be paid to the Plaintiff.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MISCROFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF JULY 2024.

.....

HON. JUSTICE MR. L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant.

b. M/s. Kasmani Advocate for the Plaintiff.

c. M/s. Abdalla Advocate holding brief for Mr. Ahmed Advocate for the Defendant.