



**Loise Wambui & others Company Limited v Chumo & another (Environment & Land Case E009 of 2023) [2024] KEELC 13334 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE E009 OF 2023  
MN MWANYALE, J  
NOVEMBER 20, 2024**

**BETWEEN**

**LOISE WAMBUI & OTHERS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**KIPKETER CHUMO ..... 1<sup>ST</sup> DEFENDANT**

**MILCA CHERUTO PINAT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff, Loise Wambui and others Company Limited vide its plaint dated 7<sup>th</sup> August 2023 sued Kipketer Chumo and Milca Cheruto Pinat seeking;
  - a. Vacant possession of title No. Nandi/Ndalat/633.
  - b. Mesne profits for non-use of land
  - c. Costs of and incidental to this suit
  - d. Any other award or relief of this Honourable Court deems fit to grant and just to prevent miscarriage of justice to the Plaintiff.
2. Ms. Elizabeth Jepkirong Chumo spouse of the 1<sup>st</sup> Defendant filed an application dated 9/11/2023 seeking joinder as an interested party in the matter. That application was disposed off by a Ruling dated 18/01/2024 where it was dismissed but the Court noted that the intended interested party could be called by the 1<sup>st</sup> Defendant as his witness in the matter.
3. Pretrial was conducted and matter confirmed for hearing and mid-stream trial after the testimony of the first Plaintiff witness, an application dated 23/5/2024 was filed by the Plaintiff. In which Ms. Koeh for the 1<sup>st</sup> Defendant sought time to respond to the applications. The said application sought dismissal of the defence and counterclaim filed by the 1<sup>st</sup> Defendant as it was resjudicata as the issues it raised had



been dealt with in Kapsabet Environment and Land Court No. 124/2021 and settled by a mediated consent on 20/12/2022, a consent decree extracted.

4. The Court considered the issues raised in the application to wit, Resjudicata, as issues of law and akin to a preliminary objection and directed the hearing to proceed and the Respondent be at liberty to file a response and that the issues raised in the said application would be considered and determined at trial and in this judgment.
5. The 2<sup>nd</sup> Defendant did not enter appearance nor file any defence and did not participate in the hearing.
6. After the closure of the respective parties' cases and noting that the Court had not determined the application dated 23/5/2024, the Court directed the filing of a valuation report of Nandi/Ndalat/633 "the suit property". The direction was made in view of the existence of the counterclaim filed by the 1<sup>st</sup> Defendant which was nonetheless facing a challenge of being Resjudicata vide the pending application dated 23/5/2024.

**Plaintiff's Case: -**

7. It is the Plaintiff case that the Plaintiff loaned one Orba Jemeli Bore a sum of kshs 3,500,000/= and the 1<sup>st</sup> Defendant deposited title number Nandi/Ndalat/290 with the Plaintiff as security.
8. The loanee disappeared and the Plaintiff sought to take possession of the security Nandi/Ndalat/290 but the 1<sup>st</sup> Defendants brother Jonah Arusei and 2 others sued the Plaintiff and the 1<sup>st</sup> Defendant in Eldoret High Court case no. 132/2019, later transferred to Kapsabet and registered as Kapsabet ELC NO. 124/2021 (herein after referred to as the previous suit).
9. That the parties to the previous suit entered into a consent for the release of Nandi/Ndalat/290 held as security in exchange for Nandi/Ndalat/633 which had been registered in the name of Plaintiff and the 1<sup>st</sup> Defendant was to refund the kshs 3,500,000/= to the Plaintiff on or before May 2023.
10. The 1<sup>st</sup> Defendant failed to pay the kshs 3,500,000/= and once the Plaintiff tried to get possession by entry into the suit property the Plaintiff found the 2<sup>nd</sup> Defendant had settled into 2 acres of the said property.
11. The Plaintiff pleaded fraud in respect of the sale between the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and particularized the same. On the strength of the above averments the Plaintiff sought for judgment against the Defendants jointly and severally as set out in paragraph 1 of this judgment.

**1<sup>st</sup> Defendants Case: -**

12. It is the 1<sup>st</sup> Defendants defence that the Plaintiff did not acquire any interest in the suit property for any valuable consideration and that the 1<sup>st</sup> Defendant has an overriding interest over the suit land.
13. That the Registration of the Plaintiff over the suit property was not sanctioned by the 1<sup>st</sup> Defendant and/or his family. The 1<sup>st</sup> Defendant particularized fraud the Plaintiff, to wit,
  - a. Forging documents without Land Control Board meetings
  - b. Registering herself irregularly without going through the requisite process including going to the Land Control Board.
14. The 1<sup>st</sup> Defendant raised a counterclaim that;
  - i. He had overriding interests in the disputed parcel and the Plaintiff registration was illegal, and irregular and ought to be reserved.



- ii. That he sought a declaration that he was the equitable owner of parcel number Nandi/Ndalat/633.
15. On the strength of the above, the 1<sup>st</sup> Defendant Sought judgment against the Plaintiff for; -
- a. An order that the registration of the Plaintiff as the owner of L.R. No. Nandi/Ndalat be revoked and/or be reversed.
  - b. A declaration that the 1<sup>st</sup> Defendant is the owner of the land parcel No. Nandi/Ndalat/633.
  - c. A permanent injunction to restrain the Plaintiff herself, her agents or servants from interfering in any with the 1<sup>st</sup> Defendants ownership and quiet enjoyment of his property.
  - d. Costs of suit
  - e. Any other relief.

**2<sup>nd</sup> Defendant's Case: -**

16. The 2<sup>nd</sup> Defendant did not enter appearance nor filed defence. A request for interlocutory judgment dated 8/10/2023 was endorsed by the Deputy Registrar on 21/2/2024 and the suit against the 2<sup>nd</sup> Defendant proceeded undefended.

**Plaintiff's Evidence: -**

17. PW1, Loice Wambui Karanja a Director of the Plaintiff Company testified and adopted her witness statement dated 7/8/2003 as part of her evidence in chief. She also produced P Exhibit No. 1 aboard by the Plaintiff Company authorizing to the filing of the suit.
18. It was her further evidence that she was aware of Kapsabet ELC NO. 124/2021 between Jonah Arusei vs the 1<sup>st</sup> Defendant and the Plaintiff (the previous suit). Whereat Kipketer Chumo the 1<sup>st</sup> Defendant was to pay the Plaintiff kshs 3,500,000 by end of May 2023, in default the Plaintiff was to take possession of Nandi/Ndalat/633 which had been registered in its name, as a security for a loan advanced to Kipketer Chumo.
19. She stated the said judgment had not been appealed against but that there was an occupant namely the Milca Pinat, the 2<sup>nd</sup> Defendant on the suit property.
20. She testified further that the property was registered to the company regularly vide a transfer by the 1<sup>st</sup> Defendant and after obtaining the request Land Control Board consent.
21. The witness sought vacant possession of the 2<sup>nd</sup> Defendant and that the defence and counterclaim be dismissed.
22. On cross – examination, by Ms. Koech Learned Counsel for 1<sup>st</sup> Defendant the witness indicated that she had no certificate of incorporation before the Court but the company was involved in the business of supplies to public school and that paragraph 4 of the consent dated 20/12/2022 had given the Company ownership of Nandi/Ndalat/635 in case the 1<sup>st</sup> Defendant default that ownership meant physical possession of the suit property, as the title deed had already been issued. The witness in further cross – examination stated that he had not produced the Land Control Board consent although she had filed the same on 7<sup>th</sup> March 2024.
23. The witness stated that the property had been transferred to her by Kipketer Chumo, although she had not obtained spousal consent; but Mr. Chumo's sons were present.



24. The witness confirmed that the property had changed hands by the time the consent judgment was recorded and that Mr. Keter did not intend to transfer fraudulently since his son was aware, and they had agreed on everything during the mediation.
25. Re – examination, the witness stated that the consent decree had come in earlier and the issues raised in the hearing were not raised during the mediation which gave rise to the consent decree.
26. The witness indicated that Kipketer Chumo did not disclose the existence of Nandi/Ndalat/274. The witness stated that the security was Nandi/Ndalat/290 but the company could not realize it hence substitution with Nandi/Ndalat/633.
27. She further stated that the mediation was voluntary process and Mr. Chumo and his family took part in it, that Mr. Kipketer defaulted on the decree. The witness stated she had not committed any fraud against Mr. Kipketer Chumo.
28. PW2, Mr. Kipruto Kibet, a Court Administrator in Charge of Kapsabet High Court and Environment and Land Court also testified. It was his testimony that he was aware of Kapsabet ELC No. 124/2021 (formerly Eldoret 132/2019).
29. The witness confirmed that he had the Original Court File whose parties are Jonah Arusei, William Arusei, Mark Chumo vs Kipketer Chumo and Loice Wambua Karanja and others which was concluded by way of mediation on 20/12/2022 and parties entered into a consent, whose terms were as follows; -
  - i. Nandi/Ndalat/290 registered under the name of Kipketer Chumo to be shared among parties as; -Kipketer Chumo 3 acresJonah Arusei 3 cresLudiah Koech 3 acresPrisca Arusei 3 acresMark Chumo 5 acresIsaac Lagat 0.3 acres
  - ii. Nandi/Ndalat/633 measuring 7 acres and Nandi/Ndalat/350 measuring 7 ½ acres were surrendered to Kipketer Chumo
  - iii. Nandi/Ndalat/633 measuring 7 acres in the name of Loice Wambui and others Limited to remain under the said ownership until Kipketer Chumo pays kshs 3.5 million from the date of mediation till end of May 2023.
  - iv. The title deed of Nandi/Ndalat/290 be returned to Mr. Kipketer Chumo on 20/12/2022.
30. The witness indicated that there was no change in the said decree and he produced the entire Court file as P Exhibit no. 2.
31. In cross – examination the witness confirmed the parties and that the parcel in issue of Nandi/Ndalat/290 that Nandi/Ndalat/633 was not mentioned in the Originating Summons but the Respondent Loice Wambui did not file a response to the Originating Summons.
32. That there was no default clause granting Loice Wambui vacant possession and it said parties of Kipketer Chumo pays kshs 3.5 million.

**Re - Examination: -**

33. On re-examination the witness stated that he was producing the entire Court file for the Court to interpret the consent. After the testimonies of the two witnesses the Plaintiff closed its case.



### **1<sup>st</sup> Defendants Evidence: -**

34. The 1<sup>st</sup> Defence witness was Kipketer Chuma the 1<sup>st</sup> Defendant himself who testified as DW1 and adopted his witness statement as part of his evidence in chief, and he produced documents listed in list of the documents as D Exhibit 1 – affidavit of Marriage.
35. He stated that he was the first registered owner and was registered on 20/9/2007. He stated that he never transferred the property but on 20/6/2013. The property was transferred to Loice Wambui and others Company Limited. It was his evidence that he never attended the Land Control Board and he never transacted with the Defendant.
36. The witness stated that he was aware of the contents of the consent reached in case ELC 124/2021, but he was the one using the property while Loice Wambui had not taken possession as they were no order for vacant possession in the previous suit. He prayed that the title to Nandi/Ndalat/633 be reverted to him.
37. On cross – examination the witness stated that he was registered as the owner of Nandi/Ndalat/633 in 2007 while Loice Wambui were registered in 2013. He did not take any action between 2007 – 2013 as he was using the property.
38. The witness stated that he was a party to case No. 124/2021 in relation to parcel Nandi/Ndalat/290 which he had given the title thereof to Orba Jemeli who was not a party to case No. 124/2021 a security.
39. The witness stated that he had agreed during the mediation to give his family title No. 290 but had not agreed to refund Loice Wambui and others Company Limited in the given time frame but he did not appeal the said decision.
40. The witness stated in further cross- examination that he did not go to the Land Control Board which suits in Kapkarero and that parcel No. 290 belonged to the family.
41. The witness stated that the title deed used as security for the loan was Nandi/Ndalat/290 and not Nandi/Ndalat/633 the suit property, that the debtor Orba Jemel Bore disappeared after the loan had been advanced to he r and attempts to take possession was made but Kapsabet ELC No. 124/2021 was filed. The title deed in respect of the Nandi/Ndalat/633 was registered in 2013, that the suit herein was based on the mediation agreement dated 20/12/2022 although there was nothing to show the exchange of Nandi/Ndalat/290 with Nandi/Ndalat/633 and that he was the guarantor and not the borrower.
42. The witness stated that the transaction between him and Milcah Pinat was conducted after subdivision of Nandi/Ndalat/274 hence the same was not in existence.
43. In re-examination, the witness stated that he did not transfer Nandi/Ndalat/290 to Orba Jemeli as it was ancestral land. The witness stated that he did not attend Land Control Board in respect of Nandi/Ndalat/633, but he attended the mediation where he was given parcel No. 350 and 633.
44. PW2. Elizabeth Chepkirong Chuma, testified and adopted her witness statement dated 31/01/2024 as part of her evidence in chief. It was her testimony that she was the wife of Kipketer Chumo with whom she has 7 children and that Nandi/Ndalat/633 belonged to her husband who lived thereon with the said children and that the property was developed. It was her testimony that she had not given her consent to transfer and that she did not attend the Land Control Board, the witness stated she did not her consent to charge the said property and it was her wish that the property reverts back to Kipketer Chumo and that the Plaintiff not to be given vacant possession of the property.



45. In cross – examination the witness stated that she had no property jointly registered with her spouse. She stated that her husband had only one property registered in his name. the witness stated that she was not aware of the previous case no. 124/2021 that her husband had been sued by his relatives.
46. DW3, Mr. Samson Kiprotich Keino testified and adopted his witness statement dated 31/01/2024 as part of his evidence in chief. It was his testimony that Kipketer Chumo the 1<sup>st</sup> Defendant was his neighbour in the village and their shared a boundary at Nandi/Ndalat/290; and that Nandi/Ndalat/633 was far from where they lived.
47. In cross – examination, the witness stated he had been neighbours with Kipketer Chumo since childhood, and he knew him very well. It was his answer in further cross – examination that Kipketer Chumo had 2 properties, he knew the 1<sup>st</sup> Defendants family members, including Mr. Jonah Arusei, Mark Chumo but was not aware of any dispute about them.
48. In re-examination, the witness stated that Mr. Kipketer Chumo was a neighbour and owned Nandi/Ndalat/290 and Nandi/Ndalat/633.
49. DW4, Edgar Oduol a Land Registrar, Nandi County, who testified pursuant to witness summons issued to him dated 4/8/2024, in relation to Nandi/Ndalat/633 which he confirmed from the search that it belonged to Loice Wambui and others Company Limited.
50. The witness stated that he had to copy of green card for Nandi/Ndalat/633 showing issuance of title deed to Loice Wambui & others on 20/6/2013, and a caution registered by Kipketer Chumo on 27/6/2023 claiming ownership. He stated further that the first registered owner was Kipketer Chumo registered on 20/7/2007, there was no transfers from Kipketer Chumo to Loice Wambui, nor Land Control Board letters of consents and no spousal consent, he produced the copy of the green card and search as D exhibit 2 and 3.
51. On cross – examination the witness stated that a green card gave records of Land to parcel of land. D Exhibit 3 was a search dated 24/7/2023 with one caution and DW3 showed caution dated 19/10/2016 by Kipketer Chumo claiming occupation interests and ownership while a second caution dated 24/7/2023 claimed ownership by Kipketer Chumo. The caution registered in 2016 was not signed by the Registrar and it could not appear on the search.
52. After the testimony of the four defence witnesses who testified in support of the 1<sup>st</sup> Defendants case the defence case was closed.
53. In view of non-attendance by the 2<sup>nd</sup> Defendant who had not entered appearance and not filed defence, the 2<sup>nd</sup> Defendants case was also closed. The Court directed parties to file written submissions and exchange the same.

**Plaintiff's Submissions: -**

54. The Plaintiffs has framed and submitted on issues as follows;
55. The Plaintiff submits that the counterclaim ought to be dismissed as it is resjudicata, given the consent decree on Kapsabet ELC No 124/2021 and by virtue of Section 7 of the [Civil Procedure Act](#), the doctrines of resjudicata and estopped by record applied. In support of this limb of submissions the Plaintiff places reliance on the decision in the case of Nancy Mwangi T/A Worthin Marketers vs Ariel Networks K. Limited and others (2014) eKLR as a well as Bernard Mugo Ndegwa vs James Nderiti Githae and 2 others, Flora N. Wasike vs Destimo Wambo (1988) eKLR. Siri Ram Kaura vs MIE 1961 EA 462 which the Court has considered.



56. The Plaintiff submits that no evidence of fraud and corruption was tabled before Court.
57. The Plaintiff further submitted for costs to be awarded to it and urged the Court to allow its claim.

**1<sup>st</sup> Defendants Submission: -**

58. The 1<sup>st</sup> Defendant has framed and submitted on 6 issues for determination to wit;
- a. Whether or not the 1<sup>st</sup> Defendants statement of defence and counterclaim is resjudicata.
  - b. Whether the title deed by the Plaintiff was legally obtained
  - c. Whether the Honorable Court can enforce an illegally.
  - d. Th whether the Plai8ntiff is entitled to the orders sought
  - e. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought
  - f. Who should pay costs?
59. The 1<sup>st</sup> Defendant submits that in Oder for a matter to be Resjudicata the Court ought to look at all the four corners as set out in Section 7 of the *Civil Procedure Act*.
60. The 1<sup>st</sup> Defendant submits that in the previous suit to wit, Kapsabet ELC No. 124/2021 formerly Eldoret ELC case no 132/2019 Jonah Arusei and 2 others vs Kipketer Chumo and 2 others, the parties were different while the parcel of land in issue was Nandi/Ndalat/290 and not Nandi/Ndalat/633 hence resjudicata does not apply since there was no hearing in the matter as the decision was reached in through mediation.
61. On issue 2, the 1<sup>st</sup> Defendant submits that the suit property was registered to the Plaintiff before the consent decree dated 20<sup>th</sup> December 2022, yet no proof of transfer by the 1<sup>st</sup> Defendant to the Plaintiff was adduced regarding the process of acquisition by the Plaintiff illegal thus the title having been acquired illegally is impeachable under Section 24 – 26 of the *Land Registration Act*.
62. The 1<sup>st</sup> Defendant placed reliance in the decision in the case of Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another eKLR.
63. On the 3<sup>rd</sup> issue, the 1<sup>st</sup> Defendant submits placing reliance on the decision in the case of Kenya Airways Limited vs Satwant Singh Flora that the Court cannot enforce an illegality,
64. On issue 4, the 1<sup>st</sup> Defendant submits that the clause 4 of the consent order did not give the Plaintiff vacant possession in case of any default hence the Plaintiff has no basis for her claim.
65. On issue 5, the Defendant submits that they have pleaded fraud on the part of the Plaintiff in obtaining the title deed of Nandi/Ndalat/633 and that having proven fraud, the under Section 26, the title held by the Plaintiff ought not to be protected. In this regard the 1<sup>st</sup> Defendant places reliance in the case of Terelia Wangari Mbugua vs Jane Njeri Nduati & another (2020) eKLR.
66. The 1<sup>st</sup> Defendant submits that he has proven his case entitling the Plaintiff's title to be cancelled as it was obtained by Fraudulent means.
67. On costs the 1<sup>st</sup> Defendant submits that costs should be awarded to the successful party.
68. That from the valuation report the 1<sup>st</sup> Defendant is in occupation of the suit property.
69. Before framing issues for determination, the Court notes the following undisputed facts in this case.



- a. That the 1<sup>st</sup> Defendant and the Plaintiff were Defendants in case Kapsabet ELC No. 124/2021.
  - b. That Kapsabet ELC No. 124/2021 was referred to the Court Annexed Mediation and a consent was arrived thereat by the parties which consent was adopted as a decree of the Court.
  - c. That no appeal has been preferred against the consent decree.
  - d. That the Plaintiff herein is the registered owner of Nandi/Ndalat/633 having been registered in 2013 before the consent judgment was reached.
70. Having analyzed the pleadings, the evidence on record and the rival submissions as well as considered the law, and taking into account the issues raised in the application dated 35/5/2024 whose determination was reserved to be pronounced in this judgment, the Court frames the following as issues or determination;
1. What is the import of the consent decree in Kapsabet ELC No. 124/221,
    - a. Does it have a bearing on this suit, if so does it render the issues raised in the Defence and Counterclaim Resjudicata?
  2. Whether or not the Plaintiff has proven its case
  3. Whether or not should upheld the Defence and Counterclaim should succeed?
  4. What reliefs ought to issue?
  5. Who should pay the costs of the suit?

**Analysis and Determination: -**

71. It is common ground between the Plaintiff and the 1<sup>st</sup> Defendant that there pursuant to a mediation agreement which was adopted in Court, a consent decree finalized Kapsabet ELC No. 124/2021.
72. The said consent decree adopted Court on 20<sup>th</sup> December 2022 has not been appealed from and its contents and terms thereof were produced together with the entire Court file of Kapsabet ELC no. 124/2021 as P Exhibit 2.
73. What then is the import of the said consent decree? The answer to this lies in the provisions of Sections 43 and 44 of the Evidence Act in relation to production of previous judgments; Section 43 of the Evidence Act provides....
- “ 43 The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, may be proved when the question is whether such Court ought to take cognizance of such suit or to hold such trial...”
74. The existence of the consent decree was introduced by the pending application which sought to strike out the defence and counterclaim as Resjudicata, and according to Section 44, P Exhibit 2, thus answers the question of the existence of the previous suit, to wit, Kapsabet ELC No. 124 of 2021 (formerly Eldoret ELC No. 129 OF 2019) between Jonah Arusei and 2 others vs Kipketer Chumo and 2 others.



75. For the purposes of this suit consent order No. 4 of the consent decree which provides as follows is very relevant...

“That the parties have agreed that the Land Nandi/Ndalat/633 measuring 7 acres in the name of Loice Wambui and others Company Limited, will remain under the said ownership till the parties (Kipketer Chumo pays kshs 3.5 Million (Three and half Million) to Loice Wambui & others Company Limited between the date of this mediation to the end of May 2023.....”

76. The said consent order No. 4 reproduced above conferred and confirmed ownership of Nandi/Ndalat/633 to Loice Wambui and others Company Limited, the Plaintiff herein.

77. Section 44 of the *Evidence Act* provides as follows;

“44 A Final judgment, order or decree of a competent Court, which confers upon,  
(i) or takes away from any person any legal character or which declares any person to be entitled to any such character or be entitled to any specific thing not against any specified person, but absolutely is admissible when the existence of any such legal character or the title of any such person to any such things is omissible.”

78. As observed above the consent decree conferred and confirmed ownership of Nandi/Ndalat/633 absolutely to Loice Wambui & others Company Limited. Thus, in terms of Section 44 (2) (b) and (d) the consent decree is conclusive proof of ownership of Nandi/Ndalat/633 by the Plaintiff herein; from the time the said decree declared in this case from 20<sup>th</sup> December 2022.

79. The defence and counterclaim, herein challenge the acquisition of Nandi/Ndalat/633 by the Plaintiff in or about 2013, for lack of spousal consent as well as Land Control Board consent.

80. In terms of Section 44 (2) (b) and (d) the ownership by Loice Wambui and others was thus confirmed by the said consent decree and could only be challenged by an Appeal to the Court of Appeal and not in the instance counterclaim, in view of the doctrine of Stare decisis as held in the case of Camps Bay Rate payers & Residents Association and another vs Harrison and Another 2010) ZACC 19; 2011 2 BCCLR 121 as quoted in the decision in the case of Grace Wakhungu & another vs Republic delivered on 11<sup>th</sup> October 2024 whereat paragraph 52, the Court observed interalia;-

“Further a Court cannot sit on appeal over the decisions of other Courts of concurrent jurisdiction.”

81. The consent decree was adopted by this very Court and the same remains final on the issue of ownership of Nandi/Ndalat/633. The issue of Nandi/Ndalat/ 633 cannot be a reopened save in an appeal, in a subsequent suit more so in a counterclaim as the 1<sup>st</sup> Defendant desires this Court to do.

82. Thus, in an answer to issue number 1, the Court finds that the import of the consent decree in Kapsabet ELC No. 124/2021, is that the same is a final determination on ownership of Nandi/Ndalat/633, hence rendering the issues raised in the counterclaim as well as the Defence by the 1<sup>st</sup> Defendant as Resjudicata, and that the Defence and counterclaim are thus Resjudicata.

83. The finding above disposes off issue No. 3 as the Defence and Counterclaims having been found Resjudicata are hereby dismissed. As observed at paragraph 5 of this judgment, the Court directed filing of a valuation report which directions were issued before determination of the application dated



23/5/2024, having found the Defence and Counterclaim Resjudicata, the Court directs the costs of the valuation report to abide by the outcome of this case.

84. On issue No. 2 as to whether the Plaintiff has proven its case. The Plaintiff has proven ownership of Nandi/Ndalat/633 by virtue of the consent decree as well as copy of Register of Nandi/Ndalat/633 produced by the DW4 as D Exhibit 2, and copy of Search D Exhibit 3.
85. On the strength of the documentary evidence adduced, the Plaintiff was able to discharge the burden of proof as required under Section 107 – 109 of the Evidence Act and is therefore entitled to judgment in its favour.
86. The Plaintiff seeks vacant possession of Nandi/Ndalat/633, which the valuation report has shown that the 1<sup>st</sup> Defendant lives thereon. In the evidence before Court, it was proven that the 1<sup>st</sup> Defendant owns another parcel of land to which Nandi/Ndalat/350 and in addition to 3 acres in Nandi/Ndalat/290 and hence will not be rendered homeless.
87. The 2<sup>nd</sup> Defendant did not defend the case and having found that the Plaintiff has proven its case on balance of probabilities and being the registered owner, the Plaintiff is entitled to quiet possession of its property without any encumbrances.
88. Accordingly, the Judgement be and is hereby entered in favour of the Plaintiff in the following terms; -
  - A. The Plaintiff shall issue a Notice requiring vacant possession under Section 152 of the Land Act to 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their family, and/or relatives and any person in unlawful occupation, and upon the expiry of the Notice period, the Plaintiff shall be at liberty to evict any person in illegal occupation of Nandi/Ndalat/633.
  - B. The cautions registered in Nandi/Ndalat/633 to be removed by the Land Registrar.
  - C. Costs of the suit and costs of the Counterclaim including the entire valuation fees to be borne by the 1<sup>st</sup> Defendant.
  - D. Judgment accordingly.

**JUDGEMENT, DELIVERED AND DATED AT KAPSABET THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

1. Mr. Mwangi for Plaintiff
2. Ms. Koech for 1<sup>st</sup> Defendant

