



Muhiddin & another v Karama & another (Environment & Land Case 190 of 2016) [2023] KEELC 951 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEELC 951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 190 OF 2016
LL NAIKUNI, J
FEBRUARY 14, 2023**

BETWEEN

SAADIYA SHEIKH MUHIDDIN 1ST PLAINTIFF

ZAKARIA MOHAMED SHEIKH BANA 2ND PLAINTIFF

AND

NASEEM SALIM KARAMA 1ST DEFENDANT

**COUNTY GOVERNMENT OF MOMBASA DEPARTMENT OF LANDS,
PLANNING & HOUSING 2ND DEFENDANT**

RULING

I. Preliminaries

1. The Judgement by this Honorable Court is based from the Suit filed by Saadiya Sheikh Muhiddin and Zakaria Mohamed Sheikh Bana the 1st and the 2nd Plaintiffs herein against the 1st and 2nd Defendants herein. The 1st and 2nd Plaintiffs filed a Complaint on 13th July, 2016 dated even date which is close to six (6) years ago. They moved Court by filing a Notice of Motion application under Certificate of Urgency which upon being served together with the Summons to enter appearance on 27th July, 2016, the 1st Defendant entered appearance and on 12th August, 2016 filed Statement of Defence dated 8th August, 2016. On 20th April, 2017 the 2nd Defendant entered appearance and filed their Defence.
2. However, on 27th March, 2017 upon obtaining leave the Plaintiffs filed an Amended Complaint dated 23rd March, 2017 while on 5th April, 2017 the 1st Defendant filed an Amended Statement of Defence.
3. On 19th May, 2021, upon all the Parties having fully complied with the pre-trial conference requirements, the matter was fixed for hearing whereby the Plaintiffs Summoned two (2) Witnesses PW - 1 and PW - 2 who testified accordingly.



II. The Plaintiff's Case

4. From the filed Pleadings the 1st and 2nd Plaintiffs averred that at all material time the Plaintiffs were the registered owners of all the Suit Property known as Title No Mombasa/Block XVI/891 situate in Majengo while the 1st Defendant was the registered owner of all that property known as Title No Mombasa/Block XVI/883 also situated in Majengo.

These two (2) properties lies adjacent to each other. The Plaintiffs averred that the 1st Defendant had intentionally and deliberately encroached and trespassed onto the 1st and 2nd Plaintiffs' land and proceeded to construct an apartment onto her land and which development had encroached on the Plaintiffs' parcel of land.

5. As a result, the Plaintiffs averred that the said encroachment had denied them their rights to use, utilize and enjoy their property and hence suffered loss and damage. The Plaintiffs informed Court that sometimes in the year 2015 a Surveyor practicing under the name and style of Philomu Mapping Services was instructed to conduct a Survey on Plot No Mombasa/Block XVI/891 to determine the boundaries, identify all corner beacons and ascertain whether there was any encroachment from the neighbours. Pursuant to that vide a Survey Report dated 6th November, 2015 it concluded that there was encroachment by the 1st Defendant onto the Plaintiffs' land. From the Eastern side by five (5) meters- total encroachment of 0.0045 Hectares. The Plaintiffs' Advocate wrote a letter to the 2nd Defendant dated 18th April, 2016 which demanded the stoppage of encroachment and illegal construction.
6. The Plaintiffs averred that sometimes in September, 2016 and during the pendency of these proceedings the 1st Defendant illegally, unlawfully and irregularly obtained and Registry Index Map (RIM) of the two (2) portions of land altered and amended.

As a result of this development the 1st Defendant surrendered her title to the District Lands Registrar to have it cancelled and issued with a new title. Vide a letter dated 25th January, 2017 by the Plaintiffs addressed to the Land Registrar informing him of the Court Order of 13th January, 2017 and advising him to recall the title that was irregularly, unlawfully and illegally issued to the 1st Defendant and have it cancelled and revoked pending the hearing and determination of the Suit. The Plaintiffs averred that the issuance of both the amendment of the Registry Index Map (RIM) and new title were done illegally, unprocedurally and unlawfully and therefore ought to be revoked.

The 1st and 2nd Plaintiffs prayed for the following Orders:-

- a. A declaration that the Plaintiff was the legal registered owners of the whole of that parcel of land known as Mombasa/ Block XVI/891 and that the 1st Defendant had unlawfully encroached and trespassed onto the said parcel of land;
- b. An order of declaration of the 1st Defendant, her Servants, Agents, family members and/or any other person acting on her authority from the Plaintiffs' parcel of land L.R No Mombasa/ Block XVI/891;
- c. A declaration that the Amendment of the Registry Index Map (RIM) and the issuance of the new title deed in respect of property known as Mombasa /Block XVI/883 was unlawful, illegal and irregular;
- d. An Order revoking, annulling and cancelling the Amended Registry Index Map (RIM) and the New Title Deed issued in respect of Mombasa/Block XVI/883;



- e. A Permanent Injunction to issue against the 1st Defendant restraining the 1st Defendant, her Agents, Servants, relatives and/or any person under instructions from further trespassing and/or encroaching onto the Suit premises or continuing with the construction and/or building onto the said Suit premises;
- f. An Order suspending and/or revoking the approval granted to the 1st Defendant by the 2nd Defendant pursuant to an application reference No P/591/2014 in the PPA2 Form;
- g. General damages for trespass and unlawful encroachment onto the Plaintiffs' Parcel of Land known as Mombasa/Block XVI/891; and
- h. Costs and Interest of this Suit.

On 19th May, 2021 the 1st and 2nd Plaintiffs commenced the case as follows:-

Examination in Chief of the PW1 by M/s. Nafula Advocate.

7. PW1 was sworn and testified in Swahili language. She identified herself by name being M/s. Saadiya Maalim. She was a businesswoman. She was the 1st Plaintiff. She recorded a witness statement filed in Court on 29th June, 2017. She adopted the said witness statement as part of her evidence - in - chief. She also relied on the List of the six (6) documents by the 1st and 2nd Plaintiffs filed on 13th July, 2016 and there being no objection to them being admitted they were all marked as Plaintiff Exhibits Numbers 1, 3, 4, 5 and 6 respectively. The 2nd document was may be marked for identification – Plaintiff MFI – 2”.

PW1 testified being the registered owner of the suit property – Land reference Numbers Mombasa/Block XVI/891. She bought the property in the year 2015 and got title deed in the year 2016. She stated that the 1st Defendant owned the neighboring plot known as Land Reference Numbers Mombasa/Block XVI 883. PW - 1 averred that the 1st Defendant had encroached onto her plot and had constructed some houses on it. PW1 stated that she told them that they had encroached on her plot, but they ignored her pleas.

She stated a survey was carried out and the report confirmed that there was encroachment on her plot. She also stated having reported to the Municipal Council. The Defendant had stopped the construction. She held that she had not been told there was a problem with the boundary. She had never been called over any boundary dispute.

She did not know whether the dispute was taken before the Land Registrar. She never attended any meeting on 16th December, 2015. By then PW1 had already purchased her plot. She was never called for any meeting or dispute over a boundary. She had never received any letter over a boundary dispute. In conclusion, she sought the prayers in the amended Plaint dated 23rd March, 2017. That was all.

Cross Examination of PW1 by Mr. Aziz Advocate.

8. PW1 plot was Plot No Land Reference number Mombasa Block XVI/891. It was registered in names of the 2nd Plaintiff, Zakaria Mohammed and herself in the year 2016. At the time of filing the suit, it was registered in my name and Zakaria Mohamed. It was registered in our names in 2016. In the year 2015, she was not the registered owner.

She could see the Survey report dated 6th November, 2015. It was in name of Zainab Mabruk Mbuu and Fauzia Juma. They were the ones who sold her the plot. She stated that when she bought the plot and by then there was no construction going on. They constructed after she had gotten title to the plot. PW1 used the survey report dated 6th November, 2015 nobody had written to state they wanted



to cancel her title deed. She had not produced any sale agreement showing she bought the plot in the year 2015.

Cross Examination of the PW1 by Mr. Amadi Advocate

9. PW1 reiterated being the 1st Plaintiff. She stressed that the 1st Defendant had encroached onto their parcel of land - Plot No 891.

She did not know what a beacon was. Her Advocate on record had shown her all the documents. She was aware that the dispute was over one beacon. She stated that should there be found that there was some discrepancy between the map and beacon on ground, it should be rectified. She informed Court that they never involved her in all these processes. She stressed that should have been a mistake, then it ought to have been rectified. She needed her right. She wanted the officers at the Land Registry to rectify the problem.

Re - Examination of the PW1 by Ms. Nafula Advocate

10. PW1 stated that apart from the Survey report, she had produced no other report in which she was involved. She emphasized having bought her land in the year 2015. She got the title in January, 2016. It was sold by Zainab and Fauz Juma. They never tell me over any dispute, neither did they give me any documents. She stated that she knew Osman as her brother who took care of the property. When she bought it, there was a Swahili house. She informed Court that they demolished their building but later on re – built it. She was never told about any beacons including beacon number 61. She was never invited nor attended any meeting. She was not involved in any survey exercise. She testified that her only complaint was that the Defendants had encroached onto her land.

Examination in Chief of PW2 by M/s. Nafula Advocate

11. PW2 Mr. Phillip Mulaa Lombu was sworn and testified in the English language. He was a Land Surveyor having graduated from the Kenya Institute of Survey in the year 2000. He came to the County of Mombasa and worked under a surveyors company trading in the names and style of M. Kipui Surveyors”. Today he was a filed Surveyor. He was not a Registered Surveyor but worked under one. He prepared and filed a Surveyor’s Report dated 6th November, 2018. He was instructed by Mr. Osman was a prospective buyer of the Parcel of all that parcel of land known s as Land Reference numbers 891. He was acting under the instructions of Sadia Mohamed and Sakaria Mohamed, the 1st and 2nd Plaintiffs herein.
12. PW2 stated that on arrival on the ground and using the map, they found that there was a house constructed on the suit land. The house had encroached onto Plot numbers 883 and 881 by 1 metre at that time. PW2 produced the the Surveyor’s Report dated 6th November, 2015 and marked as Plaintiffs Exhibits – 2.

Cross Examination by Mr. Aziz for 1st Defendant:-

13. PW2 reiterated that he had been given instructions by Mr. Osman. He stated that by that time, 6th November, 2015 there had been no dispute. It was a long time he could not remember who were the neighbors to the Plaintiffs land. The instructions was to ascertain the exact location and acreage onto the Plot Mr. Osman was buying. The registered owners were Zainab. They were not present. By that time, he was not a Licensed Surveyor but he still undertook the surveying exercise. The procedure for doing boundary within this area started from one point to another as per the houses which were built in the year 1992. According to him the beacons were planted. The beacons confirmed the sizes of the land. It was based on the already constructed house and the area the hoses covered. He was not



able to point out any beacon. He did not indicate the number of beacons outside the land. He never inquired whether there had been other houses before. This house was under construction. The upshot was to confirm whether the house being constructed had encroached onto the land for the Plaintiffs. I confirmed it did encroach. That is all.

Cross Examination by PW - 2 Mr. Amadi Advocate.

14. PW2 stated that he was not a Licensed Surveyor. He informed Court that the report he prepared dated 6th November, 2015 was a Surveyor's report. He conducted the survey exercise on 5th November, 2015. He was not aware that there had been any survey exercise done onto the two parcels known as Plot Nos. – 883 and 891 respectively. He confirmed there was a beacon marked as “K – 61” but from his report, he never referred to the said beacon marked as “K – 61”. He was referred to the beacons on the boundary disputes marked as “K – 51” and “K – 61” (17.3m) and “K – 65”. He testified that these evidence on the said beacons were not reflected in his Land Survey report. He stated that, if the beacon were found on the ground and the map, correction on the record/documents would be undertaken. That is there would be rectification done. In such a situation no one was at fault between the Land Registrar and the Land Surveyor.

Re - Examination of PW2 by M/s. Nafula Advocate

15. He was instructed by Mr. Osman. He prepared the Survey Report based and depending on documents he got. The distances between the beacons were not in agreement. The houses affected the distances in between and so was the sizes of the land. He took measurement from the beacon to beacon. He confirmed not being a Licensed Surveyor. He was working under a Surveyor called Edward Kiguru. I only visited the place once. That was all.

III. The 1st Defendant's Case

16. The 1st Defendant averred that she was the registered owner of all that property known as Mombasa/ Block XVI/883 and that she and her siblings were in the process of putting up a new structure on the said parcel.

She denied having encroached and/or trespassed on the Plaintiffs' parcel of land known as Land Reference No 891. She held if there was any encroachment it was the Plaintiffs who had intent on encroaching onto the 1st Defendant's parcel of land. She averred that the 2nd Defendant had no legal mandate to interfere with the 1st Defendant's building plans which were lawfully approved after thorough evaluation of the building structure in relation to the laid by-laws.

17. The 1st Defendant denied having spearheaded an illegal, unlawful and irregular scheme to have the Registry Index Map (RIM) of the two (2) portions of land altered and amended. The 1st Defendant stated that she surrendered the title after being directed to do so by the Land Registrar of Mombasa but denied any illegal, unlawful and irregular alterations of the Registry Index Map (RIM).

The 1st Defendant stated being a stranger to the contents of Paragraph 23 of the Amended Plaint and in any event averred that the said letter had not been supported by any order from the Honorable Court directed to the said Registrar cancelling and/or revoking the title. The 1st Defendant prayed that the Plaintiffs' Suit to be Dismissed with Costs to the 1st Defendant. The 1st Defendant summoned two (2) Witnesses DW1 and DW2 to testify as follows: -



Examination in Chief of DW1 by Mr. Aziz Advocate

18. DW1 is called M/s Muna Salim Kharama. She sworn and testified in the Kiswahili language. She lived at Majengo of the County of Mombasa. The 1st Defendant was her sister. She had a Power of Attorney. She was a holder of an national identity Card bearing numbers 8372999 which was issued on 2nd January, 2020. The Power of Attorney and the copy of the identity card were produced and marked as Defendant Exhibits Numbers 1 and 2 respectively. She stated that Plot No 883 was registered in the names:- a). Moona Kharama; b). Swaleh Salim Kharama b). Abdulaziz Kharama and d). Salama Salim Kharama. Her testimony was that they were eight (8) but in the title it was only five people who were captured. The title was issued on 16th July, 1996. The land was for their late father. But before that there had been another house on the land. DW1 stated that at Majengo area, the surveyor would be done in accordance with the sizes of the houses they found. This brought a lot of complains. She held that the Plaintiffs started holding that the Defendants had encroached onto their land – in November, 2015, By this time, the Defendant had completed building the foundation of the structure they were constructing. It had 25 shops and 8 flats but the construction had now stalled. The down floor was for commercial and on the left top floor was to be for the residential of 8 flats for the family. They saw that was good for them.
19. Their neighbors were called Saadiya Sheikh and Osman – the Plaintiffs herein. They had wanted to sell it but DW1 stopped them as there had been an error on the acreage and location of the Plot. The error was found on beacon number “K – 65”. It had taken 5 Metres from the Defendants house and there was no beacon. She testified that instead of the surveyors writing 12 Meters they wrote 17 Metres which created all this boundary problem. The error was never corrected. The DW1 informed Court that they are the one who sold the plot to the Plaintiffs and now who wanted to sell it to some new people. As a result of this error, DW1 caused it to be re - surveyed. They engaged a surveyor. They held that the beacon was in the middle of the Defendant’s house. On the day the Land Registrar came the surveyor was not there. DW1 went to the Land’s Office and approached a Government Surveyor. The Government Surveyor came on the land in the year 2016. They measured - the neighbors were all present and participated. They prepared a surveyor report – dated 13th May, 2016 entitled “The matter of boundary verification on Plots No Mombasa/Block/XVI 883 and 891 Majengo Mombasa”. After the Survey report they approached a private Surveyor called Edward Kiguru. He assisted them by taking it to Nairobi for verification and eventually the title deed was altered. DW1 was issued with a new title deed. That was all.

Cross Examination of DW1 by Ms. Nafula Advocate.

20. DW1 started building in the year 2015. Their Plot was No 883. They had wanted to sell it to Saidia, Osman and Zacharia. The are the ones who told the Defendants about the encroachment. Under Paragraph 6 shows that the owner of the property were Zainab Mbaruk and Fiaz Juma Kibwana. She was referred to the Surveyor Report marked as ‘DF - 4’ dated 5th November, 2015 prepared by Edward Kiguru Surveyor. It was made after the allegation on encroachment. DW1 held that she involved the neighbors about it. A letter dated 19th November, 2015 by the District Surveyor held that the common boundary beacons of the plot were found to be intact and undistributed. DW1 stated that the letter dated 20th November, 2015 Defendant Exhibit No 7”. Shows the beacon planted during the Colonial days.
21. The Letter dated 25th November, 2015 – Exhibit No 8” by the Defendant’s Advocates indicated the reason the allocation of boundary was 12m and 17m. The Letter of 1st December, 2015 Marked as Defendant Exhibit No “9” and the letters was never copied to them. By this time, they had not bought



the land. The District Surveyor never know whether he had done the report. The case was filed on 20th July, 2016.

Cross Examination of DW1 by Mr. Amadi Advocate

22. DW1 refuted ever colluding with the County Government and the Registrar to be issued with a new title deed. She denied ever changing the Registered Index map (RIM). She held that it was the Government (Land Registrar) who did that by following the law. She denied having been arrested on any case pertaining to allegations of fraud. She was referred to a Letter dated 19th August, 2016 marked as “Defendant Exhibit No 19” in relation to the RIM Amendment of Title No 883 and 881 and the Re-Surveying exercise. DW1 stated that she had no issue with the Plot No 891 belonging to the Plaintiffs.

Re-Examination – Mr. Aziz.

23. DW1 stated that she never did anything – neither the Re – surveying of the land, the rectification of the RIM nor re – issuing of the new title deed. Her testimony was that all these were done by the Government (The Land Registrar). The issue on rectification of the RIM was strange to her.

Examination in Chief of DW2 by Khalid Salim Advocate

24. DW2 is called Hassim Got Shat. He was sworn and testified in English Language. He stated being stationed at Machakos as the Land Registrar. He was a Land Registrar at the County of Mombasa between the years 2014 to January, 2018. He was transferred and worked at different places being - Lamu and Narok and Machakos. DW2 was a holder of the Higher National Diploma in Computer. He was employed in the year 1985. He had served the Government of Kenya for 27 years. As a Land Registrar for 25 years. He stated that sometimes in the year 2015, a lady called Moona Salim walked into his Land offices at Mombasa. She was crying. She told him some people were depriving her of her family land. DW2 calmed her down and explained to her the process to follow. DW2 got the impression that it was an issue of boundary dispute, boundary verification and boundary identification. He looked at the provision of Sections 18, 19 and 20 of the *Land Registration Act*. He guided the lady to see the District Surveyor. Later on, the District Surveyor brought to him a letter dated 19th November, 2015 Defendant Exhibit 6. It was in response to the letter by the Land Registrar – the DW2 herein. They were able to verify the boundary. He produced the letter. DW2 decided to invoke the provisions of Sections 14 and 87 of the Act to be heard.
25. DW2 decided to fix this issue as a verification exercise. He summoned the registered owners being Zainab Mbaruki, Juma Kibwana for parcel known as 883 and 891 for a sitting. The District Surveyor, Edward Kiguru was also present. However, some did not attend. They collected all the views. They agreed that the beacons were intact. DW2 prepared a report. He concluded that it was a fix boundary survey and not General Survey (this is where there were Sisals and hedges e.t.c on the boundaries). DW2 noted that all the boundaries within Mombasa were fixed boundaries by Government. DW2 informed Court that the case of the Majengo area was once exclusively occupied and owned by one person by the names Swale Guru and his family. He stated that, initially the Majengo area was more than 100 acres of (Block 14 to Block). DW2 further informed Court that upon lighting of the embargo in the years 1986 to 87 in order to construct a road and other public utility – land within Majengo was divided into some sections known as Majengo Kingorani, Majengo Musa and Majengo Musafi.
26. His testimony was that, upon finalizing the report, he submitted it to the District Surveyor. There were also reports by the District Surveyor and the private surveyors. According to DW2, they realized that there were some errors and discrepancies on the plots by some acreage measuring 0.045 acres. Therefore, they submitted these reports to the Director of the Surveyor to initiate the amendment of



the RIM. The Director acted promptly and forwarded the RIM of the Plot numbers 881, 883 and 889 as supported by the contents of a letter dated 11th August, 2016. DW2 stated that the amended RIM confirmed the acreage of the Plot No 883 as being 0.0476 & Plot No 891 measuring 0.0253 Ha. The amended RIM was forwarded to DW2. He wrote a letter dated 19th August, 2016 to the owners of these Plots explaining the discrepancies and urging them to surrender their Certificate of title deeds to him for rectification and re – issuance of new title deeds. DW2 informed Court that the owners to Plot No 883 obliged and surrendered their titles while the owner to Plot No 891 refused.

27. DW2 opened the Green Card for that matter. He received several correspondences on the matter. He received a letter from Messrs. Aziz and Co. Advocates dated 9th November, 2015 to register a restriction on the suit land. As a result, he placed a restriction pursuant to the provision of Section 76 of Land Registration Act and entered it on the green card marked as “Defendants Exhibit – 13”. However, according to DW2, later on the said restriction was removed in 5th April, 2016 and then there was transfer of the land to Saidia and Zakaria as per Entry Numbers 9 and 10 dated 9th January, 2016. Entry No 9 is for a transfer of the Land from Zainab to Saadiya Maalim Sheikh Muhidin & Zakaria Mohamed Sheikh Bana the Plaintiffs herein and item No 10 dated 9th January, 2016 of the green card. On the same date, the title deed was issued.
28. DW2 pointed out that there were some discrepancies on the title deed. The Entry No 8 and 9 were not corresponding. The restriction was on still on by 5th April, 2016, while there were transactions taking place on 9th January, 2016. DW2 stated that the current registered owner to Plot No 891 was Zakaria Sheikh Rama whom must have bought 1 share of Saadiya Maalim. He noted that Saadiya Maalim testified stating that she was till the owner of the plot but by then she had already transferred to it Zakaria the 2nd Plaintiff. DW2 affirmed that they followed the due process and laid - down procedure.

Cross Examination of DW2 by Mr. Khalid Advocate

29. DW2 confirmed that the dispute before the Court was one on the encroachment of land. DW2 stated that the first letter on the dispute that he received was from the District Surveyor Mombasa. The next correspondence was a letter from the Law firm of Messrs. Aziz Advocate dated 9th November, 2016. The first person who approached his office was M/s. Moona. The letter by the District Surveyor dated 19th November, 2015 was a response to his earlier letter to him. The letter by Aziz Advocates was written on behalf of M/s. Naseem Salim Karama. On the 2nd Paragraph of the said letter stated that the Plaintiffs as neighbors were complaining that there had been encroachment by the Defendant.
30. Under Paragraph 3 of the letter, it stated that the sub – division was done in an un-procedural manner and without the knowledge of the Defendant. In the last Paragraph was for the DW2 to place and/or register a restriction on Plot No 891. Plot No 891 belonged to the Plaintiff. According to the letter, DW2 was not to lift the caution until the deliberations or dispute had been finalized. DW2 was not to do anything else. He received the letter on 9th November, 2015. Other than the letter of 9th November, 2015, DW2 never received any other letter. On 10th November, 2016, DW2 wrote a letter to the District Surveyor. He confirmed that the said letter was not part of the documents produced by the Defendant before this Court.

DW2 further confirmed that his letter of 10th November, 2015, with reference – “Common Boundary Plot No 883 and 881” while his letter of 9th November, 2015 bears reference “Is on caution” . They were different. DW2 affirmed that there was nowhere in the Letter of 9th November, 2015 by Aziz Advocate to do anything else. It specifically gave him instruction to place a caution. By then the interest by the Defendants was on boundaries. DW2 stated that he received a response from the District surveyor, M/s. Ndambuki. She visited the site and while there she found that the common boundaries was



intact. DW2 confirmed a letter of 10th November, 2015 to the Defendants. He reminded them on the comments of the District Surveyor. He further confirmed the District boundaries were common boundaries. DW2 stated that on 25th November, 2002, he received a letter from the Law firm of Messrs. Aziz Advocates. It was referenced “Change – Alteration of Boundaries” for the 3rd time. Even after the letter and the exercise had been done, he said the boundaries did not correspond. In November, 2015, DW2 he was called and visited the site. They found that there was new construction going on in the suit land. He realized that there had been other construction that had been there. Because the surveyor had written a letter based on the provision of Section 21 of *LRA*, he went to ascertain what was happening on the ground. While there, the team saw an ongoing construction. They never saw any old structure. The only structure they saw was the new one. Mr. Aziz talked of the Green Card for Plot No 891 having been opened on 10th November, 2015. The two parcels were opened on the same day - 1992. Since the green cards were opened in 7th August, 1992. Therefore no sub - division took place on the two Plots.

31. However, the sub - division at Majengo area were not done as there had been an embargo. The sub – division only took place after the lifting of the embargo. From the letter, DW2 stated that he was being requested to start the alteration of the boundaries because the ground position did not confirm. This was because there was a house. It was on the basis of this that DW2 started altering the boundaries and to visit the site to be in conformity with what Mr. Aziz had indicated. DW2 advised them was to engage their own independent and private surveyors in order to ascertain the boundaries. As a Land Registrar, he had powers to change/amend boundaries depending with the Land Surveyor’s report. Further, the Land Registrar had the powers to alter a title based on recommendations by Land Surveyor. DW2 held that he could not change boundaries but could do so only using the recommendations made in the report prepared by the Land Surveyor. DW2 stated that the letter of 1st December, 2015 was not copied to the Plaintiffs. He was only responding directly with Mr. Aziz Advocates. He advised Aziz Advocate to nominate a private and independent Licenses Surveyor to represent them/his client during the site visit. On 3rd December, 2015, DW2 wrote a letter to Mr. Edward Kiguru Surveyor. DW2 confirmed never writing to the owners of Plot No 891 though he copied the letter to the owner of Plot No 883. He admitted that he never wrote a letter to the owner 891 to avail a private and independent licensed Surveyor during the site visit. DW2 explained that he never did so as they had been the ones who lodged a complaint to his office. He served the letter through the Chief through “the GP – 54” system of his offices. DW2 confirmed that the Chief Menza was not witness in this case and there was no affidavit of service filed. He acknowledged service. DW2 held that he had the cell phone numbers for the Chief.
32. DW2 testified that on 3rd December, 2015, he wrote a letter to the District Surveyor, M/s. Ndambuki. He was the one signed it. He stated that it was not only the Surveyor who could alter the boundary. He stated that the surveyor never prepared a report. Instead, it was only Edward Kiguru Surveyor who prepared the report. The Surveyor who prepared was engaged by Edward Kiguru. Mr. Kiguru a Licensed Surveyor. (Referred to the letter 1st December, 2015 by Aziz and Associates on the 2nd Paragraph 2-3). DW2 confirmed that after the site visit the only report he depended on for the altering of the boundary was the one prepared the report by Edward Kiguru. Thus, the alteration of the RIM was based on the recommendation by Mr. Kiguru, a private surveyor.

In my conclusion, DW2 stated that he referred of the new construction. The development plan was never attached. After this exercise, Mr. Kiguru started the process of the alteration of the boundaries and ultimately the acreage changed. The acreage of Plot 883 increased while that of Plot No 891 reduced in conformity with the ground record/data. According to DW2, from this exercise and the amendment there would be no encroachment.



Re - Examination of DW1 by Mr. Aziz Advocate.

33. DW2 stated that he did not have any knowledge on the surveying work. He placed restriction on the land under the provision of Section 96 on 10th November, 2015. The restriction was not to be lifted until, the parties had agreed. However, the restriction was lifted on 5th April, 2015. By that time, the dispute had not been resolved as per the Entry No 8 of the Green Card. When DW2 did this transaction he acted within the law. It was his testimony that he exhausted his role as a Land registrar. When he served the invitation letter, he confirmed all the parties received it through “the GP – 54_ – a Government process. There was no objection of the meeting.
34. He stated that Mr. Edward Kiguru was a the senior most surveyor in Mombasa. He was once the Senior Coast Provincial Surveyor. DW2 and others consulted him a lot. They had faith in him. He stated that having presented his report, it was sent to the Director of Surveyor and the Ministry of Lands. There was nothing presented to show any insufficiency of his report. Instead an amended RIM was prepared and the same was submitted. There was no objection by the Ministry of Lands. Upon receiving the amended RIM, DW2 wrote a letter to the parties to surrender their Title deed. His letter was dated 19th August, 2016. the process was by due and law.

Examination in Chief of DW3 by Mr. Aziz Advocate

35. DW3 is called Mr. Edward Marenye Kiguru. He was a holder of the national identity card bearing No 5466661. His date of birth was 1949. He was a Land Surveyor working at Mombasa. He was the proprietor of a surveyor’s firm trading in the style and name of Edward Kiguru Surveyors”. He graduated in the year 1973. He worked as a Civil Servant upto the level of Provincial Survivor in the year 1988. He joined the Private practice from year 1989 (30 years ago). He had practiced at the County of Mombasa. He did a lot of work at Mombasa. He prepared a Surveyor’s report dated 28th August, 2016. From the contents of the report the dispute was on a boundary verification of the Parcel No 883 and 891 of Land Reference Number Mombasa/MI/Block 16. It was in reference to a request made by an Advocate Ms. Athus Advocate. The boundaries was about the two Plots. DW3 found out that boundaries were erroneously carried out by a previous Surveyor. It was manifested by cutting through to structures of Plot No 883. The error was in the distance. In his letter, he indicated that the error would be ideal for rectification. He confirmed that was what was recommended in his report. DW3 held that it’s the previous surveyor who had encroached onto the next property No 883. DW3 stated that he made the amendments by straightening the line rather than it remaining diagonal. On the ground there was the beacon. Hence, according to him, the problem had been rectified.
36. DW3 testified that by making the boundary alteration, they involved the Land Registrar as required by the law under Sections 16 and 18 of the [Land Registration Act](#) so that the Land Registrar would rectify the registry and re - issue the title. The Director of Surveyor approved this rectification on 11th August, 2016 there was a letter from the Chief Land Registrar on these amendments.

Cross Examination of DW2 – Mr. Khalid Salim Advocate

37. DW3 testified that the first time he visited the property was in year 2015. It was in November, 2015. But prior to the year 2015 he had not been to the site. By that time there was only a new structure. He had not seen any old structures. Its him who pointed out the existence of a potential boundary dispute within this area. As we speak there was a new structure under construction on Plot No 883 but the said construction had been stopped by an order of this Court on an issue of alleged encroachment.



38. He informed Court that historically, the land tenure in Majengo area was based on the house without land. The Concept of houses without land meant where there were houses but without ownership to land. It was only prevalent in the Coast region of Mombasa. The survey was completed in the year 1992, whereby each parcel of land was being done as per the existing structures. In other words it was the houses which were determining the size of the land one got. Hence the beaconing would be guided based on the size of the house. The size of Plot No 883 was based on the house that was there. The previous surveyor was using the size of the house to determine the size of the land one attained. Therefore, this was the formula used to have gotten Plot No 891.
39. He stated that after the surveying exercise was complete in the year 1992, title deeds were issued including to Plot No 883 and 891. Both the title deeds for Plot Numbers . 883 and 891 as per the entry in Green Card were issued on 7th August, 1992. Plot No 883 measuring 0.0442 Ha while Plot No 891 measuring 0.0282 Ha. He was instructed by Moona and Anasir the owners of Plot No 883. It was under their instructions that the changes were effected whereby Plot. No 883 increased while-Plot No 891 decreased in size. DW3 testified that before he effected the changes, they were encroachment scenario on the ground but he corrected the boundary error for purposes of removing the encroachment issue. It was his testimony that by that time he had not been aware of the existence of this case. He was not aware that this case was instituted in year 2016 while the correction was done in August, 2016 which he affirmed was during the pendency of the case. DW3 confessed that had he known or been aware of the existence of the Court case, he would not have interfered at all with the matter. But being a boundary rectification/relocation, perhaps he would still to on resolving and/or tackling it. He was not instructed by the owner of the Plot No 891.
40. He was aware that the Land Registrar wrote a letter to the owner of Plot No 883 asking them to engage their own private independent surveyors in this exercise. The letter was copied to Aziz Advocate and him but not copied to the owner of Plot No 891. DW3 stated that from the correspondences, he had not seen the involvement of the owner of Plot No 891. He never saw any other surveyor during this surveying exercise. From the time he was undertaking the survey, there already been a structure on the land. Based on this scenario, he advised the owners of Plot No 883 to reach out to the owners of Plot No 891 and try to resolve the matter amicably.
41. He was aware that the law held that no one could interfere with another persons land interest without the owner's consent. He confirmed that there was a new title issued and which bears new acreage to wit No Plot No 883 measures 0.0476 and Plot No 891 measures 0.0253. According to the map, the access to Plot No 883 was on the main road. According to him, this survey was irregular. It was only cancelled as there was a road reserve intended to provide access to other people's Plots.

Re - Examination of PW3 by Mr. Aziz Advocate.

42. DW3 had he been instructed by a different person, it would not have been different. The surveyor's report would have been the same. He was only aware of this case arising from this surveying exercise. The previous surveyor had created a lot of mischief within this area.

IV. The Submissions

43. On 1st July, 2022, upon the closure of the case by both the Plaintiffs and the 1st and 2nd Defendants herein, the Honorable Court directed the Parties to file their Written Submissions accordingly with set out stipulated time frame. Pursuant to that on 14th September, 2022, the 1st and 2nd Plaintiffs confirmed having filed their Written Submissions. On 3rd October, 2022 they all fully complied and Court reserved a day to deliver its Judgement on Notice.



A. The Written Submissions by the 1st and 2nd Plaintiffs

44. On 3rd August, 2022, the Learned Counsel for the 1st and 2nd Plaintiffs the Law Firm of Messrs. Khalid Salim and Co. Advocates filed their Written Submissions dated 2nd August, 2022. Mr. Khalid Advocate commenced by providing a detailed background of the matter- which led to the Plaintiffs' instituting this case and the Defendants defending their case.

45. Fundamentally, the Learned Counsel submitted under the following three (3) main grounds.

Firstly, he averred according to him that it was not in dispute that the 1st and 2nd Defendants had encroached onto the 1st and 2nd Plaintiffs' parcel of land by constructing on a portion of it. He held that this fact was not contested as from the evidence adduced by the Witnesses by the Defendants.

The Counsel held that the only issue of contention was that the construction of the new house was done at the same spot and dimension that the old house was on an argument that since the old house had not encroached onto the Plaintiffs' land, then automatically the new house could not be encroaching as well was the basis of the argument advanced by the 1st Defendant. The Counsel then wondered should that be the case why would there be need to alter the boundary line of the properties. He held it was intended to removing the encroachment that was in existence.

The Counsel argued that while changing the boundary lines, none of the Parties were involved nor participated in the process nor saw the old house. Both the Land Registrar and the Surveyor confirmed not having seen the old house. They both only visited the site for the first time after the boundary dispute had arisen.

Thus, the Counsel submitted that based on the evidence adduced by the Parties, it was disputed that the 1st Defendant had and continued to encroach on the Plaintiffs' land. He cited the Provisions of Section 3 (1) of the *Trespass Act* Chapter 294 Laws of Kenya. He held that the report by Edward Kiguru indeed confirmed there was encroachment by the 1st Defendant onto the Plaintiffs' parcel of land. Based on this, the Surveyors by the Defendant proposed that the Defendants reaches out to the Plaintiffs for purposes of resolving the boundary dispute and advise the Defendants failed to heed but instead opted to commence an illegal process that would ultimately lead to the irregular alteration of the boundaries.

46. The above notwithstanding the Counsel expressed his surprise that Edward Kiguru was the one who led that very said irregular exercise despite having advising the Defendant to reach out onto the Plaintiffs to amicably resolve the boundary dispute after having established that there was indeed an encroachment by the 1st and 2nd Defendants.

The Counsel's contention was that the encroachment was established in a Survey Report dated 6th November, 2015 of a survey that was carried out in the year 2015 by Philomu Mapping Services also established that there was an encroachment by the 1st Defendant on the land for the Plaintiffs by five (5) meters total 0.0045 Hectares. This fact was also backed up by the Surveyor's findings of the 1st Defendant's private licensed Surveyor Edward Kiguru, who carried out a survey on land number Mombasa/Block XVI/883 & Mombasa/Block XVI/891 as on the 16th December, 2015.

To buttress on this point he cited the breach of Article 40 (5) of the *Constitution* of Kenya and decision of *Rhoda S. Kiilu v Jiangxi Water & Hydo Power Construction Kenya Limited* (2019) eKLR where the Court found the Defendant liable for trespass taking it that the Plaintiff never authorized the Defendant to enter her land and carry out works of construction.



In conclusion under this issue the 1st Defendant herein was liable for trespass and prayed that this Court grant the Plaintiffs order for demolition of the part of the premises that encroached on the Plaintiffs' Suit Land.

47. Secondly, the Counsel argued that the issuance of the new title and the alteration and amendment of the Registry Index Map (RIM) was unlawful, illegal and irregular. The Counsel stated that the District Surveyor confirmed in his letter dated 19th November, 2015 after having visited the site, she stated that: -
- i. The common boundary beacons to be intact and undisturbed;
 - ii. The boundary lines were clearly defined;
 - iii. The owners of the two (2) plots were therefore advised to respect the common line. According to the Counsel, the District Surveyor had already confirmed that the boundary lines of the two (2) properties were in order and needed not to be disturbed at all by either Party. Upon receiving this letter, the Defendant embarked on the alteration of the boundaries of the two (2) parcels and not to proceed with establishing the common boundaries. This was done through their letter dated 25th November, 2022 to the District Surveyor and from this it led to the alterations of the boundary line which was marred with illegality and irregularity. According to the Counsel the intention of altering the boundary lines was to remove the encroachment that was in existence. It was to be done by increasing the size of the 1st Defendant's parcel of land and reducing the Plaintiffs' land size.

He held that while these changes were taking place, it was notwithstanding the express advise of the District Surveyor confirming that the existing boundary lines of the two (2) parcels were proper.

48. Through the letter dated 1st December, 2015 by the Land Registrar expressed his desire to conduct a site visit in order to have the Defendant's claim addressed. The Land Registrar also advised the Defendant to nominate a private Surveyor to represent her interest during the said exercise. This was a one sided and an already decided / determined affair. While this was happening the Plaintiffs were never advised of this activity nor was the letter copied to the Plaintiffs. Indeed, a site visit report was prepared by the Land Registrar. The report was never counter signed by any party present during the said exercise. The District Surveyor never prepared her report especially this being a survey exercise. The Counsel held that the Land Registrar to undertake the site visit relied on the Provisions of Sections 19 (2) and 20 (3) of the [Land Registration Act](#), No 3 of 2012.

Unfortunately, although the said Provisions demanded that the Land Registrar fully involves all the concerned Parties and grants them an opportunity to be heard but in the instant case he failed to do so. No evidence or Affidavit of service and no expert survey report that was ever prepared during or after the site visit.

He argued that beacons and boundaries could only be defined by experts and not ordinary people with no survey expertise. Hence it was erroneous for the Land Registrar to have reached a conclusion that the boundaries lines needed alteration based on evidence by neighbours and not surveyors.

Besides, the Surveyors had already advised that the boundary line were intact and proper and needed no disturbance.

49. The Counsel further held that the Provisions of Section 20 (3) never had any bearing on empowering the Land Registrar to undertake a site visit. It was therefore not relevant at all.



The Counsel stated that the history of the two (2) parcels was that they were initially houses without land. The houses belonged to different people while the land belonged to a land owner. The houses were Swahili houses which were mainly temporary in nature.

In the year 1992, the Land owner decided to sub-divide the land and issue title deeds to the house owners. However, the Sub-division was done with the existing houses on the land. The houses were therefore the determining factor during the sub-division exercise. The sub-division was therefore made easy owing to the existence of the houses on the Land and all the issues were confirmed by the Surveyor Mr. Edward Kiguru. It's a case of house without land as explained in the case of HCCA 74 of 2007 *Shaban v Mwajuma Ulay* thus is the concept simply put is where one may legitimately own a house temporary or permanent constructed on land owned by another person.

The size of land and consequently the title that were ultimately issued with respect to the two (2) parcels of land in the year 1992 were essentially the size of the houses that were erected thereon. The Defendant's Swahili house that was in existence at the time of the survey was the one that was demolished in the year 2015 before the Defendant started constructing a house which encroached onto the land for the Plaintiff.

Therefore, the exercise of proceeding to have the boundary lines altered was irregular. He argued that the alteration exercise was done during the pendency of these proceedings; to wit, the Suit was filed on 13th July, 2022 whereas the said alteration exercise was ongoing as at the date of filing this claim, it had not been concluded yet. The Registry Index Map (RIM) was altered as at 11th August, 2016. Mr. Kiguru confirmed that had he known of these proceedings he would not have continued with the said exercise.

He further confirmed that the objective of the alteration of the boundaries was essentially to remove the encroachment that was in place, He also confirmed never having seen the old Swahili house that was on the said portion of land and this could not confirm that the new house actually occupied the space that the old house was occupying.

Further, the Land Registrar confirmed never having seen the old Swahili structure that had been erected on the Defendant's parcel of land and thus could not ascertain that the new house occupied the actual space that the old structure was on.

50. The Counsel argued that the reason for altering boundaries according to the Defendant was that the new house only occupied the space that the old house had occupied. However, no one who testified ever saw the old house.

The Counsel further submitted that after the Registry Index Map (RIM) was amended the sizes of the land changed as follows: -

- i. Land Mombasa/Block XVI/883 from 0.0422 Ha to 0.0476 Ha; and
- ii. Land Mombasa/Block XVI/891 from 0.0282 Ha to 0.253 Ha.

51. Consequently, the 1st Defendant surrendered her title deed and was issued with a new title to reflect the parcel No Mombasa/Block XVI/883 measuring 0.0476 Ha.

Hence, the Counsel's contention was that the Land Registrar never had the legal mandate to re-adjust boundary lines and/or alter the boundary lines. This is a mandate and function of a qualified Surveyor as provided for under the *Survey Act*.

Additionally, he argued that the Land Registrar had no powers to interfere with the interest of a land owner without the owner's approval and/or consent. The Provisions of Section 79 of the *Land*



Registration Act to rectify clerical errors, mistake or omission but not interfere with the interest in land. He argued that the Land Registrar breached his mandate and whose power does not include the cancellation of a title.

To buttress the point, he relied on the decision of:- Republic v Chief Land Registrar and another Ex-Parte v Yosabia Kerubo Manyura (2018) eKLR.

He held that the Land Registrar assumed the role of the Court and a Surveyor without having such powers and mandate under the law.

Thirdly, the Counsel urged Court to grant the orders sought by the Plaintiffs them having discharged their burden of proof as provided for under the Provision of Section 107 (1) of the Evidence Act, to wit: - prove of the existence of an encroachment by the Defendants and the illegality and unlawfulness on the amendment of the Registry Index Map (RIM) and alteration of the boundary lines.

52. Finally, the Counsel urged Court to award costs to the Plaintiffs based on the Provisions of Section 27 (1) of Civil Procedure Act. He further held despite the advice given to the Defendants by their own Surveyor way before then, this Suit of reaching out to the Plaintiffs for purposes of amicable resolution but the Defendants neglected the advice and instead embarked on an otherwise illegal exercise of altering the boundaries in order to remove the encroachment.

B. Written Submissions by the 1st and 2nd Defendants

53. On 3rd October, 2022, the Learned Counsel for the 1st and 2nd Defendants the Law Firm of Messrs. Aziz & Associates filed their Written Submissions dated 1st October, 2022. Mr. Aziz Advocate commenced by providing a brief background of this matter from his own view point whereby he pointed out that the 1st Defendant through her siblings was the registered owner of property known as Mombasa/Block XVI/883 situated in Majengo within the County of Mombasa which property shared a boundary with the Plaintiffs' property known as Mombasa/Block XVI/891.

He held that this fact was clearly brought out by Defendant Witness DW2 Hashim Gotsat, the Land Registrar who testified that the current registered owner as per the Green Card in the Lands Office is the 2nd Defendant and not the 1st Defendant.

54. The Counsel made Submissions based on the following three (3) grounds. These were: -

Firstly, with regard on the ownership of the two (2) properties namely Mombasa/Block XVI/891 and Mombasa/Block XVI/893 he averred that from the evidence oral and documentary adduced in Court that when the encroachment issue arose and rectification process began sometime in August 2015 until 16th December, 2015 when the final site visit was done and report prepared on the issue at hand the registered owners of the Suit Property known as Mombasa/Block XVI/891 were Zainab Mabruk and Faiz Juma Kibwana. This information was well documented in the Green Card marked as Exhibit DExh 13 which showed that the Suit Property was in the names of Zainab Mabruk and Faiz Juma Kibwana and not the Plaintiffs' Saadiya Sheikh Muhiddin and Sakaria Mohammed Sheikh Bana.

The Plaintiffs became owners of the Suit Property on 9th January, 2016. By that time, there had been registered a restriction by the 1st Defendant sometimes in November, 2015 to stop any dealings on the Suit Property pending conclusion of the ongoing boundary verification process. Hence it was in order to state that the Plaintiffs were well aware of the dispute at the time they were purchasing and having their interest registered but still went ahead and had the Suit Property transferred to them.

55. The Counsel further held that it came out during the testimony by DW2, the Land Registrar that the Plaintiffs' interest was registered before the restriction was lifted and it was only after the Plaintiffs were



issued with a title that the restriction was lifted which was very unprocedural and illegal since the 1st Defendant who had instructed the restriction to be placed was never notified of the same and she was never given the chance to raise any objection or not.

Additionally, the Counsel held that from the evidence of Land Registrar, DW2 the current registered proprietor of the Suit Property – Mombasa/Block XVI/891 was Zakaria Mohammed Sheikh Bana as sole registered owner and the 1st Plaintiff had already transferred her interest to the 2nd Plaintiff during the pendency of this matter. Hence in the given circumstances he had no capacity to continue being the 1st Plaintiff and to testify as such without the authority of the 2nd Plaintiff. Hence he urged Court to expunge her testimony from record and dismiss the Suit for lack of capacity at the time the 1st Plaintiff testified in Court.

Secondly, the Counsel refuted that there was any encroachment on Plot No Mombasa/Block XVI/891. He argued that if there had been any scenario of encroachment this only arose due to the error in the survey maps and process. It created an encroachment scenario but no real and actual encroachment. In saying so, the Counsel based his reasoning on the following rationale and/or facts: -

- a. The 1st Defendant in her testimony stated she and her siblings lived on the Suit Land for more than Thirty (30) years.
- b. Initially the Property never had district title since it was held under the Phenomenon of house without land where the registered proprietor of land leased portion of the same to individuals for monthly consideration and allowed to develop on the property.
- c. He held that during the issuance of titles, the Survey process, as explained by DW2 and DW3 was done as per the sizes of the houses on the ground and titles issued factoring in the same hence the properties were of different sizes equivalent to the structures on the ground.
- d. Defendant Witness DW1 testified that they all along knew that their title was corresponding to the size of the house that was on the ground and when they planned the construction of the new structure the dimension and size corresponded to the structure that was existing and it was only after it was demolished and construction started that the neighbours in Mombasa/Block XVI/891 held that they had encroached on their property.
- e. Due to the seriousness of the allegations, DW1 engaged a Surveyor who prepared a report on the 5th November, 2015 DExh 4 it's when it was realized that indeed there was an error on the acreage on both the properties and which created an impression of an encroachment situation and the report gave a way forward on how to rectify the error.
- f. That the said report corroborated by Defendant Witness DW2 and Defendant Witness DW3 concluded that indeed there was an error in the Registry Index Map (RIM) which needed to be rectified as error done by the Surveyors hence needed to be corrected by the Surveyor and which was duly done procedurally.

Thirdly, the Counsel submitted that the rectification process of the error was done procedurally. It was done by the Ministry of Lands through its various departments and rectification approved.

56. The Counsel held that all the registered owners to the Suit Properties Mombasa/Block XVI/891/ being Zainab Mabruk and Faiz Juma Kibwana were informed and invited to participate in the rectification process but they chose not to participate in the process.

The counsel argued that by the time of the dispute the 1st and 2nd Plaintiffs were neither beneficial nor registered owners of the Suit Property and no way they could have had been involved in the process.



The Plaintiffs never called them as the previous owner to testify that they were never informed of the rectification process.

In conclusion, the Learned Counsel averred that the Suit was an abuse of Court process, malicious and an attempt to deny the 1st Defendant and her siblings' right to wholly own their rightful property and develop the same.

The Plaintiffs' actions had caused substantial loss to the 1st Defendant to which she held them liable and prayed that the Suit to be dismissed with Costs to the Defendants.

V. Issues For Determination

57. I have keenly taken into account all the filed Pleadings, the Amended Plaintiff by the 1st and 2nd Plaintiffs, the Defence by the 1st and 2nd Defendants, the adduced documentary and oral evidence by the summoned Witnesses, Written Submissions, cited authorities, the relevant Provisions of the Constitution of Kenya, 2010 and the Statutes.

To enable the Honorable Court to arrive at an informed, reasonable, just, equitable and fair determination, it has condensed the subject matter into the following three (3) issues. These are:-

- i. Whether the Suit instituted by the 1st and 2nd Plaintiffs against the 1st and 2nd Defendants herein has any merit whatsoever;
- ii. Whether the Parties herein are entitled to the relief sought herein; and
- iii. Who will bear the costs of the Suit.

ISSUE No (a) Whether the Suit instituted by the 1st and 2nd Plaintiffs against the 1st and 2nd Defendants herein has any merit whatsoever

Brief facts

58. Prior to embarking on the analysis of this sub-heading, it's imperative that the Honorable Court extrapolates on the brief facts of this case for ease of reference. From the filed Pleadings the 1st and 2nd Plaintiffs are the current registered and beneficial owners to the Property known as Mombasa/Block XVI/891 while the 1st Defendant is the registered owner to all that property Mombasa/Block XVI/883 both located at Majengo of the County of Mombasa. These two (2) parcels of land are adjacent to each other. The history of these two (2) parcels in that they were initially informed by the phenomenon only prevalent in Coast known in the Coast of Kenya region houses without land. The Land was one block belonging to one Swaleh Guru and family. It was stated that there was an embargo not to interfere with it. It was later from the year 1992 that the embargo was lifted to allow for the sub – division of the land and construction of a road.

The houses belonged to different people while the land belonged to a land owner. The houses were Swahili houses which ordinarily temporary in nature. In the year 1992 the land owner decided to sub-divide the land and issue title deeds to the house owners.

59. The Sub-division was done with the existing houses on the land as a guide. The size of the land would therefore be determined by the size of the house thereon. The houses were therefore the determining factor during the Sub-division exercise. The Sub-division was made easy owing to the existence of the houses on the land. Hence, the title deed to these two (2) parcels was issued in the year 1992 based on the sizes of the houses. In the year 2015 the house for the 1st Defendant was demolished before



she started construction of apartments. It's from here that the Plaintiffs alleged that the 1st Defendant encroached onto their parcel of land hence interfered with their right to property.

Thus, in the year 2015, a Surveyor practicing as Philomu Mapping Services was instructed to conduct a survey on the Plot No Mombasa/Block XVI/891 to determine the boundaries of the Plots; identify all corner beacons and ascertain whether there was any encroachment from the neighbours. The survey was conducted and after surveying exercise confirmed vide a report dated 6th November, 2015 there was encroachment by five (5) meters and a total area was 0.0045 Ha. During the pendency of the Court proceedings the 1st Defendant contacted a Surveyor who prepared its report dated 28th August, 2016. She wrote a letter to the Land Registrar who conducted a site visit where though the Plaintiffs hold they were never informed but the Defendants insists the previous registered owners to the Plot No Mombasa/Block XVI/891 but never turned up. It's from here that on 11th August, 2016 the Land Registrar proceeded to alter the Registry Index Map (RIM) and title deed ideally to correct the alleged mistakes and encroachment in this order; Mombasa/Block XVI/883 from 0.0422 Ha to 0.0476 Ha and for parcel Mombasa/Block XVI/891 from 0.0282 to 0.0253 Ha, consequently the 1st Defendant surrendered her old title and was issued with a new title to reflect the above adjustments on acreage.

60. It's for these reasons that the Plaintiffs submitted and amended Suit holding that the Land Registrar had no legal mandate and powers under the law to readjust boundary lines and/or alter the boundary line. That is adequate on facts.
61. Now turning to the analysis of the Sub-heading herein. From the Pleadings and the proceedings herein the main bore of contention of the Suit filed by the 1st and 2nd Plaintiffs herein vide the Amended Plaint revolves around two (2) prong issues. These are:
 - i. The existence of the encroachment and trespass of the Plaintiffs' parcel by the 1st Defendant; and
 - ii. The powers by the Land Registrar in Law.
62. In order to critically assess these two (2) issues, it's important to note that the date when the Suit was instituted being 13th July, 2016. This date is Pari material as this Judgement herein will discern in due course.

The Provision of Sections 3 (1) of the [Trespass Act](#) Cap 294 Laws of Kenya provides that:-

“Any person who without reasonable exercise enters is or remains upon or erects any structure on or cultivate or tilts or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence”.

From the book “[Clark & Lindsell on Torts](#) 12th edition” Paragraph 113, defines trespass as follows

“trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”

Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another's real property who is in possession and ownership. While ‘Continuous trespass’ is tress in the nature of permanent invasion on another's rights, such as a sign that overhangs another's property”.



In the case of *Lutaaya v Sterling Civil Engineering* (Supra) the court stated as follows regarding the tort of trespass to land:-

“Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another’s lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he pa..... with possession of land”... where trespass in continuous, the person with the right to suesubject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

It is trite law that trespass / encroachment to land is actionable per se (without proof of any damage). In the case of *Park Towers Limited v John Mithamo Njika & 7 others* (2014) eKLR where Honorable JM Mutungi J stated: -

“I agree with the Learned Judges that where trespass is proved a Party need not prove that he suffered any specific damages or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case”.

63. Further, in *Duncan Nderitu Ndegwa v KPLC Limited & another* (2013) eKLR, P Nyamweya J (as she then was) held: -

“..... Once a trespass to land is established it is actionable per se and indeed no proof of damage is necessary for the Court to award general damages. This Court accordingly awards an amount of Kshs 100,000.00 as compensation of the infringement of the Plaintiff’s right to use and enjoy the Suit Property occasioned by the 1st and 2nd Defendants trespass...”

64. By and large, this boundary dispute within this area is monumental and likely to affect numerous other parcels of the land here. The root cause of it was caused by a previous Surveyor and the method he applied in apportioning the parcels to individuals here as shall be seen here in below. Based on the facts of this case, the two (2) adjacent parcels situated at Majengo within the County of Mombasa there were Swahili houses, temporary structures on the phenomenon only prevalent in the Coast of Kenya, houses without land. The house would belong to a different person away from the land owner.

The concept of house without land was explained in the case of HCCA 74 of 2007 *Shaban v Mwajuma Ulay* where the Court held that: -

“..... This case arises partly because of a peculiar land tenure phenomenon known only in Mombasa as house without land, defines the existing definition of land in our laws but because of its notoriety the Court has been forced to give it some measure of judicial notice. It has thus been recognized in decision that one may legitimately own a house temporary or permanent constructed on land owned by another person. I think the current initiative towards reform of our land laws must come to terms with such phenomenon....”

65. Further, to this in the Court of Appeal Civil No 18 of 2017 *Addalhrzak Khalifa Salimu v Harun Raghid Khator & another* & HCCC (Malindi) No 34 of 2005 *Faman Mwenye & 19 others v Mariam*



Binti Said W Ouko J (as he then was) described this concept as “the dispute arises from the land tenure unique to Mombasa which has baffled scholars, practineers and even jurist. The land system is only referred to as “House without land”. That is the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in Latin Maxim – “*Cujus est solum, ejus est usque ad caelum*” meaning whose is the soil, is also that which is above it”). This issue arose when one wanted to terminate of tenancy and interpretation of the Provisions of Sections 3, 8 and 51 and 106 of the Transfer of Property Act incidence of the absence of contract or local law or usage to the Contrary of a Lease. Many have build traditional permanent or temporary Swahili structure grown perennial crops and shared fruits of their labour with the owners creating a perennial relationship.

Accordingly, DW2, eloquently informed Court that the case of the Majengo area was once exclusively occupied and owned by one person by the names Swale Guru and his family. He stated that, initially the Majengo area was more than 100 acres of (Block 14 to Block). DW2 further informed Court that upon lighting of the embargo in the years 1986 to 87 in order to construct a road and other public utility – land within Majengo was divided into some sections known as Majengo Kingorani, Majengo Musa and Majengo Musafi. In the year 1992, there was Sub-division of the land by Surveyors. It’s my own view that was the root cause to the issues in this case arising from the crude method that was applied by the Surveyors then. The size of the land and consequently the titles that were ultimately issued essentially based on the size of the houses that were erected thereon. The 1st Defendant had a house without land and in the year 2015 decided to demolish it and commenced construction of apartment which adversely aggrieved the 1st and 2nd Plaintiffs on allegation of having had their land encroached by the Defendants.

From the evidence adduced by the Surveyor One practicing as Philomu Mapping Services and its report dated 6th November, 2015 and that of Edward Kiguru Surveyors dated 5th November, 2015 produced as Defendant Exhibit - 4 confirm that there were evidence of encroachment by the 1st Defendant onto the Plaintiffs’ land on the eastern side of the Plaintiffs’ parcel by five (5) meters and that the total area of encroachment was 0.0045 Ha.

Mr. Edward Kiguru stated from Paragraph 3 of the Report that: -

“..... However, in the above survey (F/R 229/84) it is abundantly clear that the common boundary between the subject properties (defined by beacons K61-F-128) did not respect the (approved) layout scheme but instead it created an encroachment scenario by shortening/ reducing the boundary line K65-K61 by 3 meters”.

The District Surveyor confirmed on the letter dated 19th November, 2015 after having visited the site. She stated that: -

- i. The common boundary beacons of the plot were found to be intact and undisturbed;
- ii. The boundary lines were clearly defined; and
- iii. The owners of the two (2) plots were therefore advised to RESPECT the common line.

Undoubtedly, therefore, there has existed encroachment by the 1st and 2nd Defendants onto the Plaintiffs’ land. As their defence, the 1st Defendant proceeded initiate the process of rectifying the anomaly that was caused by the Sub - division by engaging the Land Registrar. She held that the Plaintiff at the time of the dispute were not the registered owners and hence had no “Locus Standi to this matter. Clearly, the decision and approach taken by Defendants in the given circumstances, was all wrong, irregular and unlawful.



Issue No (b) Whether the Parties herein are entitled to the relief sought herein

66. Having caused the above elaborate analysis to the issues surrounding this case, the Court wishes to move further to the role and responsibility of a Land Registrar. As stated before, there boundary problem within the Majengo area in Mombasa is mammoth. It was caused by the previous Surveyor during the sub – division of the land by applying unscientific method of land allocation based on the already existing houses (Houses without land) as a determining factor upon which allottees were given land and title deed. Thus, it meant what mattered was the size and the distance of one house. This was disaster. Eventually, when this error was discovered, it was noted that many people had encroached onto others parcels of land. Indeed, the Survey exercise conducted by both the Plaintiffs and 1st Defendant confirmed that there were glaring errors and mistakes caused during the sub - division of the Suit Land there was need to cause the rectification of the same. Unfortunately, this Honorable Court has noted that the Parties in the cause of attempting to rectify the previous errors caused during the sub – division of the land went it all in the wrong way. Two wrongs do not make a right. They misdirected themselves in the manner in which they proceeded in rectifying or correcting the error as shall be demonstrated below.

Firstly, I dare say that, their method of operation was illegal, irregular and un-procedurally not founded on law. I further take judicial notice that this purported correction was being undertaken by Parties during the pendency of the proceedings invoking the Doctrine of *Sub Judice*”.

Secondly, the 1st Defendant testified that it initiated the process of rectifying the anomaly that was caused by the sub-division by engaging the offices of Land Registrar who according to the 1st Defendant involved and invited all the relevant Parties to participate in the re – Surveying exercise. DW2 stated that the people invited were the owners of Plot Numbers 881, 883 and 891. He stated that this was done through the Chief of Majengo vide a Letter dated 3rd December, 2015 to the then current registered owners of Plot No Mombasa/Block XVI/891 who were Zainab Mabruk Mbuha and Faiz Juma Kubwaba since the 1st and 2nd Plaintiffs herein were unknown at the time and had not yet purchased the property. He testified that a service method by Government known as “GP – 54” was used. Certainly, this being a fixed boundary issue, the process was undertaken in the absence of the Plaintiffs which was contrary to the provision of the Section 19 (2) of the *Land Registration Act*, No 3 of 2012. Section 19 (2) of *LRA* provides that:-

“The Registrar shall after giving all persons appearing in the Register an opportunity of being heard, caused to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and then plan shall be deemed to accurately define the Boundaries of the parcel.

This never happened as the owners of Plots No 881 and 891, the Plaintiffs herein were left out and only involved the owners of Plot No 883, the Defendants herein.

Thirdly, from the evidence by DW2 and DW3 they all admitted that the Government Land Surveyor nor any other was involved in this exercise. It was only DW3 who is a private surveyor engaged by the owners of Plot No 883 who participated all through the exercise. He is the one who prepared the survey report and forwarded it to the Director of Survey for the rectification and amendment of RIM for these two parcels of land. Eventually, a Survey report dated 16th December, 2015 was prepared by DW3, Mr. Edward Kiguru. It was marked and produced as Defendant Exhibit – 12. It clearly brought out the underlying issue as:- “That the Survey carried out by the original owner Saleh Nguru of Majengo has



underling issues addressed to avoid any future conflicts such as acreage, realignment of boundary path and road”.

Fourthly, the involvement of the Land Registrar on matters of the rectification of RIM, cancellation and/or revocation of title deeds and re – issuance of new title deeds was total illegal, unprocedural and wrongful. The Land Registrar, DW2 herein acted ‘ultra vires’. Through a letter dated 25th November, 2022, the Land Registrar visited the site.

It’s alleged the Land Registrar invoked the Provisions of Sections 19 (2) and 20 (3) of [Land Registration Act](#), No 3 of 2012 and thereafter caused the alteration of Registry Index Map (RIM) and title deed as stated above.

The issue here was whether the Land Registrar within his purview of law proceeded as required or did he surpass it?

The provision of Sections 12 and 13 of the [Land Registration Act](#), No 3 of 2012 defines the Land Registrar as “..... There shall be appointed by the Public Service Commission, a Chief Land Registrar and such other offices who shall be public offices as may be considered necessary for the effective discharge of functions under this Act...”

Section 14 of [Land Registration Act](#) provides the general powers of Land Registrar as follows: - The Chief Land Registrar, County Land Registrar or any other Land Registrars may in addition to the powers conferred on the office of the Registrar by this Act: -

- a. Require any person to produce any instrument, certificate or other document or plan relating to the land. Lease or charge in question and that person shall produce the same.
- b. Summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question and that person shall appear and give the information or explanation.
- c. Refuse to proceed with any registration of any instrument certificate or other document plan, information or explanation required to be produced or given is withheld or any act required to be performed.
- d. Cause oaths to be administered or declaration taken and may require that any proceedings information or explanation affecting registration shall be verified on oath or by Statutory declaration; and
- e. Order that the Costs, Charges and expenses as prescribed under this Act incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportion as the Registrar may think fit.

In addition to the above stated duties, the Land Registrar has other duties as stipulated herein:-

- a. Under Sections 18 (1), (2) and (3) of the [Land Registration Act](#) on fixed and general boundaries, the Registrar is mandate to make such determination on the boundary lines.
- b. Sections 19 (2) of the [Land Registration Act](#), the Registrar shall after giving all persons appearing in the Register an opportunity of being heard, caused to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed and then plan shall be deemed to accurately define the Boundaries of the parcel.



c. Under Sections 20 (3) of the [Land Registration Act](#) states: -

“The Registrar may in writing order which of adjoining properties shall be responsible for the care and maintenance of any feature demarcating a common boundary and any proprietor so ordered to be responsible for the care and maintenance of the boundary feature who allows the boundary feature or any part of it to fall into disrepair be destroyed or removed commits an offence and is liable on conviction to a fine not exceeding Two Hundred Thousand Shillings”.

d. Under Sections 79 (1) the Registrar may rectify the Register or any instrument presented for registration in the following cases: -

- a. In formal matters and in case of errors or omission not materially affecting the interest of any proprietor;
- b. In any case and at any time with the consent of all affected Parties; or
- c. If upon re-survey a dimension or area shown in the register is found to be incorrect in such case as the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.

The other powers that the Land Registrar has are founded under the Provisions of Sections 76 to 78 of [Land Registration Act](#) in the Registration and removal of Restriction and caution against the parcel by conducting a quasi judicial session and guided by the principles of natural justice where all the Parties are accorded ample opportunity to be heard before a determination is made.

On quick assessment of all these legal powers, none of them mandates the Land Registrar to cause the alteration of the Registered Index Map (RIM) or the cancellation of the title deed as he purported to do in the instant case. These powers are founded elsewhere under the Provision of Sections 16 (1) and (2) and 80 (1) and (2) of [Land Registration Act](#) where it's the Surveyor who has the legal mandate to rectify the boundary line or position of any boundary shown on the cadastral map based on an approved subdivision plan under the instruction of the Registrar in writing and Court of Law for the cancellation and/or revocation of title deeds.

For these reasons therefore the action by the Land Registrar to alter the Registry Index Map (RIM), cancel and/or revoke and re – issue new title deeds with new acreages was illegal, irregular and un-procedural as it utterly affected the proprietary interest of the registered land owners which are well safeguarded under the provision of Article 40 (1), (2), (3), (4) (5) and (6) of the [Constitution](#) of Kenya, 2010.

The Land Registrar conducted this process during the pendency of these proceedings. He confirmed that also he never saw the old Swahili structures that had been erected on the Defendant's parcel and thus could not ascertain that the new one occupied the actual space that the old structure was on. The 1st Defendant had argued that the reason for altering boundaries was that the new house only occupied the space that the old house had occupied. To worsen the matter after the Registry Index Map (RIM) was amended the sizes of the land for both the Plaintiffs and Defendants changed. Clearly, he had no jurisdiction nor legal mandate to do these things. In so doing, he directly infringed and violated the 1st and 2nd Plaintiff's proprietary interests on property Rights as enshrined under Article 40 (1), (2) and (3) of the [Constitution](#) of Kenya.



While saying this I am persuaded by the decision cited by the Counsel for the 1st and 2nd Plaintiffs of:- *Republic v Chief Land Registrar & another; Ex Parte Yasabia Kerubo Manyura* (2018) eKLR. It was held that: -

“In the circumstances, I find the Applicant was properly registered as the owner of the Suit Property and her title to the property could not be revoked and/ or cancelled without due Process. The Land Registrar in cancelling the Applicant’s title as he did, outside the scope of his mandate and he had no jurisdiction to do so. Sections 79 of the *Land Registration Act*, No 3 of 2012 makes Provisions for instances where the Land Registrar effect rectification of the Register. The rectification that a Land Registrar can make does not include cancelling the title of a registered proprietor”

It is evident from the Provisions of Section 79 that the Land Registrar’s power of rectification are limited only to rectifying errors, mistakes or omission that do not materially affect the interest of any proprietor. In my view, it is only the Court that under Section 80 (1) of the *Land Registration Act* that has the powers to direct the cancellation of a registration.

Thus acting contrary to the express Provisions of the above Provisions of the Law, the Land Registrar acted ultra vires. He assumed the roles of the Surveyor and the Court without having such legal powers and mandate under the law.

For these reasons, I discern that the amendment of the Registry Index Map (RIM) and the alteration and re – issuance of the title deeds by the Land Registrar was null and void.

With regards to the Prayer for Permanent Injunction, the Plaintiffs have been able to prove their case on a balance of probability and from the evidence adduced here it’s not in dispute that the 1st and 2nd Defendants encroached onto the parcel of land for the Plaintiffs. Hence the Plaintiffs are entitled to the orders of Permanent Injunction. What constitutes Perpetual/ Permanent Injunction was aptly stated by Korir J. (as he then was) in *Kenya Power and Lighting Co. Limited v Sheriff Molana Habib* (2018) eKLR when he stated this: -

“A permanent Injunction which is also known as perpetual Injunction is granted upon the hearing of the Suit. It fully determines the right of the Parties before the Court and is thus a decree of the Court. The Injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A Permanent Injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiffs to be protected”.

With reference to the damages, I concur that the 1st and 2nd Plaintiffs are entitled to the general damage sought. Precisely, while arriving at that conclusion, I have noted that the 1st and 2nd Plaintiff prayed for, inter alia:-

- a. “General damages for trespass and unlawful encroachment onto the Plaintiffs parcel of land known as Mombasa/Block XVI/891.
- b. Costs of this suit.



It is trite law that trespass to land is actionable per se (without proof of any damage). I am compelled to cite the case of *Park Towers Limited v John Mithama Njika & 7 others* (2014) eKLR where J.M Mutungi J, stated

“I agree with the Learned Judge that where trespass is proved a party need not prove that he/she suffered any specific damage or loss to be awarded damages. The court in such circumstances is under duty to assess the damages awardable depending on unique facts and circumstances of each case”.

In other words, once trespass to land is established as it is in this case, then it is actionable per se and indeed no proof of damage is necessary for the court to award general damages.

Further, I am guided by the decision of *Rhoda S. Kiilu v Jiangxi Water and Hydro Power Construction Kenya Limited* (2019) eKLR where the Court held as follows: -

“..... On the questions of what should be awarded to the Plaintiff as general damages for trespass, the issue that arises is what is the measure of it? This question was answered by Honorable E. Obaga J.M the case of *Philip Ayaya Aluchio v Crispinus Ngayo* (2014) eKLR where it was held as follows: -

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the Measure of damages for trespass is the Plaintiffs Property immediately after the trespass or the costs of restoration, whichever is less”.

In the case of *Nakuru Industries Limited v S.S Melita and Sons* (2016) eKLR where the Court faced such a similar situation it was held as follows:-

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the Defendant did trespass onto the Plaintiff’s land and conduct some excavation. For this reason, I award the Defendant damages in the amount of Kenya Shillings Five Hundred Thousand (Kshs 500,000.00) plus interest and costs of this Suit from the date of this Judgment until payment in full”.

In the instant case, it is graphically clear that the trespass began in the year 2015 when the 1st Defendant commenced the construction of the apartment on her land and permeated onto the 1st and 2nd Plaintiff’s land. The trespass has continued annually close to seven (7) years to date. Owing to the actions by the 1st and 2nd Defendants the Plaintiffs have suffered loss and damages. Therefore, I proceed to grant the 1st and 2nd Plaintiffs herein a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs 150,000.00) annually as fair, just, reasonable and adequate compensation as general damages.

Issue No (c) Who will bear the costs of the Suit

67. The *Black Law Dictionary* defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of *Reids*



Hewett & Company v Joseph AIR 1918 cal. 717 & *Myres v Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

68. Additionally, the Supreme Court fortified this position in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

69. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The out come in the instant case is the 1st and 2nd Plaintiffs herein have fully succeeded in establishing their cases. For that very fundamental reason, therefore, the costs of this suit will be borne by the 1st and 2nd Defendants herein.

VI. Conclusion And Disposition

70. Consequently, and in the long run analysis having keenly assessed the framed issues herein, the Honorable Court concludes that the 1st and 2nd Plaintiffs herein have adequately proved their case on the balance of preponderance of probability and hence their case succeeds. For avoidance of any doubts, the Honorable Court orders specifically: -

- a. That Judgment be and is hereby entered in favour of the 1st and 2nd Plaintiffs as prayed and against the 1st and 2nd Defendants jointly and severally.
- b. That a declaration be and is hereby made the 1st and 2nd Plaintiffs are the legal and registered owners to the whole parcel of land known as Mombasa/Block XVI/891 measuring nought decimal nought two eight two hectares (0.0282 Ha).
- c. That a declaration be and is hereby made that the 1st and 2nd Defendants the legally registered of all that parcel of Land known as Land Reference Numbers Mombasa/Block XVI/883 measuring nought decimal nought four two two hectares (0.0422Ha) have unlawfully, illegally and wrongly trespassed on all that parcel of land known as Mombasa/Block XVI/891 by an area measuring nought decimal nought nought four five hectares (0.0045 Ha).
- d. That an order made under the Provision of Section 152E of *Land Act* for the 1st and 2nd Defendants within the next ninety (90) days cause the demolition of any structures constructed on the parcel of land belonging to the 1st and 2nd Plaintiffs, in default the Plaintiffs be at liberty to do so at the cost of the 1st and 2nd Defendants.
- e. That a declaration to the effect that the amendment of the Registry Index Map (RIM) and the issuance of the new title deed in respect to parcel No Mombasa/Block XVI/883 was



unlawfully, illegal and irregular and hence be and is hereby cancelled and revoked under Sections 80 (1) and (2) of *Land Registration Act*.

- f. That an Order of Permanent Injunction do issue in favour of the 1st and 2nd Plaintiffs and against the 1st and 2nd Defendants restraining them, their Agents, Servants, relatives and/or any person from trespassing, encroaching onto the Suit Parcels or continuing with the construction and/or building onto the said Suit premises.
- g. That the Plaintiffs be awarded general damages for a sum of Kenya Shillings One Million and Fifty Thousand (Kshs 1,050,000.00) for trespass and unlawful encroachment onto the Plaintiffs' land.
- h. That Costs of the Suit to be awarded to the Plaintiffs to be borne by the 1st and 2nd Defendants.

It is so ordered accordingly

JUDGMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 14TH DAY OF FEBRUARY 2023.

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the Presence of:-

- a. M/s Yumnah, the Court Assistant;
- b. Mr. Khalid Advocate for the 1st and 2nd Plaintiffs; and
- c. Mr. Aziz Advocate for the 1st and 2nd Defendants.

