



**Mshomo & another (Administrators of the Estate of Mshono Mwahunga (Deceased)) v Land Registrar Kilifi & 3 others (Environmental and Land Originating Summons 8 of 2021) [2024] KEELC 5999 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5999 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 8 OF 2021**

**LL NAIKUNI, J**

**SEPTEMBER 19, 2024**

**IN THE MATTER OF: PARCEL KILIFI/ MTWAPA/ 5052**

**MEASURING APPROXIMATELY 3.696**

**HECTARES**

**AND**

**IN THE MATTER OF: APPLICATION FOR ENFORCEMENT OF  
THE KILIFI LAND REGISTRAR'S REPORT  
DATED 24/08/2020 AND THE KILIFI  
DISTRICT SURVEYOR'S REPORT DATED**

**27/9/2019**

**BETWEEN**

**SAMSON LEBA MSHONO ..... 1<sup>ST</sup> PLAINTIFF**

**NDOKO MSHONO LEWA ..... 2<sup>ND</sup> PLAINTIFF**

**ADMINISTRATORS OF THE ESTATE OF MSHONO MWAHUNGA  
(DECEASED)**

**AND**

**LAND REGISTRAR KILIFI ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT SURVEYOR KILIFI ..... 2<sup>ND</sup> DEFENDANT**

**MTWAPA ENERGY CENTRE ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**



## JUDGMENT

### I. Preliminaries

1. The Applicants herein instituted this suit against the Respondent by way of Certificate of Urgency, Notice of Motion and Originating Summons (which was later on converted to a Plaint) on the 20<sup>th</sup> January, 2021. The suit was filed on the same day premised under the provision of Order 37 and Order 50 Rule 1 of the Civil Procedure Rules, 2010 Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya, Section 13 of the [Environment and Land Court Act](#) no. 19 of 2011 Revised 2015 and all other enabling provisions of the Law.
2. Upon filing of the Originating Summons (Plaint), the Defendants/ Respondents filed a Replying Affidavit dated 26<sup>th</sup> October, 2021. As stated above, on 27<sup>th</sup> October, 2021, directions under the provision of Order 37 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010, the Honourable Court converted the Originating summons into a Plaint. At the same time, after confirming that all parties had complied with the Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules 2010, the matter was set for hearing on 23<sup>rd</sup> March, 2023. The Plaintiffs called PW - 1 on the same day.

### II. The Plaintiffs/ Applicants' Case

3. The Plaintiffs/ Applicants sought for the following orders:-
  - a. The District Surveyor Kilifi be compelled to prepare Mutation Forms for parcel Kilifi/ Mtwapa/5052 be signed by the Plaintiffs and the 3<sup>rd</sup> Defendant within 7 days but if the Mtwapa Energy Centre fails to sign, their party shall be signed by the Court Deputy Registrar Mombasa in execution of the Kilifi Land, Registrars Report dated 24/8/2020 for correcting the Registry Index Map and the Kilifi District Surveyors report dated 27/9/2019.
  - b. That Kilifi Land Registrar and Surveyor be compelled to go and put beacons on parcel Kilifi/ Mtwapa/5052 within 14 days and 3<sup>rd</sup> Defendant the Mtwapa Energy Centre surrender the portion of parcel Kilifi/Mtwapa/5052 which was erroneously included on their parcel as illustrated on the Kilifi District Surveyors Report dated 27/9/2019, in execution of the Kilifi Land Registrars Registrar's Report dated 24<sup>th</sup> August, 2020 which has not been appealed against, varied and or set aside.
  - c. That costs of the suit be provided for.
4. The Original Summons/ Plaint was based on the following grounds on the face of it and those of the 34 paragraphed supporting affidavit sworn by Samson Leba Mshono and Ndoko Mshono Lewa sworn on the same day :-
  - a. The Plaintiffs' father Mshono Mwahunga died on 26<sup>th</sup> July, 2017 at Mwaatundo Village in Mtwapa annexed herewith was a copy of the death certificate marked SN1.
  - b. Their deceased father was the registered owner of parcel Kilifi/Mtwapa/5052 measuring 3.696 hectares annexed herewith marked SN 2 was a copy of the title deed
  - c. Upon the death of their father they applied for grant of letters of administration at Mombasa Chief Magistrates Court succession cause no 135 of 2019 and on 9<sup>th</sup> March, 2020 we were issued with a grant which copy is annexed herewith marked BN 3. Earlier in the same Chief



Magistrates Court succession cause 135 of 2019, the court issued them with a grant of letters of Administration ad litem for the purposes of filing, defending and prosecuting case on behalf of the Estate of Mshono Mwachunga which copy of grant was annexed herewith marked “SN – 4”. The Plaintiffs were the Administrators of the Estate of Mshono Mwachunga deceased.

- d. The Applicants’ deceased father who died on 26<sup>th</sup> July, 2017 was the registered owner of the suit land Kilifi/Mtwapa/5052 measuring approximately 3.696 Hectares.
- e. Sometimes back, the 3<sup>rd</sup> Defendant illegally and unlawfully trespassed, encroached and fenced a portion of the Applicants’ beneficial and developed parcel Kilifi/Mtwapa/5052 with several mango trees without the authority and or consent of the Applicants or their deceased father. When their deceased father sought to know why the 3<sup>rd</sup> Defendant trespassed, encroached and fenced a portion of his parcel Kilifi/ Mtwapa/5052, the 3<sup>rd</sup> Defendant dialed him with unfulfilled promises that the issue could be sorted and their father died before the boundary dispute was resolved
- f. When the Applicants’ deceased father sought to know why the Kilifi/Mtwapa/5052, the 3<sup>rd</sup> Defendant deal dialed him with unfulfilled promises that the issue could be sorted out and Applicants’ father died before the boundary issue was solved.
- g. The Applicants engaged the Kilifi Land Registrar on the boundary dispute.
- h. The Kilifi/Land Registrar and the District Surveyor came on the side after inviting the 3<sup>rd</sup> Defendant and all the people whose parcels of land share their boundary with the Applicants beneficial land.
  - i. The Kilifi District surveyor’ report made on 27<sup>th</sup> September, 2019 attached with its map, revealed:-
- i. The 3<sup>rd</sup> Defendant, the Kilifi Energy Centre encroached on plot nos. 578, 5050, 5051 and 5052
  - ii. Plot No. 578 formerly 277 should not appear on the map since it was subdivided and the new numbers are 1487, 1958, 5049, 5050, 5051 and 5052
  - iii. Plot 571 on the Map currently 538 on the title is for energy.
- j. The Kilifi District Surveyor’s Report recommended:-
  - i. The correct boundaries be established and correct the acreages of the titles affected by the new boundaries.
  - ii. A Government mutation be prepared to correct the amendment for plot number 578.
  - iii. A Government mutation be prepared to correct plot 538 to 571.
- k. Pursuant to the said surveyors report, the district surveyor prepared mutation forms s/no. 04506069 which mutation form was annexed herewith marked as “SN – 9”. The Land Registrar adopted the Surveyor’s report on 30<sup>th</sup> September, 2019 by writing at the bottom of the said report and urged parties to cooperate and assist in the amendments.
- l. Upon hearing the parties in the boundary dispute, the Registrar made his report on 24<sup>th</sup> August, 2020 where he determined:-
  - i. The District surveyor which will assist in correcting the Registry index Map



- ii. Portion of land which was erroneously included on their parcel to the Applicants Samson Leba Mshono and Ndoko Mshono Lewa as illustrated on the surveyor's Report.
  - m. On 3<sup>rd</sup> November, 2020 the District Land Registrar went to the suit site on parcel Kilifi/Mtwapa/5052 to put beacons but did not do so and there was no reasonable cause or compelling written reasons or explanation to the contrary because the Registrars report dated 24<sup>th</sup> August, 2020 has not been set aside.
  - n. Considering the time taken, fruitless engagement with different authorities including the presidency in seeking for help, all the notices issued to the Defendants and even the fees we duly paid the Land Registrar and the surveyor, they had been oppressed and this court should be pleased to intervene.
  - o. The Land Registrars report dated 24<sup>th</sup> August, 2020 was not a novel but enforceable in law.
  - p. The encroachment of the 3<sup>rd</sup> Defendant into several neighboring parcels of marking the boundary and fencing her parcel and she failed to involve the people with neighboring parcels of land. The portion of land which the 3<sup>rd</sup> Defendant erroneously included in her parcel of land and fenced it. The authorities including the presidency in seeking for help, all the notices issued surveyor, we have been oppressed and this court should be pleased to intervene.
  - q. It was in the interest of justice that the orders sought herein be granted in execution of the Kilifi Land Registrars report dated 24<sup>th</sup> August, 2020 on the boundary dispute of the Plaintiff beneficial parcel Kilifi/Mtwapa/505.
5. The Plaintiffs/ Applicants called PW - 1 on 23<sup>rd</sup> March, 2023 testified as follows:-

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

6. PW - 1 was sworn and testified in Swahili language. He identified himself as Samson Leba Mshono and provided Court with full particulars as founded in his national identity card. He stated that he lived at Majengo and the 1<sup>st</sup> Plaintiff. He had brought the case with his sister Ndoko Mshono Lewa on 20<sup>th</sup> January, 2021, he swore an affidavit. He relied on his witness statement sworn and dated 20<sup>th</sup> January, 2021 in support of his case. Further, he relied on the several annexures attached on the pleadings. They were 13 documents marked as Plaintiffs Exhibit 1 to 13.

**B. Cross examination of PW - 1 by M/s. Opio Advocate.**

7. PW - 1 confirmed that the suit land belonged to his father. The suit land was no. 277, but later on it was sub – divided into No. 252. He had been concerned about their land. Many people had been coming wanting to buy the suit property and in particular Mtwapa Energy Centre. He could not remember when they came to the land. He had never lived on the suit land. On it there were plantations such as Mango and coconut trees. There was a river there and a natural boundary. Mtwapa Energy Centre had a fence on it. He was not a land surveyor.
8. PW - 1 stated that he knew that Mtwapa Energy Centre – had taken their land though he knew they had denied it. With reference to the Mutation from dated 23<sup>rd</sup> August, 1993 – he may not show where his land/ portion was situated on the mutation form.



### **C. Re - examination of PW - 1 by Mr. Oluga Advocate.**

9. PW - 1 reiterated that he read slightly on the title deed showing his father and it read that L.R. No. 5052. There was a river that passed in between the land. It was in middle of the land. There was a natural boundary with trees on it.
10. The Counsel for the Plaintiffs Mr. Oluga marked their case closed on 23<sup>rd</sup> March, 2023.

### **III. The Defendants/ Respondents' Case**

11. The Defendants/Respondents' opposed the Originating summons through a 21 Paragraphed Replying Affidavit sworn by Mohammed Shuqry, the Centre Manager at Mtwapa Energy Centre on 26<sup>th</sup> October, 2021 where he averred that:-
  - a. Mtwapa Energy Centre was one of the sixteen Renewable Energy Centre in the Country under Ministry of Energy. The Centre is located in Kilifi County, about 1.2 KM from Mombasa-Malindi road West of Umoja Rubber in Majengo Kanamai.
  - b. The function of the Centre includes promotion of renewable energy technologies and development of renewable energy resources, energy efficiency and conservation in households and institution, training on construction, use and maintenance of household and institutional biogas digesters and conducting demonstration on wood fuel production and carrying out research and trials in the field of renewable energy.
  - c. The Centre occupied a total of 8.32 Ha (approximately 20.8 Acres) which was in 4 parcels with each parcel having its own title; Kilifi/Mtwapa/538 which measures 4.97HA, Kilifi/Mtwapa/996 which measures 0.51 HA, Kilifi/Mtwapa/995 which measures 0.81 HA, and Kilifi/ Mtwapa/994 which measures 2.03 HA.
  - d. The entire area was fenced as one unit by a perimeter wall in the South, a chain link wire on precast concrete posts in the West, North and perimeter wall of a neighbor to the East.
  - e. The Land was procured from one Mr. John Ndungu A. Thuo in the year 2009. Copies of the Contract Agreement of the properties were annexed and marked as "MS - 1" annexed thereto.
  - f. During the procurement of the suit property, the following procedure Was employed by the Ministry of Energy:
    - i. The Centre manager was advised to identify land for procurement, a minimum of three parcels of land were to be identified to avoid cases of single sourcing.
    - ii. Three land parcels were identified and Mr. Thuo's parcel was settled on due to its suitability by the criteria used
    - iii. A request for land valuation was written to Ministry Lands Kilifi Office.
    - iv. Survey (ground verification) of plot Nos: Kilifi/Mtwapa/994, 995, 996, 993 was done.
    - v. Consent for the purchase of land parcels Kilifi/Mtwapa/538, 994, 995 and 996 was made and approved.
    - vi. With due diligence the parcel of Land was procured and transfer of titles done from John Ndungu A. Thuo to Permanent Secretary to the Treasury (as Trustee of Ministry of Energy) P.o.box 30582, Nairobi.



- vii. In April, 2011 the construction of Offices and other infrastructure started and was completed in July, 2014. The offices were occupied in October 2014.
  - viii. The chain link fence was erected in financial year 2016/2017 along same contour of the old barbed wire fence that was done by Mr. John Ndungu A. Thuo.
  - g. John Ndungu Thuo acquired the parcels from the previous owner, one Dena Mwangomba Dena in the years 1992 - 1993 in piece meal. Copies of the Purchase Agreements were in the affidavit annexed and marked as “MS – 2”).
  - h. Land tenure challenges adversely affect the operations of the outreach programmes of the Ministry of energy and therefore the procurement procedure was done with utmost due diligence and included area confirmation which was carried out by the District Survey offices.
  - i. The 3<sup>rd</sup> Respondent erected its fence along the same contour of the old barbed wire fence that had been done by the John Ndungu Thuo and did not shift the boundary nor attempt to trespass on the applicant's parcel.
  - j. There had been no disputes regarding the suit property and/or area until 2019 when a neighbor, on the Northern border, alleged that there was encroachment on his parcel of land.
  - k. This necessitated and culminated in a series of meeting involving, the applicants herein, the District Survey officers and Land registrar, Kilifi and the 3<sup>rd</sup> Respondent in the same year.
  - l. The survey report and Land Registrar's Report that the applicant wished to enforce was a culmination of the various meeting mentioned above.
  - m. However following further verification meetings involving all the stakeholders herein and the Regional Survey Office, Coast region, there was a realization that the report dated 27<sup>th</sup> September, 2019 and relied upon by the applicants herein was erroneous.
  - n. The error referred to above was discovered prior to implementation of the Report that necessitated the maintenance of the status quo as the Ministry of Lands and Physical Planning was in the process of resurveying and consequently amending the Registry index Map to reflect the correct position and clarify the boundaries in the area. Attached in the affidavit and marked as “MS – 3” was a letter from the Land Registrar, Kilifi.
  - o. There was need for a re-survey of the area as the precise boundary in contention is at a converging point of four maps.
  - p. The Application herein was premature as there were discrepancies between the maps and the ground boundaries which were yet to be clarified.
  - q. They prayed that this Honourable Court directs that a re- survey was carried out with a keen look at the discrepancies between the map and the ground boundaries affecting all the parties herein.
12. The Defendants called DW – 1 and DW – 2 on 26<sup>th</sup> April, 2023 and further on 23<sup>rd</sup> October, 2023 respectively. They testified as follows:-

**A. Examination - In - Chief of DW - 1 by Mr. Penda Advocate.**

13. DW - 1 testified on oath in English language. He identified himself as Lee Melle Dzoro. He told the court that he was a Land Surveyor. He was employed at Kilifi Station and he covered Kilifi North,



Kaloleni and Gaze. He was aware of the dispute in court. He had sworn a witness statement dated 25<sup>th</sup> September, 2022 which he adopted as his evidence in chief. From his statement the actual dispute, the Plaintiffs had fenced part of the property. The dispute was parcel 5052; 994 and 995 – i.e they had fenced property no. 5052. The resolving of the boundary disputes – they were general boundaries – they obtained the data and features from the ground. As for the fixed boundary it was by the survey and the plans.

14. According to the witness, the Plaintiffs made the application and the survey exercise was done and a request dated 27<sup>th</sup> September, 2019 and registrar's report dated 24<sup>th</sup> August, 2020. From the list of documents dated 14<sup>th</sup> February, 2022 and filed on 13<sup>th</sup> May, 2022 i.e. 9 documents. After the land surveyor had done his report and made his findings then it was implemented by the land registrar. This did not happen as some parties did not agree to its contents. Further, he was aware that some new evidence came up – i.e. rim during the site visit which was not amended accordingly i.e. refer to the second last paragraph of the statement as Defendant exhibit 1. The surveyor report dated 4<sup>th</sup> February, 2022.
15. DW - 1 told the court that the original mutation form could not be traced before the report was done and the replacement of mutation form dated 4<sup>th</sup> April, 2016. The witnesses produced the original and replacement mutation to court. The mutation form were signed by the proprietors and the surveyors. These were signed by Dena Mwangomba and the other by Kalume Mwangomba, James Mgandi, A. Mwangomba and Julius Mwangomba. There were discrepancies which were on distances which the Defendants Exhibit No. 2 which was a copy of the original mutation dated 24<sup>th</sup> August, 1993 and Defendants Exhibit No. 3 which was a copy of the erroneous replacement mutation dated 4<sup>th</sup> April, 2016. The last document was a copy of a letter with reference KLF/AG/MLD/VOL/1 dated 2<sup>nd</sup> June, 2021 by the Land registrar, Kilifi which was Defendants Exhibit 4 in the said letter.
16. With reference to the letter dated 17<sup>th</sup> March, 2009 the witness showed discrepancies produced and marked as Defence Exhibit No. 5. The original boundary dispute resolution dated 27<sup>th</sup> September, 20199 for plot Kilifi/Mtwa [Pa/5052](#) and Energy Centre. It was used to amend the Rim which was produced as Defence Exhibit 6. There was a letter dated 8<sup>th</sup> October, 2020 entitled RIMM Amendment Kilifi/Mtwapa/539 which was produced and marked as Defence Exhibit 7. He also produced a Defendants supplementary list of document dated 27<sup>th</sup> October, 2022 which was a copy of the 1<sup>st</sup> edition Development Plan for Mtwapa Settlement Scheme which was produced as Defence Exhibit No. 8 (the larger/ original version).

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

17. DW - 1 confirmed that he did the replicant of the Mutation Form of the original could not be traced and if the RIM was not amended. It was the RIM to be used to doo the ground survey. The RIM was amended to reflect the new parcel number – depending with the subdivision done. The original No. 271 – according to the developing plan. It changed to 539 to 993, 994, 995 and 996 and this was what prompted to the replacement of the mutation form. In the instant case there was replacement of the mutation form because the map was not amended and also the original RIM could not be traced; hence the mutation was based on ground visit.
18. According to him it reflected on what was on the ground. With reference to the Sketch Map (Coloured). From the original mutation the acreage for Plot. No. 994 was 2.03HA. It appeared to have been altered with a pen. The acreage for 994 was replacement mutation form was 1.01Ha. With reference to the bundle of documents by the Attorney General was the Mutation Form dated 4<sup>th</sup> August, 1993 acreage for 994 was 1.01ha. The copy of the mutation form on the bundle - page 7



from behind had alteration the parcel numbers from parcel No. 271 to 539 and acreage alteration was done using a white out. With reference to page 44 the certificate of title deed – Kilifi/Mtwapa/ 994 – 2.03 HA issued on 29<sup>th</sup> December, 2010 but the acreage inside showed 1.01HA on the name of the Permanent Secretary to the Treasury (a trustee of the Ministry of Energy).

19. DW - 1 confirmed that somebody tried too alter the acreage of Plot No. 994 from its original size of 1.01HA to 2.03HA. With reference to the Defendants Exhibit 5, the witness stated that it was confirmed with the altered mutation form and the title deed. The Land registrar makes a finding if any one who was aggrieved would appeal within 30 days. He was not aware whether any one preferred an appeal – he had never been to the ground (see page 49 to 53). Mr. Athman used the available maps to do his report. He did not use thee replaced mutation form. It was the witness' evidence that the two mutation forms were conflicting. In such circumstances was to leave it too the land registrar to decide. Ideally one of the mutation forms should have been cancelled. None of it had been cancelled so far. One of the streams looked like a natural one.

### **C. Re - examination of DW - 1- Mr. Penda Advocate.**

20. The witness told the court that the letter dated 17<sup>th</sup> March, 2009 was authored by the District surveyor to the Land Registrar. It read after a request of the boundary; it called for the surveyor to go to the ground. The replacement mutation form meant that the survey was to the ground. The replacement of the mutation form was by same parts. As per the letter of 17<sup>th</sup> March, 2009, the names have not been changed.
21. On 23<sup>rd</sup> October, 2023, the Defendants called DW – 2. He testified thus:-

### **A. Examination – in - Chief of DW - 2 by Mr. Penda Advocate.**

22. DW - 2 was sworn and he testified in English language. He identified himself as Mohamed Shukry. He informed court that he was employed by the Ministry of Energy. He was at Mtwapa Energy Centre and his designation was Manager. His company promoted renewable energy technologies. He understood why they were in court. It was due to the dispute of the boundary. He had provided a witness stated dated 12<sup>th</sup> May, 2022 which he adopted as his evidence in chief. He was aware of the list of documents filed on 14<sup>th</sup> February, 2022 – Mtwapa Energy Centre bought the land from John Ndungu Thuo vide a sale agreement on 3<sup>rd</sup> September, 2009 initially Thuo had bought the land from Dena Mwangomba, Dena Mgandi Dena, Dena Manangu Jazungu and Dena Mohamed Dena.
23. According to the witness vide a sale agreement dated 17<sup>th</sup> April, 1993. The agreement talked of the land measuring 8 acres in total. The Ministry of Energy brought partition all measuring:-
- a. Kilifi/Mtwapa/538 – 4.92HA
  - b. Kilifi/Mtwapa/996 – 0.81HA
  - c. Kilifi/Mtwapa/996 – 0.81HA
  - d. Kilifi/Mtwapa/538 – 2.03HA i.e. 20 acres.
24. Mr. Thuo sold 4 parcels as he had gotten an extra parcel from Karisa Kalama. During the procurement of the said properties the manager was asked to secure the land. The land in dispute was parcel 994. It was in the measurement as per the title deed 2.03HA while on the ground it was 2.03HA and this Mutation Form read the same. The only discrepancy was on the green card which read 1.01 HA. Mr. Thuo had written to the land for them to correct the discrepancy. With reference too the letter dated 17<sup>th</sup> March, 2009 Defence Exhibit No. 5, the witness stated that the same sought to have the error done



by the ministry of land; the same was not done as at the time of sale and the testimony. There existed two mutation forms – the original was done on 24<sup>th</sup> August, 1993 which read 2.03 HA which showed the exact acreage.

25. In the year 2016, another mutation form was done, he believed to sub divide the land 993 which had been for Dena. Instead the land surveyor they considered in all the 3 plots which the Ministry had already bought. The new mutation was dated 12<sup>th</sup> April, 2016 and the acreage for 994 as 1.01HA – they never involved the Ministry. The entire parcel – were done into one unit. On the Eastern side of the land there was a chain link wire for the area and there was a stream and thus one was not interfered with. If one had added all the mutation forms one got 8 acres originally by the had sold to this by the Dena family. They attempted to resolve the matter out of court as they realized that the RIM had an error. They proposed for a re- survey as a solution. But the other party were not amenable to that proposal and that was why they came to court.
26. According to the witness, there were corrections on the mutations with a write out on the 993 and the title. However 994 did not have a white out which was the plot in dispute. Mtwapa Energy Centre never wrote for any of the write out to take place.

#### **B. Cross examination of DW - 2 by Mr. Oluga Advocate.**

27. DW - 2 told the court that he conducted due diligence of the Plots No. 996, 995 and 994. They had a grounds verification request vide a letter dated 17<sup>th</sup> March, 2009 (Defendants Exhibit 5). It was not from Mr. Thuo but by Mr. Wambua. It was a request by Mr. Thuo. It was not Mtwapa Energy Centre who initiated it. They conducted an official search. With reference to the report compiled by the Manager (Mtwapa Energy Centre dated 4<sup>th</sup> February, 2021 to the director Renewable Energy, Ministry of Energy. There was a search conducted by Mr. Nahashon Kibirichia Weru which was done before they bought the Plot No. 994. It revealed that the measurements were 1.01HA which was an error. The title deed dated 29<sup>th</sup> December, 2010 measuring 2.03HA on the front page and 1.01HA on part A – the property section. The discrepancies came earlier before they bought i.e. official search dated 30<sup>th</sup> July, 2009; it was not correct they committed the government to buy the property. However the discrepancy was never corrected. The standard was high to all intending to buy property but it was even higher when it came to the Government buying property.
28. According to the witness the one he had shown was the original mutation form from the original mutation form the acreage for 994 measures 1.01HA dated 4<sup>th</sup> August, 1993. From all these documents clearly there was a confusion; with reference to the list of documents – there was a mutation form of 4<sup>th</sup> August, 1993. Fromm the mutation form of 23<sup>rd</sup> August, 1993, the acreage for Plot 994 – there was some alteration by land from 1.01 to 2.03HA (as per the drawing).
29. With reference to page 64 DW - 2 told the court that the report of boundary dispute for plot Number 5052 and MTWAPA Centre – by the District Surveyor, Kilifi – Mr. Ngoka dated 27<sup>th</sup> September, 2019 to the land registrar. It was from this report that cumulated to the report by the land registrar dated 24<sup>th</sup> August, 2020 by J.B. Oketch. The Land registrar makes two determinations. From these findings there had never been any implementation nor was there any appeal. They did not appeal. Although he knew the right procedure would have been this but instead the Ministry opted to inform the Permanent Secretary who proposed that they attempt for an out of court settlement but the parties refused the offer and opted to come to court. There was proper procurement process by the managers on identifying the parcels of land to be bought by Mtwapa Energy Centre. There was a letter dated 30<sup>th</sup> June, 2009 by the Centre Manager Mr. Nahashin Kibiricha Weru to the Director Renewable Energy. They identified the parcels of land from Muthoni Gikandi, John Thuo Ndung'u and Fredrick Gikandi.



They ended up with the one from Mr. Thuo . There was a criteria and the request to look for the land came from the Permanent Secretary.

30. With reference to the letter dated 25<sup>th</sup> June, 2009 by Director, the witness stated that on acquisition of land for the Energy Centre. With reference to paragraph 2 of the said letter, DW - 2 stated that from the letter dated 24<sup>th</sup> February, 2009, the plots had been identified and they all appeared to be from Mr. Thuo. Earlier before the letter of the Permanent Secretary dated 25<sup>th</sup> June, 2009. The process for procurement had be followed. It had to be gazetted i.e. pre – tending, publishing in the local newspaper and bidder land quotation tender in open for evaluation as per the Disposal Procurement Act, to him the bidders were identified and the prices were quoted and the process concluded. With reference to the sale agreement dated 17<sup>th</sup> April, 1993 – it referred/ mentioned the land surveyor Mr. Mbui. He had never received or seen the report.

#### **C. Re - Examination of DW - 2 by Mr. Penda Advocate.**

31. DW - 2 reiterated when referred to the letter dated 17<sup>th</sup> March, 2009 that he had been shown two mutation form with 2.03HA and 1.01HA – both for year 1993. There was an alteration as requested by Mr. J.B. Wambua. There were 16 Renewable Energy Centre in the Country. From the year 1982, Mtwapa Energy Centre for the land to be acquired it had not met certain specification for research:-
- a. Land had to be flat.
  - b. Land had to be accessible.
  - c. Land had to be affordable.
  - d. Land had to be where water was available.
32. For the parcels identified for Mr. Gikandi, it was inhabited by squatters but for Mr. Thuo; it was vacant and all the four (4) parcels were adjacent too each other. He was a mechanical engineer.
33. On 23<sup>rd</sup> October, 2023 the Defendants/Respondents marked their case closed through their advocate.

#### **IV. Submissions**

34. On 22<sup>nd</sup> January, 2024, immediately after the closure of the Plaintiffs/ Applicants' and the Defendants/ Respondents case, the Honorable Court directed the parties to canvass the originating summons/ plaint through written submissions. Thereafter, on the 18<sup>th</sup> March, 2024 the Applicants having fully complied and the Honorable Court reserved a date for delivery of Judgement on notice accordingly. It is instructive to note that by the time of penning down this Judgement there was no submission by the Defendants.

#### **A. The Written Submissions by the Plaintiffs**

35. The Plaintiffs/Applicants through Law firm of Messrs. Oluga & Company Advocates filed their written submissions dated 13<sup>th</sup> March, 2024. Mr. Oluga Advocate commenced the submissions by stating that this suit was commenced by Originating Summons dated and filed on 20<sup>th</sup> January 2021. The background of the case in a nutshell was that Plaintiffs were sons of one Mshono Mwahunga who was deceased. The Plaintiffs; deceased father was the registered owner of the land known as Kilifi/ Mtwapa [Pa/5052](#) (hereinafter “the suit property”).
36. The 3<sup>rd</sup> Defendant trespassed on the suit property. The 3<sup>rd</sup> Defendant's trespass prompted the Plaintiffs to lodge formal complaint at the office of the Land Registrar, Kilifi (page 28 of Plaintiff's Bundle). The Kilifi District Surveyor visited the suit property and conducted a survey to ascertain the boundaries.



The survey was conducted by one Mr. Athman Ngoka, the District Surveyor, Kilifi who prepared a Survey Report dated 27th September 2019 (page 29 of the Plaintiff's Bundle).

37. The Learned Counsel submitted that the Survey Report by the Kilifi District Surveyor revealed that the 3<sup>rd</sup> Defendant had encroached on the Plaintiffs' property and recommended that the boundaries be corrected to re-establish the correct acreages of the subject properties. The Kilifi Surveyor prepared mutation forms in readiness to correct the boundary and acreage of the suit properties but the same was not implemented.
38. The Report of the Kilifi District Surveyor was adopted by the Kilifi Land Registrar, one Mr. J.B. Okech who delivered a ruling dated 24<sup>th</sup> August 2020 (page 49 of the Plaintiff's Bundle). There was no appeal against the ruling by the Land Registrar. In his said ruling, the Land Registrar adopted the Report of the District Surveyor and ordered the parties to sign the mutation forms prepared by the District Surveyor. Further, the Land Registrar ordered the 3<sup>rd</sup> Defendant herein to surrender the portion of land which was erroneously included on its parcel as illustrated in the Survey Report.
39. Despite not appealing the determination by the Land Registrar, the Defendants did not comply with the same. Instead, a different Land Registrar, M/s. Stella G. Kinyua, wrote a letter dated 2<sup>nd</sup> June 2021 (Defendants' Exhibit No. 9) in which she purported that the Survey Report by Athman Ngoka, the District Surveyor could not be implemented "due to the conflicting views on how to interpret the map." M/s. Stella G. Kinyua further alleged that "the map used in making the determination is in question." The Land Registrar (M/s. Stella G. Kinyua) then directed the Mombasa Regional Survey office to carry out another survey. The Mombasa Regional Surveyor did not comply with the directive of the Land Registrar. Instead, a very junior officer, the Sub-County Survey Officer, who was below the rank of the District (now county) surveyor is the one who took up the matter and wrote a letter dated 4<sup>th</sup> February 2022 (Defendant's Exhibit 4) in which a wild allegation was made that there was new evidence discovered to the effect that the mutation used by the District Surveyor (Mr. Athman Ngoka) to conduct his survey was not the right one. Mr. Athman had used a replacement mutation to prepare his report instead of the original mutation. Aggrieved by the Defendants' action and refusal to comply with the ruling of the Kilifi Land Registrar dated 24<sup>th</sup> August 2020, the Plaintiff's filed this suit.
40. On the issues for determination, the Learned Counsel relied on the following:-
  - a. Whether the determination by the Kilifi Land Registration dated 24<sup>th</sup> August 2020 was valid and should be enforced
  - b. Whether the Kilifi District Surveyor used the wrong mutation while preparing his report
41. On whether the determination by the Land Registrar dated 2<sup>th</sup> August, 2020 was valid and should be enforced, the Learned Counsel submitted that regulations 40 (1) of the Land Registrations, 2017 provided that a person may apply to the Registrar for the ascertaining of a boundary in dispute. That is exactly what the Plaintiffs herein did. They applied to the Land Registrar and the District Surveyor was sent to the ground. The District Surveyor undertook a survey in the presence of both sides. He prepared a Survey Report which was subsequently adopted by the Land Registrar in his determination dated 24<sup>th</sup> August 2020.
42. The said determination by Land Registrar was made in compliance with Regulation 40 (5) of the Land Registration (General) Regulations, 2017 which mandates the Registrar to make determination after hearing the parties. Under Regulation 40 (6) of the Land Registration (General) Regulations, 2017, a party aggrieved by the decision of Land Registrar was required to appeal against the decision within 30 days. In the instant case, none of the parties, least of all the Defendants, appealed against the Land Registrar's determination. To date, the Defendants had never appealed against the Registrar's



- determination. In light of the foregoing the Registrar's determination dated 24<sup>th</sup> August 2020 is intact and remains valid to date. There was no reason why this court should not order that the determination be complied with and enforced.
43. The Learned Counsel further asserted that the only legal and known way of challenging or setting aside the Registrar's determination was through an appeal to this court. The second Registrar, Stella G. Kinyua had no mandate to overturn the determination by the first Registrar, Mr. J.B Okech. A registrar could not sit on appeal against the decision of her fellow Registrar.
  44. On whether the Kilifi District Surveyor used the wrong mutation while preparing his report, the Learned Counsel averred that the Defendants contended that the Report by Mr. Athman Ngoka dated 24<sup>th</sup> September 2019 was erroneous (see paragraph 16 of the Replying Affidavit). In the letter by the Sub - County Surveyor dated 4<sup>th</sup> February 2022, it was alleged that Mr. Athman Ngoka had used replacement mutation instead of the original mutation. Although the said letter by the Sub-County Surveyor alleges that there were "a lot of discrepancies in both areas," the details of the alleged discrepancies were not disclosed. There were no discrepancies in the mutation form and the map used by Mr. Athman Ngoka to conduct survey and prepare his report dated 27<sup>th</sup> September 2019. Instead, it is the documents which the Defendants relied that have discrepancies.
  45. The documents used by the Defendants were doctored and altered. The copy of the original mutation dated 24<sup>th</sup> August 1993 (whose original was shown to court) is clearly altered on its face. The Title No. indicated in the said mutation form was altered by white out and a new parcel No. 539 written on it. The acreage of the four (4) plots contained in the mutation form were altered. For instance, Plot No. 994 which belonged to the 3<sup>rd</sup> Defendant and was the one that immediately borders the Plaintiffs' property had its acreage altered from 1.03 Ha to 2.03 Ha. The acreage of the 3<sup>rd</sup> Defendant's plot was crucial in the determination of this case because it was the said plot that borders the Plaintiffs' plot and it was the one which had encroached on part of the Plaintiffs' property.
  46. According to the Learned Counsel contended that while the Defendants rely on the original mutation form to support their claim that the report by the District Surveyor (Mr. Athman) was erroneous, the truth of the matter (based on the evidence filed in court by the Defendants themselves as well as the testimony of the Defendant's own witnesses during cross-examination), was that Mr. Athman's report was the accurate one. In fact, it was the Defendants who allegedly stole part of the Plaintiffs' land by altering and increasing the acreage of Plot No. 994 from 1.03 Ha to 2.03 Ha.
  47. The purported original mutation form dated 4<sup>th</sup> August 1993 produced and relied upon by the Defendants as the rightful mutation form shows that the acreage of Plot No. 994 is 2.03 Ha. However, as they had pointed out, the acreage of Plot No. 994 was clearly altered from 1.01 Ha to 2.03 Ha so as to support and justify the encroachment by the 3<sup>rd</sup> Defendant on the Plaintiff's property. They confidently said so because there is another huge bundle of bound documents contained in a letter dated 4<sup>th</sup> February 2021 by Mr. Shuqry the 3<sup>rd</sup> Defendant's manager who testified as DW - 2. The said bundle contains the original mutation form before it was doctored/alterred. The unadulterated original mutation form clearly shows the acreage of Plot No. 994 as 1.10 Ha and there is no alteration on it whatsoever. It is the genuine original mutation form. Yet the Defendants chose to ignore it and instead filed a different mutation form in their Bundle of Documents which shows very glaring alterations on its face. When the unaltered/intact original mutation form was shown to the Defendants' witnesses during cross-examination, they both admitted that the mutation form relied upon by the Defendants was altered.
  48. There was more evidence to show that the acreage of Plot No. 994 was altered from 1.01 Ha to 2.03 Ha so as to increase its size on the ground and justify the encroachment on the Plaintiffs' plot. The Title



Deed for Plot No. 994 which the Defendant deliberately omitted from their Bundle of Documents but was included in the bound bundle attached to Mr. Shuqry's letter dated 4<sup>th</sup> February 2021 shows on the first page that the acreage of Plot No.994 is 2.03 Ha. However, the acreage shown on the inner part of the title deed (page 2) is 1.01 Ha. Since most people only notice the acreage indicated on the first page of a title deed, the Defendants ensured that the acreage indicated on the face of the Title Deed is the false/altered one of 2.03 Ha. Unfortunately for the Defendants and fortunately for the Plaintiffs, the Defendants forgot to alter the acreage on the inner part (page 2) of the Title Deed which still shows the true/genuine acreage of 1.01 Ha. The Defendants did not cover their trail well. The acreage shown on the second page of the Title Deed is the genuine one as it conforms with the acreage indicated in the original mutation form before it was altered by hand.

49. In fact, before purchasing Plot No. 994, the 3<sup>rd</sup> Defendant (through one Mr. Nahashon Kibirithia Weru) lodged an application dated 27<sup>th</sup> July 2009 for official search. That led to the issuance of a certificate of official search dated 30<sup>th</sup> July 2009. Both the application for search and the certificate of official search are contained in the Big Bound Bundle contained in Mr. Shuqry's letter dated 4<sup>th</sup> February 2021. The certificate of official search shows the acreage of Plot No. 994 as 1.01 Ha. That conformed with the acreage shown in the genuine original mutation form.
50. The Learned Counsel averred that before the 3<sup>rd</sup> Defendant purchased Plot No. 994, the 3<sup>rd</sup> Defendant was aware that the acreage of the said plot was 1.01 Ha and that was the size of land that the 3<sup>rd</sup> Defendant bargained for and bought. It is therefore fraudulent that the 3<sup>rd</sup> Defendant holds a Title Deed showing the acreage of Plot No. 994 as 2.03 Ha which is far beyond what was revealed in the official search. The reasons why they had dwelt on the alteration of Plot No. 994 from 1.01 Ha to 2.03 Ha is to show the court that the Defendants encroached increased the acreage of their plot so as justify their encroachment on the Plaintiffs' property. The alteration of the official records so as to increase the acreage of Plot No. 994 on paper was clearly intended to make the documentation agree with the bloated size of the plot on the ground so that no one can detect that the size of the plot was actually increased on the ground beyond what is on paper. That was why the original mutation form which the Defendants filed in their List of Documents is altered to 2.03 Ha yet the genuine Original Mutation Form in the Big Bundle contained in Mr. Shuqry's letter, which the Defendants forget to alter, showed the true acreage of Plot No. 994 as originally created in 1993 of 1.01 Ha.
51. The Learned Counsel submitted that the Defendants' conduct as revealed in this case is worrying. Why a Government entity and public officials could proceed on as far as altering documents and presenting the same in court is something that should not be taken lightly. Why did the Defendants present to court two sets of the same documents? Why did a Land Registrar disown a determination made by her fellow Land Registrar and purport to overturn the same when no appeal against the same has been lodged as provided for in law? Why should a Sub-County Surveyor purport to countermand a report done by his senior in the District/County Land Registry?
52. The Defendants' conduct in this case was appalling. Looking at the evidence in totality, the following facts could not be disputed:
  - i. The 3<sup>rd</sup> Defendant conducted an official search which revealed that the acreage of Plot No. 994 is 1.01 Ha. That was what the 3<sup>rd</sup> Defendant bargained for and purchased.
  - ii. After buying Plot No. 994, the Defendants altered the boundaries on the ground and increased the size of their property from 1.01 Ha to 2.03 Ha. In the process, the 3<sup>rd</sup> Defendant took part of the Plaintiffs' property and encroached/trespassed on the same.



- iii. When the Plaintiffs lodged an official complaint with the Land Registrar, the District Surveyor visited the properties and conducted a survey which revealed that the 3<sup>rd</sup> Defendant had encroached on the Plaintiffs' property.
  - iv. In order to defeat the survey which had revealed encroachment by the 3<sup>rd</sup> Defendant, the Defendants altered and (or caused to be altered the original mutation form by changing the acreage of Plot No. 994 from 1.01 Ha to 2.03 Ha to conform with the encroachment on the ground.
  - v. Armed with the altered mutation form, the 3<sup>rd</sup> Defendant approached a different Land Registrar, M/s. Stella G. Kinyua and not Mr. J.B.Oketch and sought to have another survey done on the basis of the altered mutation form.
  - vi. Despite the request by M/s. Stella G. Kinyua that another survey be done by the Mombasa Regional Surveyor, the 3<sup>rd</sup> Defendant disingenuously went to a far much junior surveyor, the Sub-County Surveyor to do the resurvey. The Sub-County Surveyor was lower in rank than the District/County Surveyor Mr. Athman Ngoka who had undertaken the first survey.
  - vii. Interestingly, the junior Sub-County Surveyor overruled his boss the District Surveyor and relied on the altered mutation form to do so.
53. The above conduct could not be allowed to stand. This court must stamp its authority by admonishing the Defendants. They urged the Honorable Court to protect the Plaintiffs from the Defendants' misdeed by allowing this case. Since the determination by the Land Registrar dated 24<sup>th</sup> August 2020 was not challenged on appeal and is valid to date, they urged the Honorable court to order implementation of the determination by allowing this case and granting the orders sought by the Plaintiffs.
54. In conclusion, the Learned Counsel urged the Court to award costs the Plaintiff to be paid by the Defendants jointly and severally as costs follow the event.

## V. Analysis and Determination

55. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the relevant provisions of *the Constitution* of Kenya, 2010 and the law.
56. For the Honourable Court to arrive at an informed, fair and reasonable decision, there has been three (3) salient issues for its determination. These are thus:-
- a. Whether the Plaintiffs are the bona fide owners of the suit property?
  - b. Whether the mutations forms are valid
  - c. Who meets costs of the suit

### Issue no. A: Whether the Plaintiffs are the bona fide owners of the suit property

57. Under this sub – heading, the Honourable Court has deciphered that the main issue for its determination is on the legal ownership of the suit property and the whether therein were illegalities over it by the Defendants. To begin with, the Plaintiffs through their witness and in their submissions have averred that they the legal registered owners of the suit property.



58. It is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the Evidence Act Cap 80 laws of Kenya which provides as follows:-

“107Burden of Proof(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.”

59. Fundamentally, I reiterate that the main issue here is on the ownership of the suit properties. This has been the dominant one throughout this proceedings. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that they are the absolute and legal owner of the property. In so doing, the effected and efficacy of registration is based on the provision of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012, the owner attains indefeasible rights, title and interests on the land vested in him/her by the law. The provision of Section 24 of the Land Registration Act provides:-

“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;”

60. While the provision of Section 25 states as follows:-

“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—

- i. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

61. However, the registration of such title is not absolute as the same maybe impeached under certain circumstances as provided by the provision of Section 26(1) of the Land Registration Act which states as follows:-

“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—

- i. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- ii. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

62. In the instant suit as already stated above, the evidence produced by the Plaintiffs is that of the title produced a Certificate of Title dated 22<sup>nd</sup> December, 2015 of Kilifi/MtwaPa/5052 for Mshono



- Mwahunga. According to the testimony of PW - 1, the suit property belonged to his Father who had died on 26<sup>th</sup> July, 2017. The suit land was no. 277, but later on. It was sub – divided into No. 252. He had been concerned about their land. Many people had been coming wanting to buy the suit property and in particular Mtwapa Energy Centre. He could not remember when they came to the land. He had never lived on the suit land. On it there were plantations such as Mango and coconut trees. There was a river there and a natural boundary. Mtwapa Energy Centre had a fence on it. He was not a land surveyor.
63. According to the Plaintiffs, upon the death of their father they applied for grant of letters of administration at Mombasa Chief Magistrates Court succession cause no 135 of 2019 and on 9<sup>th</sup> March, 2020 we were issued with a grant which copy is annexed herewith marked BN 3. Earlier in the same Chief Magistrates Court succession cause 135 of 2019, the court issued them with a grant of letters of Administration ad litem for the purposes of filing, defending and prosecuting case on behalf of the Estate of Mshono Mwahunga which copy of grant was annexed herewith marked SN4. The Plaintiffs were the Administrators of the Estate of Mshono Mwahunga deceased.
64. The Defendants on the other hand never produced any title neither have they shown any authorization to be on the suit properties known KILIFI/MTWA [PA/5052](#), Kilifi County. It has been said time and time again that a Title Deed is an indefeasible evidence of the ownership of land. It is also not in dispute that the ownership of the land is uncontroverted. There had not been any challenge by the Defendants on the Plaintiff's title by reason of fraud or otherwise as envisaged under the provision of Section 26 (1) (a) and (b) of the [Land Registration Act](#), No. 3 of 2012.
65. I have looked up at the title deed and I am satisfied that the suit property indeed belongs to the Plaintiffs who are legal administrators to the registered proprietor of the suit property. The registration and proprietorship of the deceased is therefore not in dispute and thus, the Plaintiffs remains the rightful, absolute and indefeasible owner of the property with all the rights and privileges accruing therefrom as the legal administrators of the deceased's estate; including the right to possession, to a quiet and peaceful occupation and right to use of their property.
66. Therefore, based on the overwhelming evidence by the Plaintiff and which was never controverted by the Defendants only that the Defendants disputed the two mutation forms. According to the Defendants the Centre occupied a total of 8.32 Ha (20.8 Acres) which was in 4 parcels with each parcel having its own title; Kilifi/Mtwapa/538 which measures 4.97HA, Kilifi/Mtwapa/996 which measures 0.51 HA, Kilifi/Mtwapa/995 which measures 0.81 HA, and Kilifi/ Mtwapa/994 which measures 2.03 HA.
67. Defence Witness 1 told the court that he was a land surveyor. He was employed at Kilifi Station and he covered Kilifi North, Kaloleni and Gaze. He was aware of the dispute in court. He had sworn a witness statement dated 25<sup>th</sup> September, 2022 which he adopted as his evidence in chief. From his statement the actual dispute, the Plaintiffs had fenced part of the property. The dispute was parcel 5052; 994 and 995 – i.e they had fenced property no. 5052. The resolving of the boundary disputes – they were general boundaries – they obtained the data and features from the ground. As for the fixed boundary it was by the survey and the plans.
68. According to the witness, the Plaintiffs made the application and the survey exercise was done and a request dated 27<sup>th</sup> September, 2019 and registrar's report dated 24<sup>th</sup> August, 2020. From the list of documents dated 14<sup>th</sup> February, 2022 and filed on 13<sup>th</sup> May, 2022 i.e. 9 documents. After the land surveyor had done his report and made his findings then it was implemented by the land registrar. This did not happen as some parties did not agree to its contents. Further, he was aware that some new evidence came up – i.e. rim during the site visit which was not amended accordingly i.e. refer to the



second last paragraph of the statement as Defendant exhibit 1. The surveyor report dated 4<sup>th</sup> February, 2022.

69. DW 1 told the court that the original mutation form could not be traced before the report was done and the replacement of mutation form dated 4<sup>th</sup> April, 2016. The witnesses produced the original and replacement mutation to court. The mutation form were signed by the proprietors and the surveyors. These were signed by Dena Mwangomba and the other by Kalume Mwangomba, James Mgandi, A. Mwangomba and Julius Mwangomba. There were discrepancies which were on distances which the Defendants Exhibit No. 2 which was a copy of the original mutation dated 24<sup>th</sup> August, 1993 and Defendants Exhibit No. 3 which was a copy of the erroneous replacement mutation dated 4<sup>th</sup> April, 2016. The last document was a copy of a letter with reference KLF/AG/MLD/VOL/1 dated 2<sup>nd</sup> June, 2021 by the Land registrar, Kilifi which was Defendants Exhibit 4 in the said letter.
70. Based on the surrounding facts, inferences and the evidence adduced herein, I am fully persuaded and hence hold that the Plaintiffs are the absolute, legal and rightful bona fide proprietors of the suit properties with all the indefeasible rights, title and interest on the suit land vested in them by law. Indeed, they have been issued with the title deeds and the boundary features clearly outlined by the Land Registrar and is thus entitled to protection of the law.

**Issue No. B: Whether the mutations forms are valid.**

71. It is trite law that the issue of boundary disputes are pre – dominant jurisdiction of the Land Registrar. The provision of Section 18 of the *Land Registration Act* stipulates that except where it is noted in the register that the boundaries of a parcel of land have been fixed, the cadastral mark and any field plan should be deemed to indicate the approximate boundaries and the approximate situation of the parcel. Section 18(3) gives the Registrar the discretion to receive evidence as to the boundaries and situation where necessary in proceedings concerning the parcel.
72. The provision of Section 19 of the Act deals with fixed boundaries and gives the Registrar the leeway to indicate on a field plan approved by the office or authority responsible for the survey of the land or otherwise to define in the register the precise position of the boundaries of a parcel or its parts or where an interested person applies to the Registrar, the Registrar is to give notice to the owners and occupiers of the adjoining lands of the intention to ascertain and fix boundaries. That section requires the Registrar to afford all persons appearing in the register an opportunity to be heard before causing to be defined by survey the precise position of the boundaries in question. Thereafter, the Registrar is to file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed following which the plan should be deemed to accurately define the boundaries of the land.
73. According to the Plaintiffs the Kilifi/Land Registrar and the District Surveyor came on the side after inviting the 3<sup>rd</sup> Defendant and all the people whose parcels of land share their boundary with the Applicants beneficial land. The Kilifi District surveyor’ report made on 27<sup>th</sup> September, 2019 attached with its map, revealed:-
- a. The 3<sup>rd</sup> Defendant, the Kilifi Energy Centre encroached on plot nos.578,5050,5051 and 5052
  - b. Plot No. 578 formerly 277 should not appear on the map since it was subdivided and the new numbers are 1487, 1958, 5049, 5050,5051 and 5052
  - c. Plot 571 on the Map currently 538 on the title is for energy
74. The Kilifi District Surveyor’s Report recommended the correct boundaries be established and correct the acreages of the titles affected by the new boundaries, a Government mutation be prepared to correct



the amendment for plot number 578 and a Government mutation be prepared to correct plot 538 to 571. k) Pursuant to the said surveyors report, the district surveyor prepared mutation forms s/no. 04506069 which mutation form was annexed herewith marked SN 9. The Land Registrar adopted the Surveyor's report on 30<sup>th</sup> September, 2019 by writing at the bottom of the said report and urged parties to cooperate and assist in the amendments.

75. According to the Defendants, there had been no disputes regarding the suit property and/or area until 2019 when a neighbor, on the Northern border, alleged that there was encroachment on his parcel of land. However following further verification meetings involving all the stakeholders herein and the Regional Survey Office, Coast region, there was a realization that the report dated 27<sup>th</sup> September, 2019 and relied upon by the applicants herein was erroneous. The error referred to above was discovered prior to implementation of the Report that necessitated the maintenance of the status quo as the Ministry of Lands and Physical Planning was in the process of resurveying and consequently amending the Registry index Map to reflect the correct position and clarify the boundaries in the area.
76. That is the mandate which the Land Registrar was discharging in the boundary dispute that is the subject of these proceedings. Going by the report which the Registrar prepared and produced in this case, it is clear that the precise position of the boundaries of the parcels in question have not been defined by a survey and there is no indication that the Registrar filed a plan containing the necessary particulars or that she made a note on the register that the boundaries in dispute had been fixed.
77. I discern that the report prepared by the Land Registrar in this court's view does not comply with the provision of Section 19 of the *Land Registration Act*. Therefore, it follows that the Mutation Forms prepared as result are invalid – null and void ab initio. .

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

78. The issue of Costs is at the discretion of the Court. Costs mean that the award a party is awarded at the conclusion of a 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”

79. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

80. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on



Civil Procedure, 2<sup>nd</sup> Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.

81. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

82. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the Defendants herein and therefore shall have the costs of the suit.

## VI. Conclusion and Disposition

83. 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 Plaintiffs have established their case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That judgment be and is hereby entered in favour of the Plaintiffs as per the Plaint/ Originating summons dated 20<sup>th</sup> January, 2021.
- b. That an order do and is hereby made compelling the District Surveyor Kilifi to prepare Mutation Forms for parcel Kilifi/Mtwapa/5052 be signed by the Plaintiffs and the 3<sup>rd</sup> Defendant within 7 days but if the Mtwapa Energy Centre fails to sign, their part shall be signed by the Court Deputy Registrar Mombasa in execution of the Kilifi Land, Registrar’s Report dated 24/8/2020 for correcting the Registry Index Map and the Kilifi District Surveyor’s report dated 27/9/2019.
- c. That an order do and hereby made compelling the Kilifi Land Registrar and Surveyor to go and put beacons on parcel Kilifi/Mtwapa/5052 within 14 days and 3<sup>rd</sup> Defendant the Mtwapa Energy Centre surrender the portion of parcel Kilifi/Mtwapa/5052 which was erroneously included on their parcel as illustrated on the Kilifi District Surveyor’s Report dated 27/9/2019, in execution of the Kilifi Land Registrar’s Report dated 24<sup>th</sup> August, 2020 which has not been appealed against, varied and or set aside.
- d. That the costs of the suit shall be in favour of the Plaintiffs.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

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**HON. JUSTICE L. L. NAIKUNI,**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA**

**Judgement delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the Plaintiffs.
- c. M/s. Opio Advocate for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants.

