



**Dhanji & another v County Government of Mombasa & 3 others (Civil Appeal
16 of 2020) [2024] KEELC 6001 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL 16 OF 2020
LL NAIKUNI, J
SEPTEMBER 18, 2024**

BETWEEN

MAHENDRA VELJI DHANJI 1ST APPELLANT

NANDA MAHENDRA VELJI DHANJI 2ND APPELLANT

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**EMANUEL MALENYA (SUED IN HIS CAPACITY AS THE
ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE RODICA
MALENYA) 2ND RESPONDENT**

HASSAN MOHAMED SHEIKH 3RD RESPONDENT

PETER KINYUA T/A KINYUA & CO AUCTIONEERS 4TH RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by Mahendra Velji Dhanji and Nanda Mahendra Velji Dhanji – the Appellants herein. The appeal was filed through a Memorandum of Appeal dated 13th July, 2020 and amended on 18th November, 2021 and the Record of Appeal dated 3rd May, 2023 filed on 14th July, 2020 against County Government of Mombasa, Emmanuel Malenya, Hassan Mohamed Sheikh and Peter Kinyua t/a Kinyua & Co. Auctioneers, the Respondents herein. In a nutshell, the appeal revolves around the interpretation by the lower court of its own orders herein as seen here below.
2. The Appeal emanated from the Judgment of the Chief Magistrate’s Court based at Mombasa of Honourable. Francis Kyambia, Senior Principal Manager (As he was then) in Chief Magistrate’s Court



(Mombasa) Civil Suit Number 421 of 2014 delivered on the 12th June 2020. Based on the Affidavit of Service on record the Record of Appeal was properly served upon all the Respondents.

3. On 29th May, 2023 having confirmed that the Record of Appeal dated had been filed and served, directions were granted by the Honourable Court under the provision of Section 79B & G of the Civil Procedure Act 21 and Order 42 Rules 16, 17 and 18 of Civil Procedure Rules. The appeal was admitted and it was slated for highlighting of written submissions on 13th July, 2023 which the parties discharged effectively.

II. The Appellant's case

4. From the filed Memorandum of Appeal, the Appellant averred as follows: -
 - a. The Learned Magistrate erred in fact and in law in finding and holding that the sale of the suit property by the Plaintiff in its claim for rates was null and void.
 - b. The Learned Magistrate erred in fact and in law in finding and holding that the transfer of the suit property to the 1st Interested Party and subsequently to the 3rd Interested Party was illegal, null and void.
 - c. The Learned Magistrate erred in law in holding that the 1st Interested Party and the 3rd Interested Party did not acquire good title to the suit property.
 - d. The Learned Magistrate erred in in fact and in law in finding and holding that the 1st Interested Party and the 3rd Interested Party were not bona fide purchasers for value without notice of any irregularities.
 - e. The Learned Magistrate erred in law in directing the 3rd Interested Party to demolish the-development they erected on the suit property at their own cost within 30 days of delivery of the judgment.
 - f. The Learned Magistrate erred in fact and in law in directing the Registrar of Titles Mombasa Lands Registry to cancel the transfer and title to the 1st Interested Party and the 3rd Interested Party and have the Defendant registered as the owner of the suit property.
 - g. The Learned Magistrate erred in fact and in law in awarding the Defendant general damages for wrongful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000.00 against the 3rd Interested Party.
 - h. The Learned Magistrate erred in awarding costs and interest on the Defendant's counterclaim or at all.
5. The Appellants proposed to ask the Court for the following orders:-
 - a. This appeal be allowed;
 - b. The Defendant's Counter - Claim against the 3rd Interested Party be dismissed with costs to the 3rd Interested Party;
 - c. An appropriate order for costs be made in respect of this appeal; and
 - d. Any other or further order that this Honourable Court may deem fit to grant



6. From the filed Pleadings in the lower court, the case was filed on 17th March, 2014 by the 1st Respondent as against the Robica Malenya as the ratable owner of Plot No. IMN/2496 Mombasa for a sum of Kenya Shillings One Million Six Ninety Eight Thousand Nine Eighty Nine Hundred (Kshs. 1,698,989/-) being monies owing by the Robica Malenya to the 1st Respondent in respect to rates levied on the aforesaid property under the provisions of the Rating Act up to 31st May, 2013, together with interest owing on the unpaid rates calculated at the rate 1% per centum in accordance with the provision of Section 16 (3) of the said Act from the due date for each of the years concerned until the 31st day of March, 2013.
7. Subsequently, the 2nd Respondent herein filed a Counter - Claim where he contended that the purported sale and transfer of the suit property by the 4th Respondent to the 3rd Respondent and subsequently to the Appellants was fraudulent, illegal and unlawful. The elements of fraud were particularized in paragraph 15 of the Statement of Defence and Counter - Claim. In the Counter - Claim the 2nd Respondent prayed for:-
 - a. A declaration that the sale of the suit property by the Plaintiff to the 1st Interested Party was illegal, null and void.
 - b. Annulment of the transfer of the suit property by the 1st Interested Party to the 3rd interested party.
 - c. Reinstatement and restitution of the Defendant to the suit property.
 - d. In the alternative, but without prejudicial to the foregoing. Payment to the Defendant a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) being the value of the suit property.
 - e. The 2nd interested party to compensate the plaintiff for demolition of the structures on the suit property.
 - f. The 2nd interested party to compensate the defendant for forceful eviction.
 - g. Costs.
 - h. Interest
8. In its determination, the Trial Court opined itself as follows:-
 36. Upon consideration of the material placed before the court, the evidence adduced by the Defendants and the statements of the interested parties, I consider the following to be the issues for determination: -
 - a. Whether the sale of the suit property by the Plaintiff in purported execution of a decree herein was valid and lawful.
 - b. Whether the 1st Interested Party and subsequently the 3rd interested parties acquired good title to the suit property.
 - c. Whether the Defendant is entitled to the reliefs sought on the Counter - Claim
 37. On the first issue, it is unfortunate that the Plaintiff choose not to participate in the proceedings. The reason may well be implied that the advocates who represented the Plaintiff acted without instructions.



38. According to letter dated 26th October, 2016 addressed to O.M. Robinson & Co. Advocates from the Plaintiffs Director of legal Services, the Plaintiff raised concern on how the said firm of advocates purport to represent the plaintiff in this matter without formal instructions.
39. These are serious allegation being made against an advocate. Unfortunately the firm of O.M. Robinson & CO. Advocates did not come out and rebut these allegations instead they withdrew from acting for the Plaintiff when these allegations were made.
40. In view of the a foregoing, it may be assumed that the filing of the suit against the defendant for claim for rates was not sanctioned by the Plaintiff and therefore the consequential process leading to the sale of the Defendants property by public auction by the 2nd Interested Party was manned with unlawfulness and therefore illegal.
41. Be that as it may, the Defendant testified that no demand for the rates had been made by the Plaintiff as required by the law and in any case she had not refused paying the rates. The Plaintiff did not come out and rebut the Defendant's evidence that no demand was send to her.
42. The law governing enforcement of payment of rates is the *rating Act* Section 15 (1) of the Act provides that a Notice of rates payable shall be published at least 30 days. Section 17 of the Act provides for written demand by rating authority to the defaulter to pay the rate within 14 days after service failure of which the rating authority may file proceedings in subordinate court for recovery by filing Plaint setting out the particulars and every summons issued thereto shall be served upon the defaulter to appear and answer the claim. Service may be by post, by fixing it on or to some conspicuous part of the land or by, any mode authorized by the Rules made under the *Civil Procedure Act*.
43. In this case unfortunately the Plaintiffs did not participate in the proceeding to demonstrated that it complied with the requirements of the law before purporting to claim the rates and subsequently causing the Defendants property to be auctioned in purported enforcement of payment for rates.
44. The Defendant testified that her rates were compensated at a sum of Kenya Shillings One Hundred and Fourty Nine Thousand Eight Thirteen Hundred (Kshs. 149, 813/-) which she prepared a bankers cheque for payment butt was asked to want for demand and publication. This buttress the finding that the Plaintiff did not follow the law before claiming the rates and eventual filing of the us it which resulted to the sale of the Defendant's property.
45. In the circumstances and in answwer to issue (a) I find that the purported sale of the defendant's property was invalid and unlawful.
46. The next issue for determination is whether the 1st Interested party obtained good title which he could pass to the 3rd Interested parties. Both the 1st and 3rd interested parties claimed that they were innocent purchaser for value without notice of any irregularities.
47. On the issue of bona fide purchaser for value without notice of any irregularities. The purchaser relying on the doctrine must demonstrate the requirements/elements set out in the case of KATENDE - Versus - Haridar & Company Limited (2008)2 E.A. 173 where it was held that the purchaser must prove-
 - a. He holds a certificate of title.
 - b. He purchased the property in good faith



- c. He had no knowledge of fraud
 - d. He purchased for valuable consideration
 - e. The vendors had apparent valid title
 - f. He purchased without notice of fraud
 - g. He was not party to any fraud.
48. In the instant case, the suit property was purportedly sold in execution of a decree. The 1st Interested Party alleges that he purchased the property in an auction conducted by the 2nd Interested Party. The 2nd Interested Party purported to have been instructed by the Plaintiff to execute the decree the Plaintiff purportedly obtained against the Defendant. However, the Plaintiff has denied having instructed any advocates to claim the rates. Therefore the entire process leading to the auction of the Defendants property was fraudulently.
49. Similarly when the 1st interested purported to transfer the property to his name a suit was filed in the High Court division of Environment Land Court. Prohibitory orders were issued. The 1st interested party was also privy to the defendants claim when he moved the court for vesting orders in the same breath, the 3rd interested parties were also aware of the proceedings pending before the court over the suit property.
50. From the a foregoing the 1st and 3rd interested parties though they claim to be innocent purchasers without notice of any irregularities the circumstances under which they acquired title to the suit property do not conform to the elements set out on the KATENDE case.
51. It is my finding that the 1st Interested Party did not obtain good title which he could pass to the 3rd Interested Parties. Equally the 3rd interested parties did not acquire good title to the suit property.
52. The next issue is what reliefs should the court should grant. As I have indicated in this Judgment the Plaintiff did not participate and as such its case must therefore fail and it is dismissed. This brings me to the defendants relief sought in the counter claim.
53. I have already held that the entire transaction from the filing of the suit to the execution was marred by illegalities and as such the purported sale of the suit premises was null and void and I so declare the same. Consequently the purported transfer of the suit property to the 1st interested party and subsequently to the 3rd Interested Parties is equally null and void. In the circumstances the transfer of the suit property to the 1st Interested Parties and subsequently to the 3rd Interested Parties is hereby cancelled and the registrar of the titles Mombasa Land Registry is ordered to cancel the title to the 3rd Interested Parties and have the defendants registered as the owner of the suit premises.
54. The 3rd Interested Parties did not give viva voce evidence but according to the documents filed, they purported to have developed the suit property. If at all they have developed the suit property, I order that they do demolish such developments at their costs within 30 days from the date of this Judgment.
55. The Plaintiff testified that she had developed the suit property where she had put up rental house which were demolished. It is not clear who conducted the demolition neither did the defendant give evidence on the value of the property. However, this is a court of law and court of equity. Equity demands that no loss without remedy in the circumstances I award the



Defendants damages for forceful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) to be paid by the Plaintiff and the interested parties.

9. In the long run, the trial Court entered a Judgment for the 2nd Reespondent as follows:-
 - a. A declaration that the sale of the suit property by the Plaintiff in purported claim for rates is null and void.
 - b. A declaration that the transfer of the suit property to the 1st interested and subsequently to the 3rd Interested Parties is illegal, null and void.
 - c. An order directing the registrar of titles Mombasa land registry to forthwith cancel the transfer and title to the 1st interested party and subsequently to the 3rd interested parties and have the defendant Registered as the owner of the suit property.
 - d. General damages for forceful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) against the plaintiff and interested parties herein.
 - e. Costs of the suit.
 - f. Interested on (d) and (e) at court rates from the date of this Judgment.
10. Being aggrieved by this decision, the Appellant lodged the instant appeal herein.

III. Submissions

11. On 6th May, 2024, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that on 11th June, 2024, all the Counsels were granted ample opportunity file their written submissions. Upon compliance, both the Learned Counsels - M/s. Nzisa and Mr. Kaka for the Appellant and the Respondents respectively were accorded an opportunity to orally highlight their submission. They effectively and efficiently executed their duties with great diligence, devotion and dedication thereof. The Honourable Court will remain sincerely grateful to them., pursuant to that the Honourable Court reserved to deliver the Judgment on 18th September, 2024 by Micro Soft Teams Virtual Means.

A. The Appellant orally highlighted submissions

12. On 11th June, 2024 at 10.45 am Ms. Nzisa Advocate holding brief for the M/s Kuria for the 1st Respondent heighted her submissions. She stated that the appeal emanated from the proceedings from the Magistrate's Court, whereby the County Government of Mombasa was the Plaintiff in the CMCC – No. 421 of 2014 in which they sued Rodica Malenya the 2nd Respondent in the appeal. In that claim the Plaintiff was claiming rate arrears of a sum Kenya Shillings One Forty Nine Thousand Eight Hundred and Thirteen (Kshs. 149,813/-) as at 31st May, 2013 and a sum of Kenya Shillings One Million Six Ninety Eight Thousand Nine Eighty Nine Hundred (Kshs. 1,698,989/-) interest of rent of Plot No. IMN/249 and cost of the suit. While this was going on there was another civil suit ELC. 253 of 2014 in which the Plaintiff was Rodica Malenya suing the County Government of Mombasa as the 1st Defendant and 2 others. That matter concluded by a court order the Plaintiff having withdrawn the case was awarded costs. See Page 55 of the Record of Appeal.
13. Back to the Lower Court the Defendant – Rodica Malenya filed a Defence and a Counter Claim where they alleged the sale and transfer of the suit to the 3rd Party was illegal and unlawful. Se Page No. 24 to 27 of the Record of Appeal. In that matter, Mr. HASSAN MOHAMED SHEIKH and PETER



KINYUA t/a Kinyua & Company Auctioneers filed to be joined as Interested Party in the matter and the allocation was allowed. The 3rd Respondent filed a Defence opposing the Counter Claim and stating that they bought the portion of the land CR 1828/24 Original 127 at a Public Auction on 23rd May, 2015. the 3rd and 4th Respondent joined the suit and they explained the Chronological order up to the auction took place. The documents are in Page 33 of the Record of Appeal. They produced the documents for the diligence that led to the property being auctioned and that the 3rd Respondent obtaining the property and thereafter sold it to the 1st and 2nd Appellant jointly.

14. The Learned Counsel argued that on the part on the Appellants they relied heavily on the documents that had been filed and the title that is how they bought the property. The suit proceeded and Judgment was delivered. Court found the sale of the suit property by the Plaintiff (County Government) in its Claim for rates was null and void and subsequently the sale to the 3rd Respondent was null and void. It directed the 3rd Respondent to demolish the suit property at their own costs and the Defendant (Rodica Malenya) were awarded general damages of a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00) and costs.
15. The Learned Counsel relied on the following issues that arose in the lower court they include:-
 - a. The role of the Interested Party.
 - b. The Advocate who filed the suit, had not received instruction from the County Government. This was never projected, from that the Appellant, holds that erred in depending on that allegation.
 - c. The Defendants never proved irregular and fraud by the Appellant.
 - d. Magistrate erred in law on directing the demolition of the structure and awarding a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-).
16. On the details on the issue on issue one, the Learned Counsel submitted orally that there were no summons, during the trial the 3rd Interested Party was reduced to a mere spectator (“Social Company Limited –Versus - John Maina & Others”) they asked the Court to consider the position of the Interested party to a fair hearing and defending themselves. On issue b, the Learned Counsel argued that the Appellant found that there ought to have been more evidence. There were many pleadings made by the said Advocate yet nothing was ever raised.
17. On issue C, the Learned Counsel submitted that the Magistrate erred in his findings as there was no irregularity or fraud against the 3rd Respondent that were ever proved by the people who made the allegations. Fraud is a very serious allegation. The allegation is higher than preponderance of probability. The 3rd Defendant, relied on the orders of withdrawal of the suit, e.t.c. was not a good reason to have suspected that there were irregularities before they obtained that title – see the cross examination of the Defendant and the findings and the Court will see there were no irregularities as alleged or fraud.
18. On issue D, according to the Learned Counsel, if at all there were any irregularity to award the orders of demolition of the development and awarding of damages of a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000.00) was an error. The Appellant held that the awarding of damages was high and ought to have been awarded. They entirely relied on the submissions – Article 23 of [the Constitution](#) of Kenya and be allowed as prayed.



B. The Written Submissions of the 1st Respondent

19. The 1st Respondent through the County Attorney filed their written submissions dated 3rd May 2024. M/s. Waswa Advocate commenced the submissions by stating that the Appellant herein filed an Amended Memorandum of Appeal dated 18th November 2021 being aggrieved by the Judgement and Decree of the Chief Magistrate's Court at Mombasa (Hon. Francis Kyambia, SPM) made on 12th June 2020 in Mombasa Chief Magistrate's Court Civil Suit Number 421 of 2014. The Appellants relied on 8 Grounds in their Memorandum of Appeal.
20. On the background of the lower Court "CMCC NO.421 OF 2014 County Government of Mombasa – Versus - Rodica Malenya and Hassan Mohammed Sheikh and 2 Others (Interested Parties)" Learned Counsel further submitted that the case was filed in Court on 17th March 2014 seeking to recover rate arrears from the Defendant (2nd Respondent) herein. However in the course of the trial it was discovered that the Advocate Mr. Malombo, purporting to represent the plaintiff (the 1st Respondent) herein did not have instructions and that the plaintiff was not interested in pursuing the matter.
21. The Learned Counsel submitted that on 16th November, 2018 according to the proceedings Mr. Tajbhai Counsel appeared in court and informed the court that the matter was not pursued by the Plaintiff. The Plaintiff (1st Respondent) herein had not instructed the firm of O.M Malombo & Co. Advocates. On 22nd January, 2019 according to the proceedings the court directed Mr. Malombo to file an Application to withdraw from Acting for the plaintiff based on the allegations made. On 28th January, 2019 according to the proceedings the Application was allowed.
22. The Learned Counsel in response to the appeal submitted that the 1st Respondent supported the whole of the appeal herein. In Response to the Appellant's Ground 1 to 8 of the Amended Memorandum of Appeal filing of the suit against the Defendant for claim for rates was not sanctioned by the Plaintiff (1st Respondent) and therefore the consequential process leading to the sale of the Defendant's property by public auction was manned with unlawfulness and therefore illegal.
23. According to the Learned Counsel there what the court ought to have done was to order the Plaintiffs Advocate to withdraw the whole suit as he had no instructions from the Plaintiff. The court however by ordering the Advocate to cease from acting instead validated the issue of having being issued with instructions while the court was aware that there were no instructions.
24. From the judgement by the lower court the court noted the following:-

Paragraph 37 "The first issue, it is unfortunate that the Plaintiff chooses not to participate in the proceedings. The reason may well be implied that the advocates who represented the Plaintiff acted without instructions."

Paragraph 38 "According to a letter dated 26th October 2016 addressed to O.M. Robinson & Co. Advocates from the plaintiffs Director of legal services, the Plaintiff raised concern on how the said firm of Advocates purport to represent the Plaintiff in this matter without instructions."

Paragraph 39 "These are serious allegations being made against an advocate. Unfortunately the firm of O. M Robinson & Co. Advocates did not come out and rebut these allegations instead they withdrew from acting for the plaintiff when these allegations were made."

Paragraph 40 "In view of the foregoing it may be assumed that the filing of the suit against the Defendant for claim of rates was not sanctioned by the Plaintiff and therefore the



consequential process leading to the sale of the Defendants property by public auction by the interested party was manned with unlawfulness and therefore illegal.”

Paragraph 41 “Be that as it may the Defendant testified that no demand for the rates had been made by the Plaintiff as required by the law and in any case she had not refused paying the rates. The Plaintiff did not come out and rebut the Defendant’s evidence that no demand was send to her.”

25. The Learned Counsel submitted that this was crystal clear that the Learned Magistrate erred in fact and law as far as all the ground of Appeal are concerned because the Plaintiff had not issued instructions to the Advocate and such the Advocate ought to have withdrawn the suit and not cease from acting. When one looked at the proceedings on 22nd January, 2019 the court directed Mr. Malombo to file an Application to withdraw from Acting for the plaintiff based on the allegations made by fellow Counsel in that he had no instructions to act for the Plaintiff.

26. From the proceedings of the lower court:-

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“Court having listened to the parties herein I do direct Mr. Malombo to file an application to withdraw from acting for the Plaintiff. This matter shall be mentioned on 28.1.2019

Hon. F Kyambia

S.P.M

27. The Learned Counsel submitted that the application was allowed on 28th January, 2019 as per the proceedings Further to paragraph 41 above no demand for rates was ever served by the Plaintiff and therefore there was nothing for the Plaintiff to rebut having not pursued the said matter from the onset. When the matter was concluded the Lower Court entered Judgement for the Defendant as follows: -

- a. A declaration that the sale of the suit of the suit property by the Plaintiff in purported claim for rates is null and void.
- b. A declaration that the transfer of the suit property to the 1st and subsequently to the 3rd Interested Parties is illegal, null and void.
- c. An order directing the registrar of titles Mombasa land registry to forthwith cancel the transfer and title to the 1st Interested Party and subsequently to the 3rd Interested Parties and have the Defendant registered as the owner of the suit property.
- d. General damages for forceful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) against the Plaintiff and interested party.

28. The Learned Counsel submitted that the 1st Respondent supported the Appeal in grounds 7 and 8 and responds as follows:-

Having established that the suit was illegal, then the Learned Magistrate erred in fact and in law in awarding the Defendant general damages for wrongful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000) against the 3rd Interested Party and also the Learned Magistrate erred in awarding costs and interests on the Defendant's counterclaim or at all. No award should have been award to the 3rd interested party and any other party to the suit.



29. To buttress on this point, the Learned Counsel relied on the case of “Macfoy – Versus – United Africa Co. Ltd (1961) 3 ALL E.R. 1162” where Lord Denning stated as follows at page 1172 concerning an act which is a nullity:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

30. In conclusion, the Learned Counsel submitted that having found that the Act by Counsel was illegal then it follows that upon realization of the illegality by the Learned Magistrate the suit would have been declared illegal, null and void. Counsel would have been ordered to withdraw the suit for purporting to represent the plaintiff without instructions which amounts to professional misconduct. We finally pray that the Appeal be allowed with costs to the 1st Respondent.

C. The Written Submissions by the 2nd Respondent

31. The 2nd Respondent through the firm of Messrs. Kaka Kamau & Company Advocates filed their written submissions dated 21st September, 2023. Mr. Kaka Advocate commenced the submissions by stating that the Appellants herein have filed an Amended Memorandum of Appeal dated 18th November 2021 wherein they are aggrieved by the judgment and decree of the Chief Magistrate’s Court at Mombasa (Hon Francis Kyambia, SPM) made on 12th June 2020 in Mombasa Chief Magistrates Court’s Civil Suit Number 421 of 2014.

32. The Appellants had relied on 8 grounds namely:-

- a. The Learned Magistrate erred in fact and in law in finding and holding that the sale of the suit property by the Plaintiff in its claim for rates was null and void.
- b. The Learned Magistrate erred in fact and in law in finding and holding that the transfer of the suit property to the 1st Interested Party and subsequently to the 3rd Interested Party was illegal, null and void.
- c. The Learned Magistrate erred in law in holding that the 1st Interested Party and the 3rd Interested Party did not acquire good title to the suit property.
- d. The Learned Magistrate erred in fact and in law in finding and holding that the 1st Interested Party were not bona fide purchasers for value without notice of any irregularities.
- e. The Learned Magistrate erred in law in directing the 3rd Interested Party to demolish the development they erected on the suit property at their own cost within 30 days of delivery of the Judgment.
- f. The Learned Magistrate erred in fact and in law in directing the Registrar of Titles Mombasa Lands Registry to cancel the transfer and title to the 1st Interested Party and the 3rd Interested Party and have the Defendant registered as the owner of the suit property.
- g. The Learned Magistrate erred in fact and in law in awarding the Defendant general damages for wrongful eviction in the sum of Kenya Shillings Five Million Kshs. 5,000,000.00 against the 3rd Interested Party.



- h. The Learned Magistrate erred in awarding costs and interest on the Defendant's counterclaim or at all
33. According to the Learned Counsel the brief facts of the case were that the same was filed in Court on 17th March 2014 seeking to recover rates from the Respondent herein. The Summons to Enter Appearance to the Respondent herein were not served and the Court then entered judgment in default of defence. Thereafter Auctioneers were instructed to sell the suit property to recover the rates arrears. The 2nd Respondent herein came to learn of it later and successfully moved the Court to set a side default judgment and sought and obtained inhibition orders in the case Misc. Civil Application No.-115 of 2014 that were indeed registered at lands office Mombasa.
34. The Learned Counsel submitted that while the case was pending for determination the 3rd Respondent in the subordinate herein in an attempt to steal a match sold and transferred the suit premises to the Appellants herein. It was intrusive to note that the inhabitation orders that were already in place were lifted without a Court order to pave way for the transfer of the suit premises to the Appellants herein. It was indeed curious that after the Appellants allegedly acquired the property they sought to be enjoined in the suit. The Appellants herein despite being enjoined in the proceedings in the subordinate Court did not testify in Court neither did they call any witness. The subordinate Court rendered its judgment in the presence of the Appellants Advocates.
35. In response in opposition of the appeal, the Learned Counsel submitted that the 2nd Respondent eas opposed to the whole appeal. On grounds numbers 1, 2, 3 and 4 of the Amended Memorandum of Appeal the 2nd Respondent has this to say: -
- a. The Learned Magistrate did not err in fact and in law in finding and holding that the sale of the suit property by the Plaintiff in its clam was null and void.
 - b. From the onset it was crystal clear that the filing of the suit against the Defendant for claim for rates was NOT sanctioned by the Plaintiff and therefore the consequential process leading to the sale of the Defendant's property by public auction was tainted with illegalities and therefore null and void.
 - c. The Appellants claim to fame is that they were purchasers for value without Notice.
 - d. In the case of *Katende – Versus - Haridar & Company Limited* [2008] 2 E.A 173 the Court of Appeal in Uganda held that:

“.....for a purchaser to successfully rely on the bona fide doctrine..... he must prove that;

 - i. He holds a certificate of title
 - ii. He purchased the property in good faith
 - iii. He had no knowledge of the fraud
 - iv. He purchased for valuable consideration
 - v. The vendors had apparent valid title
 - vi. He purchased without notice of any fraud
 - vii. He was not party to any fraud



- e. In the instant case, the suit property was purportedly sold in execution of a decree. The plaintiff in the subordinate Court denied having instructed any advocates to claim the rates thus rendering the whole process a nullity. In the absence of any instructions, then the whole suit fails ab-initio as it lacks jurisdiction.
- f. It is further instructive to note that the 1st Interested Party in the subordinate Court was privy to the defendant's claim when he moved the High Court division of Environment Land Court for vesting orders and in the same breath, the 3rd Interested thereto was also aware of the proceedings pending before the Court over the suit property.
- g. It is on the above basis that the Subordinate Court rightly and correctly found that the 1st Interested Party therein did not obtain a good title which he would pass to the 3rd Interested Parties (the appellants). Equally the 3rd Interested Parties did not acquire good title to the suit property.
- h. The Court of Appeal in “Munyu Maina – Versus - *Hiram Gathiba Maina, Civil Appeal No. 239 of 2009* stated as thus;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrance including all interests which would not be noted in the register.”

Further in the case of “Daudi Kiptugen – Versus - Commissioner of Lands & 4 others [2015] eKLR” the Court held that;

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease of or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof claim to be the rightful proprietor of the land indicated therein.”

- i. In “Margaret Wairimu Warima – Versus - Phylis Wanjiru Thairu & 2 Others [2017] eKLR the Court stated as follows on the doctrine of lis pendens:

“Apart from the Court orders, which we find were operative at all times material to the suit there is a common law doctrine of lis pendens which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of Bellamy Vs. Sabine [1857] I DE J 566 as follows:-

“It is a doctrine common to the Courts both of law and equity and rests as I apprehend, upon this jurisdiction that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the Judgment or decree and would be driven to commence his proceedings de novo, subject again to defeat by the same cause of proceedings.”



- j. In *Mawji – Versus - International University & Another* [1976] eKLR 185, the Court stated that:

“The doctrine of *lis pendens* under Section 52 TPA is a substantive law of general application. A part from being in the statute, it is a doctrine equally recognized by common law. It is based on experience of the Court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the Court and in the general interest of public policy and good effective administration of justice”

- k. In “*Kawaljeet Singh Rekhi – Versus - Peter Wainaina & 2 Others* [2016] eKLR” the Court stated that:

Mulla and Gour in their treatise on the Indian Transfer of Property Act explained the doctrine further that

“... Every man is presumed to be attentive to what passes in the Courts of justice or sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendent lite*, for a valuable consideration and without any express or implied notice in part of fact affects the purchaser in the same manner as if he had such notice and he will accordingly be bound by the Judgment or decree on the suit.”

The doctrine therefor bars dealings with the landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if under taken in those circumstances will really amount to nothing and this is the case here.

- l. In the instant case the Appellant acquired the suit property while this suit was pending. In the absence of a valid title, there was nothing that the 1st Interested Party could convey to the 3rd interested parties in the subordinate Court.

- m. In *Macfoy – Versus - United Africa Co. Ltd* [1961]3 ALL E.R 1169, Lord Denning stated as follows at page 1172 concerning an Act which is a nullity;

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

- n. At Paragraphs 31, 37, 38, 39 & 40 of the Subordinate’s impugned judgment by the Appellants the Learned Magistrate noted as thus;

31. “On inquiry from the Plaintiff’s legal department she was informed that the Plaintiff had not instructed any advocate to demand rates on its behalf.

She provided letter dated 26th October, 2016 addressed to O.M. Robinson & Company Advocates from the Plaintiff’s legal services department where the plaintiff’s lamented how the Advocates proceeded in the matter without formal instructions.”



37. “On the first issue, it is unfortunate that the Plaintiff choose not to participate in the proceedings. The reason may well be implied that the advocates who represented the Plaintiff acted without instructions.”
38. “According to letter dated 26th October, 2016 addressed to O.M. Robinson & Co. Advocates form the Plaintiff’s Director of legal services, the Plaintiff raised concern on how the said firm of advocates purport to represent the Plaintiff in this matter without formal instructions.”
39. “These are serious allegations being made against an Advocate. Unfortunately the firm of O.M. Robinson & Co. Advocates did not come out and rebut these allegations instead they withdrew from acting for the Plaintiff when allegations were made.”
40. “In view of the a foregoing, it may be assumed that the filing of the suit against the defendant for claim for rates was not sanctioned by the plaintiff and therefore the consequential process leading to the sale of the Defendants property by public auction by the 2nd Interested Party was manned with unlawfulness and therefore illegal.”
36. The Learned Counsel referred the Court to the case by the Supreme Court of Kenya in “Dina Management Limited – Versus - County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)” at paragraph 94 ruled;
- “To establish whether the Appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment as this is the bone of contention in this matter.”
37. At paragraph 108 the Supreme Court affirmed the decision in the case of “Funzi Development Limited & others – Versus - County Council of Kwale, Mombasa Civil Appeal No. 252 of 2005 [2014] eKLR” Court of Appeal:-
- “..... a registered proprietor acquires an absolute and indefeasible title and only if the allocation was legal, proper and regular. A Court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”
38. The Supreme Court in the above authority event went further and declared as follows at paragraph 111;
- “Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40 (6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”
39. The Learned Counsel concluded that the long and short of their submission was that the Appeal herein had no merit and pray the same to be dismissed with costs.



D. The 2nd Respondent's orally Highlighted Submissions

40. Mr. Kaka Advocate for the 2nd Respondent on 11th June, 2024 submitted orally that they opposed the submissions and appeal entirely. They fully associated themselves to the Judgment of the CMCC (Mombasa) Page 158 of the Record of Appeal. The 2nd Respondent only got to know of the case after the Judgment had been entered. She dashed to High Court, Appl. 114/2015. She obtained inhibition orders. While the case was pending the 3rd Defendant (Haseb) attempted to steal the match against the Rodica Malenya. It was after the Appellant had obtained the property they applied to join in the Sub-Ordinate Court. Page 161 of the Record of Appeal.
41. With reference to page 166 paragraph 33, the Learned Counsel argued that they were no reduced as mere spectators, they relied on their statements. The filing of the suit was never sanctioned by the Plaintiff. Referred to Page 167 Paragraph 38, 39 and 40 (Refer). The Appellant claimed that they were innocent purchasers for value. Indeed, the court had looked at the grounds of the case of "Katende – Versus- Hanvinder & Co". Paragraph 47 Page 169.
42. He argued that they had to be read together how did they know of this proceedings. The least they would have done was to have filed a Counter Claim but they did not. They were indolent. They only had dangled the title where the root of the title had been challenged. He had relied on the authorities of "Maina David Kiptugonjo Margaret"). The doctrine of Lis Pendens where the parties proceeds to sell the property when they know it has issues; he relied on "Mawij – Versus - USIU case" by Justice Madan e.t.c.
43. With reference to paragraphs 31, 37, 38, 39 and 40 the Learned Counsel submitted that it was a summary of what the Sub-Ordinate – he referred to the "Dina Management case" from the Supreme Court. He wished to address the issue of costs – Court used its discretion. It was their humble submission that the Appeal be dismissed with costs.

E. Re – joinder by the 1st Respondent

44. M/s Nzisa Advocate made a rejoinder mainly on the doctrine of Les Pendens. She made reference to page 151 of the Bundle – on the cross examination issuance of a cheque dated 28th July, 2014 and the List of Documents is not well related, it shows there were arrears. He made reference to the fact that there was no instruction with reference to page 167 paragraph 38 which was a mere letter which was never produced by the maker. It was trite law, the essence of Verifying Affidavit, this was a serious allegation for the court to be guided by a weight of a letter. This was an affidavit by an Advocate of the County of Mombasa. The letter never denied this assertion. They had relied to the authority by Justice Maraga in ENKORIKA CASE, on the Verifying Affidavit hence a mere letter cannot persuade or out way the role of the Plaintiff and Verifying Affidavit. The Appellant ought to have filed a Counter - Claim, they were Interested Party and hence they played a role of spectators.

IV. Analysis and Determination

45. The Honourable Court has had a chance to critically assess all the pleadings filed in this Appeal being the Record of Appeal and its contents, the Memorandum of Appeal by the Appellants, the written and oral submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
46. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has



condensed the subject matter into the following three issues (3) salient issues for its determination. These are: -

- a. Whether the filed appeal by the Appellants being aggrieved by the Judgment of the Chief Magistrate's Court at Mombasa [Hon. Francis Kyambia, SPM) made on 12th day of June, 2020 in Mombasa Chief Magistrate's Court Civil Suit No. 421 of 2014 has any merit.
- b. Whether the parties herein were entitled to the reliefs sought.
- c. Who will bear the costs of the Appeal?

Issue No. a). Whether the file appeal by the Appellants being aggrieved by the Judgment of the Chief Magistrate's Court at Mombasa [Hon. Francis Kyambia, SPM) made on 12th day of June, 2020 in Mombasa Chief Magistrate's Court Civil Suit No. 421 of 2014 has any merit]

47. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honourable Court in a preamble form the court makes two assertions. Firstly, on the re-evaluation of the evidence from trial court and secondly the brief facts of this case. This is a first appeal. In the case of "Kenya Ports Authority – Versus - Kuston (Kenya Limited (2009) 2 EA 212" this Court stated as follows regarding the duty of first appellate court: -

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

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

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

49. The various powers of the Court on appeal, the provision of Section 78 of the Civil Procedure Act, Cap. 21 are provided as follows:

“78. Powers of appellate court

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - (a) To determine a case finally;
 - (b) To remand a case;
 - (c) To frame issues and refer them for trial;
 - (d) To take additional evidence or to require the evidence to be taken;
 - (e) To order a new trial.



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

50. The only issue for determination in the appeal is whether this Honourable Court can interfere with the Judgment of the lower court by find the claim by the Appellants. Thus, it is imperative to extrapolate on the brief facts of this case. Briefly, as per the Plaint dated 17th March, 2014, the 1st Respondent’s claim against the 2nd Respondent as the ratable owner of Plot No. Plot No. IMN/2496 Mombasa a sum of Kenya Shillings One Million Six Hundred and Ninety Eight Thousand Nine Eight Nine Hundred (Kshs. 1,698,989/-) being monies owing by the 2nd Respondent’s to the 1st Respondent in respect to rates levied on the aforesaid property under the provisions of the Rating Act up to 31st May, 2013, together with interest owing on the unpaid rates calculated at the rate 18 per centum in accordance with the provision of Section 16 (3) of the said Act from the due date for each of the years concerned until the 31st day of March, 2013 full particulars whereof were also per the rates statement ending 8th April, 2013 annexedhereto to the verifying affidavit. Also, the Plaintiff claimed further interest on the unpaid rates at the rate of 18 per centum under the provisions of the said Act until payment in full by the Defendant's and a further sum of Kenya Shillings Five Hundred (Kshs. 500/-) for official search at the Land Registry. The value of the subject matter in this suit was Kenya Shillings Two Fifteen Thousand (Kshs. 215,000/-). The 1st Respondent prayed for Judgment to be entered against the 2nd Respondent for: -
- a. Kshs. 149,813/- as at 31st May 2013 being rates arrears as particularized above
 - b. Kshs. 1,698,989/- in respect of interest on arrears of rates up to and including 31st May 2013 as at the rate of 1% per menses on the unpaid rates from the date of filling claim until payment in full by 5th Defendant.
 - c. Costs of and incidental to this suit.
51. In her defence and Counter - Claim, the 2nd Respondent denied being male as per the Plaint, denied the contents of paragraph 3 of the Paint and more specifically denies owing to the Plaintiff an amount of a sum of Kenya Shillings One Million Six Hundred and Ninety Eight Thousand Nine Eight Nine Hundred (Kshs.1,698,989/-) as alleged. In further answer to paragraph 3 of the Plaint, the Defendant admits being the owner of Plot No. 1MN/2496 but denied owing to the Plaintiff an amount of a sum of Kenya Shillings One Million Six Hundred and Ninety Eight Thousand Nine Eight Nine Hundred (Kshs. 1,698,989/-) as alleged or at all. According to the 2nd Respondent the value of the suit property is far more than the stated amount.
52. The 2nd Respondent averred in the Counter - Claim that at all material times, the 2nd Respondent was the proprietor of Plot No. IMAN/2496 (CR 63200) previously (CR 1828/24) situate at the Upmarket Nyali Estate of Mombasa. In July 2014, she came across a letter by the 1st Respondent demanded for Kenya Shillings One Million Eight Seventy Two Thousand Six Eight Nine Hundred Sixty Five Cents (Kshs.1,872,689.65) in rates and a sum of Kenya Shillings Two Thirty Thousand (Kshs. 230,000.00/=) in charges the same payable in 45 days of demand. The suit premises was located at Nyali area of Mombasa and its value was well over a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). According to her she was not served with the summons in this case as stipulated or at all. She was not served with the demand for rates by the County Government, the 2nd Respondent’s Advocates and neither had the 1st Respondent advertised in the local daily Newspaper the payment of rates. The 2nd Respondent at all material times was ready and willing to pay any rates due on the suit premises. The



purported sale and transfer of the suit by the 3rd Respondent to the 4th Respondent was fraudulently illegal and unlawful. The 2nd Respondent sought for the dismissal of the 1st Respondent's case with costs and Judgment to be entered for:-

- a. A declaration that the sale of the suit premises by the Plaintiff to the 1st Interested Party was illegal, null and void.
- b. Annulment of the transfer of the suit premises by the Plaintiff to the 1st interested party.
- c. Annulment and cancellation of the transfer of the suit premises by the 1st Interested Party to the 3rd Interested Party.
- d. Reinstatement and restitution of the Defendant to the suit premises
- e. In the alternative but without prejudice to the foregoing payment to the Defendant a sum of Kshs. 20,000,000/- being the value of the suit property
- f. The 2nd Interested Party to compensate the Plaintiff for demolition of the structures on the suit premises.
- g. The 2nd Interested Party to compensate the Defendant for forceful eviction
- h. Costs
- i. Interest.

53. In all fairness, having noted down the pleadings in the trial court I will now proceed to examine the grounds of the appeal one by one. The first ground of appeal was that the Learned Magistrate erred in fact and in law in finding and holding that the sale of the suit property by the Plaintiff in its claim for rates was null and void. The first ground is in relation to law governing enforcement of payment of rates by a County Government. In the judgment delivered by the Honourable Trial Court, the Court opined that the Plaintiff (1st Respondent) did not participate in the proceedings unfortunately that it complied with the requirements of the law before purporting to claim the rates and subsequently causing the 2nd Respondent's property to be auctioned in purported enforcement of payment for rates.
54. The 2nd Respondent contended that they were served with a notice of the alleged accrued rates before the purported sale. The provision of Section 15 of the *Rating Act* ("the Act") provides that every rate levied by the rating authority under the Act shall become payable on a date fixed by the rating authority and requires the rating authority to publish at least 30 days' notice of the amount payable as rates. Under Section 16 of the Act, when the rating authority has given the notice contemplated by Section 15, of the day on which the rate levied is payable, it shall be the duty of every person liable to pay the amount of such rate at the offices of the rating authority or to any person authorised by the rating authority to collect such rent failing which proceedings may be taken as provided in that Act.
55. Section 17 (1) of the Act empowers the rating authority to cause a written demand to be made to a person who fails to pay the rates due from him and interest where they fail to pay at the time fixed for payment within 14 days after service of the notice while Section 17(2) empowers the rating authority to take proceedings in a subordinate court of the first class to secure the payment of such rate and interest if a person who has had such demand served upon him makes default. The modes of service of summons issued in proceedings under that section are set out in Section 17 (4). These include post, or by affixing the summons on some conspicuous part of the land, or by any mode of service authorised by the Civil Procedure Rules. The Longman Dictionary of Contemporary English defines 'conspicuous' as very easy to notice.



56. Section 26 (2) of the Act provides that any notice, demand or other documents required to be sent or served for purposes of that Act may be served either by delivery to the person, or by leaving it at the usual last known place of abode or business of that person, or sent by ordinary or registered post, or by delivering it to some person on the premises to which it relates or if there is no person on the premises, by fixing it on some conspicuous part of the rateable property. The proviso to Section 26 states that having attempted the aforementioned methods of service, if the rating authority has reason to believe that such notice has not been received by the addressee it may advertise the general purport of such notice or demand in the Kenya gazette and in one or more newspapers circulating in the municipality. Thereafter such notice demand or other documents shall be deemed to have been received by that person. The advertisement may refer to one or more notices, demands and many rateable owners.
57. The Court notes that the 1st Respondent did not attach any evidence of the service of the notice contemplated by Section 15 of the *Rating Act*. This is what would precede the liability of a rate payer under Section 16 before the rating authority can commence the proceedings contemplated by Section 17(2) and (3). Section 17 (2) states that if any person who has had a demand served upon him defaults, the rating authority may take proceedings in a subordinate court. The 1st Respondent and the Appellants did not show that such demand was served upon the 2nd Respondent.
58. This Court notes that just advertising the sale on the dailies without fixing the process on a conspicuous part of the suit property was unprocedural. If the 1st Respondent did not effect personal service then the place on which the process was fixed should have been conspicuous.
59. The decree annexed to the record of appeal showed that the decretal sum amount was a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) for forceful eviction. The Memorandum of sale dated 23rd June, 2014 drawn by M/s Kinyua & Co. Advocates confirmed that the 3rd Respondent was declared as the purchase for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-). I have noted that there is no return of service filed in accordance with the provision of Order 5 Rule 15 of the Civil Procedure Rules, 2010 showing that the 2nd Respondent was properly served. Ideally, therefore, it makes this Court strongly feel inclined to agree with the Learned Magistrate that proper service not having been effected on the 2nd Respondent, a good title did not pass to the Appellants following the auction conducted as a result of the decree issued in the proceedings for the recovery of rates from the 1st Respondent.
60. The 1st Respondent stated in their submissions that they supported the entire appeal herein arguing that the trial suit was marred by irregularities being that they had not issued instructions to the Advocate and such the Advocate ought to have withdrawn the suit and not cease from acting. When you look at the proceedings on 22nd January, 2019 the court directed Mr. Malombo to file an Application to withdraw from Acting for the Plaintiff based on the allegations made by fellow Counsel in that he had no instructions to act for the them. The Court shall not fault the decree of the trial court on the issue of holding that the auction by the 1st Respondent was un-procedural. For this very reasons, therefore, the 1st, 2nd, 3rd, 4th, 5th and 6th grounds the appeal outrightly fails and this Court upholds the orders by the Honourable Trial Court.
61. On the 7th ground of appeal to the effect that the Learned Magistrate erred in fact and in law in awarding the Defendant general damages for wrongful eviction in the sum of Kenya Shillings Five Million (Kshs. 5,000,000.00/-) against the 3rd Interested Party, this Honourable Court will examine the doctrine of forceful eviction. The provision of Section 38 of the *Land Act*, No. 6 of 2012 provides as follows on disposition of an interest in land:
38. (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 to by a witness who was present when the contract was signed by such party.
- (2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.
62. Based on the foregoing legal prepositions, I strong find it rather difficult to see the success of this appeal. In other words, the appeal fails to succeed to pass the basic threshold of law.

Issue No. b). Whether the parties herein were entitled to the reliefs sought.

63. The above notwithstanding, under this Sub – heading the Honourable Court wishes to further extrapolate whether the parties herein, the Appellant, the Respondents and the Interested Parties herein were entitled to the reliefs sought. Essentially, while on the one hand the Appellants sought that the Court for the following orders:-
- a. This appeal be allowed;
 - b. The Defendant's Counter - Claim against the 3rd Interested Party be dismissed with costs to the 3rd Interested Party;
 - c. An appropriate order for costs be made in respect of this appeal; and
- On the other hand, from the Statement of Defence and Counter - Claim the 2nd Respondent prayed for:-
- i. A declaration that the sale of the suit property by the Plaintiff to the 1st Interested Party was illegal, null and void.
 - ii. Annulment of the transfer of the suit property by the 1st Interested Party to the 3rd interested party.
 - iii. Reinstatement and restitution of the Defendant to the suit property.
 - iv. In the alternative, but without prejudicial to the foregoing. Payment to the Defendant a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) being the value of the suit property.
 - v. The 2nd Interested party to compensate the Plaintiff for demolition of the structures on the suit property.
 - vi. The 2nd interested party to compensate the Defendant for forceful eviction.
 - vii. Costs.
64. To respond to the reliefs sought though fully responded to above, I am further compelled to seek for some definitions. The provision of Section 2 of the Land Law [Act, No. 6 of 2012](#) holds that disposition is defined as follows:

“disposition” means any sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the disclaimer or the creation of an easement, a



usufructuary right, or other servitude or any other interest in a land or a lease and any other act by the owner of land or under a lease where the owner's rights over that land or lease are affected or an agreement to undertake any of the dispositions;

In the case of "Teresia Irungu – Versus - 2 others [2013] eKLR", the Court held that: -

“since the proprietors of the suit premises did not obtain a court order for possession, the Plaintiff's eviction from the suit premises was illegal.”

The Court of Appeal sitting in Nairobi in the case of "Moi Education Centre Co. Limited – Versus - William Musembi & 16 others [2017] eKLR" opined that: -

“.....in Constitutional Petition *No. 264 of 2013* as consolidated with Constitutional Petition *No. 274 of 2013* is hereby set aside and substituted with a declaration in favour of the evictees that the demolition of their houses and their forced eviction without a court order is a violation of their right to inherent human dignity and security of the person.”

65. *The Constitution* of Kenya, 2010 establishes a non derogable bill of rights, and establishes the National Land Commission to manage public land on behalf of national and county governments. *The Constitution* does not however have an article dealing with eviction. It therefore must be construed together with other international principles which have been allowed under Article 2(6) and include international law dealing with human rights which protect evictees or those about to be evicted.
66. Treaties and conventions ratified in Kenya form part of Kenyan law and are therefore binding to Kenya and can be interpreted as such by Kenya Courts. The Courts have recognised the UN Covenant on Economic, Social and Cultural Rights (CESCR); UNGA, The Right to Adequate Housing which require the state to refrain from forced evictions. However, where there is unlawful occupation, forceful eviction must be carried out in a humane manner. The procedures to be followed during forced evictions include:
- a) an opportunity for genuine consultation with those affected;
 - b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
 - c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
 - d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
 - e) all persons carrying out the eviction to be properly identified;
 - f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
 - g) provision of legal remedies; and
 - h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts



67. Other international treaties which Courts have relied on include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons. From the foregoing it is quite evident that the Statutory Procedure on evictions was not followed and that the 2nd Respondent was not given sufficient notice. The Court shall therefore not vary the award issued by the Trial Court and the ground on the general damages for forceful eviction is hereby dismissed.
68. By and large, while the Appellant is not at all entitled to the reliefs sought, the 2nd Respondent and the Interested Party deserve to be granted the prayers sought. The upshot of the foregoing, therefore, I discern that the appeal must fail. In simple terms, the Judgment of the Chief Magistrate's Court at Mombasa Hon. Francis Kyambia, Senior Principal Manager (As he was then) in Mombasa Chief Magistrate's Court Civil Suit Number 421 of 2014 dated the 12th June 2020 is herein hereby upheld as the Appellants have failed to make out a clear case to vary the same.

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

69. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. According to the Black Law Dictionary defines cost to means:-
- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
70. 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) of the *Civil Procedure Act* 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.”
71. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
72. 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*, 2nd 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.



73. 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 the case of “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.”

74. In the instant case, I find that the Appellants having failed to establish his claim on the appeal the 2nd, 3rd and 4th Respondents have the costs of the appeal. The 1st Respondent shall bear its own costs.

V. Conclusion and Disposition

75. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellants lacks merit and is hereby dismissed. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof: -

- a. That the appeal filed through a Memorandum of Appeal dated 18th November, 2021 and the Record of Appeal dated 3rd May, 2023 herein be and is hereby found to lack merit hence it is dismissed in its entirety with costs.
- b. That the Honourable Court reserves the right to uphold Judgment of the trial court delivered by Hon. Mr. F. Kyambia, Senior Principal Magistrate in Mombasa Chief Magistrate’s Court Civil Suit Number 421 of 2014 on the 12th June 2020.
- c. That the costs of the appeal to be awarded to the 2nd, 3rd and 4th Respondents to be borne by the Appellant herein. The 1st Respondent shall bear its own costs.

It is so ordered accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH 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. M/s. Nzisa Advocate for the Appellant.
- c. M/s. Kuria Advocate for the 1st Respondent.
- d. Mr. Kaka Advocate for the 2nd Respondent.

