



**Mohamed v Abdul-Rahman & another (Environment & Land Case
193 of 2019) [2024] KEELC 6447 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 193 OF 2019
LL NAIKUNI, J
SEPTEMBER 26, 2024**

BETWEEN

MAHFUDH ABDULRAHMAN MOHAMED PLAINTIFF

AND

AHMED SAID ABDUL-RAHMAN 1ST DEFENDANT

MOHSIN SAID ABDUL-RAHMAN 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains the suit instituted through a Complaint dated 29th October, 2019 by Mahfudh Abdulrahman Mohamed, the Plaintiff herein. It was against Ahmed Said Abdul-Rahman and Mohsin Said Abdul-Rahman, the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the 1st and 2nd Defendants herein entered appearance dated 11th November, 2019 and filed in court on 18th April, 2019 and filed their Statement of Defence dated 17th February, 2023 on 21st February, 2023.

II. Description of the Parties in the suit

3. The Plaintiff was described as a male adult of sound mind and understanding, residing and working for gain in the County of Mombasa in the Republic of Kenya; while the 1st Defendant was described as a male adult of sound mind and understanding, residing and working for gain in the County of Mombasa in the Republic of Kenya. Finally, the 2nd Defendant was also described as a male adult of sound mind and understanding residing within the Republic.



III. Court directions before the hearing

4. Nonetheless, on 22nd February, 2023, the Honourable Court fixed the hearing dated on 4th May, 2023 with all parties having fully complied with the Pre – trial conference requirements pursuant to the Provisions of Order 11 of the Civil Procedure Rules 2010. On 4th May, 2023 the Court adjourned the matter to 31st October, 2023 on account of the Plaintiff with the Plaintiff proceeding with his witness on the same day and marked his case closed and the Defendants called their witnesses on 22nd May, 2024 and closed their case the same day.
5. This matter proceeded on for hearing by way of adducing “Viva Voce” evidence with the Plaintiff’s witness (PW - 1) testifying in Court on 31st October, 2023.

IV. The Plaintiff’s case

6. From the filed pleadings, at all material time, the Plaintiff was the Lawful Heir/Beneficiary of 16.67% share of Plot No. MSA/BLOCK XVI/1343, comprising the Estate of Abdulrahman Ahmed Mohamed (hereinafter referred to as “Deceased”). The said Deceased was the Plaintiff’s Father and the Defendants’ Grandfather, through the Plaintiff’s Late Brother Said Abdulrahman Ahmed Hassan (Deceased). The Plaintiff further averred that he was the lawful Proprietor of the 1st Floor Apartment comprising Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference No. MSA/Block XVI/1343 (hereafter referred to as “the Plaintiff’s/Suit Premises”).
7. The Plaintiff stated that pursuant to a number of Civil Suits as between the Defendants and himself, being:-
 - a. ELC case No. 37 of 2013;
Mahfudh Abdulrahman Ahmed – Versus - Mohsin Said Abdul – Rahman.
 - b. KC Misc. Civil Appl. No. 24 of 2018 -
Mahfudh Abdulrahman Ahmed – Versus - Mohsin Said Abdul – Rahman.
 - c. CMC Land case no. 86 of 2018 -
Mahfudh Abdulrahman Ahmed – Versus - Mohsin Said Abdul – Rahman.
 - d. HC Succ. Cause no. 326 of 2012 -
Mohsin Said Abdul - Rahman – Versus - Mahfudh Abdulrahman Ahmed.
8. In the interest of maintaining cordial relations with Defendants, his Biological Nephews, the Plaintiff entered into Diverse Consent Agreements with the Defendants, withdrawing the Entirety of his Claims against them. On 12th September, 2019 and repeatedly thereafter the Defendants proceeded to the Plaintiff’s Premises and committed the following Acts and/or Omissions, viz:
 - a. Broke the common padlock to the common Store Facility;
 - b. Retrieved and removed the Plaintiff’s Properties therefrom, viz:
 - 1 Bag of Cement;
 - Sand;
 - Ballast;



2 Units Bicycle (Another Unit still locked);
PVC Pipes;
3 Wooden Pallets;
3 Used Tyres,

and placed the entirety of said Items outside the Main Gate to the Premises;

- c. Replaced the Common Padlock with a Different One, and Locked the said Store, thereby totally denying the Plaintiff access thereto;
 - d. Switching On and Off the Common Water Pump thereby denying the Plaintiff the unfettered Use of the Utility, whose Bills he settles single handedly;
9. The Plaintiff stated that vide a letter dated 22nd July, 2019, he through his Advocates on record:
- i. Clarified the foregoing;
 - ii. Made Demand of the Defendants to Cease and Desist from the Acts and/or Omissions subject of said Letter.
10. Despite the foregoing, vide demand letter dated 11th October, 2019, the 1st Defendant, through Messrs. Asige, Keverenge & Anyanzwa Advocates, made Demand to the Plaintiff to the effect that, he, the Plaintiff:
- i. Vacate and Hand - Over Vacant Possession of his/the Suit Premises House on Title No. Mombasa/block XVI/1343 w.e.f. 1st November, 2019;
 - ii. Pay Rent Arrears at the rate of a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000.00/=) per month w.e.f. 1st August, 1994 to-date, a sum of Kenya Shillings Seven Million Four Twenty Seven Thousand (Kshs. 7,427,000.00/=) C.O.B. on 26th October, 2019.
11. Vide the letter dated 18th October, 2019, the Plaintiff responded to the inordinate demand and clarified, inter alia, that:
- a. He was neither a tenant nor a licensee on the subject premises
 - b. The Defendants' claim was baseless in law and in fact, devoid of any merit whatsoever and did not warrant a more profound response from the Plaintiff.
 - c. The Plaintiff opted not to make any positive reactions to the said demand
 - d. It would be in the Defendants' Best Interests to maintain Cordial Relations with the Plaintiff, and grant him access to, inter alia, the Common Meter Boxes and Rooftop Terrace;
12. According to the Plaintiff despite due service of said response, there had been no positive reaction thereto by the Defendants, thereby confirming a likelihood of the Defendants threat of unprocedural eviction of the Plaintiff from the suit premises.
13. The Plaintiff stated that in the circumstance, the Plaintiff's claim against the Defendants was therefore for;
- a. A declaration do Issue to the effect that the Plaintiff is the Lawful Proprietor of the 1st Floor Apartment comprising a Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference Mombasa/block XVI/1343.



- b. Consequently, an order of permanent injunction do issue Restraining the Defendants, whether by Themselves, Their Agents, Servants, Employees, Assigns or Anyone howsoever Claiming through them from Levying Execution, Attachment, Sequestration and/or Distress against any Assets of the Plaintiff and/or in any Manner whatsoever, interfering with the Plaintiff's Open, Peaceful, Quiet, Lawful, Continuous, Exclusive and Uninterrupted Possession, Occupation, Enjoyment and/or Derivative Use of the Plaintiff's Property being the 1st Floor Apartment comprising a Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference Mombasa/block XVI/1343.
 - c. General Damages.
 - d. Costs of this Suit and Interest
 - e. Any other/further relief the Honourable Court may deem fit and just to award, in the circumstances.
14. Despite demand made and notice of intention to sue duly intimated, the Defendants had failed, refused and/or neglected to admit Liability and/or make good the Plaintiff's Claim, thereby necessitating the institution of these Proceedings. The Plaintiff averred that there was no suit pending and there had been no previous proceedings in any court between the parties in respect to the suit subject matter. The Plaintiff also admitted to the jurisdiction of the court.
15. The Plaintiff therefore prayed for judgment against the Defendants for:-
- a. A declaration do Issue to the effect that the Plaintiff is the Lawful Proprietor of the 1st Floor Apartment comprising a Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference mombasa/block XVI/1343.
 - b. Consequently, an order of permanent injunction do issue Restraining the Defendants, whether by Themselves, Their Agents, Servants, Employees, Assigns or Anyone howsoever Claiming through them from Levying Execution, Attachment, Sequestration and/or Distress against any Assets of the Plaintiff and/or in any Manner whatsoever, interfering with the Plaintiff's Open, Peaceful, Quiet, Lawful, Continuous, Exclusive and Uninterrupted Possession, Occupation, Enjoyment and/or Derivative Use of the Plaintiff's Property being the 1st Floor Apartment comprising a Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference mombasa/block XVI/1343.
 - c. General Damages.
 - d. Costs of this Suit and Interest
 - e. Any other/further relief the Honourable Court may deem fit and just to award, in the circumstances
16. The Plaintiff called their witness PW - 1 on 5th December, 2022 at 12.30 pm where he averred that: -

A. Examination in Chief of PW – 1 by M/s. Nzamsa Advocate.

17. PW - 1 testified under oath in Swahili language. He identified himself as Mahfudh Abdulrahmany. He was 62 years old and lived in Guraya, Majengo - Mombasa. It was on plot No. MSA/XVI/1343, it was a 2 storey building he was on the first floor. There were shops on the grounds. He had lived there for 29 years. He had a copy of the title deed. It was registered in the name of Said Abdulrahman; his brother and had died in the year 1993. He had sued Mohsin Said and Ahmed Said as the Defendants



who were his nephews who were the children of his deceased brother. He filed his witness statement dated 29th October, 2019 which he adopted as his evidence in chief. He had sued the Defendants as they had been harassing him. They had locked the house and blocked his entrance. He filed a list of documents (6) documents filed on 29th October, 2019 – Plaintiff Exhibit 1 to 6 in that order.

18. According to the Witness of great importance was the ruling dated 31st May, 2018 by Justice Thande which was referred to extensively in the statement by witness.

B. Cross - Examination of PW - 1 by Mr. Asige Advocate.

19. The witness when referred to the ruling of Justice Thande dated 31st May, 2018 stated that it was significantly important to him. He referred to pages 12 to 17 from the HCCC No. 326/2012 Succession Cause where the ruling was found. He was the objector in the succession cause. With reference to page 16 paragraph 16, the witness read it to the court stating that it referred to the meaning the decision was for Plot No. MSA/Block XVI/1343. It was the same title he had brought to the Court and the Court had already decided that the title belonged to the deceased. He agreed with the decision of the Court.
20. According to him the property belonged to the deceased and not him. The Legal administrator of the estate was the 2nd Defendant who the witness confirmed was his nephew. PW - 1 stated that he had not right over the inheritance from the estate however he had sued the Defendants. He had sued the Defendants seeking Prayer No. 1 and 2 of the Plaint. There were (5) prayers from the Plaint which he wanted to be granted. From the Ruling of High Court of 31st May, 2018 I never preferred any appeal
21. With reference to paragraph 7 of the Plaint, PW - 1 told the court that he had filed ELC No. 37 of 2013 but had withdrawn it. It was against the Defendants. It was also captured in the witness statements. He did not recall the causes of action and whether it was the same as this instant case but he recalled withdrawing it. He also recalled filing the cases 2 of 2018 and CMCC 86 of 2018 which he also withdrew.
22. According to PW - 1 the Legal Administrators had not asked him to produce the Certificate of Title. He did not recall being asked to produce the title. He did not have the title and had never seen it. The legal administrator – Mr. Mohinn had asked him to produce the title. During the hearing of the succession he produced a photocopy of the title. He had gotten a copy from the original. He got the copy from the mother of Mohin when he married her. He had never refuted or denied not having the original title. He had stated that he got the photocopy of the title from the mother of Mohin. He did not remember stating this in his witness statement but he was telling the court the truth.
23. With reference to page 54 he stated that the same was a copy of the Certificate of Title of Plot no. 1343. He was claiming the inheritance of his father from 16.67% shares from the ruling of Thande.

C. Re Examination of PW - 1 by M/s. Nzamsa Advocate.

24. PW - 1 confirmed that they agreed mutually to withdraw the case from court on the basis that as blood was thicker than water with reference to the last paragraph of the Ruling by Thande J. dated 31st May, 2018.
25. On 31st October, 2023 the Plaintiff marked his case closed through his Counsel M/s. Nzamsa Advocate.



V. The Defendants' case

26. The Defendants filed their Statement of Defence dated 17th February, 2023 admitting the descriptive Paragraphs 1, 2 and 3 of the Plaint save that their address of service for purposes of this suit. The Defendants denied the contents of Paragraph 4 and 5 of the Plaint. The Plaintiff was not a proprietor of 16.67% share of the Estate of the Defendants late grandfather (Plaintiff's father). The 16.67% share of the Estate of Defendants father was to be shared among all the Defendants grandfather's heirs who were eleven in number.
27. The Defendants averred that the allegations in Paragraph 6 of the Plaint were false. The lawful proprietor of the 1st floor apartment comprising a three bedroom house and attendant facilities situated in the residential building standing on plot no. MSA/Block XVI/1343 was the late Said Abdulrahman Ahmed Hassan. The Defendants averred that they were not aware of the contents contained in paragraphs 7, 12 and 14 of the Plaint. The Defendants denied the allegation made in paragraph 8 of the Plaint. The contents of paragraphs 9, 10 and 11 were admitted by the Defendants.
28. The Defendants averred that the claims made in Paragraph 13 of the Plaint were outrageous and an abuse of the Court process. In denying the contents of Paragraph 15, the Defendants averred that there had been previous suits between the Plaintiff. The Defendants admitted the contents of Paragraph 16 of the Plaint stating that the Plaintiff had no locus standi and/or legal capacity to institute this suit. According to the Defendants the suit was incompetent, frivolous, vixous and scandalous, it had no prospect of success and was doomed to fail. The Defendants averred that the allegation of the Plaintiff that he was a sole proprietor of 16.67% share of title No. Mombasa/block/XVI/1343 was false and misleading.
29. The Defendants prayed that the Plaintiff's suit herein be dismissed with costs.
30. The Defendants Counsel Mr. Asige in his opening remarks stated that they were asking court to dismiss the suit as it was incompetent. The Plaintiff had no capacity to recover property from the estate of the deceased without having obtained Grant letter of administration. The property was registered in the Defendant's father name and the Plaintiff can be apportioned the property and court cannot grant the declaration being sought as prayed in Prayer No. 2 hence the suit should be dismissed with costs. The Counsel called for evidence to that effect. The Defendants called their witnesses on 22nd May, 2024 at 11 pm who testified as follows:

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

31. The witness testified in English under oath. He identified himself as Mohsin Said Abdulrahman. He was the 2nd Defendant and was born on 24th September, 1988. He knew the Plaintiff. He was his uncle, being his father's brother. His father died on 29th December, 1993. He had read the Plaintiff's claim against the 1st and 2nd Defendants. The 1st Defendant was his brother. He had filed a joint Defence dated 17th February, 2023 which he adopted the contents of the same and he had filed witness statements dated 25th April, 2023 and he adopted the same as his evidence in chief. He had also filed a list of documents dated 25th April, 2023 – which contained 4 documents. He produced them as "Defendant's Exhibits – 1 to 4. He held and urged that the claim by the Plaintiff be dismissed with costs.

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

32. According to DW - 1, he was born on 24th September, 1988. By the time of the demise of his father he was 5 years old. According to the Certificate of death, the cause of death of his father was stomach cancer. It meant he had been ailing for long. He died in Saudi Arabia, where he had been seeking for



medical assistance. He said his father had made the application for approval for building plans in 28th October, 1993. This was exactly 2 months before his father passed on.

33. DW - 1 told the court that although he was 5 years, he confirmed with certainty that it was his father who applied for the approval and not the Plaintiff. His father died in the year 1993 and the building through the foundation was done when his father was still alive but completed after he had already died. By the time of the demise of his father, his grandfather Mr. Abdulrahman Ahmed as per Islam Law had left everything to his father. He had no recollection of when his father died
34. The witness told the court that according to the Islamic Law the assets of the deceased were inherited by all the children (male and female). It was not true that he had no proof in court to show that his father constructed in the suit property. He financed the construction. He left all the finances with his grandfather to complete the construction while his grandfather was in possession of the suit property till the time his grandfather completed the construction. The construction had a contractor. He had not brought the name of the contractor to court he only had the building plans.
35. With reference to Paragraph 6 of the witness statement, he stated that his mother was left with 8 children. He was the 6th born, the 7th born was 1st Defendant. He had a half sister called Faiza Makfuth whose father was the Plaintiff who had married his mother one month after his father's death but they divorced later on. The Plaintiff never took care of them; in terms of schooling, shelter, food and clothing.
36. The second Defendant witness testified on the same day as follows:-

A. Examination in Chief of DW - 2 by Mr. Asige Advocate.

37. DW - 2 testified under oath in English. He identified himself as Ahmed Said Abdul- Rahaman. He told the court that he was born on 11th May, 1990 and knew the Plaintiff in this case and his uncle. He told the court that he was also knew the 2nd Defendant who was his elder brother. He had read the Plaintiff's claim against them. He had filed a defence to the said claim and he wished to adopt the said defence as his evidence in the case. He had filed a witness statement dated 6th April, 2023 and had also filed a list of documents. He had heard the evidence of his brother and wished to adopt it and the documents – "Defence Exhibit Numbers 1 to 4" and he adopted the same as his evidence.
38. Cross – Examination. Nil
39. The Defendants closed their case on 22nd May, 2024 with the Learned Counsel, Mr. Asige closed their case.

VI. Submissions

40. On 22nd May, 2024 after the Plaintiff and Defendants marked the close of this cases, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that on 13th June, 2024 the Honourable court reserved a date to deliver its Judgement on 26th September, 2024.

A. The Written Submissions by the Plaintiff

41. The Plaintiff through the Law firm of Messrs. Nzamsa Sankale & Company Advocates filed their written submissions dated 13th June, 2024. M/s. Nzamsa Advocate commenced her submissions by providing the Court with a brief background of the case. She held that the claim before court, which according to her was very straight forward, was filed by the Plaintiff who was the Defendants' paternal uncle.



42. According to the Counsel, the same was based on the rights over the property entitled to him pursuant to the Judgment of the court in the family court where Justice Thande held that the father was entitled to the Plaintiff was entitled to a 16.67 share of the estate of the late Mohsin Said Abdul-Rahman which included the Plaintiff herein. The Plaintiff averred in his pleadings and viva voce evidence that the Defendants wanted to chase away the Plaintiff from the premises yet he had been living there for a very long time and even contributed in its construction.
43. The Learned Counsel relied on the following two (2) legal issues for the consideration by this court while making its final determination. Firstly, whether the Plaintiff was entitled to a share of the suit property. The Learned Counsel submitted that at page 12 of the Plaintiff's documents filed in court on the 29th October, 2019 was a Ruling by Justice Thande where the Judge held that a 16.67% of the Estate of the deceased Said Abdulrahman Ahmed Hassan belonged to his father Abdulrahman Ahmed Hassan. The Plaintiff was the only surviving son of the said Abdulrahman and even though the Estate had not been administered, the Plaintiff remained a beneficiary of this Estate. The Defendant never disputed that the Plaintiff was entitled to a share of the Estate which included this suit property.
44. During cross examination of the DW – 1 admitted that the Plaintiff and the Defendants normally reside in the suit property and had been doing so for quite some time. At some point the Plaintiff and the Defendants were all living together when the Plaintiff was married to the Defendant's mother for a year and even got a child together. Therefore, the Counsel contended that this evidence showed that this house was a family - owned house and even though the Defendants allege that the house belonged to their father, the only available evidence was that the land where the house stood was their father's but not the house. During the cross examination of the DW - 1, the witness admitted that when the father got unwell he was hospitalized in Saudia where he was being treated for cancer had he had been ailing for some time. The Certificate of death showed that the father passed away on the 29th December, 1993.
45. The approvals were made on 28th October, 1993 and hence logically, the deceased could not have been the one to fund and/or chase the approvals. The Plaintiff testified in chief on the 31st October, 2023 and informed the court that he was being harassed by the Defendants who wanted him to vacate from the suit premises. He further testified that despite his inheritance, he also contributed in the construction of the property and general maintenance before the Defendants became of age and moved to occupy the second floor of the house. Granted, none of the parties herein have produced any evidence to show that they constructed and/or provided monetary contribution into the suit property. However, the one thing that was very clear from the evidence herein, it was that the suit property as a family property and should be amicably shared by the members of the entire family. It was not controverted that the registered owner of the land itself was the Deceased father of the Defendants who was also the Plaintiff's brother. The house itself was not constructed by the Defendants; they were children. The late father was deceased at the time of construction and hence he could also be safely ruled out as not contributing to the construction of the suit property. Therefore, the Counsel submitted that the nature of the house ownership fell under the complicated scheme of owing a house without owning the land. Thus, she prayed that the Honourable Court finds it in the favour of the Plaintiff that he owned part of the house as a heir of the estate of Said Abdulrahman Ahmed Hassan and also, for the reasons of contributing to the construction of the house after the demise of his house.
46. The Counsel admitted that there was no evidence in relation to who actually contributed into the construction of the house. One thing was clear though. It was not the Defendant's late father. It left either the Plaintiff's father or the Plaintiff himself and they needed not produce any evidence because the evidence of construction was the house itself. The Defendants' Exhibit number 2 showed that the approvals were obtained two months before the death of the Defendant's father and hence he could not have constructed the house.



47. Finally, the Counsel prayed that the Plaintiff be awarded the costs of this suit.

B. The Written Submission by the 1st and 2nd Defendants

48. The 1st and 2nd Defendants through the Law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed their written submissions dated 8th September, 2024. Mr. Asige Advocate commenced the submission by providing court with a brief background of the case filed by the Plaintiff against the Defendants herein. He enumerated all the claim and the reliefs sought by the Plaintiffs as above stated. The Plaintiff further filed Witness Statement, List of Witnesses and List of Documents dated 29th October 2019 on an even date. In support of his claim the Plaintiff produced a bundle of documents being a List of Documents dated 29th October 2019. In addition the Plaintiff testified on 31st October 2023 in support of the Plaintiff's claim. The Plaintiff never called any witness and closed his case.
49. On the other hand, the 1st and 2nd Defendants filed their Defence dated 17th February, 2023 on 21st February, 2023; Defendants Witness Statements, Defendants List of Witnesses and Defendants List of Documents dated 6th April 2023. The Defendants also produced their List of Documents dated 6th April 2023 and produced the same as Defendants Exhibit Numbers 1, 2, 3 and 4. In addition the Defendants testified on 22nd January 2024 and both the Defendants adopted their statements and their case was closed. He reiterated and adopted the evidence produced by the Defendants in support of the Defendants Defence opposing the Plaintiff's claim.
50. Briefly, the Learned Counsel stated that the 1st Defendant is the Legal Administrator of the estate of the late Said Abdulrahman Ahmed Mohamed (Defendants father) who died intestate in December 1993 leaving his wife and seven children as his dependants (see Defendants list of documents marked as Defendants exhibit no.3). On 12th February 1987 Defendants father purchased a parcel of land known as Mombasa/Block XVI/1343 for a consideration of a sum of Kenya Shillings Thirty Thousand (Kshs.30,000/=). The Defendants father was the sole proprietor of the abovementioned parcel of land and a title was issued in his name in the year 1995 (see Defendants' list of documents marked as Defendants' exhibit no.1).
51. In May 1993 the Defendants father applied for building permit from the Municipal council of Mombasa to construct a three storey building on Plot No. MSA/BlockXVI/1343, which plan was approved in October 1993 by the Council. (see Defendants' list of documents marked as Defendants' exhibit no.2). The Defendants father had laid the foundation of the building and had already hired a contractor to carry out the construction. He had plans to build some shops to let on the ground floor for him and his family to reside on the top floors of the building. The Defendants father passed away in Saudi Arabia in December 1993 while undergoing medical treatment (see Defendants' list of documents marked as Defendants exhibit no.4). At the time of his death, all his children were minors, therefore leaving the burden of taking care of seven (7) minor children with the Defendants' mother alone.
52. At the time of the Defendants father death, the Defendants' father had left funds with his father Abdulrahman Ahmed Mohamed(Defendants grandfather) to complete the construction of the building. As the foundation had already been laid and the contractor sourced, the Plaintiff herein continued with the construction of the building but using the funds that the Defendants father had left with the Defendants' grandfather to pay for the construction. That upon completion of the building, the Plaintiff came to ask the Defendants mother if he could live in one of the apartments that had been erected while the Defendants family lived in other apartment. The Plaintiff has lived in the 1st floor of the building since it was completed and the Defendants family have lived on the 2nd floor of the building. The Plaintiff had, since the construction was completed, rented out shops on the ground



floor. He had never provided any accounts for the rental income that he collects from the property and to date the Defendants family did not know the terms of tenancy agreements the Plaintiff had with any of the tenants of the shops. The Plaintiff was also in possession of the title deed and the original building plans of the property.

53. According to the Ruling delivered on 31st May 2018 by the Honourable M. Thande at Mombasa in “HCSUCC Cause no. 326 of 2012 - Mohsin Said Abdul - Rahman – Versus - Mahfudh Abdulrahman Ahmed” the Defendants grandfather was entitled to 16.67% of the Defendants father estate. Since the Defendants' grandfather was deceased the 16.67% share of the Defendants' father estate was to be shared among all the Defendants' grandfather's heirs who are eleven in number. The Plaintiff was not the sole beneficiary of the 16.67% share.

54. The Learned Counsel relied on the following three (3) issues for the determination by this Court. Firstly, whether the Plaintiff has locus standi and/or capacity to institute this suit. The Learned Counsel submitted that the Plaintiff lacked “Locus Standi” and/or capacity to institute this suit as he was not the Legal Administrator of the estate of the late Abdulrahman Ahmed Mohamed. To support its argument, the Counsel relied on the case of: “Alfred Njau -Versus - City Council of Nairobi [1983] KLR 625 the Court of Appeal, held inter alia that:-

“.....Locus Standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

55. Additionally, in the case of: “Julian Adoyo Ongunga – Versus - Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant:-

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

56. The effect of the above case is that for a party to have “locus standi” and appear in a case involving a deceased person, he or she must first obtain Grant of representation or Grant of Letters of Administration in his favour that entitles him to sue or file proceedings on behalf of the estate of the deceased. Thus, there was no such evidence shown or filed in this Honourable Court by the Plaintiff to convince this Court to think otherwise.

57. On the same point, the Learned Counsel also cited the case of: “Hawo Shanko - Versus- *Mohamed Uta Shanko (2018) eKLR. Marsabit Civll Suit No.1 of 2018* in which the Honourable Court cited several cases on the issue of need to obtain. Letters of Administration before filing a suit where Honourable Justice Said Chitembwe as he then was, stated that:-

“There is no dispute that the Plaintiff did not obtain a Limited. Grant allowing her to file this suit. Such a Grant is the key which allows the Plaintiff access to the suit, the Plaintiff would be like someone who has entered a closed room without opening the door. All what the Court can tell someone who is before it without having obtaining a Limited Grant to



the filing of the suit is that dissolve the validity of the suit or strength of the case. The Court cannot hear the suit as the initiator thereof lacks the capacity to file the suit.”

58. Accordingly, he submitted that in this instant case it was the Limited Grant or Grant of Letters of Administration which would confer the right and capacity to institute and prosecute this suit. Without letters of administration the Honourable Court has no jurisdiction to hear and entertain this suit. He stressed that the Plaintiff herein lacked the capacity to file this suit. The Plaintiff herein had not obtained Limited Grant or Grant of Letters of Administration to clothe him with locus to institute a suit on behalf of the estate of the late Abdulrahman Ahmed Mohamed.

59. The Plaintiff stated clearly in his Plaint at Paragraphs 4 and 5 that:-

“.....i) The Plaintiff is the Lawful Heir/ Beneficiary of 16.67% share of Plot No. MSA/BlockXVI/1343, comprising the Estate of Abdulrahman Ahmed Mohamed (Deceased).

ii) The said Deceased Abdulrahman Ahmed Mohamed is the Plaintiff's Father and the Defendants' Grandfather, through the Plaintiff's Late Brother Said Abdulrahman . Ahmed Hassan(Deceased)”

60. He submitted that by the time the Plaint was instituted the Plaintiff possessed no Grant of Letters of Administration issued to him or Grant of Letters Ad Litem to administer the estate of the late Abdulrahman Ahmed Mohamed. Going by the provision of Section 45 of the Succession Act, Cap. 160 any party that purported to file suit or deal with the estate of the deceased prior to obtaining limited grant or letters of administration was in law intermeddling and is committing a crime punishable in law.

61. It was imperative to point out that the Plaintiff had neither obtained Grant of Letters of Administration to administer the estate of the late Abdulrahman Ahmed Mohamed nor Limited Grant or Letters of Administration Ad Litem Limited to enable him litigate on behalf of the estate of the late Abdulrahman Ahmed Mohamed thus he has no capacity to file any Pleadings and/or Applications in this Honourable Court on behalf of the estate of the late Abdulrahman Ahmed Mohamed. Failure to obtain limited grant or grant of letters of administration is not a technicality but went right to the heart of this suit.

62. Secondly, whether the Plaintiff is the lawful proprietor of the three (3) bedroom house situated on the 1st floor of the residential building standing on parcel reference Mombasa/Block XVI/1343. The Learned Counsel contended that the Plaintiff was not the lawful proprietor of the suit property upon the following grounds:-

i. The Plaintiff alleged that the Plaintiff is the lawful proprietor of the 1st Floor Apartment in residential building standing on Plot Title No. MSA/Block XVI/1343. The Plaintiff had not however exhibited or shown in evidence a title that vests him with the alleged proprietorship of the 1st Floor Apartment in building standing on Plot Title No. MSA/Block XVI/1343. Further the Plaintiff had not proved that Plot Title No. MSA/Block XVI/1343 belonged to him in fact as pleaded in the Defendants' Defence Plot Title No. MSA/Block XVI/1343 was in the name of the Defendants' deceased father and not the Plaintiff. Thus, he submitted that the Plaintiff had not proved that the suit property belonged to him and hence prayer number one in the Plaint could not be granted. He had no proprietorship of the suit property. Further the Plaintiff could not obtain an injunction over property which was not his. The prayer of Permanent Injunction as pleaded in the Plaint therefore could not issue.



- ii. The Plaintiff pleaded in the Plaint that he is the lawful heir and beneficiary of 16.67% share of Plot No. MSA/BlockXVI/1343. The Plaintiff had not shown any evidence by tender of any document or at all that he was an heir or beneficiary as alleged. More importantly, if the Plaintiff was an heir or beneficiary as alleged, then he had not shown any grant of representation or Grant of Letters of administration in his favour that entitles him to sue or file proceedings against the Defendants to protect and enforce his alleged shares in the estate of the late Abdulrahman Ahmed Mohamed. In other words the Plaintiff had no locus standi and the suit filed by him against the Defendants is incompetent and a nullity *abi nitio*.
63. Finally, which party should bear the costs. The Learned Counsel cited the provision of Sections 7 and 19 of the *Environment and Land Court Act*, 2011 as read with Section 27 of the *Civil Procedure Act*, Cap. 21, Laws of Kenya provide this Court with powers to make an award for costs and that the said costs shall follow the event unless for other reasons to be recorded by the Court. Having demonstrated that the Plaintiff lacked “locus standi” to institute this suit and that he instituted these proceedings in abuse of the law and *the Constitution* to attempt to acquire the suit property belonging to Defendants late father. He urged the Honourable Court to dismiss the suit filed herein with costs to the Defendants.

VII. Analysis and Determination

64. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
65. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a. Whether the Plaintiff has locus standi to institute the suit?
 - b. Who is the legal proprietor of the suit property?
 - c. Whether the Plaintiff is entitled to the orders sought in the Plaint
 - d. Who bears the costs of the suit?

Issue No. a). Whether the Plaintiff has locus standi to institute the suit

66. Under this sub – title the Honourable Court will examine the issue of whether or not the Plaintiff has a standing in instituting this suit. Whereas many issues could have been considered, I am convinced that since the Defendants challenged the Plaintiff’s locus standi to bring this suit, I would do well to consider the issue first since the success or otherwise of it determines the direction of both the instant Application and suit. The issue of locus standi is a point of law which this Court is under the duty to determine first before any other. Thus, I frame the issue: Whether the Plaintiff has ‘the Locus Standi’ to bring the present suit.



67. In the case of “Law Society of Kenya – Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000”, as follows: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others -Versus - City Council of Nairobi [1982] KAR 229, the Court also held that:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

68. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, party has no basis to claim anything before the Court. The Defendants aver that the Plaintiffs lack “locus standi” to institute the suit. The thrust of their argument was that he did not own the suit property therefore had no right to claim the land.

69. This Court notes that the Plaintiff is claiming proprietorship of the suit property and the Defendants are the legal administrators of the deceased’s estate keeping them away from it. That means therefore that the issue as to whether or not the Plaintiff has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. See the case of “Presbyterian Foundation & Another - Versus - East Africa Partnership Limited & Another[2012]eKLR”,

“The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff’s position vis-à-vis the 1st Plaintiff, I cannot say that the 1st Plaintiff’s suit is non-existent. It is further submitted that since the Church has registered officials and the 1st defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st Plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st Plaintiff’s authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the Plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the Defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs.”

70. Taking into account the above findings of the court, this Court finds that since the Plaintiff’s suit is based on interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian to determine it on merit as hereinunder. Therefore the claim on “locus standi” by the Defendants fail.



Issue No. B: Who is the legal proprietor of the suit property

71. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter is the ownership of the suit property. The Plaintiff’s claim is based on the proprietorship share of the suit land and entitlement to the rights in respect of the ownership of land. It was the Plaintiff’s case as PW - 1 that he lived on the suit property for 29 years and he had a copy of the title deed which showed that the property was registered in the name of Said Abdulrahman; his brother and who had died in year 1993. He had sued Mohsin Said and Ahmed Said as the Defendants who were his nephews who were the children of his deceased brother. He filed his witness statement dated 29th October, 2019 which he adopted as his evidence in chief. He had sued the Defendants as they had been harassing him. They had locked the house and blocked his entrance. He filed a list of documents (6) documents filed on 29th October, 2019 – Plaintiff Exhibit 1 to 6 in that order.
72. The Defendants on the other hand argued that he knew the Plaintiff, who was his uncle and his father’s brother. His father died on 29th December, 1993. He had read the Plaintiff’s claim against the 1st and 2nd Defendant. The 1st Defendant was his brother. He had filed a joint defence dated 17th February, 2023 which he adopted the contents of the same and he had filed witness statements dated 25th April, 2023 and he adopted the same as his evidence in chief. He had also filed a list of documents dated 25th April, 2023 – which contained 4 documents. He produced them as “Defendant’s Exhibits – 1 to 4. The Plaintiff in his testimony conceded to the fact that the property belonged to the deceased who was the Defendants’ father and the Defendants were legal administrators of the property according to the ruling of Justice Thande dated 31st May, 2018 stated that it was significantly important to him. It was on page 12 to 17 from the HCCC No. 326/2012 Succession Cause. He was the objector in the succession cause. With reference to page 16 paragraph 16, the witness read it to the court stating that it referred to the meaning the decision was for Plot No. MSA/Block XVI/1343. It was the same title he had brought to the Court and the Court had already decided that the title belonged to the deceased. He agreed with the decision of the Court.
73. Critically, to do justice to this issue, it would be paramount to examine the legal framework on proprietary rights and interest over land in Kenya. The provision of Article 40 of *the Constitution* of Kenya 2010 provides any individual to own land anywhere in Kenya. Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership and indefeasible rights, title and title of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.
74. Further, the provision of Section 26 of the *Land Registration Act*, 2012 provides:-
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

75. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the title produced by the Plaintiff showed that the suit property was registered in the name of his deceased brother.
76. Under the provision of Section 79 of the *Law of Succession Act*, Cap. 160 of the Laws of Kenya, the property of a deceased vests in the personal representative, that is, the executor or administrator to whom representation has been granted. All the property of a deceased person vests in the personal representative unless the grant imposes limitations. From the filed pleadings nor the testimony adduced in Court, there is no evidence to show that the Plaintiff neither applied nor obtained Grant of Letters of Administration to the estate of the late Said Abdulrahman. Under Section 82 of the Act, it is a personal representative that is empowered to enforce by suit causes of action which by law survive the deceased and to deal with the assets vested in them in accordance with the provisions of that section.
77. Based on this, the Honourable Court discern that the Plaintiff who never qualifies as a joint owner to the suit property nor a duly appointed Legal Administrator of the estate of the deceased he has no interest onto the suit land whatsoever. For this reason this Honourable Court is of the opinion the ownership of the land is solely on the legal administrators of the estate of the deceased. And for the reasons the Defendants being the beneficiaries of the deceased are entitled to the proprietary rights over the suit property.

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

78. Under this Sub - heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaintiff, herein. Before proceeding with whether the Plaintiff is entitled to the prayers, it is important to note that among the rights to be enjoyed by a registered owner of any land is the right for peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the suit land. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiff in the Plaintiff filed herein are for declarations that the Plaintiff is the lawful proprietor of the 1st Floor Apartment comprising a Three (3) Bedroom-House and attendant Facilities situated in the Residential Building standing on Parcel Reference Mombasa/Block XVI/1343, a permanent injunction and general damages. These are clearly orders relating to the use, occupation and title to suit property and within the jurisdiction of this Court.
79. The Honourable Court has taken with great interest the heavy reliance on the decision by High Court delivered on 31st May 2018 by the Honourable M. Thande at Mombasa in “HCSUCC Cause no. 326 of 2012 - Mohsin Said Abdul - Rahman – Versus - Mahfudh Abdulrahman Ahmed”. Apparently, it appears that this was the main legal basis in support of the Plaintiff’s case. According to the Plaintiff, the Court held that the Defendants grandfather was entitled to 16.67% of the Defendants father estate. Since the Defendants’ grandfather was deceased the 16.67% share of the Defendants’ father estate was to be shared among all the Defendants’ grandfather’s heirs who are eleven in number. My basic understanding of this is slightly different. I fully concur with the Defendants’ Counsel that the Plaintiff was not the sole beneficiary of the 16.67% share. To me Justice Thande meant that the Plaintiff was entitled to a 16.67 share of the estate of the late Mohsin Said Abdul-Rahman which included the Plaintiff herein. Although, the Plaintiff pleaded in the Plaintiff that he was the lawful heir and beneficiary of 16.67% share of Plot No. MSA/BLOCK but never shown any evidence in terms of any document or at all that he was an heir or beneficiary as alleged the 16.67% share of the Estate of Defendants



father was to be shared among all the Defendants grandfather's heirs who were eleven in number. The Plaintiff failed to prove he was a beneficiary or sole beneficiary of the 16.67% share of the estate of the Defendants' deceased father. On a balance of probability the Plaintiff had not proved any of his claims as pleaded in the Plaintiff herein.

80. Having found that the Plaintiff has neither the legal capacity to institute this suit nor any legal claim to the suit property and that the Defendants as the legal administrators of the deceased's estate I find that the Plaintiff has not proven his claim on a balance of probability and established that the Defendants have no legal right to remain on the suit land based on the evidence placed before this court. Therefore the Plaintiff is not entitled to any prayers sought in the Plaintiff.

Issue No. c). Who bears the costs of the suit

81. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
82. In the case of:- "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;
- "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."
83. In the present case, the Plaintiff has not been able to establish his case as pleaded from the filed pleadings against the Defendants. Therefore, I proceed to award the Defendants the costs of this suit.

VIII. Conclusion and Disposition

84. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has not established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:
- a. That Judgment entered to the effect that the suit instituted by the herein Mahfudh Abdulrahman Mohamed, the Plaintiff herein through the Plaintiff dated 29th October, 2019 be and is hereby dismissed.
 - b. That the costs of this suit be awarded to the Defendants jointly and severally to be borne by the Plaintiff.



It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.**

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**HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. No appearance for the Plaintiff.
- c. No appearance for the Defendants.

