



**Mbaabu v Iha & 3 others (Environment & Land Case 43 of 2018)
[2024] KEELC 6421 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 43 OF 2018
LL NAIKUNI, J
SEPTEMBER 24, 2024**

BETWEEN

JOSEPH KUBAI MBAABU PLAINTIFF

AND

KAIDZA MWANDORO IHA 1ST DEFENDANT

JOHN KARHAYU KOFA 2ND DEFENDANT

DISTRICT LAND ADJUDICATION OFFICER MOMBASA 3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable court pertains to the suit instituted through the Complaint dated 26th February, 2018 by Joseph Kubai Mbaabu, the Plaintiff herein. It was against Kaidza Mwandoro Iha, John Karhaya Kofa, District Land Adjudication Officer Mombasa, the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the 3rd and 4th Defendants entered appearance dated 6th March, 2018 and filed in court on 18th April, 2019 and filed its Statement of Defence dated 17th April, 2018 on 18th April, 2019. However, despite of the service, the 1st and 2nd Defendants never entered appearance. In essence, therefore the Plaintiff's case was uncontroverted by the said Defendants.

II. Description of the Parties in the suit

3. The Plaintiff was described as a male adult of sound residing and working for gain in Mombasa in the Republic of Kenya; the 1st Defendant was described as a female adult of sound mind residing and working for gain in the County of Mombasa in the Republic of Kenya.



4. The 2nd Defendant was described as a male adult of sound mind residing within the Republic. The 3rd Defendant was described as the a Government Ministry, department and is represented by the Attorney General and the 4th Defendant was described as the principle legal adviser to the Government of the Republic of Kenya and represents the 3rd Defendant.

III. Court directions before the hearing

5. Nonetheless, on 4th July, 2022, the Honourable Court fixed the hearing dated on 5th December, 2022 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 2.00 pm and the Plaintiff called his witness on 5th December, 2022. The Plaintiff called his cases to a close on the same day. The 3rd and 4th Defendant called called its witnesses on 21st May, 2024 and closed their case on the same day.
6. This matter proceeded on for hearing by way of adducing “Viva Voce” evidence with the Plaintiffs’ witness (PW - 1) testifying in Court on 5th December, 2022.

IV. The Plaintiff’s case

7. From the filed pleadings at all material time, the 1st Defendant was the allottee of plot no. 84 now Plot No. 69/V. O. K/MN Ziwa La Ng’ombe Settlement Scheme measuring approximately 0.02 hectare (Hereinafter referred to as “the Suit Property”). The 1st Defendant sold the entire portion of land known as Plot no. 84 now Plot No.69/V. O. K/MN Ziwa la Ng’ombe Settlement Scheme to the 2nd Defendant sometimes on 8th September, 2006 at a consideration of Kenya Shillings Two Thousand (Kshs. 200,000/-). The suit property then was undeveloped and the 2nd Defendant started construction of some structures which he could not complete.
8. The Plaintiff purchased the suit property from the 2nd Defendant on 23rd August, 2013 at a consideration of a sum of Kenya Shillings One Million Six Hundred Thousand (Kshs. 1,600,000/-). The Plaintiff stated that he carried out renovations and construction of 5 single rooms and 4 stores which are fully occupied by tenants and he draws rental income from the suit property. The 4th Defendant has received the discharge of charge from the settlement fund trustee which was processed in the name of the 1st Defendant who was to effect transfer of the suit property to the Plaintiff. The Plaintiff had approached the 1st Defendant and had had several meetings with the 3rd Defendant with the view of the 1st Defendant signing the transfer documents in favour of the Plaintiff to no avail.
9. The 1st Defendant had refused and or neglected to sign the transfer documents of the suit property in favour of the Plaintiff and had intentions of disposing off the same to 3rd parties and had suggested the same to the Plaintiff. The Plaintiff was in occupation of the suit property where he drew his livelihood from. The Plaintiff was apprehensive that unless the 3rd Defendant was restrained from handing over the discharge of charge to the 1st Defendant before a transfer was signed in favour of the Plaintiff then there is likelihood that the 1st Defendant may dispose off the suit property to other people oblivious of the proprietary rights of the Plaintiff herein.
10. Despite demand and notice of intention to sue having been issued, the Defendant had failed, refused, neglected and/or ignored the Plaintiff’s claim or any part thereof or at all thereby rendering this suit necessary. The Plaintiff averred that there was no other suit pending and there have been no previous proceeding in any court between the Plaintiff and the Defendant over the same subject matter. The Plaintiff admitted to the jurisdiction of the court.



11. The Plaintiffs herein prayed that Judgement be entered against the Defendants jointly and severally in terms of:-
 - a. In the first instance, a temporary injunction and thereafter a permanent injunction restraining the Defendants, their agents, servants, or whomsoever acting under their directions from interfering, transferring, selling, trespassing developing or dealing in any way with the Plaintiff's portion of land known as plot no. 84 now 69/V.O. K/MN Ziwa la Ng'ombe.
 - b. The 1st Defendant be ordered to sign the Transfer documents in favour of the Plaintiff failure of which the Deputy Registrar ELC do sign on behalf of the 1st Defendant in favour of the Plaintiff over plot no.84 now 69/V.O.K/MN Ziwa la Ng'ombe.
 - c. Costs of this suit.
12. The Plaintiff called their witness PW - 1 on 5th December, 2022 at 12.30 pm where he averred that: -

Examination in Chief of PW - 1 by Mr. Muyala Advocate.

13. PW - 1 testified on oath in Kiswahili language. He identified himself as Mr. JOSEPH KUBAI MBAABU who was born on 1st January, 1978. He provided Court with all the details as contained in his national identity card. He was a businessman and a resident of Majengo, Mombasa. He knew the case in court. He stated that he had sued the 1st, 2nd, 3rd and 4th Defendants seeking for the reliefs as stated from the filed pleadings thereof. On 26th February, 2016, he filed his witness statement dated the same day which he adopted as his evidence in chief. He got his land at Bombolulu, V.O.K; Plot No. 69/VOK/MN – Ziwa la Ngombe settlement scheme measuring 0.02HA. He bought the land from John Karhayu Kofa at Kshs. 1,600,000/-. There were no titles when he bought the suit land. One John had bought the land from the 1st Defendant on 8th September, 2006. Indeed, when he went to check on it and found that the suit property was still registered in the names of the 1st Defendant.
14. PW - 1 testified that there were two sale agreements:-
 - a. One was between the 1st Defendant and the 2nd Defendant dated 8th September, 2006.
 - b. While the other was between the Plaintiff and the 2nd Defendant dated 23rd August, 2013.
15. He produced the sale agreements as Plaintiff Exhibits No. 1 and 2. When they went to the land registry to have the same changed to his names, his request was declined. This made him come to court on 15th February, 2018 by Kennedy Ngaira Associates to the District Land Adjudication Officer marked and produced as Plaintiff Exhibit No. 3. PW - 1 told the court that he was called by the Land Agent. He was taken to Mr. Kofa who had an agreement; when they went to the land, the records showed that the land was registered in the names of Kaidza Mwandoro Iha. He had sued him. Kaidza claimed that he wanted to be given an increment of the purchase price.
16. According to the witness these agreements were in the land offices and fixed/ water and electricity; he had been collecting rent from 23rd August, 2013 up to date. The 1st Defendant had never made any claim to the land. Therefore he prayed to Court to grant him the relief sought.

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

17. The witness told the court that he conducted due diligence at the DLAO and Land Registry. He found that the land was in the names of 1st Defendant. But there were agreements between the 1st Defendant and the 2nd Defendant. He had not been able to bring an official search. He did not have proof of payment in court apart from the sale agreement and the cash paid to the Advocates. He had



two witnesses called William Kaberia and Edwin Muriithi on the payment of a sum of Kenya Shillings One Six Hundred Thousand (Kshs. 1,600,000/-) but the said two witnesses were not in Court.

18. PW - 1 confirmed that they had had many meeting with the 1st Defendant and the 2nd Defendant, himself, DLAO and Land Registrar to agree on the parcel of land. There was no prof of notices to attend the meeting. He received a call. He told the court that when he bought the land there were a few incomplete structures. The structures were for the 2nd Defendant. He had bought a bare land. It was the title that gave a person ownership. He bought the land in the year 2013. But he filed the case in the year 2018 which was 5 years after he bought it.
19. The witness told the court that there was no written document to show that he ahd purchased the suit property hence he decided to sue the Defendants.

C. Re - Examination of PW - 1 by Mr. Muyala Advocate.

20. PW - 1 confirmed that he had nothing to show that he had been following the matter. He had been getting telephone calls to attend the meetings. He paid cash in full for the purchase price of the parcels of land.
21. On 5th December, 2022 the Plaintiff marked their case closed through their Counsel Mr. Muyala Advocate.

V. The 3rd and 4th Defendants' case.

22. The 3rd and 4th Defendants filed their Statement of Defence dated 17th April, 2018 admitting the contents of Paragraphs 1, 2, 3, 4 and 5 of the Plaintiff but only to the extent that the same were descriptive of the parties herein save that their address of service for purposes of this suit shall be care of Attorney General, Attorney General's Chambers.
23. The 3rd and 4th Defendants averred that they were strangers to the averments contained in Paragraphs 6, 9, 10, 12 and 13 of the Plaintiff. They denied the contents of Paragraphs 7 and 8 of the Plaintiff. The 3rd and 4th Defendants denied the contents of Paragraph 11 of the Plaintiff and more specifically that it had received the discharge of charge from the settlement fund trustee. The Defendants admitted to the jurisdiction of the Honourable Court to hear and determine the matter. For the foregoing reasons, the defendants stated that the reliefs sought were neither available nor merited.
24. The Learned Counsel for the 3rd and 4th Defendants, Mr. Mwandeje had the following opening remarks that their case was to show the Court that the property at the settlement depict the 1st Defendant was the 1st Allottee and still belonged to the 1st Defendant and the only remaining thing was the discharge to allow it be acquired by the Plaintiff as the intended purchaser for value.

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

25. DW – 1 testified on oath in English language. He identified himself as Benjo Kibet Daniel and also provided Court with all his particulars as founded in his national identity card. He was born in the year 1978. He was the County Land Adjudication Officer – Mombasa. He had filed a list of documents consisting of four (4) documents dated 20th May, 2024 which he produced as Defendants' Exhibits numbers 1 to 4 in support of his case. According to the witness and from the records within his custody, the parcel of land known as Land reference number 69/VOK/MN was allocated to Mr. Kaidza Mwadoro Iha. The Allottee had paid all the pre-requisite charges and had been discharged accordingly. The only pending issue was the collection of the Discharge. Indeed, the Discharge was still being held with him and he had brought it to court. It was dated 14th June, 2017. This meant that no



other legal transaction would be undertaken on the parcel of land. As DLAO, there was nothing else they could do as their core business was not on transfer of land but purely allocation of land to the Allottee and hence their duties stopped there.

B. Cross examination of DW - 1 by Mr. Muyala Advocate.

26. According to DW - 1, the property was discharged on 14th June, 2017. By then he was not the County Adjudication Officer. But all the records were intact in the office. If there was anything that happened then he would not know.

C. Re - examination of DW - 1 by Mr. Mwanjeje Advocate.

27. DW - 1 confirmed that the Discharge had not been collected since 14th June, 2017. The parcel was charged and hence nothing could happen on the parcel of land. According to the witness no transaction could occur on it.

28. The Defendants closed their case on 21st May, 2024 with the Learned Counsel, Mr Muyala closed their case.

VI. Submissions

29. On 21st June, 2024 after the Plaintiff and Defendant marked the close of this cases, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. However, by the time of penning down this Judgement none of the parties had filed their submissions as directed. Pursuant to that on 10th July, 2024 the Honourable court reserved a date to deliver its Judgement on 24th September, 2024 on its own merit accordingly.

VII. Analysis and Determination

30. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

31. 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 there was a valid agreement between the Plaintiff and the 2nd Defendant and whether the 2nd Defendant passed proper title to the Plaintiff.
- b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff
- c. Who bears the costs of the suit?

Issue No a). Whether there was a valid agreement between the Plaintiff and the 2nd Defendant and whether the 2nd Defendant passed proper title to the Plaintiff

32. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter whether the by virtue of the agreement between him and the 2nd Defendant, the Plaintiff acquired a proper title. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of Contract, Cap, 23 and Section 38 of the *Land Act*, No. 6 of 2012. Section 3(3) of the Law of Contract reads as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-



- (a) The contract upon which the suit is founded:
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”

33. While Section 38 of the *Land Act* holds that:

- (1). “No suit shall be brought upon a contract for the disposition of an interest in land unless-
 - a) The contract upon which the suit is founded:
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
- (2). Sub – section (1) shall not apply to a contract made in the course of a public auction nor shall anything in sub – section affect the creation or operation of a resulting implied or a constructive trust”

34. It is trite law, with regard to “the Burden of Proof” is that he who alleges must prove. This legal principle is well stated out under the provision of Sections 107 and 109 of the *Evidence Act* Cap. 80 which provide: -

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

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

35. A perusal of the agreement for sale dated 8th September, 2006 and 23rd August, 2013 and produced as Plaintiff’s exhibit numbers 3 and 4 confirms that the above requirements of the law were complied with at the point of preparing the Agreements for Sale. The consequence of the compliance above therefore makes the Agreements of sale dated 8th September, 2006 and 23rd August, 2013 legal and binding on the Parties in this suit and can be relied upon by the Court in the determination of this suit. The Plaintiff complied to the terms of the agreement of sale dated 23rd August, 2013 and therefore the same was binding to him and the 2nd Defendant. According to the Plaintiff the 1st Defendant was the allottee of plot no. 84 now Plot No. 69/V. O. K/MN Ziwa La Ng’ombe Settlement Scheme measuring approximately 0.02 hectare (hereinafter referred to as the “Suit Property”). The 1st Defendant sold the entire portion of land known as Plot no. 84 now Plot No.69/V. O. K/MN Ziwa la Ng’ombe Settlement



Scheme to the 2nd Defendant sometimes on 8th September, 2006 at a consideration of Kshs. 200,000/-. The suit property then was undeveloped and the 2nd Defendant started construction of some structures which he could not complete.

326. The Plaintiff purchased the suit property from the 2nd Defendant on 23rd August, 2013 at a consideration of a sum of Kenya Shillings One Million Six Hundred Thousand (Kshs. 1,600,000/-). The Plaintiff stated that he carried out renovations and construction of 5 single rooms and 4 stores which are fully occupied by tenants and he draws rental income from the suit property. The 4th Defendant has received the discharge of charge from the settlement fund trustee which was processed in the name of the 1st Defendant who was to effect transfer of the suit property to the Plaintiff. The Plaintiff had approached the 1st Defendant and had had several meetings with the 3rd Defendant with the view of the 1st Defendant signing the transfer documents in favour of the Plaintiff to no avail.
37. The 1st Defendant had refused and or neglected to sign the transfer documents of the suit property in favour of the Plaintiff and had intentions of disposing off the same to 3rd parties and had suggested the same to the Plaintiff. The Plaintiff was in occupation of the suit property where he drew his livelihood from. The Plaintiff was apprehensive that unless the 3rd Defendant was restrained from handing over the discharge of charge to the 1st Defendant before a transfer was signed in favour of the Plaintiff then there is likelihood that the 1st Defendant may dispose of the suit property to other people oblivious of the proprietary rights of the Plaintiff herein.
38. It is evident that the 2nd Defendant did not fulfil the conditions of sale on the execution as per the sale agreement which indicated that the 2nd Defendant was to hand over possession of the property to the purchaser immediately after the execution of the agreement. This Court cannot imply any term in the said contract unless it was intended. See the case of “Lulume – Versus - Coffee Marketing Board (1970) EA 155”, where the Court held that: -

“No term should be implied in a contract unless it was intended”.

39. Having now carefully considered the available evidence, the Court finds that the Plaintiff and 2nd Defendant entered into a valid sale agreement, but by completion date, the 2nd Defendant had not fulfilled all the conditions set therein and he later failed to transfer the property to the Plaintiff even after having received substantial amount in respect of the purchase price. The 2nd Defendant was therefore the one in breach of the sale agreement herein. Subsequently, the 1st Defendant was also in breach of the agreement he entered into with the 2nd Defendant because as soon as he got the allotment letter he should have alerted the 2nd Defendant that the title documents of the suit property had been issued to him.
40. The next question would be then therefore was the Plaintiff a Bona fide purchaser for value, without notice of any defect in the vendors title? The import and tenor of the Doctrine of bonafide purchaser for value and in particular the decision in “Katende – Versus - Haridar & Company Ltd (2008) 2 E.A 173”, has since been reviewed as explained vide the decision in case of “Mwangi James Njehia – Versus - Janetta Wanjiku Mwangi & another [2021] eKLR”, where the court explained as hereunder:

“As appears from the 1st appellant’s testimony and as correctly observed by the trial Judge, the first appellant is a veterinary doctor. Therefore, it is peculiar that he would take a transaction worth Kshs. 4,000,000, so casually to the extent of not finding it necessary to keep records pertaining to the same.



Further, despite deposing that some of the documents pertaining to the conveyance were in the custody of M/s. Kambi Muhia Advocates who were acting for both deceased and the 1st and 2nd appellants, he did not bother to call an advocate from the firm to testify in that regard or produce the said documents in evidence.

36. From the mere conduct of the appellants herein, it could be construed that the circumstances under which they acquired the suit property were fraudulent and fraught with illegalities and that they were well aware of those circumstances.

In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014* this Court cited with approval the case of *Katende – Versus - Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki – Versus - William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the *Land Registration Act*.

41. From the foregoing decision, it is worth noting that for one to benefit under the doctrine for bona fide purchase for value, he or she must established that the vendor had a valid title, as opposed to apparent valid title. In this case it has not been denied that the 2nd Defendant bought the land from the 1st Defendant who had a valid title. Therefore, in that case, I discern that the 2nd Defendant passed a good title to the Plaintiff.



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

42. Under this Sub heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaintiff, herein. Having held that the Defendants were guilty of breach of the contract, the next thing I need to determine is the question of prayers in the plaintiff. In the case of “Hadley – Versus - Baxendale (154) 9. Exch 214” where Anderson P at page 354 stated as follows:

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”

43. Further in the case of “Millicent Perpetua Atieno – Versus - Louis Onyango Otieno (2013) eKLR”, the Court of Appeal quoted with approval Halsbury’s Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.....”

44. The Plaintiff has sought for injunctive orders to restrain the Defendants from disposing off the suit property and the order the signing of the transfer documents by the 1st Defendant. I do note though that the Plaintiff has implied that the Deputy Registrar ELC may sign the transfer document on behalf the 1st Defendant which is far from the truth as the Deputy Registrar herein as he or she is an officer of the court and does not deal with disposition of land.

45. On the issue of the permanent injunction sought for by the Plaintiff. The Court has already opined itself that the Plaintiff was the valid bona fide purchaser of the suit property therefore prayers 1 and 2 of the suit are allowed.

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

46. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean 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.



47. 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.”

48. In the present case, the Plaintiff has been able to establish his case as pleaded from the filed pleadings against the Defendants therefore, I proceed to award him the costs of this suit.

VIII. Conclusion and Disposition

49. 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 fully established his case against the 1st, 2nd, 3rd and 4th Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff as pleaded in the Plaint dated 26th February, 2018.
- b. That an order for a permanent injunction do and is hereby issued restraining the defendants, their agents, servants, or whomsoever acting under their directions from interfering, transferring, selling, trespassing developing or dealing in any way with the Plaintiff's portion of land known as plot No. 84 now 69/V.O. K/MN Ziwa la Ng'ombe.
- c. That an order do and is hereby issued instructing the 1st Defendant herein to sign the Transfer documents in favour of the Plaintiff over Plot No.84 now 69/V.O.K/MN Ziwa la Ng'ombe.
- d. That the costs of this suit vide the Plaint dated 26th February, 2018 are awarded to the Plaintiff to be borne by the 1st, 2nd, 3rd and 4th Defendants jointly and severally.

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

HON. MR. JUSTICE L.L. NAIKUNI

**ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:-

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

