



REPUBLIC OF KENYA



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Bandari Investments & Co. Limited v Chiponda & 140 others (Environment & Land Case 16 of 2021) [2024] KEELC 3588 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3588 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 16 OF 2021**

LL NAIKUNI, J

APRIL 23, 2024

BETWEEN

BANDARI INVESTMENTS & CO. LIMITED PLAINTIFF

AND

MARTIN CHIPONDA & 140 OTHERS DEFENDANT

JUDGMENT

I. Preliminaries

1. This is a Judgement emanating from the filed further Amended Plaintiff dated 22nd June, 2023 filed on even date by Bandari Investment Co. Limited, the Plaintiff herein against the 140 Defendants herein.
2. Upon the Defendants being served, the 1st and 18th Defendants appointed the Law firm of Messrs. Stephen Macharia Kimani and Company Advocates to represent them. These Defendants filed and served their Statement of Defence dated 14th January, 2022 and filed in court on 19th January, 2022 which was later amended on 21st July, 2023, Witness statements by Martin Chiponda (now deceased and represented by the personal representative Francis Randugu Mwambuni), Witness statement by 18th Defendant Kazungu Katana Kazia, Witness statement by Beatrice Nzingo Kenga, a statement of the personal representative was also filed and is dated 21st July, 2023 and A list of documents dated 24th December, 2021. The Amended Statement of Defence by the 1st and 18th Defendants raised a Counter – Claim and which the Honourable Court shall be dealing with at a later stage of this Judgement. Although the 2nd -17th Defendants were served but never entered appearance. However, the 19th to 139th Defendants filed a Statement of Defence dated 26th February, 2021, list of witnesses and a list of documents dated 26th February, 2021. The Honourable Attorney General representing the 140th Defendant only filed their Statement of Defence but not any documents nor statements. They never tendered any evidence whatsoever.



3. It is instructive to note that in the pendency of this proceedings, another Civil Suit being ELC. No. 160 of 2022 – *Bandari Sacco Investments Limited v Vincent Lugise & 16 Others* was instituted against some of the Defendants herein but over the same subject matter. Indeed, on 17th August, 2021 the Plaintiffs moved Court and were able to obtain eviction orders against the Defendants. On 28th August, 2021 demolitions of the structures by the Defendants were effected. Indeed, as result of this, on 19th November, 2021 the Honourable Court conducted a Site Visit (“Locus in Quo”) pursuant to the provision of Order 40 Rule 10 and Order 18 Rule 11 of the [Civil Procedure Rules](#), 2010 and its report has been reproduced verbatim for ease of reference and forms part of the Judgement herein. Through a motion, the 1st and 18th Defendants moved this Court and an order reinstating them into the land was made. Ideally, these two Defendants are deemed to be in occupation of the suit land pending the final determination of the suit.

II. The Parties in the Suit

4. The Plaintiff is described as a limited liability company trading in the names and style of Bandari Sacco Limited. Whist, the 1st Defendant is described as a legal representative of Martin Mwabuni Chiponda, (now deceased) pursuant to obtaining the Limited Grant of Letters of Administration ad litem issued in “CMCC, Family Division Misc/Succession Cause E067 of 2023, Mombasa” and dated 24th May, 2023.
5. The 2nd to 139th Defendants are individual male and female adults of sound mind residing in Mombasa and the 140th Defendant is the Chief Legal Adviser of the Government of Kenya sued in this suit on his behalf and on behalf of the Ministry of Interior and Internal Co - ordination as the ministry in charge of protecting private property and lives of all Kenyans under the provision of Article 156 of [Constitution](#) of Kenya, 2010.

III. The Plaintiff’s case

6. According to the further amended Plaintiff, the brief facts of the suit, the Plaintiff is wholly owned by Bandari Savings & Credit Co-operative Society Limited, a member based Sacco. The Plaintiff acquired for a valuable consideration all that parcel of land known as Plot Sub - division No. 817 (Original number 324/2) Section II MN. (Hereinafter referred to as “The Suit Land”). The suit property measures approximately 59.5 acres is situated at Nguu Tatu area, Kiembeni, within Mombasa County.
7. At the time of acquisition the property was an open farm actively utilized by the previous owner with no single squatters in occupation. As the proprietor, the Plaintiff has absolute and indefeasible legal mandate to use the suit property for its benefits in exploitation of Constitutional and statutory rights and the [Constitution](#) of Kenya and the land laws. The 132 Defendants were at all material times to the suit operating as Kaguta self Help group and Nguu Tatu self-help group. After acquiring the suit property in the year 2012, the Plaintiff engaged and installed private security guards to watch over the suit property. On or about the month of September 2016, the 1st to 139th Defendants by themselves, their servants and or agents invaded the suit property by wrongfully and illegally entered, trespassed and took possession of portions of the suit property. They remained in possession and thereafter commenced construction of temporary structures. They chased away the security guards and erected temporary structures.
8. As a result of the Defendants’ trespassing onto the suit property, a complaint was lodged at the Bamburi police station, whereupon some of the 132 Defendants, their agents and servants were arrested and charges preferred and they were arraigned in court. Resultantly, the Plaintiff herein undertook two broad steps all intended to preserve the suit land. Firstly, it caused the commencement



of the construction of the perimeter wall around the suit land; and secondly, on or about 1st December, 2017, to file “a Constitutional Petition (Mombasa) No. 15 of 2017” against the said Respondents (Defendants herein) seeking certain orders. During the subsistence of the aforesaid Petition, the Honourable Court issued some orders restraining the squatter from selling sub - dividing and interfering with the construction of a perimeter wall. It also directed the peace and tranquility be prevailed and to ensure that the wall was not destroyed. The Orders were issued on these diverse dates:-

- a. 4th December, 2017;
 - b. 19th December, 2017;
 - c. 18th July, 2019.
9. Between the years 2018 and 2020 the Plaintiff completed the construction of the perimeter wall as per the Court order of 18th July, 2019 issued in the said Petition. The said orders were final and the construction of the perimeter wall was lawful. After the wall was completed, most squatters left and only a small number was left inside the suit property. On the 28th January 2021, Judgement in the Petition was delivered whereby the suit was dismissed on a technicality – to be precise that the suit never raised any breach of the Constitution and thus it offended the doctrine of Constitutional avoidance being a claim for a suit which ought to have been instituted through an ordinary suit. This decision left the Plaintiff exposed as 139 Defendants or any other invader would take advantage of the absence of a court order to interfere with the quiet possession of the Plaintiff over the suit property.
10. The Plaintiff stated that the dismissal of the Petition was not a bar of them bringing this suit in compliance with the law and the guidance given in the Judgment of the court in the Petition. As a result of the 139 Defendants’ trespass and wrongful occupation of portions of the suit property, the Defendants had misused, damaged, wasted, destroyed, polluted and/or defrauded the suit property by reason of which, the Plaintiff had been deprived of the sue and enjoyment of the suit property.
11. The Plaintiff relied on the following particulars of trespass:-
- a. Entering into the suit property without authority to do so.
 - b. Intentionally entering into the suit property with a view to continue being in possession.
 - c. Occupying, taking possession and sub - dividing the suit property for sale to unsuspecting buyers.
 - d. Putting up temporary and illegal structures haphazardly.
12. According to the Plaintiff, the 139 Defendants threatened and intend unless restrained by this Honourable Court to continue to remain in wrongful occupation of the suit property and to trespass thereon. By reasons of the trespass by the 139 Defendants, the Plaintiff had been denied its constitutional rights to its private property, its enjoyment thereof seriously curtailed and its property rights injured by the 139 Defendants aforesaid trespass, and the Plaintiff had suffered loss and damage.
13. The Plaintiff further relied on the following particulars of loss and damage:-
- a. The Plaintiff had been deposed of the use and quiet enjoyment of the suit property.
 - b. The 139 Defendants' misuse of the suit property occasioned detriment to the Plaintiff.
 - c. The 139 Defendants had prevented the Plaintiff from having access and enjoying the suit property.



- d. The 139 Defendants had threatened the Plaintiff's agents with physical violence whenever the agents attempt to enter the property.
 - e. The 139 Defendants erection of houses and structures on the suit property was an eye sore and therefore had defaced and undervalued the property.
 - f. The Plaintiff had been denied an opportunity to get partners for purposes of investing on the property.
14. According to the Plaintiff, unless restrained by the court, the Defendants would continue to trespass on the suit property by entering upon, constructing illegal structures, pull down the perimeter wall and remain upon the suit property. Through an application dated 18th May, 2023, the Counsel for the 1st and 18th Defendants disclosed that one Martin Chiponda as fate would have it died on 18th February, 2023. The Plaintiff stated that no course of action survived his death. Despite the demand and notice of intention to sue having been issued to the Defendants, the 139 Defendants had refused, neglected and or otherwise failed to vacate the suit property.
15. According to the Plaintiff, the following suits had previous been filed with regard to the suit property which had since been determined:
- a. Constitutional Petition No.15 of 2017.
 - b. Mombasa SRMCC No. 1686 OF 2016.
 - c. ELC Constitutional Petition No.18 of 2020.
16. The Plaintiff prayed that Judgment be entered against the 1st to 140th Defendants jointly and severally for:-
- a. A permanent injunction restraining the 1st to 139th Defendants from entering upon, remaining continuing in occupation, constructing, destroying quiet possession and enjoyment of the suit property, namely, Plot Sub - division No. 817 (Original number 324/2) Section II MN.
 - b. A mandatory injunction compelling the 1st to 139th Defendants by constructions erected on the suit property, remove and dispose the materials in default the Plaintiff be at liberty to demolish, remove and dispose the dispose of the materials at the Defendants costs.
 - c. Vacant possession of property.
 - d. An order for compensation of the value of destroyed wall since February 2018.
 - e. An order directing the 133rd Defendant through the County Commander Mombasa, OCPD Kisauni and the OCS Kiembeni to ensure full implementation of the Decree.
 - f. Costs of the suit together with interest.
17. On 30th September, 2022, the Plaintiff called its first witness PW - 1 who testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Munyithia Advocate:-

18. PW – 1 was sworn and testified in English language. He identified himself as Mr. Tobias Odero Sungu, born in 1968 and a resident of Tudor Area of Mombasa. He was a holder of the Kenya national identity card bearing all the particulars noted by Court. He was a Director/Shareholder and chairman of Bandari Sacco Limited, the Plaintiff herein. On 29th January, 2021, he filed a witness statement dated



29th January, 2021 and he adopted the same as his evidence of chief. He also filed a bundle of nine (9) documents namely:-

- a. A copy of the Certificate of Incorporation as Plaintiff Exhibit Number 1.
 - b. A copy of the board Minutes/Resolution as Plaintiff Exhibit Numbers 2.
 - c. A copy of the CR - 12 Forms for the Bandari Sacco as Plaintiffs Exhibit Number 3.
 - d. A copy of transfer of land as Plaintiff Exhibit Number 4.
 - e. A copy of the official receipts on payment of Stamp Duty as Plaintiff Exhibit Number 5.
 - f. A copy of the Certificate of Title as Plaintiff Exhibit 6.
 - g. Copies of photographs of the suit land and the Perimeter Wall as Plaintiff Exhibit Number 7.
 - h. A copy of the Judgment from the Constitution Petition No. 15 of 2020 delivered on 28th January, 2021 as Plaintiff Exhibit number 8.
 - i. A copy of the Ruling delivered on 18th October, 2017 in CMCC (Mbsa) 1686/2016 as Plaintiff Exhibit – 9.
19. Hence all the Exhibits by the Plaintiffs – apart from Plaintiff Exhibit No. 3, were all produced and admitted as their documentary evidence. On 27th July, 2021, he signed a supplementary statement which he adopted as his evidence. They filed a supplementary affidavit on 27th July, 2022 and they filed bundle of documents. The Notice of Motion application dated 12th April, 2021 and the affidavit in support of the notice of motion application was produced and marked as Plaintiff Exhibit numbers 10).

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

20. PW - 1 told the court that he had adopted his two witness statements. He confirmed that the Plaintiff purchased the suit land in the year 2012. That the trespass onto the suit land by the Defendants started later on after they had already purchased the land in the year 2016. He confirmed that the only prayer against the 40th Defendant was on compliance with the security i.e. prayer (e) of the Amended Plaint.

C. Cross examination of PW - 1 by Mr. S.M. Kimani Advocate.

21. On 7th November, 2022, the Plaintiff re - called PW – 1. He informed Court that he was a director and chairman of the Plaintiff's company. He was a shareholder of the company through shares he acquired in the year 2017 when he was Delegate representing a constituent of Members of Company. He had the power to participate in the decision making process. He had been involved in the decision of the purchase of the suit land for the Bandari Investment Limited. The decision was based on the resolution adopted at the Annual General Meeting and also that of a Board of Directors' of the Sacco. He was referred to the Resolution – Plaintiff Exhibit 2 – whose title read as “Bandari Investment Co. Ltd. Resolution” and told the Court that it never read any “Bandari Sacco” or “Bandari Sacco Limited.”
22. PW - 1 stated that these were minutes of a meeting held on 28th January, 2001 which they used to file the suit. The minutes only showed when the meeting ended which was at 5.00 pm. but never showed when it had started. By this time they had a case filed in Court - ELC Constitutional Petition No.15 of 2017. By this date of the meeting he did not know the decision of this case. From the resolution it indicated it was a suit by Court. To him, a suit was as good as an appeal. They had resolved to file a suit against invaders of the Plot. The minutes never provided the date of the invasions by the Defendants.



From his own knowledge, there had been several reports made to the police on then trespass/invasion from year 2016. From the meeting they engaged a Quantity Surveyor (Q.S.) and the police investigated. They filed this case on 29th January, 2021. By that time, the Quantity Surveyor had not given a report and nor the Police had not furnished them with their report.

23. PW - 1 further stated that there were many resolution over other cases. From this bundle they had not displayed any resolution. It was in the year 2012 when they bought the suit land. They had inspected the land before buying it. He did not sign the transfer form. He had not become a Director of Bandari Sacco nor Bandari Investment Limited by then. When he became the Director, he did not see any minutes for the purchase of land. He was a member of the Delegate when the land was acquired. There was no due diligence report of the land. There were the record of the SACCO. He did not display the due diligence report as it was not a requirement. He was referred to paragraph 20. It was the suit No. SRMCC (Mombasa) No. 1686 of 2016 which he was aware of. By that time, he was party to this case. He learned that they had instructed an Advocate to cause an eviction of people from the land. They had the resolution to file all cases. They could be in the file of the Bandari Sacco. He only got knowledge of the order for the demolition of the Perimeter wall. By the year 2016, he was a member of the Board. They retained the law firm of Messrs. Munyithia Advocate to represent them in all these cases. He did not know of the Judicial Review case and neither did he know of its outcome.
24. According to the witness, there had not been any resolution in the cases of Constitution Petition No. 15 of 2017, SRMCC No. 1686/2026 and ELC. No. 18 of 2020. The Constitution Petition No. 15 of 2017 was dismissed on 28th January, 2021 – as per contents of Paragraph 14 of the Plaintiff. They were using the same resolution – Plaintiff Exhibit 2. After that they appealed against the decision at the Court of Appeal. There had been no resolution. The Court decision with regard to the Constitution Petition was made on technicality. The ideal situation was to have the invaders removed from the land. In this matter they were praying for the orders a stated out in the Amended Plaintiff.
25. When referred to the prayers of numbers (a), (b) and (c) of the Plaintiff, the witness stated that it presupposes that there were people on the suit land. He was not aware of the civil suit ELC No. 160 of 2021. He disowned the case. He could not remember ever signing any papers regarding the said civil suit of ELC No. 160 of 2022. When shown pleadings pertaining to the said Civil suit ELC No. 160 of 2021, he told the court that although the Affidavit bore his name but the signature affixed thereon was not his. He had never met an advocate by the name of B.M. Mutisya Advocate who appeared in the case.
26. PW - 1 was referred to the Plaintiff filed on 16th August, 2021 and verifying affidavit sworn by Mr. Mwamunge Muzungu Advocates. He reiterated that that was not his signature. With reference to the witness statements in his name, he equally stated that the same was not his signature. He disowned the whole case. He knew that there were a two faction fighting among themselves over the same subject matter. Its confirmed that it was the order from ELC. No. 160 of 2022 to evict the people from the suit land. He was only aware of the cases filed by Munyithia Advocate as he was their Advocate. The witness disowned all other cases filed by the other advocates. He disagreed there was an abuse of the due process of multiplicity of cases in difference court over the same subject matter. He was aware of there being cases with one Mr. Hussein Dairy who had been the alleged original owner of the suit land where the police were trying to get the land back.
27. The witness told the court that he was aware that the 2nd and 18th Defendants came back and reconstructed their structure. They demanded for the building plans. There must have been someone else. According to the PW – 1, they purchased the land from Mr. Hussein Dairy. However, he stated that they were not part of these proceedings. They were not aware of the Criminal proceedings at Shanzu Courts. There were two factors.



D. Cross examination of PW - 1 by Mr. Mkan Advocate.

28. On 10th November, 2022, PW - 1 was re - called for cross examination after being stood down. He told the court that he was a director and chairman of the Plaintiff's Company since the year 2017. Before he had been a honorable Delegate for over 20 years. Court learnt that one had to be elected by members to be a delegate. After being elected as a delegate one had to present themselves. Then the appointment as a director came up. So in his case. it was for membership, delegates and directorship. For one to be a delegate the shares worth at a sum Kenya Shillings One Million (Kshs. 1,000,000/-) and for Director shares worth a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=). PW – 1 had many shares.
29. According to PW – 1, from the CR - 12 Form of Bandari Investment Limited, he had no shares at all. His testimony was that before the Plaintiff bought the suit land, it was vacant. It had no encumbrances. This information was obtained from the due diligence they conducted. They had not displayed any official search. They built the perimeter wall in the year 2016. They were advised to get the approvals. At the time they were building the wall, there were people already on the land. There were no condition not to remove squatters. They engaged Oriole Investment Limited & Njiru Limited as the contractors for the construction of the perimeter wall.
30. The witness told the court that the contractor advised them that since there were squatters on the land, there would be need to apply and obtain the approval. After they obtained the approval, the construction began. M/s. Oriole Investment Limited contractors was disrupted by the people. They acquired the land from Mr. Hussein Dairy. PW – 1 was not involved in the day to day level duties. With reference to the transfer forms for the purchase of the land. He stated that it was executed but not dated. It only indicated the year when it was executed. With reference to the Certificate of title deed, it indicated there being a loan having been taken by the land owners. Partially they took a loan and partially they paid from their own contribution. It showed that they took the loan and discharged it on the same day. The title became clear.
31. PW - 1 reiterated that they conducted investigations of the people who had entered on the land and this led to the amendment of the Plaint. They added 139 people into the pleadings. As for todate, they were no longer on the suit land. He did not know where they were. Before, these people had constructed semi permanent structures on the land and that was the reason why they came to court. They filed two (2) suits and they had one resolution to file these suits. They filed the appeal. It was ongoing. One of the suits was to stop the parties from destroying the perimeter wall.
32. He confirmed that on this suit they had sought for certain prayers. They had the same prayers from all these courts. Currently, there were no people on the land. After the eviction only two persons had applied and gotten Court orders to be reinstated. Despite of this, the two still never came back. There were no other persons. When they acquired the land it was vacant. PW – 1 had photographs to that effect. The Plaintiff made complaint to Kiembeni and Shanzu police stations as every time they would build the perimeter wall it would be brought down by some people they suspected were the Defendnats. From the lodged complaint, the people would be arrested charged and arraigned in Court.

E. Re - Examination of PW -1 by Mr. Munyithia Advocate.

33. PW – 1 confirmed that as a delegate he would be involved in the running of the company. He came to Mombasa in the year 1987 as a delegate cadet and they would move around. Hence he had a lot of knowledge of the area. It was a place well known to him. He had so many of their members in Court who were directors. When referred to the Amended Plaint, he stated that the squatting ended in early year of 2017. On being referred to the list and bundle of documents by the 1st and 18th Defendants, he



identified them as follows:-A copy of the Certificate of the Community Based Organisation (C.B.O). dated 24th August, 2016.A copy of a letter of Muhuri dated 19th August, 2015.Page 5 being the official search of 11th July, 2014.Pagebeing the official Search of 19th December, 2014.Page 8 being a Letter to NLC dated 7th December, 2016.

34. The witness told the court that from the bundle, it was dated earlier than the year 2012. There were two factions fighting each other over the subject matter. That had led to arrests and charges of assault being preferred against them in court. He had not been shown any Court order that he had refused to obey. He had not seen any title in the names of the 1st to 40th Defendants. He had not seen any judgment giving land to the 1st to 40th Defendants. They bought land in 2012 to date its 10 years. They bought land that was free from encumbrances. Before they built a perimeter wall they obtained approval from the County Government. They had not seen any approval and plan for the construction of the structures. From the title it could be seen from whom the Plaintiff had purchased the land from. The certificate of title was the same document in the Defendant's list of documents. Hence the Defendants knew who sold the land to them. They were only two individuals who were on the land. He did not know where the rest were living. That was all.

35. On 22nd November, 2022 the Plaintiff called PW - 2 who testified as follows:-

F. Examination in Chief of PW - 2 by Mr. Munyithia Advocate.

36. PW – 2 was sworn and testified in English language. He identified himself as Mr. Kelvin Kiprotich Biwott. He held a Kenya National identity card bearing all the details as noted by Court. He stated that between the years 2018 to 2010 he was involved in the building of a Perimeter wall as the Project Manager. His duties entailed overseeing the project management, drawing, costs specifications and time. He was to ensure that there was agreement on these issues between the contractor and the client. On various occasion, he would be called by the Chief Executive Officer of Bandari Investments and informed that some sections of the wall had been demolished as seen from Pages 121 to 141 of the Bundle of the statement by PW-1 – Page 121. On all these occasions he would assess the damage and prepare a report. On 1st April, 2020 he assessed and prepared the damage report after he had found some section of wall having been damaged. That time and part, the damage was worth at a sum of Kenya Shillings One Million Seven Seventy Five Thousand Three Fourty Hundred and Fifty Six cents (Kshs. 1,775,340.56/-) – marked as Plaintiff Exhibit 12.

37. In the year 2021. PW - 2 was called by the CEO upon the wall having been damaged. He confirmed the damaged wall. From the damage report dated 2nd April, 2021. It indicated the loss as being a sum of Kenya Shillings One Million Nine Thirty Eight Thousand Four Sixty Hundred (Kshs. 1,938,460/=) marked as 'Plaintiff Exhibit No. 13 on Page 122. On Page 123, 124 and 125 was the damage report. The report was dated 2nd April, 2021. According to him, on 30th April, 2021 there having been more damage, he prepared a report dated even date and estimating the damage as being more than a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000/=) as per Plaintiff Exhibit No. 14. Pages 126, 127 and 128 was the same report. On page 129 was another report for damage – he took photos showing the damage as being at Kenya Shillings Two Million Nine Thirty Eight Thousand Four Sixty Hundred (Kshs. 2,938,460/=). Plaintiff Exhibit No. 15. Page 132. He took photographs and prepared a combined report.

38. He was referred to the Plaintiff Exhibit No. 16. PW – 2 told Court that the report on on Pages 132 to 139 was the same report as the one on page 140. It was dated 28th August, 2021. According to him the total damage caused onto the wall was a sum of Kenya Shillings Five Million Six Fifty Seven



Thousand Four Fifty Hundred (Kshs. 5,657,450/-). The Plaintiff Exhibit No. 17 was a document where he undertook the calculations. That was all.

G. Cross Examination of PW - 2 by Mr. Mkan Advocate.

39. PW - 1 confirmed that as a Civil Engineer Technician his work was to oversee the construction work. It was to ensure that the project was done as per the approved designs. In this case he did not prepare any designs. He had not produced any of his certificates of his qualifications. He was referred to page 121 of the List of Plaintiff's documents – he said he was the one who prepared that document. It never had his signature. The document was not complete on page 123. It had his name and signature. It was for the police. But on page 121, he was referred as the supervisor and not as an Engineer. The document had a sum of a sum of Kenya Shillings One Million Seven Seventy Five Thousand Three Fourty Hundred and Fifty Six cents (Kshs. 1,775,340.56/-) as the total damage. There were no workings on how he arrived at this figure.
40. On building construction, the witness stated ordinarily that the same was approved by a Quantity Surveyor. In the instant case, they never involved/engaged a Quantity Surveyor in the construction of the Perimeter wall as should have been expected. He was the one who prepared that report. They did not involve a Quantity Surveyor in all these works as they were repair works. They were small works to have involved a Quantity Surveyor. On Page 124 – was another report, it never showed the person who prepared it. According to him on pages 121, 123 and 124 was one document. There was no attachment. On page 123 was the police report. Pages 125, 126, 127 and 128 – was another report from one incident. On page 127 was on the estimates on the damages. He arrived at this estimates based on the measurements.
41. The witness testified that they were not there but he could refer to his diary. Further one can arrive at those figures based on the description and many other documents not in court. He did it this way as the best way out. If he applied any other method, they would end up in being a very big document. However, he presented the detailed information to the client. What he had given were estimates based on the measurements carried out.

H. Cross Examination of PW - 2 by Mr. S.M. Kimani Advocate.

42. Upon being referred to Paragraph 4 of his witness statement, PW – 2 stated that he had seen the statement by Mr. Ken Tobia Odero Sungu – PW -1. PW - 2 was described as a Quantity Surveyor, yet he was not the person described in the document. He was the Project Manager and not a Clerk of Works though they played the same role. He did this for his employer. He confirmed all the Plaintiff's exhibits. He confirmed Plaintiff Exhibits 12, 13, 14 and 15, were standard forms. By the year 2020, his employee was Bandari Investments but none of the exhibits were in their names. The form had the words – “The contractors, employee are required to report any damages, loss or theft caused within Bandari Sacco Limited as soon as possible.
43. PW – 2 was referred to the averments on pages 122, 123 and 124. On Page 123, PW – 2 confirmed that that was his signature for Floyud East Africa Ltd, which was his Company. It had an official stamp. He acknowledged that he received instructions to go to site and access the damage pointed out by the CEO of Bandari Investments Limited. He confirmed that in the report on Pages 123, 126, 130 and 131 were all the signatures bore the same date. There was a site diary for the Engineers. It was kept and the information entered all the time they visited the site. He kept a diary but he had not availed it in Court. They were rather bulky documents. His report was worthwhile though it was not supported by the workings and measurements. His damages reports were made in the year 2020:-
 - a. 122, 123 and 124 – year 2020.



- b. 125, 126 and 127 which were made in the year 2021.

I. Re – examination of PW - 2 by Mr. Munyithia Advocate.

44. PW – 2 confirmed that he was satisfied on the manner and mode of the damage reports prepared. He was able to provide all the relevant information pertaining to the damages caused on the wall. No one asked him of his identity card. Page 127 – gave the description there was nothing in his professional life that he had left out. That was all.
45. On 22nd November, 2022, the Plaintiff close their.

IV. The Defendants’ case.

46. The 1st and 18th Defendants in their Amended Statement of Defence and Counter - Claim dated 18th July, 2023. Likewise, the 19th to 140th filed their Defences accordingly. However, the 140th Defendant, the Honourable Attorney General never filed any evidence whatsoever nor participated in the proceedings. The 1st and 18th Defendants disputed all the averments set out in the further Amended Statement of Claim by way of Plaint dated 17th March, 2021, 22nd June, 2023 and filed on 18th March, 2021 undisclosed date and proffered their statement of defence to the claim. The 2nd to 17th Defendants never filed any Defences despite service. The 16th Defendant to the knowledge of the Plaintiff deceased since 1st May, 2015 and the suit does not lie against a deceased party. It abated.
47. In general terms, the 1st and 18th, 19th to 139th Defendants made claims that the suit was either offended “the doctrine of Res Judicata and Sub – Judice” or otherwise an abuse of the due Court process arising from the fact that the same subject matter and suit involving the same parties had been substantially heard and finally determined by this Court being competent so to do in “the Constitutional Petition No. 15 of 2017 (here after the ‘Constitutional Petition’). The Petition had been filed by the same Plaintiff. It was dismissed on 28th January, 2021. According to the Defendants herein, the Constitutional Petition was a claim for recovery of the suit land on the same grounds as the present claim. Being aggrieved by the dismissal, the Plaintiff had since preferred an appeal and was actively prosecuting it before the Court of Appeal. In these circumstances, the present claim was either “Res Judicata” or filed in contravention of the doctrine of “Sub – judice” rule as stipulated under the provision of Sections 6 and 7 of the *Civil Procedure Act*, Cap. 21. Therefore, it was an abuse of the court process. Thus, the Defendants would seek to have this action struck out on these grounds.
48. In further response to the Plaintiff’s claim as set out in Paragraphs 1 to 223 of the Further Amended Plaint, the 1st and 18th Defendants averred that they, with others (some of whom were not named in these proceedings), had had exclusive and open possession of the suit land which was part of the larger land known as Plot No. 324 of Section II Mainland North (Otherwise known as “The Nguu Tatu” area), for a period of more than 12 years as stipulated by law.
49. Hence, it was the Defendants case that they were in open, exclusive, and continuous peaceful possession (*nec vi, nec cram nec precario*) of the suit land for over 12 years before the Plaintiff reportedly purchased the suit land – Sub - Plot No. 817/Section II/MN in the year 2012 from the previous title holders. The previous title holders’ rights in and over the suit land had by the time of the said purchase been extinguished by the operation of law, and the title was and still is held in trust for the Defendants through the Doctrine of Land Adverse possession. The Plaintiff and the previous title owners from who it claimed to have derived title by purchase had been litigated over the said suit land in previous proceedings, against the 1st and 18th Defendants and had either been concluded, dismissed and/or were still pending herein as shown hereinbelow in:-



- a. ELC (Mombasa) Case No. 201 of 2013 - *Ibrahim K. Baya & 12 Others v Mohamed Kassam & 7 Others*, for a claim for recovery of Plot 819/II/MN against the title owners.
 - b. ELC (Mombasa) No. 298 of 2013 (OS) *Muhambi Kalinga & 188 Others v Mohamed Kassam & 4 Others*, for a claim for Plot 819/II/MN against the title holders.
 - c. Constitutional Petition (Mombasa) Number 74 of 2014 *Kazungu Katana & 382 Others v Mohamed Kassam & 6 Others*, for a claim for recovery of Plot No. 324, 382,817 and 819, / all of Section II Mainland North.
 - d. ELC (Mombasa) No. 301 of 2015, *Martin Chiponda and 860 Others v Mohamed Kassam & 4 Others*, for a claim of recovery of Plot Numbers. 324, 382, 817 and 819 all of Section II Mainland North.
 - e. CMCC (Mombasa) No. 1686 of 2016 *Bandari Investments Co., Limited v Hashim Loma Baya Omar Juma; Shida Charo; Kashindo; Nahodha John; Chris*. The Plaintiff obtained eviction orders ex-parte before a court without jurisdiction.
 - f. H.C (Mombasa) JR No. 7 of 2017 *Republic v Hon. E. Mutunga, SRM; Hon. Attorney General; OCPD Kisauni and OCS Kiembeni Police Station Ex-parte Dalu Chigamba Munga and Ephraim Kitsao Baya*. A claim to call up to the High Court for quashing the Plaintiff's eviction decree in CMCC No.1686/2016.
 - g. ELC Constitutional Petition (Mombasa) Number 15 of 2017-*Bandari Investments Co. Limited v National Police Service and 22 Others*. This was a claim for recovery of the same land on the same facts. It was dismissed on 28th January, 2021. The Plaintiff had since appealed that decision by filing a notice of appeal on the bed of the same court file.
 - h. Mombasa Court of Appeal Civil Appeal (Mombasa) No. 21 of 2018 - *Martin Chiponda & 4 Others v Bandari Investments Co. Limited and 6 Others*, an interim appeal by the Defendants from the order of 19th December, 2017 by ELC, Mombasa in ELC Petition No.15 of 2017, aforesaid. It was dismissed on 20th September, 2018.
 - i. CA Civil Application (Mombasa) No. E033 of 2021 - *Martin Chiponda and Others v Bandari Investments Co. Limited*, - an application to strike out the notice of appeal for want of timely service of notice of appeal on the applicants or their advocates. The President of the Court of Appeal had sanctioned the empaneling of a five (5) Judges bench to hear this application.
 - J Court of Appeal (Mombasa) Civil Application No. E034 of 2021-*Bandari Investments Co. Limited v Martin Chiponda and Others*, an application for extension of time to correct and remedy the default under i) above. The application was allowed by a single Judge but the Defendants had sought a reference to full court and leave to have the reference heard alongside application under j).
50. The Plaintiff and the title owners from whom it reportedly derived the alleged title in and over the suit land had also set in train several criminal proceedings in:-
- a. Criminal Case (Shanzu) No. 822 of 2015 – *Republic v Michael Fondo and 10 Others* - a charge of trespass on the suit land. Upon conviction, the accused persons appealed, and the appeal is pending hearing and determination before the High Court, Mombasa.
 - b. Criminal Case (Shanzu) Number 1 1252 of 2015 – *Republic v Samuel Chivatsi*, a charge of injuring animals on the larger parcel 324 of Section II MN.



- c. Criminal Case (Shanzu) No.1040 of 2016 – *Republic v 1 Joba Athumani Saba* - (a charge of disobeying lawful court orders issued in Criminal Case (Shanzu) number 822/2015, regarding the same land.
51. By reason of the matters aforesaid, the 1st and 18th Defendants would averred that the present suit was bereft and marred by violation “inter alia” of “the doctrines of Res judicata and Sub - Judice, Prohibition of multiplicity of suits, Lis pendens contrary to the administration of civil and criminal justice. According to the Defendants, the orders issued in the Constitutional Petition could survive Plaintiff’s illegal and fraudulent activities of demolition of the Defendants’ structures, dishonestly burying and deleting evidence of such structures, and eventual taking of possession of the suit land during the pendency of these and other proceedings, thereby permanently dispossessing the Defendants and depriving them equality of arms in this contest. The Plaintiff was put to the strict proof thereof.
52. The Defendants relied on the following particulars of illegality, fraud and inequality of arms:-
- a. The Plaintiff reportedly purchased the suit land in the year 2012.
 - b. The Plaintiff’s previous action in “the Constitutional Petition No 15 of 2017, CMCC No.1686 of 2016 and HC JR No. 7 of 2017 were allowed or dismissed without any saving Clause(s) in the Judgements of court.
 - c. The Plaintiff illegally demolished the Defendants’ residential houses on the suit land, notwithstanding court orders injuncting and barring such action, thereby evicting the Defendants without a lawful court order.
 - d. The eviction of the Defendants had the effect of prematurely dispossessing them of the suit land during the pendency of this action, thereby unjustly disadvantaging one side before trial.
 - e. Physical possession of the suit land was vested in the Defendants all along, before their eviction, hence the multiple suits filed by the Plaintiff before the filing of this suit, for recovery of possession.
 - f. The Plaintiff presently had physical possession and title to the suit land, thereby rendering this action otiose and the Defendants’ defence of possession, nugatory
 - g. The Plaintiff’s impugned actions of demolishing houses pendente lite” and eviction of the Defendants from the suit land lacked “bona fides’ and were actuated by malice and spite.
53. The Defendants denied the plea of loss and damage made out under Paragraphs 17 and 18 of the Amended Plaint and specific threats of violence, damage or waste to the suit land or denial of investment opportunity or companion of development partners. An injunction could not and ought not to issue to sanction the retaining of the Plaintiff’s position of advantage through fraud by barring the Defendants’ entry (or re-entry) upon the suit land after their wrongful eviction by use of force, contrary to the Court order issued in these proceedings in August 2021, during the pendency hereof and of ELC (Mombasa) No. 160 of 2021. Fraud unraveled everything and vitiated all transactions known to land (See “[*Lazarus Estate Limited v Beasley* \(1956\)](#)”).
54. According to the Defendants, the jurisdiction of this court was disputed on account of the plea of “Res – Judicata”, and “Lis Pendens” now that the Constitutional Petition (Mombasa) Number 15 of 2017 was dismissed on 28th January, 2021 and there was pending an intended appeal before the Court of Appeal which if ultimately successful, would either grant the Plaintiff the same prayers as sought herein, or restore the Constitutional Petition for re-hearing before this court, probably differently



- constituted. The Amended Plaint otherwise never disclosed a reasonable cause of action against the 1st and 18th Defendants. In response to the Plaintiff's plea in Paragraph 20 of the Further Amended Plaint the Defendants averred that the defence and the cause of action pleaded in the Counter - Claim survive the deceased.
55. On the Counter - Claim, the Defendants averred that the Plaintiff filed the ELC Constitutional Petition (Mombasa) No. 15 of 2017 seeking to evict squatters from the suit land. The same was dismissed on 28th January, 2021. But later on the Plaintiff preferred an appeal and instituted the current suit. By an order of a single Judge of the Court of Appeal made on 4th December, 2021 the Plaintiff by original action was granted leave to amend and serve a notice of appeal.
56. The Defendants relied on the following particulars of abuse of court process:-
- a. Instituting different actions over the same subject matter simultaneously in different court;
 - b. An improper use of an order in a similar suit in ELC (Mombasa) No.160 of 2021 to demolish and evict the 1st and 18th; 19th to 139th Defendants (the Plaintiffs in the Counter Claim) from the suit land.
 - c. Employing of judicial process in a malicious or in a desire to misuse or pervert to the irritation and annoyance of the Plaintiffs in the Counter - Claim.
 - d. Instituting another suit regarding the same matter and securing an order which resulted to eviction and demolition
 - e. The 1st Defendant was guilty of abuse of court process as it was aware of the order issued on 19th August, 2021 and yet it went ahead and demolished the 1st and 2nd Plaintiffs' houses after the order had been served on it.
 - f. Disobeying the orders issued by this Honourable court on 19th August, 2021 with knowledge of the presence of the 1st and 2nd Plaintiffs' actual possession of the suit land.
57. The 1st Defendant maliciously damaged the 1st and 18th Defendants' property by:-
- Particulars of malicious damage to property:-
- a. Forceful eviction which caused damage to property and eviction of the 1st and 18th; 19th to 139th Defendants;
 - b. Demolition of the Plaintiffs' (by way of counterclaim) and other residents of Nguu Tatu Community houses;
 - c. Theft of the household by hired goons;
 - d. The act of arson where beddings and other household items were torched.
 - e. Deletion of evidence of the Defendants houses by bulldozing and flattening the suit land to obliterating the evidence.
58. According to the Plaintiffs' in the Counter - Claim, by reason of the matters aforesaid the 1st and 18th Defendants and 19th to 139th Defendants had suffered grave mischief, loss and damage; and have been rendered destitute.
59. On particulars of loss and damage, the Plaintiffs in the Counter claim relied on the following:-



- a. Estimated value of the demolished shelter at a sum of Kenya Shillings Three Hundred and Fourty (Kshs.340,000/-).
- 60 The 1st and 18th Defendants and 19th to 139th Defendants claim damages. Before securing alternative accommodation the 1st and 18th and 19th to 139th Defendants with their families were forced to stay in the open for over one month and they claim by Counter - Claim general damages for loss and suffering to be assessed by the court. By reason of the matters aforesaid, the 1st and 18th Defendants claim by way of Counter - Claim, a declaration that their eviction pendente lite was illegal, an abuse of the due court process and contemptuous of the court authority and proceedings. They further prayed for restitution for equality of arms so that they could prosecute and defend their case while on the suit land. The jurisdiction of this court was admitted.
- 61 The 1st and 18th Defendants (1st and 2nd Plaintiffs by way of counterclaim) prayed for:-
- a. That the Plaintiff's suit by original action be dismissed with costs on the higher scale, for the attempts to overreach, steal a march and brazen breach of court orders; and or for being in contravention of "the doctrine of Res Judicata".
- b. An order for reinstatement and restoration of their structures on the suit land is ordered.
- c. Compensation for damage to property.
- d. Award of exemplary damages for loss and damage occasioned by abuse of the court process.
- e. Costs of the suit
- f. Any other order the court deems fit.
62. On 28th July, 2023 the Defendants called their witnesses DW - 1 and DW - 2 who tender their testimony in support of their case as follows.

A. Examination in Chief of DW - 1 by Mr. S.M. Kimani Advocate.

63. DW – 1 was sworn and testified in Kisawakili language. He identified himself as Mr. Francis Randungu Mwabuni. He was a holder of the Kenyan national identity card bearing all the details (numbers, place of issue, location and date of birth) as noted down by Court. He told the court that he used to work for the Kenya Bus Services Ltd. (Mombasa) as a bus conductor. He was representing his brother the late Martin Chiponda (the 1st Defendant) who was elder than him. He was appointed in Succession Cause No. E067 of 2023 – Mombasa C.M. on 24th May, 2023. He recorded a witness statement on 21st July, 2023. He knew that his brother the late Martin Chiponda was sued by the Plaintiff allegedly for acts of trespass onto the suit land. His brother started occupying the suit land from the year 1997. Mr. Chiponda also invited DW – 1 and he started living on the suit land with him. By then he was employed at KBS. His brother used to live on the suit land peacefully and without any interruption from anybody in the Government or any other body.
64. The witness told the Court that he lived with his family wife and children on the suit land. They had numerous neighbors. Both of them constructed semi permanent houses on the suit land. Before the year 2016 he had never seen Bandari Sacco Investment Limited, the Plaintiff on the land. DW – 1 was aware that the Plaintiff filed a Constitution Petition against his brother but it was dismissed on 28th January, 2021. He was further aware that Bandari Sacco Investment Limited preferred an appeal before the Court of Appeal. He knew the case at Court of Appeal was still pending before the said Court. He was also aware of the second civil case ELC (Mombasa) No. 160 of 2021 which was before this Court. When it was filed in August 2021 the Plaintiff obtained a Court order during the global Covid



- 19 pandemic period to unlawfully evict the Defendants. They and in Company of the Policemen and bull dozers used it to demolish all the structures and evict people from the suit land.
65. Thereafter, his brother moved to Court and was allowed to re – enter the land and reconstruct the houses but not the others. The Plaintiff in ELC (Mombasa) No. 160/2021 was Bandari Sacco Investment Limited. It was Bandari Sacco Investment Limited who had been the ones suing the Defendants on the allegations of acts of trespass. These were wrong legal actions taking that they had been living on the land for over 10 years. DW – 1 wondered how comes then there were structures on the suit land. Thus, to him these were wrongful and false information. Thereafter, he moved to court and he was allowed to him and another were allowed to reconstruct the house but not the others. Bandari Sacco Investments Limited had been suing them in numerous cases on the same allegations of them being trespassers and encroachers.
66. At the moment, there were two houses on the land but they were demolished again. That is there the roofs were wiped away. The suit land was surrounded by a perimeter wall bearing one exit gate. It was manned by a private security Guards hired by the Bandari Sacco Investment Limited. There were still two (2) structures. Unfortunately, Mr. Kazungu – the 18th Defendant was not in a position to live on the suit land alone for fear of being attacked by hired goons. His apprehension was due to lack of company arising from the death of the late Martin Chiponda, the 1st Defendant with whom they were allowed re – entry into the Suit land through a Court order. DW – 1 stated that Bandari Sacco Investment Limited claimed to have bought the suit land in the year 2012 but by then, his brother and him were already living on the suit land.
67. The witness stated that he was not one of the parties in the civil case ELC (Mombasa) No. 16/2016. Their houses were demolished and their property stolen. Likewise, he was not a party in the Constitution Petition (Mombasa) No. 15/2021 but he was on the land. He was never a party in all the other suits. But his brother was a party in all of them. He was aware there were other people who were in occupation of the suit land and party to those suits. They were approximately 133 people. He knew some of them. Apart from the two people, none of the other the 133 people had any houses nor structures in existence on the land.
68. DW - 1 reiterated that he was aware that Mr. Chiponda and Mr. Kazungu (1st and 18th Defendants) filed a Counter Claim. DW - 1 was aware that he was urged to allow to construct his house. It was made of coral blocks and iron sheets. It consisted of 3 bedrooms. The house was valued at a sum of Kenya Shillings Three Hundred and Fourty Thousand (Kshs. 340,000/=). He had re-constructed another 3 bedroom. It was not yet complete. When the land was demolished, they would be living with neighbors outside the suit land. His property were stolen by the goons and crushed by hired bull dozers. They were forcefully evicted from the suit land. The hire people were using blunt objects. They did all these under the orders of the Bandari Sacco Investment Limited. They prayed to be compensated for the loss and as sought out from the Counter Claim in the Amended Defence and any other relief the court may deem fit. From the statement. He produced the following documents namely:-
- a. A Copy Letters of Administration Ad Litem.
 - b. A copy of the Decree – Constitution Pet. No. 15 of 2017
 - c. An Order – JR No. 7 / 2017 (Defendants Exhibits No. 1 to 3.)
69. DW – 1 produced a Further List of Documents dated 24th December, 2021 and filed 1st February, 2022. They were 10 documents namely:-
- a. A copy of a Certificate of Incorporation of Nguu Tatu.



- b. A copy of a Letter of Muhuri – 19th August, 2015.
 - c. A copy of a Letter dated 7th December, 2015 to the National Land Commission.
 - d. A copy of a Letter by NLC dated 6th May, 2015 Page 11.
 - e. A copy of a Letter dated 23rd July, 2018.
 - f. A copy of a Letter dated 19th May, 2020 to police
 - g. A copy of a Letter dated 19th May, 2020 by the NLC
 - h. A copy of a Letter dated 12th August, 2020 from 1st Defendant . to the Director of Public Prosecution (DPP).
 - i. A copy of a Letter dated 31st August, 2020.
 - J A set of Photographs of the village before demolition up to Page 55.
70. They were the Defendant Exhibits Numbers 1 to 13 and hereby produced as his evidence. From the ELC. No. 160/ 2021, his brother urged court to have the 139 people be reinstated to the suit land.

B. Cross Examination of DW - 1 by Mr. Mkan Advocate.

71. DW - 1 told the court that he applied for the Limited Grant Ad Litem on 24th May, 2023. He confirmed that his brother entered the suit land in the year 1997. DW – 1 got into the suit land three years later. By then there were people in the land. They allocated themselves their portions of the land. There were neighbors. He also constructed a house. It was an iron sheet – walls and roof. Others had built a coral blocks. At the moment, there were no people who lived on the suit land after the demolition but the two – 1st and 18th Defendants came back and re – constructed the house. The place was well guarded, nobody was allowed in the suit land.

C. Cross Examination of DW - 1 by Mr. Kimei Advocate.

72. DW – 1 told the Court that his brother entered the land in the year 1997. Before getting to the suit land at Nguu Tatu, his brother used to live at Vikwatani. It was Mr. Kazungu, the 18th Defendant who came first then Mr. Chiponda, the 1st Defendant followed. Before his brother got there they knew that the land belonged to their forefathers which was then leased to Mr. Hussein Dairy. The said lease had expired and according to the laws of Kenya once a lease had expired it reverted back to the people. He had an official search and the letter from the National Land Commission which indicated the lease had expired. His brother was not granted any title deed to the land.

D. Cross Examination of DW - 1 by Mr. Munyithia Advocate

73. DW – 1 was referred to the Notice of Motion application dated 18th May, 2023. The witness confirmed that before settling down on the suit land, he had come from the Nguu Tatu. He used to live there before the demolition. On that date when he attended Court to testify he had come from Vikwatani estate. It was an adjacent place to the suit land. That is where he lived. His brother died at Coast General Hospital. He was referred to the Certificate of death which confirmed that fact. DW – 1 was referred to the letter dated 12th May, 2023. It indicated who were the heirs and beneficiaries of the family of Martin Chiponda. The witness’ name was not in the list.
74. DW -m 1 was further referred to the minutes of the family. Although it authorized him to come to court and represent the family but it did not bear their signatures. He confirmed that his brother moved onto



the suit land from the year 1997. But before then, his family used to live at Kaloleni within the County of Mombasa. When referred was made to the copies of the national identity card he told the court that it showed they were from Kaloleni. He stated that the parents of Mr. Chiponda used to live at Nguu Tatu. He had not seen any sale agreement entered between Mr. Martin Chiponda to acquire land. He had seen the letter of Director of Public Prosecution (DPP) and the National Land Commission (NLC) proposing that the land should be given to Mr. Martin Chiponda. He expected Mr. Chiponda to be given 300 acres in total. The Bandari Sacco Investment Limited were occupying 60 acres. From the documentary in possession of Mr. Chiponda, he had not been mentioned. He was astonished that his brother was a party to the suit but him left out by the Bandari Sacco Investment Limited never came to him for his role.

75. DW – 1 was referred to the Defendant Exhibit Numbers 4 to 13, being the letters to NLC, DPP, Police Commissioner etc. none of them mentioned or referred to the DW - 1. When his brother was sued and filed a Counter - Claim, he was never joined as a party. They gave him the leadership role but unfortunately he died. They had never sued Mr. Hussein Dairy but he remembered they had that discussion about it. He had lived and built houses on the suit land. Bandari Sacco Investment Limited found them there. His brother may have caused any some surveying exercise. He was referred to the set of photographs taken by the neighbors and Mr. Chiponda. He confirmed that his house never appeared on the photographs. The lease issued to Mr. Hussein Dairy had expired. He confirmed there were no documents to proof or show that the lease had expired.
76. According to the witness, the Plaintiff claimed to have bought land in the year 2012. To date, it was 11 years. He did not know whether there was a court order stopping Mr. Hussein Dairy from selling the land to the Plaintiff. According to him, he confirmed that the damages caused to the Defendants was a sum of Kenya Shillings Three Hundred and Fourty Thousand (Kshs. 340,000/-) although it was not supported by any evidence as all the documents were destroyed during the demolition and eviction. On the second construction. It was not complete as yet. Hence, he may not know the costs incurred for the re - construction. He confirmed that among the prayers sought by Mr. Chiponda, the title deed was not one of them.

E. Cross Examination of DW - 1 by Mr. Wameyo Advocate.

77. DW – 1 stated that he had never filed any case against Bandari Sacco Investment Limited. This was the first time where he appeared on behalf of his brother. He got on the land after the year 1997. Precisely, in the year 2000. He never witnessed people settling there. Before the year 1997, he had been living at Vikwatani and Likoni though he used to move from place to place due to the nature of his occupation as a bus conductor. His brother and him had their own places. The suit land belonged to their forefathers but it was acquired by Mr. Hussein Dairy through a lease. They got in land when the leases issued to Mr. Dairy expired as he was informed by the elders. He did not know these elders but his brother knew them. His brother was invited on the suit land by the elders. He only knew one of them – called Kazungu Katana. There was demolitions of all the structures, including mine.
78. After the demolition, he had never filed any case. The demolition was through a court order from the civil case ELC. No. 160/2021 which was obtained irregularly. Thereafter an application was made for there to be reinstated and that caused the building of houses for Martin Chiponda and 18th Defendant to be re - constructed. The wife of Martin Chiponda never signed the authority for him to file the case. The wife was still alive and after the death of the husband she had not gotten a stable place of residence. One time she was at Vikwatani and Kaloleni. He did not know the name of the neighbors where she went to live. He knew the area chief and the elders. They were informed but they never recorded statements. The village elders would allocate the land. But none of the elders had recorded



witness statements in this case. The roof for the house for Mr. Kazungu was removed. He reported the matter to the police and got an occurrence book number. He demanded to be compensated for the demolition. He was aware there was a court order which to him it was acquired irregularly. The loss for the demolition was for a sum of Kenya Shillings Three Fourty Thousand (Kshs. 340,000/-). He believed that when he was building permanent house they may have gotten approvals from the authorities. The deceased had 8 children. He had four (4) wives. They all gave him authority to apply for the Ad Litem.

F. Re – examination of DW - 1 by Mr. S.M. Kimani Advocates.

79. DW - 1 was recalled and re - examined on 24th October, 2023. He informed court that they were removed from the suit land through a Court order in the Civil case ELC No. 160 of 2021. He knew that both the Plaintiff in that case and ELC No. 16 of 2021 was Bandari Investment Company. They obtained fake orders. The deceased filed the case after the illegal demolition of the structures. Since Mr. Chiponda was their leader, DW – 1 could not file any case. He was appointed as his legal Representative and not his wife. Traditionally wife(ies) went where men stated.
80. Furthermore, the witness told the court that the deceased used to confided in him a lot. By that time the deceased’s wife had not gotten a national identity. The wife was 35 years. Mzee Kazungu – 18th Defendant got into the land first. Both of them used to be close friends with the deceased. Mzee Kazungu welcomed Martin Mzee who was welcomed to the land by Mr. Mohamed Kazinga. All these Civil and Criminal cases had been filed in court by Hussein Dairy. By then Bandari Investment had not been on record. Bandari Investment Ltd. came into force in year 2021. They then started filing cases agaibst the 139 people. He had never been a party to the said cases. He knew they caused the demolition. After the year 2016. It was them who caused the demolitions. His house was among the one that were demolished. He confirmed that on 28th January, 2021 the court dismissed the case against Bandari Investment to their favour. He was never a party to the case. He also knew that there were appeals filed in Court of Appeal from the outcome of the Constitution Petition.. Hi brother filed a Counter – Claim in ELC No. 160 of 2021. He was claiming a sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/-). He had no proof such as receipts as all these documents were destroyed by the bulldozers while causing demolition of the structures. The receipts were destroyed. He was not involved in the purchased of the material for the re-building of the houses a fresh.
81. Upon obtaining a Court order, his brother was allowed to rebuild. He started though it was not completed. He was requesting that they be allowed to rebuild the house and for compensation for the demolition. He also wanted the people who obtained the fake orders to be investigated and action taken against them. That was all.

G. Examination in Chief of DW - 2 by Mr. S. M. Kimani Advocate.

82. DW – 2 was sworn and testified in Kiswahili language. He identified himself as Mr. Kazungu Katana Kazia. He held a national identity card bearing all the details (numbers, which were noted by Court. He told the Court that he knew the Plaintiff – Bandari Investment Company Limited. He was the 18th Defendant in this case. They came to the suit land and claimed to be their land. He came to the land in the year 1983. He found others already there such as Mzee Mohamed Kalinga. He found many other elders. There was no chaos or problems at all. Mzee Kalinga was not a party to the suit. He was sued by Bandari Investments Company in ELC No. 16 of 2021 on 24th December, 2021. He recorded a witness statements and filed on 1st February, 2022, which he endorsed as his evidence in chief. By the time he got into the suit land, he had come from Mwembelegeza Settlement Scheme. It was their ancestral land being a Duruma a sub group of the Mijikenda.



83. DW - 2 told the court that he was from an area which was between Kinango and Mariakani. By then he was around 10 years old. He would require to be held by hand to enable him cross the road. He left Duruma with his parents. His home was at Nguu Tatu. He knew of Bandari Sacco because his house was demolished thrice. On the third time, the court allowed the deceased and him to reconstruct their structures. Although he never had adequate finances but he managed to purchase a few building materials. But the roof has been removed. The suit property had a perimeter wall round it and one gate. One had to seek authority from the guards to enter and leave the compound. He did not know who removed the iron sheet roof. He was sued due to the land ownership dispute. All the Defendants had houses on the land. Mr. Chiponda got into the suit land much later on than him. He was invited by the elders who were already in occupation of the land.
84. According to the witness, all these people were never invited or held a session with Mr. Hussein Dairy nor Bandari Sacco Investment Limited. Mr. Dairy never raised any issue on ownership. His only issue was on his livestock. They were never involved on the sale of the land to Bandari Sacco Investment Limited. Mr. Dairy never raised any issue on ownership. His only issue was on his livestock. They were never involved on the sale of the land to Bandari Sacco Investment Limited. Mr. Dairy never informed him on the intentions to sell the land. The witness was shown the authority to plead and he defence and the relief sought.

H. Cross Examination of DW - 2 by Mr. Munyithia Advocate.

85. DW – 2 confirmed that he had started off as a farmer. He used to farm at Nguu Tatu but now he farmed elsewhere. He previously worked at Haller Park. By then he had constructed a house where it was demolished. He had never engaged a surveyor. He was told by Mr. Dairy where he had constructed had been his grazing area for his livestock and wanted them to vacate from there. He was not informed that the Bandari Sacco Investment Limited had bought the land from Mr. Dairy. DW – 2 never knew when the perimeter wall was built. It must have been when Mr. Dairy asked him to move out to Plot No. 817/2/MN. He told of this number by Mr. Chiponda. He was referred to paragraph 5 of his witness statement. He did not know why he had been sued. He had never sued Mr. Dairy, seeking for land. He had never seen him. He knew Bandari Sacco Investment Limited bought the land in the year 2012. Before the demolition, he had been on the land for over 20 years.
86. DW - 2 told the court that he had never taken photographs of the second demolition. He had spent approximately a sum of Kenya Shillings Two Hundred Thousand (KShs. 200,000/-) for the reconstruction. All the receipts were kept by Mr. Chiponda. After the reconstruction, he had never habited in his house. He did not have the receipts of the reconstruction nor photographs to that effect. He had never given any approval to construct by the County Government of Mombasa. He was claiming to be refunded for a sum which he had incurred in the re – construction.

I. Cross Examination of DW - 2 by Mr. Wameyo Advocate.

87. DW – 2 stated that he came from Duruma with his parents. They had moved from Mwembelegeza. He knew that there were people who were given title and they sold it. That was their business i.e. being given land and upon obtaining title deed they would then sell the land off. Before working at Haller Park, he used to work in town on manual works but he was now retired. By the time Mr. Chiponda got in freely as nobody required any permission to get there. By that time there were many people. They were approximately 2,000 people. All these times they were able to plant some trees, such as Mango, Coconut trees. When court got there it was able to see a few plantations. By the time he got into the suit land, he was unemployed. His parents who hailed from Mwembelegeza were welcomed there by his



uncle Baba Katibu Salim. They were buried at Mwembelegeza on a plot which he had no knowledge of the number.

J Re - Examination of DW - 2 by Mr. S.M. Kimani Advocate.

88. There was no re - examination.

89. On 24th October, 2023 the Defendants called DW - 3 who testified as follows:-

K. Examination in Chief of DW - 3 by Mr. S.M. SUBKimani Advocate.

90. DW – 3 was sworn and testified in Kiswahili language. She identified herself as Beatrice Nzingo Kenga. She was a holder of the national identity card bearing all the details (numbers, place of issue, date of birth, location) recorded by Court. She knew Bandari Sacco Investment Limited since the year 2016. They caused the demolition of their houses. He knew they had an eviction order from the suit No. 160 of 2021. She was not a party in that suit. The orders affected as one of the houses that got demolished was hers. She was not a party in one of the cases. She had neither been shot nor teargassed. They came to the land forcefully. The Plaintiff filed a case against them in ELC JR No. 7 of 2022 which was dismissed – See paragraph 6 of her statement. After the JR. they filed ELC. Pet. No. 15/2017 which was dismissed on 28th January, 2021. The Plaintiff constructed the perimeter wall while the civil case ELC Constitution Petition No. 15 of 2017 was still pending. By this time they were there living on the suit land peacefully with Mr. Dairy.

91. According to her she got the land in the year 2003 and not 2013 as stated from her witness statement. She urged Court to have the error rectified. She had never had any relationship with the Plaintiff. They had never had any negotiations. She was aware that Bandari Sacco Investments Limited after the decision of Petition No. 15 of 2017 on 28th January, 2021 had preferred an appeal. Bandari Investment served them with a notice and she was aware that in Appeal No. 34/2022 the President of the Court of Appeal has directed the Appeal be heard by a five (5) Judge Bench. The eviction order caused her losses and damages. They came to the land on 15th August, 2021 and 29th and 30th August, 2021 and September 2021 there was curfew during the Covid – 19 Pandemic. Through a Court order, they had to be escorted by the Police. She was aware that Mr. Chiponda and Mr. Kazungu were allowed through a Court order to rebuild. She never applied for the reinstatement as they all knew Mr. Chiponda was their leader. Before the demolition, there were mosques, plantations, schools, a hospital and several residential structures and homestead on the suit land. These parties were sued. From the damage and loss incurred from the demolition they prayed that they be reinstated into the land as from where they were before.

L. Cross Examination of DW - 3 by Muniyithia Advocate.

92. DW – 3 told the court that she was the Secretary General of Nguu Tatu Community based Organisation. She was not a party to the suit. She never had any authority to represent the people of Nguu Tatu. She was a class 7 primary school drop out at Ziwa la Ng’ombe school. She used to live at Bombolulu within the County of Mombasa – with her Aunt in the year 1985. She completed school in 1992. She left Bombolulu in the year 2003. She was from Ganze. She had been at Nguu Tatu from the year 2003. She had never been sued by Mr. Dairy. She went to the Advocates office to record her witness statement. She was aware that they used to have a tussle with Mr. Dairy due to interference the grazing grounds for his livestock. They could have several court cases with him up to the time he agreed to let them live on some part of the land pending the hearing of the case. She never had any documents nor photographs showing her residential premises on the suit land that is to demonstrate she ever occupied the land as claimed. She had not anticipated this case.



M. Cross Examination of DW - 3 by Mr. Wameyo Advocate.

93. DW – 3 stated that she was married in the year 1995. She did not know how old she was when she enrolled in Class 1. She attained 486 points in her exam. She completed school while 18 years old. They got into the land with her husband. She was aware that there were many who were getting on the land freely. She never got any documents to get onto the land. Her husband lived in Bombolulu within the County of Mombasa taking that they had separated. He got re – married. She got herself the land. By the year 2003, the land was already full of people. Mr. Dairy used to have a dispute with them due the grazing rights of his livestock. There were numerous cases filed by him against these people for trespass. The cases were pending. She was still living at Nguu Tatu on Plot No. 819. It was different from Plot No. 818. The Plot 819 belonged to Mr. Dairy.

N. Re - Examination of DW - 3 by Mr. S.M. Kimani Advocate.

94. She lived at Plot No. 819. It was adjacent to Plot No. 818. She knew of the land dispute with Mr. Dairy. There existed several civil and criminal cases lodged against them lodged by Mr. Dairy and Bandari Sacco Investment Limited as complainant. There were on trespass at Shanzu Law Courts. She was not involved. Some of appeals emanating from them have been preferred. By the time of demolition, the court cases had been pending.

95. The Counsel for the 1st to 18th Defendants closed the case on 24th October, 2023.

V. The 1st, 19th to 139th Defendants Case

96. The 19th -139th Defendants filed a statement of defence dated 26th February, 2021, list of witnesses and a list of documents dated 26th February, 2021. On 24th October, 2023, the 1st, 19th to 139th Defendants called three (3) witnesses namely, DW - 4, DW - 5 and DW - 6 respectively who testified as follows:-

A. Examination in Chief of DW - 4 by Mr. Mkan Advocate.

97. DW – 4 was sworn and testified in Kiswahili language. He identified himself as Mwaka Chika Saha. He was a holder of the Kenya national identity card bearing all the relevant details (being the numbers, place of issue, location, date of birth) all on record. He informed Court being a vegetable vendor and lived at Nguu Tatu. Their houses on the suit land were demolished. He was a resident there. To him, the land was ancestral. One part belonged to Mr. Dairy while the other belonged to their grandfathers. The Bandari Sacco Investment Limited claimed the land belonged to them and hence they caused the demolition. The Bandari Sacco Investment Limited build a perimeter wall round the whole suit land. He was born at Vikwatani. He prayed for the court to give them back the land. They were tired of leasing other places.

B. Cross Examination of DW - 4 by Mr. Munyithia Advocate.

98. DW - 4 confirmed having been born at Nguu Tatu. His identification card was issued from Duruma, Rabai. He was not there when the land was being surveyed. He was not aware the land was surveyed. His land measures 360 acres. His house consisted of 4 rooms.

C. Cross Examination of DW - 4 by Mr. Wameyo Advocate.

99. He confirmed that they used to cultivate the land. There were plantations then but all the coconut, mango, tamarind etc had dried up. There were no grass due to the scotching sun. His grandfathers called Nguwa, Bunda and Katendewa, all lived there. His father was born there. They had children and they were all there; people had lived there for a long time e.g. he was now 65 years old and was born



there. Apart from the demolished houses, there were no evidence of the settlement. Mr. Chiponda found him on the land. He was the one who welcomed him on the land as a brother.

D. Re - Examination of DW - 4 by Mr. Mkan Advocate.

100. He reiterated that he never saw any land surveyor on the land as alleged.

E. Examination in Chief of DW - 5 by Mr. Khan Advocate.

101. DW – 5 was sworn and testified in Kiswahili language. He identified himself as Mwinga Nzoka Kimbio. He was a holder of the Kenya national identity card bearing all the relevant details (being the numbers, place of issue, location, date of birth). He was born there. He got married while on the suit land. He was a guard by profession but he had since retired. He was in court because the land was invaded by Mr. Dairy. Mr. Dairy then sold it to Bamburi Sacco Investment Limited. Initially there were cattle for a European called Ginger. He used to rear/ guard the livestock. Sometimes in the year 1962, some people wronged Ginger. They wrapped his dog with the Kenya flag. Although Mr. Ginger got so offended but so were the locals and they overpowered him. They chased him away from the suit land. He left but gave the farm to Mr. Dairy who now acquired the land. There was also Mr. Kassim Dairy the son of Mr. Hussein Dairy. They started pushing people away to pave way for their livestock – keeping and rearing. They were told that the land was sold to other people. The suit land was divided into two. The one that fenced through perimeter wall and the outer side. Mr. Dairy used to live there but he had since moved out.

F. Cross Examination of DW - 5 by Mr. Munyithia Advocate: -

102. DW – 5 stated not knowing the number of his plot. He occupied 4 acres measured by tractor. He was aware that the court had conducted a site visit. Mwakirunge within Kisauni location was indicated in his identity card as his place of origin. He was aware that in the year 2016, their leaders wrote a letter to the Government to be allowed into the land. They were 80 people. They never sued Mr. Dairy. Mr. Dairy sold the land to Bandari Sacco Investment Limited. But he wondered why, Mr. Dairy would do that without their consent/authority.

G. Cross Examination of DW - 5 by Mr. Wameyo Advocate.

103. DW – 5 told the court that Mr. Dairy still had land there. That was where he came from. He was aware that the disputed land was at Nguu Tatu.

H. Re - Examination of DW - 5 by Mr. Mkan Advocate.

104. DW – 5 confirmed that the suit property was the one occupied by Bandari Sacco Investment Limited. He used to cultivate the land. They used to have shares. He asked for his rights to the land.

I. Examination in Chief of DW - 6 by Mr. Mkan Advocate.

105. DW – 6 was sworn and testified in Kiswahili language. She identified herself as Damaris Patricia Okiso. She was a holder of the Kenya national identity card bearing all the relevant details (being the numbers, place of issue, location, date of birth) all on record. She was married and her place of birth was indicated in the identification card as Nakuru. They lived there well. People came there and demolished their houses. They also beat them up. They were police officers and goons. She was injured. She informed the court that they were now paying rent elsewhere. In the past it was free staying on the land. The costs of living was high. They prayed to be reinstated and they filed documents dated 26th February, 2022 – 7 documents to be produced.



J Cross Examination of DW - 5 by Mr. Munyithia Advocate

106. She stated that she was born in Nakuru. She got into the suit land in the year 2006. They were welcomed by Mr. Mwaka. They never paid anything to be allocated the land nor for being on it. She used to reside at Vikwatani and got familiar with Mr. Mwaka. As a result, she requested him for space. Mr. Mwaka never gave them documents. She had never been sued by Bandari Sacco Investment Limited nor Mr. Dairy. She did not have any photographs of the place as he never knew there would be a law suit. She was not a party to this suit. She had never been sued.

K. Cross Examination of DW - 5 by Mr. Wameyo Advocate.

107. DW - 5 confirmed that she was given the portion of land for free. She never spend nor paid anything to Mr. Mwaka. She never knew the Plot number of where she occupied. She got there in the year 2016. She had no title deed.

L. Re - Examination of DW - 5 by Mr. Mkan Advocate.

108. DW - 5 reiterated that she had no title deed to the land where she was claiming. The place had never been surveyed. It was Bandari Sacco who filed the case against the people. They never picked on her. Her house was demolished. She had evidence as she had seen the demolition happen.

M. Examination in Chief of DW - 6 by Mr. Mkan Advocate.

109. DW – 6 was sworn and testifies in Kiswahili language. She identified herself as Rebecca Mudambi. He was a holder of the Kenya national identity card bearing all the relevant details (being the numbers, place of issue, location, date of birth) all on record. The witness told the Court that she lived at Nguu Tatu and was a business lady on small scale trading. She was in court because of the demolition of her house. There after she requested a friend to house her. However, he had given her notice. She lived there from year 2017. She produced the 7 documents Defendant’s Exhibits numbers 1 to 7 respectively.

N. Cross Examination of DW - 6 by Mr. Munyithia Advocate.

110. She informed Court having been born in Vihiga of the County of Vihiga. That was the place where she came from. She used to sell alcohol and she would take to them the alcohol as her customers. As a result they became familiar with Mr. Mwana Mwaka. By that time she did not know who owned the land. She did not know that the land belonged to the Plaintiff. People would always come to the land at night and in large numbers. There were about 300 people on the land. She never paid anything for the land. She never took any photographs of the place or the houses which were demolished. Her land was 80ft by 140 ft. It was Mwaka who gave her the land for free. She did not know the value of her share. She never inherited the land. She had undergone loss of a high magnitude which was more than buying land.

111. On 24th October, 2023 the 1st, 19th to 140th Defendants closed their case.

VI. Submissions

112. On 24th October, 2023 while in the presence of all the parties, the Honourable Court directed that the amended plaint and counterclaim be canvassed by way of written submissions with given stringent timelines. All parties complied and the Court on 23rd January, 2024 reserved a date for delivering of Judgement on 2nd April, 2024 or all facts remaining constant earlier on notice. However, due to unavoidable circumstances the Judgement was fixed for 22nd April, 2024.



A. The Written Submissions by the Plaintiff

113. The Plaintiff through the Law firm of Messrs. Muniyithya, Mutugi, Umara & Muzna Co. Advocates filed their written submissions dated 15th November, 2023. Mr. Muniyithya Advocate commenced by providing a brief background of the matter. He stated that this suit was commenced by way of a Plaintiff dated 29th January, 2021 and filed in court on the same day. Together with the Plaintiff, the Plaintiff filed a Notice of Motion application seeking for injunctive orders against 19 Defendants. On 17th March, 2021 the Plaintiff was amended and further amended pursuant to a court order issued on 13th June, 2023 where the number of Defendants increased to 133. For purposes of these submissions, the Plaintiff would be relying on the further Amended Plaintiff dated 22nd June, 2023. In the body of the Plaintiff. In particular Paragraphs numbers 12, 13, 14 and 15 the Plaintiff disclosed the existence of an earlier case being Constitutional Petition (Mombasa) No.15 of 2017. The Petition to that suit was part of the documents produced by the Plaintiff during the trial.
114. In Petition No. 15 the Plaintiff had obtained several Court orders namely on 4th December, 2017 and 18th July, 2019 to wit allowing the Plaintiff to continue with the construction of a perimeter wall round Plot LR Sub - Division No. 817 (Original no.324/2) Section II/MN as approved by the County Government of Mombasa. The court further issued an injunction orders against the Respondents from interfering with the construction or demolition of the perimeter wall, Sub - dividing, selling, constructing all in or any other manner whatsoever dealing with the suit property pending the hearing and determination of the main Petition. The Plaintiff continued with the construction of the perimeter wall and by January 2021 the wall was complete round the suit property. Petition No. 15 proceeded for full hearing before Hon. Justice Sila Munyao. On 28th January, 2021, the Judge delivered his Judgement by dismissed it on a technicality and directed the Plaintiff to file a fresh suit by way of a Plaintiff. That led to the filing of the current suit.
115. The Learned Counsel went further to state that what existed on the ground as at the time of filing of the suit was properly pleaded in the further Amended Plaintiff. The Plaintiff then filed a Witness Statement of Mr. Ken Tobias Odero Sungu and a further witness statement by the same witness which was filed on 18th August, 2022. The Plaintiff filed a list of documents dated 29th January, 2021. The Plaintiff filed a reply to the Defence and Defence to the Counter - Claim by the 1st and 18th Defendants dated 2nd February, 2021. The Plaintiff also filed a supplementary list of documents dated 23rd November, 2021 and a further supplementary list of documents dated 27th July, 2022. After the 1st and 18th Defendants amended their Defence and Counter - Claim dated 18th July, 2023.
116. The 1st and 18th Defendants appointed the Law firm of Messrs. Stephen Macharia Kimani and Company Advocates to represent them and filed, Statement of defence dated 14th January, 2022 and filed in court on 19th January, 2022. This was later amended on 21st July, 2023, Witness statements by Martin Chiponda (now deceased and represented by the personal representative Francis Randugu Mwambuni), Witness statement by 18th defendant Kazungu Katana Kazia, Witness statement by Beatrice Nzingo Kenga, a statement of the personal representative was also filed and is dated 21st July, 2023 and A list of documents dated 24th December, 2021.
117. According to the Learned Counsel, in the amended statement of Defence by the 1st and 18th Defendants they raised a Counter - Claim where they prayed for the following remedies; Dismissal of the suit against them with costs, an order for reinstatement under restoration of their structures on the suit property, compensation for damage to property, award of exemplary damages for loss and damage occasioned by abuse of court process and Costs of the suit and any other relief. The 2nd -17th Defendants, though served but never entered appearance. The 19th -132nd Defendants appointed the



Law firm of Messrs. Mkan and Company Advocates who filed a Statement of Defence dated 26th February, 2021, list of witnesses and a list of documents dated 26th February, 2021. There were witness statements recorded by several witnesses but only 4 were called as witnesses. Those who testified were; Mr. Mwaka Chula Salia, Mr. Mwinga Nzioka Kimbio, M/s. Damaris Patricia Okusi and M/s. Rebecca Mudambi. The Honourable Attorney General representing the 140th Defendant never recorded any statement nor did he tender any evidence.

118. On the evidence, the Learned Counsel summarized the Plaintiff's case as follows:-

119. There were several interlocutory applications filed and prosecuted between 3rd February, 2021 and 24th October, 2023 when all the witnesses had testified. These interlocutory proceedings form part of the court record and carried the history of this case. The Plaintiff testified through its chairman Mr. Ken Tobias Odero Sungu (PW - 1) on 30th September, 2022, 7th November, 2022 and 10th November, 2022 whereby he tendered evidence in Chief, cross-examined and re-examined. On 22nd November, 2022 PW - 2 Mr. Kelvin Biwott testified – he tendered evidence in chief, cross examined and re-examined. The Plaintiff then closed its case. The evidence of PW - 1 was set in the statement filed together with the suit, his further witness statement dated 27th July, 2022 together with what he orally informed the court during his examination in chief, cross examination and during re-examination. To start with PW - 1 informed the court that he was a director and Chairman of the Plaintiff and that he had authority to testify. He produced as exhibits:-

- a. A copy of Certificate of Incorporation as Plaintiff's Exhibit 1.
- b. A copy of Board Resolution to file this suit and authorizing him to swear all affidavits and represent the Plaintiff in this case as Plaintiff's exhibit No.2.
- c. A copy of CR 12 Form showing the interests of Bandari Savings & Credit Co - Operative Society Limited as Plaintiff's Exhibit No. 3.

120. According PW - 1 went on and informed the court that the Plaintiff purchased Plot Sub - Division no. 817 (Original number 324/2) Section II/MN (the suit property) for a valuable consideration in the year 2012. He produced a copy of the Transfer as Plaintiff's exhibit No.4, evidence of payment of Stamp Duty as Plaintiff Exhibit No.5 and Certificate of Title as Plaintiff's exhibit No. 6. It was his evidence that prior to purchasing the suit property, it was a farm with animals and crops belonging to the previous owners, the family of Hussein Dairy. To that extent, there were no squatters on the suit land. Indeed, the previous owners were their immediate neighbors with huge chunks of land most of which was being used as a farm. Mr. Sungu informed the court that sometimes in the year 2016 or thereabouts, they started having challenges of sporadic invasions of their land. PW - 1 testified to the fact that the Defendants were not squatters but invaders who moved into their land armed with weapons ready to kill. To secure the land from these invaders, the Plaintiff resolved to erect a perimeter wall round the suit property which measured approximately 59.5 Acres. To this effect, they applied for and obtained a building permit from the County Government of Mombasa. This plan was approved on 23rd December, 2016 being P/2016/499.

121. Mr. Sungu went on to inform the court that they encountered challenges from invaders who would move from the neighboring slums and obstruct the construction of the wall. For that reason, the Plaintiff filed Petition No. 15 of 2017. He then produced a copy of the Petition as plaintiff exhibit No. 8. He further informed the court that in Petition No. 15 of 2017 the court issued several orders. The key orders issued were those issued on 4th December, 2017, 19th December, 2017 and 18th July, 2019. The last order of 18th July 2019 allowed Plaintiff to construct to completion the wall round the suit property. It also ordered the police to provide the Plaintiff with sufficient armed security to



secure the suit property. This was the status quo which prevailed as at 28th January, 2021. He then produced photographs of the wall as exhibits No. 7. Mr. Sungu went on and informed the court that by December, 2020 they had completed the construction of the perimeter wall around the suit property in line with the approved building plans and in accordance with order of 18th July, 2019 issued in ELC Petition No. 15 of 2017. The completion of the wall saw most of the squatters locked out. There was however a small number who had some temporary structures inside the enclosed wall. Indeed, Mr. Sungu informed the court that the order of 18th July, 2019 barred the invaders from having any dealing with the suit property and those inside the suit property were there contrary to the express orders of the court. The order also directed the police to provide the Plaintiff with security.

122. Mr. Sungu informed the court that he had been residing in Mombasa for a long time and at one time he served in the security docket. From his background, he was privy to the tricks and approaches being applied by civilian land grabbers at the Coast. The group first moved in with violence and took possession of the target property. Once in possession they brought in the second level of invaders to purchase portions of the target plot and simultaneously construct temporary structures. This process went on and unless evicted, permanent structures were erected. This complicated the process of eviction. Mr. Sungu told the court that Petition No. 15 of 2017 proceeded for full hearing and on 28th January, 2021 the court (Sila Munyao J) delivered the Judgment and dismissed Petition No. 15 of 2017 on a technicality. In the Judgment the trial Judge advised that the Plaintiff to consider filing an ordinary suit commenced by way of a Plaintiff. That led to the filing of this case. He produced a copy of the Judgment in Petition No. 15 of 2017 as Plaintiff's exhibit No. 8.
123. The witness also informed the court that the purpose of the Plaintiff in acquiring the suit property was to develop low income residential houses with State of the Art facilities for its vast membership. This plan was to enable the Plaintiff's membership to acquire fundamental basic rights under the provision of Articles 40, 42, 43, 57 and 64 of the Constitution. He informed the court that the membership of the Plaintiff was over 16, 000 members. However, because of the violent nature of the Defendants, the Plaintiff had to seek orders of the court to have the National Police Service through the office of the Attorney General provide armed security. This was to forcefully move to the suit property and by use of state power evict the remaining members of the 1st -139th Defendants. PW - 1 went on and informed the court that after 29th January, 2021, many developments had taken place during the pendency of the suit. While there existed court orders issued on 1st February, 2021 and 16th February, 2021 the Defendants brought down the wall around the suit property on the night of 1st April, 2021. He produced as an exhibit the application dated 15th April, 2021 which had photographs showing the extent of damage committed by the Defendants. He further produced a detailed affidavit in reply on 14th September, 2021 as an exhibit In particular he demonstrated the costs the Plaintiff had incurred in rebuilding the wall after it was demolished by the Defendants as follows:-
 - a. 21st March, 2018 it cost – Kenya Shillings One Million Four Eighty Five Thousand (Kshs.1,485,000.00/=).
 - b. 1st April, 2020 it cost – Kenya Shillings One Million Seven Seventy Five Thousand Three Fourty Hundred and Fifty Six cents (Kshs.1,775,340.56/=).
 - c. 10th October, 2020 it cost – Kenya Shillings One Million Nine Hundred and Thirty Eight Thousand Four Sixty Hundred (Kshs. 1,938,460.00/=).
 - d. 1st April, 2021 it cost – Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000.00/=).



- e. 19th April, 2021 it cost – Kenya Shillings Two Million Nine Thirty Eight Thousand Four Sixty Hundred (Kshs. 2,938,460.00/=).
 - f. 30th April, 2021 it cost – Kenya Shillings Five Million One Hundred Thousand (Kshs. 5,100,000.00/=).
 - g. 28th August, 2021 it cost – Kenya Shillings Five Million Six Hundred and Fifty Six Thousand Four Fifty Hundred (Kshs. 5,656,450/-).
124. This amounted at a total sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Ten Hundred and Fifty Six cents (Kshs. 20,593,710.56/=). Each of these calculations were an assessment by a Quantity Surveyor - Mr. Kevin Biwott (PW - 2). Apart from the repair cost, the witness informed the court that the Plaintiff had by then spent on security in the sum of Kenya Shillings Fourty Six Million Twenty Six Thousand Three Sixty Hundred (Kshs. 46,026, 360.00/=) as at July 2021. This amount continued to increase. Mr. Sungu then produced proceedings in the civil case of “SRMCC No. 822 of 2015 Shanzu” as an Exhibit. This document was filed in court by the 1st Defendant and were proceedings and Judgment where some of the squatters were charged with trespass. From this exhibit, Mr. Sungu urged the court to find that the Defendants were in Plot Sub - Division No. 819/ II/MN and not the suit property.
125. Finally, in relation to the duration of occupation by the Defendants on the suit property, the PW - 1 pointed out to the evidence of the Defendants themselves where they had included in their documents a copy of the Certificate of Title showing that the Plaintiff acquired the property in 2012. By ordinary calculation 12 years would expire in 2024. There could not be a claim for adverse possession against the Plaintiff by the Defendants. The witness denied the involvement of the Plaintiff in the alleged demolition of the structures erected by the Defendants. He informed the court that there were two factions one led by Martin Chiponda (now deceased) and the other -one led by Mr. John Mwangala Shauri. He invited the court to note that all the affidavits filed by the Law firm of Messrs. Mkan & Co. Advocates were signed by Mr. John Mwangala Shauri. However, at the trial he never appeared to testify. According to PW - 1, the two groups clashed heavily over the control of the suit property and that in the process many structures were brought down and a life lost in the process. These demolitions were done at night and the Plaintiff only came to know of the evictions in the morning.
126. Mr. Sungu was then cross examined by Mr. Kimani Advocate for the 1st and 18th Defendants. PW - 1 informed the court that he had been the Chairman of the Plaintiff since the year 2017 and before then he had been a delegate representing a constituency of members of the Plaintiff. At the time the property was purchased, together with other delegates he visited the land and confirmed that the land was vacant. On the resolution to file suit, PW-1 confirmed that a resolution was passed before the suit was filed. PW-1 further informed the court that first encounter with squatters was in the year 2016. Further, PW - 1 informed the court that there was due diligence done prior to the purchase of the property. Mr. Sungu denied knowledge of the Judicial Review Application No.7. He further informed the court that the Plaintiff never retained the services of M/s. Egunza & Co. Advocates. In relation to the Constitutional Petition No. 15 of 2017, Mr. Sungu informed the court that a Notice of Appeal was issued after the Petition was dismissed on a technicality. He was then shown some documents relating to ELC (Mombasa) No. 160 of 2021 to which he denied knowledge. In relation to allegations that the demolition of the structures of the squatters, Mr. Sungu informed the court that the said structures were brought down by other rival groups of squatters as they tried to outdo one another in the control of the suit property. At the height of these squatter battles, the police moved in and evicted the squatters out of the suit property. In relation to the former owners of the suit property, Mr. Sungu informed the court that those parties are not involved in this suit either as plaintiffs or defendants.



127. Mr. Sungu was then cross-examined further by Mr. Mkan Advocate for the 19th -139th Defendants and reiterated his role as a delegate when the suit property was purchased and fact that the delegates visited the suit property and found it to be vacant. This was before the suit property was ultimately purchased. Mr. Sungu informed the court that sometimes in the year 2016, they got approval from the County Government of Mombasa to construct a perimeter wall. The contractor appointed to do the construction was Oriole Investment Co. Ltd. When the contractor commenced the execution of the contract, he faced resistance from invaders who were coming from the nearby slums. According to Mr. Sungu, the property was purchased legally at a time when there were no squatters. He further reiterated that there existed two factions of the squatters, one represented by Mr. Martin Chiponda (now deceased) and the other group represented by Mr. Shauri. The Shauri group was the one represented by Mr. Mkan while the Chiponda group was represented by Mr. Kimani. As to the status of the suit property, Mr. Sungu informed the court that the land was vacant but there was the threat caused by the invaders who could very easily move back unless security was sustained. On re - examination by the Counsel for the Plaintiff, Mr. Sungu clarified that he was involved in the process of acquisition as a delegate. In relation to what was happening when this suit was filed, PW - 1 confirmed that there were orders issued in Petition No. 15 of 2017. Using those orders, the Plaintiff had proceeded to construct a perimeter wall round the property. After the dismissal of Petition No. 15 of 2017 there were real threats of squatters moving back to the suit property. Mr. Sungu reiterated that the conflict with squatters started around the year 2016. He was then referred to the 1st and 18th Defendants where he made several observations on the documents filed by 1st and 18th Defendants. The documents had dates of between 2015 and 2021. None of the documents filed by the Defendants had a date earlier than the year 2015.
128. According to the Learned Counsel, PW - 1 informed the court that the suit property was acquired in the year 2012. At that time the land was open grazing land used by the previous owner and there were no squatters. He then informed the court that as a former security officer he knew the area very well. Mr. Sungu then elaborated further on how squatters fought one another to the extent that there were active criminal cases in court because of that conflict. In relation to the Counter - Claim by the 1st and 18th Defendants Mr. Sungu informed the court that those Defendants were not asking to be given the land back rather they were asking to be allowed to move back and occupy the land. In relation to the other Defendants numbers 19 -139 he confirmed that there was no Counter - Claim. He then informed the court that the Plaintiff had not abused the court process. In relation to the purchase of the property the witness pointed to Entry No. 12 shown in the copy of the Title being the entry of the transfer registering the property in the name of the Plaintiff. Mr. Sungu then pointed to the court the kind of structures which were in the suit property when the same were demolished. To him they were temporary makeshifts of mud and old iron sheets with no other amenities.
129. The Plaintiff then called the second witness Mr. Kelvin Biwott (PW -2). He did not file a witness statement but appeared to produce the Bills of Quantities identified by Mr. Sungu appearing in his further witness statement dated 27th July, 2022 and in particular pages 121 to 143. He informed the court that he was the author of those documents. In his evidence he disclosed to the court that he was not a Quantity Surveyor but his training enabled him to prepare Bills of Quantities for small projects like the construction of a perimeter wall. He appeared as an expert witness under Order 3 Rule 2(c) of the *Civil Procedure Rules* 2010. Upon cross examination Mr. Biwott reiterated that he was the maker of the documents and that he was competent to prepare such. There was no re - examination to this witness. That closed the Plaintiff's case.
130. The Learned Counsel submitted that the 1st and 18th Defendants' case was that the 1st Defendant was Mr. Martin Chiponda. He presented a written statement dated 24th December, 2021. However, the 1st Defendant died before the defence case commenced. He was replaced by one Francis Randugu



Mwambuni (DW - 1) his personal representative. This witness became DW - 1 after the court allowed substitution. However, the Plaintiff raised a legal issue surrounding the appointment of Francis Randugu Mwambuni arising from the application dated 18th May, 2023 and the reasons were as follows:-

- a. There was a letter from the Office of the President, Deputy County Commissioner, Kisauni Sub - County which identifies 14 heirs of the deceased. There was also a letter of consent which authorized Francis Randugu Mwambuni to file the application for grant. That letter was dated 8th May, 2023 and was signed by the father, a sister, 5 brothers. The wife was also shown to have signed (one wife). From the letter of the chief, there were only two minors, a son and a daughter. The rest of the beneficiaries (12) were adults.
- b. Out of the 12 people, only 2 signed – Mr. Julius Mumbuni Chiponda (the father), and Karama Kahindi Mramba (the 3rd wife). The rest of the beneficiaries did not sign. Those who never signed to give their consent were:- Rael Mwambuni Chiponda (Mother) Florence Mwenda Gona (1st wife), Victoria Riziki Masha (Daughter), Christine Tumu Ngala (2nd Wife), Moses Mwanyae Chiponda (Son), Kelvin Mwambuni Chiponda (son), Maurine Mwambuni Chiponda (Daughter), Herme Ngele Mwasi (4th Wife), Racheal Tatu Chiponda (daughter) and Julius Mwambuni Chiponda (son). They equally never signed a consent.

131. The Learned Counsel averred that the Grant ad litem offended the provision of Section 40 of the *Succession Act* Cap 160. The effect was that the Limited Grant ad litem issued to Francis Randugu Mwambuni was a nullity. To buttress on this point, the Learned Counsel relied on the case of “*Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 Others* [1998]eKLR” where the three Judges of this Court wrote their findings and quoted the case “*Macfoy v United Africa Co. Ltd*” had this to say:-

“In *Macfoy v United Africa Co. Limited* [1961] 3 All ER 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

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

132. DW - 1 filed a witness statement dated 21st July, 2023. He also produced as exhibits documents dated 24th December, 2021. He further informed the court that he was a brother of Mr. Martin Chiponda Mwambuni the 1st Defendant. He informed the court that he was the legal representative of his late brother. According to the witness the deceased started staying in the premises way back in the year 1997 and he stayed without any disturbance with his family consisting of a wife and children. This witness further informed the court that he was invited by his late brother into the suit property and he constructed his own house. In the year 2016 the Plaintiff appeared and claimed the land by filing Petition No. 15 of 2017 which case was dismissed against the deceased. According to him the Plaintiff appealed to the Court of Appeal. He informed the court that he did not know the outcome of the appeal. He informed the court that the Plaintiff obtained what he termed as a false order which they used to demolish the house belonging to his brother and other occupants later on his brother was given permission to reconstruct his house on the suit property. According to him his brother had stayed in the suit property for more than 12 years. DW - 1 further informed the court that by the time the Plaintiff



- purchased the property his deceased brother and him had stayed in the suit property for a while. He confirmed that he was not sued as a Defendant in this suit. DW - 1 went ahead to tell the court that currently at the suit property there were two houses one belonging to the deceased while the other one belonged to Defendant number 18. To enter the property one had to get permission from the Plaintiff. It was his evidence that the 18th Defendant's house had now been partially demolished with some iron sheets removed. In his own evidence, he was staying in the suit property by the year 2016. He however informed the court that he was not a party as far as this suit was concerned but his brother was as the 1st Defendant. He went on to tell the court that his late brother has denied having committed any wrong.
133. In relation to the Counter - Claim DW - 1 informed the court that there was a house constructed by his deceased brother that which house was yet to be completed. He estimated the value to be about a sum of Kenya Shillings Three Fourty Thousand (Kshs. 340,000/-). He also produced a bundle of documents dated 1st February, 2022. He informed the court that the demolished house was made of coral blocks and iron sheets with three rooms. In relation to the manner of demolition, he explained to the court that the Plaintiff used extreme force and those who demolished were escorted by police and carried blunt weapons and for that reason he prayed for compensation. He then proceeded and produced several documents and prayed for orders as prayed. The witness was further examined in Chief by Mr. Mkan, Counsel for the other Defendants where he informed the court that after entering the suit property, they subdivided the property amongst the neighbors. The houses constructed by them were of coral blocks and others of iron sheets. He then informed the court that currently there was heavy security and none of them was staying in the suit property.
134. DW - 1 was then cross examined by Mr. Kemei appearing for the Honourable Attorney General. He informed the court that his late brother entered the suit property the year 1997. Before coming to the suit property the deceased used to stay in Vikwatani area. Amongst the Defendants the witness informed the court that Katana Kazungu Kazia, Defendant no.18 entered the suit property first. He further informed the court that before they entered the land they knew it belonged to their fore fathers who leased it to Mr. Dairy but the lease had now expired. He however confirmed that his late brother never had the Title Deed.
135. DW-1 was then cross - examined by Mr. Wameyo and informed the court that it was the first time they had come to court on behalf of his late brother. As for him he informed the court that he used to live in different places like Likoni, Kaloleni and other places. In relation to how he knew that the lease had expired, he informed the court that he had been told by their elders and also by his late brother. As to how his late brother came into the suit property DW - 1 informed the court that his late brother had been invited by Defendant No.18. He informed the court that the order to demolish their structures was issued in this case. He then informed the court that he knew the area chief and the village elder. Among the structures removed was his house. When the structures were demolished DW - 1 confirmed that he was not near. Further he never reported to the police about the demolition. He then reiterated that the structures for the deceased were valued at around Kenya Shillings Three Fourty Thousand (Kshs. 340,000/=). He then informed the court that he did not see an approved plan from the County Government of Mombasa. He then told the court that the deceased left behind four (4) wives and that the four wives gave consent for him to be appointed an administrator.
136. The 1st Defendant was extensively cross examined by Counsel for the Plaintiff. From the cross examination the following came out clearly;
- a. That DW - 1 used to stay on the suit property until the structures were demolished. That day he had come from Vikwatani which neighbors the suit property. He disclosed that his late brother died at the Coast General Hospital. He disclosed that the beneficiaries of the estate of his late brother signed a consent. He then informed the court that the family of his late



brother used to stay in Kaloleni while the deceased stayed at Nguu Tatu since the year 1997. In relation to the National Identity Cards they showed that the family members of the deceased were from Kaloleni. He then informed the court that his late brother never had an agreement of purchase of land. There was also no document from the Government allocating the land to Mr. Chiponda.

- b. Finally, on the issue of ownership, DW - 1 informed the court that there was no court order giving the deceased the suit property. He however informed the court that the deceased owned about 300 acres. The suit property measures approximately 60 acres or thereabout. The witness disclosed that he was not a party to this case and he had never been sued in any of the pending cases. He also confirmed that he was not included in the Counter Claim. As to whether the squatters had ever sued the previous land owner his answer was in the negative.
- c. In relation to survey DW - 1 confirmed that the squatters had never done a survey to determine the boundary of the suit property. He then disclosed that he never took a photograph of his former house nor did he have any document relating to the same. In relation to how the land was sold to the Plaintiff the witness said that he was not aware whether there was a court order stopping the previous owners from selling the land to the plaintiff. He disclosed that he never knew what was the value of the demolished structures. He also confirmed in his evidence that the demolitions took place at night even though he was not present.
- d. Finally, the witness said that the court had not cancelled the Title Deed for the Plaintiff over the suit property because his deceased brother never asked ask for it.

137. On re-examination, the 1st Defendant clarified that;

- a. the orders to demolish the structures were issued in case No.16 of 2021;
- b. The order used to demolish their structures and evict them was fake; He was staying in Vikwatani because his house was demolished by the Plaintiff;
- c. His late brother used to tell him a lot of his secrets. When signing the consent he left out the wife of the deceased brother because she never had an Identity Card; Defendant No.18 was the first one to move into the suit property and was a neighbor to the deceased; Defendant No. 18 was invited by Mohammed Kalinga;
- d. There were other cases against the land in issue; Defendant No. 18 and the deceased had another case against Mr. Dairy, the previous owners of the suit property; The Plaintiff came into the property into year 2016 and accused his deceased brother of trespass he was not a party to that case;
- e. When the people were evicted his structure was demolished and he was evicted; The eviction and demolition of the year 2021 was almost the 3rd time their structures weredemolished. He knew that after Petition no. 15 of 2017 was dismissed the plaintiff appealed but he did not know the progress of that appeal;
- f. In case No. 160 he was not a defendant but his house was demolished following an order issued in this case; The demolition was done using bull dozers and all the evidence was destroyed; He did not have receipts for the deceased because his house was destroyed and everything was lost therein;



- g. The house the deceased had started building is inside the wall of the suit property and he is asking the orders to compensate the deceased on account of his brother's house which was demolished.
138. DW - 2 was the 18th Defendant, Katana Kazungu Kazia who produced a written statement dated 24th December, 2022 and added the following: - The statement contained 8 paragraphs; The witness writes in paragraph 3 that he lived in Nguu Tatu area. since the year 1983; At one time he was an employee of Haller Park. He then disclosed that previously there was a dispute between him and Hussein Dairy Limited because where they were staying was grazing land for Hussein Dairy; This was why he proceeded and moved to the suit property; According to him they lived in harmony until the houses were brought down. According to this witness, he never knew when the suit property was sold to the Plaintiff. In relation to his house he disclosed in paragraph 6 that the same was demolished by the plaintiff during the construction of a wall. He then says after the demolition of his house he had to rebuild another house. In paragraph 7, DW - 2 alleged that houses were demolished at night and he moved away to save his cows and goats. In Paragraph 8 he prayed for restitution and for damages for the demolished house and household items.
139. In court the witness adopted the written statement and stated further that he is a farmer ad that; He was a Duruma and came to Mombasa when he was aged around 10 years; He stays in Nguu Tatu and that he had been sued 3 times; He was invited by Mzee Kalinga; In the year 1983 he settled in Mwembelegeza within Bamburi of te County of Mombasa but it was not his place later he left there and that was how he found himself within Nguu Tatu area; After the house was demolished the third time he was allowed by the court to rebuild the house; The house was not complete because of lack of money; That recently some iron sheets had been removed from the roof but he did not know who removed the iron sheets. According to him Mr. Chiponda (Deceased) was allowed into the suit property by some elders. In relation to the complaint by Mr. Dairy there concern was a grazing area of their cattle by 2012 he was on the suit property and Hussein Dairy never told him that they were contemplating selling the suit property; Currently he was staying at his residence.
140. DW - 2 was then cross examined by Counsel for the Plaintiff and the following came out; He has a farmer in Nguu Tatu but at a different place; That he had never brought a surveyor on the suit property to determine the acreage and boundary; He was told by Mr. Hussein Dairy to vacate the land because they were using the land for grazing of their livestock; His house was demolished when the perimeter wall was being constructed by the Plaintiff; He informed the court that because he was illiterate and he could not recall the year when the house was demolished; The Defendants had never filed a suit against Mr. Hussein Dairy and they never had such a suit against Hussein Dairy; From the time he was evicted by Hussein Dairy until the time the place was demolished was about 20 years; That he never took any photographs of the structure before demolition; He had used about a sum of Kenya Shillings Two Sixty Thousand (Kshs. 260,000/=) to build the demolished house; After being allowed to rebuild he constructed a 3 - bedroom house but he had never lived there; The house never got completed; He never had any receipts; As to whether he had permit from County Government his answer was in the negative; Finally, he told the court he never knew how much money he needed to be paid by the Plaintiff as a compensation. Upon further cross examination by Mr. Wameyo DW - 2 informed the court that; He went to Mwembelegeza with his parents and stayed there for a long time; He got married there and his parents died there; He did not know if people had been evicted in Mwembelegeza; What he was fighting for was to be given land to settle; He was employed at Haller Park in the year 1990; He later retired at a year he could not remember ; When the deceased (1st Defendant) came into the suit property the land was almost full; New people had to be allowed to enter the land; He was tasked as to whether there was evidence of their long stay. He said there was none; Further when the court went to



the suit property he was not present; His parents were buried in Mwembelegeza at a plot he could not remember. There was no re-examination for DW - 2 by his Advocate.

141. DW – 3, - M/s. Beatrice Kenga was the last witness. She was not a party to this case but appeared to testify on behalf of the 1st and 18th Defendants. She informed the court that she was the secretary of a Community Based organization (CBO) known as Nguu Tatu Community. She adopted her written statement dated 24th December, 2021 and informed the court that she lived in the suit property since the year 2003. According to her, the land previously belonged to Mr. Dairy who had a lease from the Government of Kenya. He held that the lease had now expired; In paragraph 5 of her statement, she alleged of court battles between the community members and Mr. Dairy. Thereafter, the structures were demolished by police and goons claiming they had a court order; In paragraphs 6 and 7 of her statement, she detailed some of the cases filed in court; During the hearing of Petition No. 15 of 2017 the court directed a perimeter wall to be built but in the process skip the houses standing between the two walls; The squatters were subsequently evicted allegedly in the middle of the night; As a result of that demolition she sought for compensation for the loss of their homes. Upon cross examination by the Counsel for the Plaintiff she confirmed that having been the secretary general of Nguu Tatu CBO but not a party to the suit. She never had a letter of authority from the CBO; Prior into coming into the suit property she used to stay in Bombolulu; She left Ziwa la Ngombe in the year 2003. She admitted that she was from Ganze of the County of Kilifi; She was born in Mombasa; In relation to this suit she confirmed that she had never been sued by either Mr. Dairy Limited or the Plaintiff; She never had a document or photograph of her former house. Previously they used to have problems with Hussein Dairy Limited especially when they demanded that the squatters move out to leave room for their animals to graze in; She did not know why she had not been sued as a Defendant to this suit.
142. DW - 3 was then cross examined by Mr. Wameyo and disclosed that she finished primary school in the year 1992. She got married in the year 1995. She informed the court that she could not remember how old she was when she joined nor cleared primary school education from standard 1 and 8. She entered the suit property in the year 2003 with her husband with whom they had since divorced. She was invited by Mr. Kazungu Katana Kazia and a lady by the name Fatuma. Between her and her husband, she confirmed that she is the one who looked for the land. The land had many people. It was almost full. At the moment she was staying in Nguu Tatu in Plot No. 819. The squatters had no agreement with Hussein Dairy in relation to where she was staying. Upon re-examination by her counsel, DW - 3 confirmed that the dispute between the squatters and Hussein Dairy was still in court. That there had been several criminal cases but the Plaintiff had not been party to them. When demolition happened some of those cases were on going and there had been a demolition previously which was done during curfew time. That was the close of the 1st and 18th Defendants' case.
143. The Learned Counsel submitted that the 19th to 139th Defendants called Mwaka Chula Salia as their 1st witness. She was DW - 4. She presented a two paragraphed written statement dated 28th September, 2022. In her statement she alleged that her father was born in the suit premises and through her life this was the place she had known to be her home. She mentioned Mr. Dairy whom she alleged was occupying a different parcel of land. She complained that the sale of the land was irregular. She proceeded to inform the court that she has lived in the suit property for a very long time. She urged the court to dismiss the suit and compensate her for her demolished house. On cross-examination, DW - 4 explained that she had been born and raised in Nguu Tatu. She took her national identity card in Kilifi. She never had any evidence of having inherited the suit land from her late father. Survey was not done. She never known when the suit property was surveyed. The land she was claiming measured approximately 360 acres. Her house was a semi-permanent one which she constructed herself and never knew its value. She used to farm on the suit property. She alleged that there were trees planted by their grandparents but all of them had dried up because of the drought. Her grandfathers were namely



Katendewa; another one Bunda and another one Ngwa. All these grandparents had a space in the same land. She was on the suit property for more than 65 years. She said she knew all the neighbors and who were the Co - Defendants. When Mr. Chiponda came hto the land, he found her there. She was the one who invited Mr. Chiponda in the suit property. She was re-examined by Mr. Mkan and told the court that she had never seen any survey activity on the property.

144. DW - 5 was the 2nd witness of 19th to 139th Defendants. He was Mwenga Nzioka Kimbio. He adopted his witness statement dated 11th October, 2022. In his written statement he informed the court that he was a resident of Mwakirunge sub - division having been born in the year 1944. According to him he had lived in the area throughout his life. When he was young there were families staying there such as Ngunda, Katendewa, Ngua and Mwamboko. This was in the 50's. He confirmed that at one time, Hussein Diary and another person known as Jinga came into the scene and started co-existing with these families. After independence Jinga was deported by the Government. Later Hussein Diary claimed ownership and started displacing the original residents. In the year 2015, their houses were demolished and some of them arrested and charged in court. This was followed by another claim by the Plaintiff who also went to evict the squatters. The structures were demolished including his own house. He denied that the land belonged to the Plaintiff because the previous owner who sold the land to the Plaintiff had a Title which was obtained fraudulently. It was his evidence that the land belonged to his fore-fathers and urged the court to dismiss the suit with costs. He used to be a watchman but now he was retired, He was in court because his land was invaded by Hussein Diary then sold to the Plaintiff and He stayed outside the perimeter wall of the suit property.
145. On cross - examination he informed the court that. There had never been a survey on the land and for that reason his parcel of land never had a number. Asked about the size of his land, he answered that he used to own 3 acres but they have never been measured but measurement was done by tractor operator during the time of farming. He further said that graves and the mosques were all on the three acres. On the date when the court visited the land, he informed the court that he had gone home in Rabai for a burial. In the year 2016, he remembered a letter being written to the government where the squatters were asking to be given the land. Asked about the number of people in the land, he said that they were about 80. Asked about whether he had ever taken Hussein Diary to court he answered in the negative and told the court that Hussein Dairy was a rich man and for that reason they could not take him to court. There was a theoretical question of what he will do if he got someone inside his house. And the answer was that he would evict that person. He blamed Hussein Dairy for having chased the Defendants to use the land for grazing his livestock. Later on, he sold the land to the Plaintiff without the permission of the Defendants. DW – 5 was aware he never had a Counter - Claim but nevertheless he was asking the court to give them the land. He agreed that Hussein Diary had a neighboring parcel of land where he was staying but he doesn't bot know the number of that land. DW - 5 was re-examined and informed the court that the land which was previously owned by Hussein Dairy was the same one they sold to the Plaintiff. They used to stay on the suit property before they were evicted. On the suit property they had planted trees which marked their boundary. He prayed the court to give him his rights and He was asked by the court to explain the meaning of the suit land measuring 360 acres. He answered was that he was asking the court to give him the 360 acres being the whole of Nguu Tatu area.
146. DW - 6 was 3rd witness called by the 19th – 139th Defendants, one Damaris Patricia Okusu. She produced her witness statement dated 28th September, 2022. She informed the court that lived in Nguu Tatu as a house wife. She was in court because they were invited by DW - 4 into the suit property and that they were staying peacefully. Then she saw people come and started building a wall. They were accompanied by police officers and goons. They started beating people, demolished their structures and threw them out. She was currently renting a house from nearby villages. She urged the court to reinstate them to the suit property. On cross-examination; She confirmed that she was born in Nakuru and entered the



suit property in the year 2016. She never bought her portion but the same was given to her for free by DW - 4. They were never issued with the Title Deed for the suit land. She was not a party to the suit only that she came as a witness. She had no photographs of her former structure but urged the court to help them get her house back. She reiterated that she did not pay for any part of the land and did not know the number of the suit property. On re - examination by Mr. Mkan, She reiterated that she had no Title Deed and that no survey had ever been done on the property. Her house was demolished and that was why she came to court because she witnessed the demolition.

147. DW - 7 was the 4th witness called by the 19th – 139th Defendants. Her name was M/s. Rebecca Mudambi. She adopted her witness statement dated 28th September, 2022. In her statement she informed the court that having moved to the suit property in the year 2017. She had developed a portion of the suit property by building a three bedroomed house and a chicken pen (banda). She alleged that the eviction was done by the Plaintiff on 25th August, 2021. During the evictionshe alleged to have been assaulted and all her structures demolished. To her the demolition and eviction were illegal and asked the court for reinstatement and compensation. Currently, she had been staying in someone else place but she had been given a notice to vacate. She produced as exhibits the documents assembled by Messrs. Mkan & Co. Advocates dated 26th February, 2021. On cross-examination she confirmed that she had been from Vihiga but born in Mombasa. She was invited to the suit property by DW - 4. When she entered the suit property she had never known that the land belonged to the Plaintiff. She only came to know about the Plaintiff at the time of demolition. Currently she knew the land belonged to the Plaintiff but they should not have demolished their houses at night., The demolition was done by the police together with some goons. She reiterated that she never paid anything to own the land. Asked why she could not produce photographs showing her alleged development she said that the demolition happened abruptly and she could not take anything with her. The portion of land she occupied was 80 by 120. Her portion was marked by elders together with DW - 4. She also did not know of the value of the portion of land she was claiming. There was no re - examination of DW - 7. Thus the 19th to 139th Defendants represented by Mkan & Co. Advocates closed their case.
148. On the analysis of the case, the Learned Counsel submitted that arising from the evidence would rely on the following nine (9) issues for Court’s determination.
- a. Whether the Plaintiff was the registered owner of Plot Sub Division No.817 (Original No.324/2) Section II/MN – the suit land and If so when and how did the Plaintiff become the registered owner?
 - b. Whether the Plaintiff constructed a perimeter wall around the suit property prior to the filing of this case? If so how was it done?
 - c. Whether the 1st to the 139th Defendants entered the suit property prior to the filing of this case? If so how many, when and how?
 - d. Whether the structures belonging to the 1st -139th Defendants existed inside the walled suit property prior to the filing of this suit?
 - e. Whether the 1st to 139th Defendants evicted from the suit property and their structures demolished? If so, when and by whom?
 - f. Whether the suit was “Res judicata?
 - g. Whether the Plaintiff proved its case within the required standard? If so what remedies were available to the Plaintiff?



- h. Whether the 1st and 18th Defendants proved their Counter - Claim within the required standard? If so what remedies were available to them.
- i. What was the order as to costs?

The Learned Counsel asserted that in answering issues numbers (a), (b), (c), (d), (e) and (f) above, they would have answered issues numbers (g) and (h). Issue number (i) was consequential. The Learned Counsel intimated that they would like to handle the issues numbers (a) to (f) consecutively.

- 149. On issue number (a) as to whether the Plaintiff was the registered owner of Plot Sub-Division No.817 (Original No.324/2)Section II/MN? If so when and how did the Plaintiff become the registered owner. The Learned Counsel argued that from the pleadings and in particular under Paragraph 4 of the further Amended Plaintiff, the Plaintiff disclosed that it acquired the suit property at a valuable consideration. In the defence filed by the 1st – 139th Defendants (excluding Defendants No. 2 - 17) the Defendants made a general denial. From the exhibits produced by the 19th -139th Defendants, Exhibit No. 3 thereof was a copy of the Certificate of Title. Entry No. 10 is a registration of transfer into the name of the Plaintiff. In his evidence, DW - 1 Mr. Francis Randugu Mwambuni acknowledged that the property was registered in the name of the Plaintiff. While testifying, PW - 1 produced a copy of the Certificate of Title as Plaintiff Exhibit No. 6, a copy of the transfer as Plaintiff Exhibit No. 4 and evidence of payment of stamp duty as Plaintiff Exhibit No.5 In this trial, no other certificate of Title/ Title Deed had been produced. Further, PW - 1 produced Certificate of Incorporation of the Plaintiff and a building permit issued by the County Government of Mombasa.
- 150. The Learned Counsel submitted that the issue of who was the registered owner of the property had been proved to the required standard. The Learned Counsel relied on the provision of Section 23 of the *Registration of Titles Act* Cap. 281 (Now repealed).
- 151. The Learned Counsel was also guided by the provision of Section 26 of the *Land Registration Act* No. 3 of 2012 as earlier demonstrated. Therefore, he submitted that the Plaintiff had proved to the required standard that it acquired the suit property through purchase in the year 2012. To him, that settled issue No.(a). The Plaintiff through PW - 1 and PW - 2 explained to the court the existence of a perimeter wall prior to the filing of this suit. From the further Amended Plaintiff the Plaintiff pleaded in paragraph 12 of the existence of Constitutional Petition (Mombasa) No. 15 of 2017 - where three (3) orders were issued on 4th December, 2017, 19th December, 2017 and 18th July, 2019 respectively. In particular, the order of 18th July, 2019 were final in nature and allowed the Plaintiff to complete the construction of the perimeter wall. In paragraph 13 of the further Amended Plaintiff, the Plaintiff pleaded that by the end of the year 2020, they had completed the construction of the perimeter wall round the suit property. However, during and even after the construction of the wall there had been hostility and blatant breach of the three court orders by the Defendants. They would be demolishing portions of the perimeter wall severally. This was pleaded in paragraph 18 of the Further Amended Plaintiff.
- 152. On issue number (c) on whether the 1st to 132nd Defendants entered the suit property prior to the filing of this case? If so how many, when and how. The Learned Counsel submitted that as a preliminary issue, they urged the Court to note that the defence consisted of the 1st and 18th Defendants and 3 witnesses from the 19th to the 139th Defendants. This totaled to 5 individuals. There was no letter of authority given to the 3 witnesses representing the 19th to 139th to represent them. He argued that this was against the provisions of Order 1 Rule 12 (previously and now Order 1 Rule 13 of the Civil Procedure Rules 2010). To support his point, the Learned Counsel relied on the following cases



“Ndungu Mugoya & 473 others v Stephen Wangombe & 9 others [2005] eKLR”. The court had this to say;

“The said Defendants also relied on the ruling of Lady Justice Gacheche in *Justo Ngoka & 225 others v Rai Ply Wood (K) Limited & 2 others* Eldoret HCCC No.69 of 2001 (unreported) where the Learned Judge held at page 4 as hereunder:

“There are 226 Plaintiffs here, it is imperative that I point out, that first and foremost, at the time of filing the Plaint, each of the 226 Plaintiffs was a Plaintiff in his own right, and each should be treated individually.”

The provisions of Order 1 Rule 12 (1) of the *Civil Procedure Rules* are mandatory where a Plaintiff has opted for another to “appear, plead or act” for him in a proceeding. It is not sufficient for such a party to state that he has been so authorized without the written consent of the person so authorizing him. The option is not mandatory where such a Plaintiff as opted to act or appear on his own behalf in the proceedings of a suit. But where he has opted to authorize another Plaintiff, then it is mandatory that such a written authority be filed in court, hence the wording of Order 1 Rule 12 (2) of the *Civil Procedure Rules* which provide that

“The authority shall be in writing signed by the party giving it and shall be filed in the case”. (underlining mine).....

This court had the occasion to deal with a case of similar circumstances as the present case and ruled as hereunder in case of *John Kariuki & 347 Others v John Mungai Njoroge & 8 others* Nakuru HCCC No. 152 of 2003(unreported) at page 9:

“The plain reading of the above rule (Order 1 rule 12 *Civil Procedure Rules*) is that where a party requires another party to appear, plead, or act on his behalf he has to give the authority in writing before such a person filing suit can claim to be representing such person. The said written authority has to be signed by the person giving the authority and must be filed in court where the suit is to be filed. The mischief that the said rule was meant to address, in my humble view, is to prevent a situation where a party may become bound by a court decision without his having any knowledge of the suit that led to the said decision. The court can envisage a scenario, where, lets say, after the dismissal of a suit, such a Plaintiff whose name has been included declines to settle the costs on the pretext that he did not authorize the suit to be filed in his name. In my considered view, this requirement is mandatory. A party cannot be condemned or enjoy a benefit from a court process without his say so.”

153. Further, in the case of:- “Moses Onchiri v Kenya Ports Authority & 4 others [2017] eKLR” the court observed as follows;

“The second principle is that it is a cardinal rule of procedure that any party who stands to be directly affected by any orders that may be made in any suit and or whose participation is necessary in a suit for effective adjudication of the matters in controversy ought to be made a party in the suit or at least be notified about the existence of the suit. Under order 1 Rule 13 aforesaid, where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding. It is



a mandatory requirement that the authority be in writing, signed by the party giving it and filed in the case. *Research International East Africa Ltd v Arisi & Others*, [2007]1 EA 348. Under Rule 4 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (the Mutunga Rules), any person alleging violation or threatened violation can petition the High Court, and any person acting as a member of, or in the interest of a group or class of persons may also petition the High Court on behalf of the members, group or class of persons for redress. The same principle in Order 1 Rule 13 aforesaid must, by necessary implication apply where a petition has been instituted on behalf of many people.”

154. Thus, the Learned Counsel contended that the whole group of Defendants was a mere circus. They never mounted any defense and their participation should not be considered by this court. Only the 5 Defendants participated in the trial in accordance with the law. The first correspondence appeared in the documents filed and produced by the 1st and 18th Defendants dated 24th December, 2021. The Community Based Organisation (CBO) known as Nguu Tatu Community was registered on 24th August, 2016. This was defence exhibit No. 1. Then there was Defence Exhibit No. 2 which was a letter by an organization known as Muhuri dated 19th August, 2015 on behalf of the squatters. This letter however, talked of Plots Number 324/II/MN and 819/II/MN owned by Hussein Dairy family.
155. The Learned Counsel submitted that the Defence Exhibit No. 3 was a letter to the Chairman of National Land Commission dated 7th December, 2016. This was the first time the suit property was being mentioned by the Defendants. One of the functions of the National Land Commission is to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress as provided for under the provision of Article 67 (2) (e) of the *Constitution* of Kenya, 2010. The provision of Section 15 (2) of the *National Land Commission Act* No 5 of 2012 states what amounts to Historical injustice:
- “a historical land injustice means a grievance which- (a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; (b) resulted in displacement from their habitual place of residence; (c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the *Constitution* of Kenya was promulgated; (d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and (e) meets the criteria set out under sub - section 3 of this section.”
156. To buttress on this point, the Learned Counsel relied on the case of:- “The Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa v The National Land Commission & Another [2016]eKLR” the court identified no less than six instances when the National Land Commission could intervene in so far as private land was concerned. The instances were identified as; where the private land had been irregularly and unlawfully acquired, matters concerning administration of private land, matters concerning land use and planning, compulsory acquisition of private land, issues touching on present or historical land injustices and instances of review of grants to establish their propriety or legality under the provision of Section 14 of the *National Land Commission Act*. This was to be done within the first 10 years after August, 2010. Obviously, if the Defendants believed in their claim for historical injustice they should have followed that path against the National Land Commission. On the contrary, the Defendants never took advantage of this. The natural conclusion was that they never had a historical injustice claim to adverse. Defence Exhibit No. 5 was a letter from Mombasa County Executive Committee dated 23rd July, 2018 appealing on behalf of the squatters. Defence Exhibit No. 6 was a letter to National Police Service dated 19th May, 2020 about Plot LR No. 330/II/MN. This letter was



- crucial because under the contents of Paragraph 1, they confirmed that the problem started in the year 2015. However, the suit property was not mentioned in that letter. Defence Exhibit Numbers 7, 8 and 9 were all letters written in the 2020.
157. In the pleadings by the Plaintiff the squatters started moving into their land sometimes in September, 2016. This was under Paragraph 10. To the Plaintiff, this was an invasion by armed squatters who then chased away the security guards and took over possession of the parts of the suit property and proceeded to erect temporary structures in the suit land. To the Plaintiff, they got help from Bamburi Police Station and the first group of squatters were evicted. The Plaintiff then proceeded to obtain permit from the County Government to construct a perimeter wall. Later on, that led to the filing of the ELC (Mombasa) Petition No. 15 of 2017. By December, 2017, a small number of squatters had built structures on the suit property but were not staying therein. This evidence was well captured and presented in the evidence of PW - 1 and was supported by the evidence of all the defence witnesses. The only variance was on the duration of occupation by the squatters prior to the filing of this suit. Finally, PW - 1 produced photographs showing the few structures standing on the suit property as the time the suit was filed on 29th January, 2021. The issue has been proved to the required standard.
158. On issue No. (d) above on what structures belonging to the 1st -139th Defendants existed inside the walled suit property prior to the filing of this suit. The Learned Counsel submitted that in the pleadings by the Plaintiff, it was admitted that there were few temporary structures standing inside the suit property prior to the filing of this suit. This appears under the contents of Paragraphs numbers 10, 11,12 and 17. In the evidence of PW - 1, the Defendants who were in the suit property were very few. Most of those sued were not inside the suit property but had an interest in the suit property because their structures had been demolished. One of such squatters was Defendant number 18 who explained to the court that his structure was demolished when the wall was being constructed. As earlier explained, the wall was completed in the year 2020 so that such demolition must have occurred before the filing of this suit.
159. The Learned Counsel averred that from the evidence adduced by the Defendants, an example of those structures were what could be seen in the background of the annexures shown from the plaintiff's Replying Affidavit to the application dated 19th August, 2021 and filed in court on 14th September, 2021. The photographs related to the demolished wall. However, in the background one could see the small structures majority of which were already on the ground. In the bundle of documents filed by the Defendants on 1st February 2022 in particular pages 24, 25, 26, 27, 29, 30,31, 32,33, 34,35,36, 37,38, 39,40, 41 and 42 were never identified by the owners. He submitted that they should not be used as a guide to what existed on the ground before the filing of the suit. The photographs were not produced by the photographer, they are equally not dated and for that reason the court should not use them as a guide to the kind of structures which existed before the filing of the suit.
160. As to the number of squatters, the Learned Counsel submitted that the evidence adduced by the Plaintiff was that it was a small number. The Defendants themselves never knew how many they were. For example, the 1st and 18th Defendants were acting on their own behalf. They never represented the other members of the squatters. The rest of the 19th to 139th Defendants being 113 squatters were represented by Mr. Mkan Advocate. It made a total of 115 squatters. 2nd to 17th Defendants never appeared at all. Therefore, he submitted that there were 113 squatters as at the time of filing the suit. The Plaintiff never knew how many structures there were. Likewise, the Defendants also never adduced any evidence to show how many squatters they were and how many structures they were in. The 19th to the 139th Defendants filed an application dated 19th March, 2021 where in prayer number (b) they sought orders of the court for a census to be conducted. In the supporting affidavit of one John Mwangala Shauri, the Chairman of Nguu Tatu Self Help Group he swore in paragraph 5 stating



that “.....it is only fair and just that the person to be parties to this suit be the person who are within enclosure of the perimeter wall and no other person who are outside. The perimeter wall had suffered no loss and not affected by the orders issued in respect to the occupants of the suit parcel of land”. He then attached a copy of list of members of Nguu Tatu Community Self Help. This led to the amendment of the Plaint to include those members. They numbered 272 in total. However, during the trial of this suit the actual list of the two groups was never produced in evidence and or as an exhibit. To this effect, the Learned Counsel asserted that the number of squatters on the suit property prior to the filing of the suit was 113 and their structures were few.

161. Regarding issue (e) on whether the 1st to 132nd Defendants were evicted from the suit property and their structures demolished? If so, when and by whom, the Learned Counsel submitted that the issue is related to issue no. (c). According to him, there were three (3) stages to be considered. The first stage was the period before December, 2017. It was admitted that during that time unknown number of squatters moved the suit property and through the assistance of the police those squatters were evicted. Between 4th December, 2017 and December 2020, there were court orders in place which restrained the squatters from entering the suit property and or demolishing the perimeter wall. Any eviction which may have taken place between that period was governed by the existing court orders issued in Constitutional Petition (Mombasa) No. 15 of 2017. That issue could only be determined within the perimeters of that Petition and or the resultant appeal.
162. There were those squatters allegedly evicted after the filing of this suit. The Plaintiff testified that there were two groups of squatters. The first group was led by the late Mr. Chiponda who was the 1st Defendant in this matter. There was the second group led by John Mwangala Shauri and the minutes for the takeover were produced as exhibits by the 19th to 139th Defendants as their exhibits. The Plaintiff testified that while trying to outdo one another, the two groups fought so viciously against one another and the suit property became a battle field. In the process people were injured and one person killed. Several of the members of either side were equally arrested and charged in court. The Plaintiff further testified that it was the squatters themselves who destroyed the structures constructed by their rival groups.
163. In the evidence by the Defendants, they alleged that their structures were destroyed by goons who were accompanied by the police. In their evidence, they did not identify any representative of the Plaintiff. Secondly, the demolitions were done at night. Other than assuming that the Plaintiffs were involved in the demolition, none of the witnesses called by the defence positively identified any of the agents of the Plaintiff to have been part of the demolition squad. The Counsel averred that the structures were destroyed by the rival squatters. The court visited the suit property and saw the debris left behind by the destruction. It was the evidence of the Plaintiff that they came after the demolition had taken place and they cleaned their land of the debris.
164. On the question of eviction, the Learned Counsel opined that the court must bear in mind that after the wall was completed, the Plaintiff installed armed police officers to guard against unauthorized entry and or the demolition of the wall. The Plaintiff demonstrated that the wall was demolished severally.
165. They invited the Court to look at the Supplementary supporting affidavit of PW - 1 sworn on 29th April, 2021. The photographs showed extensive destruction of the wall and the matter was reported to Kiambeni Police Station on 19th April, 2021. There were also other demolitions clearly captured in the evidence of PW - 1 and PW - 2. It was the evidence of PW - 1 that after the issue was reported to the police, majority of those found around there were arrested. Others ran away fearing for fear of being arrested and had never come back. In the evidence produced by the defence, there were general statements made about the eviction. When the court visited the site, there were no squatters residing on the road side or in the nearby parcel of land. Indeed, it was only after the people learned that the



court was inspecting the property when they started gathering outside the gate. Therefore, the Counsel submitted that the burden of proving eviction by the Plaintiff was with the Defendants. It was never discharged. However, the Learned Counsel submitted that the court should find that the evidence by the Plaintiff about how the squatters left their land was believable. Finally, there were eight (8) witnesses who testified in support of the Defendant's case. However, three (3) of these witnesses were not parties. Even those who testified they did not represent a group. It was his contention therefore that the bulk of squatters never defended this suit. In other words, the issue of their eviction was not defended.

166. On issue 6 on whether the suit offended the doctrine of "Res Judicata". The Learned Counsel averred that in the Plaint, the Plaintiff disclosed that it had filed Constitutional Petition (Mombasa) No. 15 of 2017. The copy of that Petition was produced as an Exhibit by the 19th to the 139th Defendants. The Learned Counsel invited the court to look at the prayers sought in that Petition and the first 7 prayers were declarations based on public law and not prayers within the realm of private law. Their foundation was the Constitution under the Bill of Rights. The remaining prayers (h) was for injunction against Kaguta Self Help Group, Nguu Tatu Self Help Group from entering into, occupying or in any manner whatsoever from interfering with the Petitioners use of the suit property. Those prayer were also based on the remedies under the provision of Article 23 of the Constitution of Kenya, 2010. The Learned Counsel relied on the following authorities to show the distinction between Constitutional Petitions and ordinary suits.
167. In the case of: "*Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 Others* (2013) eKLR" Lenaola J (as he was) said;

"While I am alive to this Court's unlimited jurisdiction under Article 165(3) (a) of the Constitution, I do not think as can be seen elsewhere above that the Petitioner has raised any constitutional matters to warrant the intervention of the Court under Article 165 (3) (a). In any event, this Court in *International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others*, Petition No. 552 of 2012 held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in *Speaker of National Assembly v Njenga Karume* [2008]1 KLR 425, where it held that:-

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

168. In another case of:- "*Edward Karanja Chogo & 2 others v County Government of Kakamega* (2018) eKLR", the Court rendered itself as follows:-

"A Constitutional Petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the Petitioner ought to revert to a civil claim....."

169. In the Judgment from the Petition No. 15 of 2016 by Justice Sila Munyao, he dismissed the said Petition not on merit but on a technicality. In his view the Judge found that the Petitioner should have filed an ordinary suit rather than filing a Constitutional Petition. The Learned Counsel invited the court to look at Paragraph 32 of the Judgment, where the Judge observed as follows:-

32. it is therefore an established principle that where a person has remedies in ordinary civil law, all remedies provided for in statute, he needs to pursue those remedies and follow the provisions



of the laid down statutes rather than invoking the Constitution. Indeed, in many instances a Constitutional petition is not the best avenue to take, where there is an established remedy and procedure, for it may happen that there are facts in contention which can only be tested when the suit is heard in the manner that Civil suits are ordinarily conducted.

33. It does appear to me that the basis of this Petition is that there are persons who have invaded the land of the Petitioner.....Eviction from land and a permanent injunction to bar a person from certain land are matters that are routinely heard through ordinary civil suits commenced by way of plaint.
34. ...
35. My position is that the petitioner ought to have filed an ordinary civil suit rather than a Constitutional Petition.....If in deed there is question whether the 6th to the 23rd Respondents are in adverse possession that is a question that can only be determined through a hearing in an ordinary Civil Suit.
36.
37.
43. Prayer (g) is for eviction and prayer (h) is seeking a permanent injunction against the 6th to 23rd Respondents. I have already held that if the Petitioner wants these prayers, then the avenue is to file a civil suit for determination.”
170. They tookover the challenge from the Judge to file a civil suit for determination and the following day this suit was filed and placed before the same Judge who had the history of this conflict. They invited the Honourable court to note that the Judge proceeded and issued orders ofinjunction in terms of prayer 2 and three of the application dated 29th January,2021. Therefore, he submitted that this suit was not Res Judicata as alleged by the Defendants. In support of the argument, the Learned Counsel relied on the following authorities:-
171. In the case of:- “Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others (2014) eKLR” it was stated:-
- “To constitute Re - Judicata, there must be adjudication which conclusively determines the rights of the parties with regards to all or any of the matters in controversy”
172. Further, in the case of:- “Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2017) eKLR”. Here, the supreme Court while considering the issue of res judicata under the provision of Section 7 of the Civil Procedure Act, Cap. 21 stated that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked.
173. Regarding issue 7 on whether the Plaintiff had proved its case within the required standard? If so what remedies are available to the Plaintiff. The Learned Counsel asserted that all the Defendants were no longer in the suit property. Only two unfinished structures belonging to the 1st and the 18th Defendants were standing in the suit property. Even these said structures were never occupied. That the Plaintiff is the registered owner of the suit property. That the Plaintiff purchased the suit property in the year 2012 at a time when there were no squatter on it. That there was no justification for any of the squatters to remain on the suit property. The Learned Counsel submitted that the two prayers for injunction were merited under Article 40 of the Constitution of Kenya, 2010. The Plaintiff could not enjoy use and occupation of the suit property when the Defendants were entering in to it, sub - dividing the land, destroying the perimeter wall and or in any manner dealing with the suit property. Secondly, to



keep off the Defendants from interfering with the occupation, ownership and use of the suit property, then the court should intervene by granting a mandatory injunction compelling the 1st and the 18th Defendants to demolish their structures and carry away the debris therefrom. This would facilitate vacant possession to the Plaintiff.

174. The Learned Counsel invited the Court to look at the defence raised by the Defendants. The first uniform defence was that the Defendants (except Defendant no. 133) had been on the suit property for a long time and have inherited it from their fore fathers as alleged. This line of defence was not uniform in that the witnesses called by Defendants' numbers 19 - 139 included people who were invited to the land by other squatters as late as the year 2016, M/s. Damaris Patricia, testified to have been invited to the land in the year 2016 while Rebecca was invited sometime in the year 2017. For that reason, they could not claim the land through transmissions from their forefathers. The Learned Counsel urged the court to look at the legal ways of acquiring land in Kenya. They referred the Court to Section 7 of the Land Act no 4 of 2012. These methods were:-
- a. allocation;
 - b. land adjudication process;
 - c. compulsory acquisition;
 - d. prescription;
 - e. settlement programs;
 - f. transmissions;
 - g. transfers;
 - h. long term leases exceeding twenty-one years created out of private land; or any other manner prescribed in an Act of Parliament.
175. The burden of proving how they acquired the suit property was on the Defendants. To buttress his point, the Learned Counsel referred Court to the provision of Section 109 of the Evidence Act. None of them alleged to had acquired the suit property through allocation, land adjudication, compulsory acquisition, settlement, transfer. Long lease or any other method. Their evidence was that they had lived on the land for a very long time (prescription) and they had inherited from their ancestors (transmission). In the latter one, there were no documents produced to show that the land belonged to the ancestors. Secondly, that the ancestors died and the squatters acquired the land through transmission. This left them with only one method and that was prescription/adverse possession.
176. In proving their Counter - Claim, Defendants numbers 1 and 18 must comply with the procedure for acquiring land registered under Cap 281 (now repealed). If the procedure is wrong, the resultant right is null and void. They relied on the case of "Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)". At paragraph 110 the apex court stated:-
109. We note that the suit property was subsequently converted and H.E. Daniel T. Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, Section 10 of the GLA is applicable. Being a town kenyalaw.org/case law/cases/view/256748/30 plot, within the jurisdiction of the 1strespondentand its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.



110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The Orst allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.
111. Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the *Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.
112. We therefore agree with the appellate court that the appellant's title is not protected under Article 40 of the *Constitution* and the land automatically vests to the 1st respondent pursuant to Article 62(2) of the *Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative.

The appellant ought to have been more cautious in undertaking its due diligence.

177. The Learned Counsel invited the court to note that the bulk of the blame in all the defence witnesses was an accusation to Hussein Dairy family for selling the suit property when the Defendants were in occupation. The court could note from the record that Hussein Dairy Family or their representative were not parties to this case. Any findings against that family would be unconstitutional. This doctrine was stated in the case of “Mibebe & 105 others v Attorney General & 7 others (Constitutional Petition 69 of 2015) [2021] KEHC 146 (KLR) (26 October 2021) (Judgment)”. Mativo J (now JA) had this to say;

42. To sum it up, no order should be passed behind the back of a person who is to be adversely affected by the order, a position aptly stated by the Supreme Court of India in *JS. Yadav v State of U.P. & Anor* 32 thus: -32{2011}6 SCC 570 “No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,... provide that impalement of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff... More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post...” (underlining ours for emphasis only)
43. The above judicial pronouncements are graphically clear that the undisclosed persons contemplated in the prayers sought are necessary parties, so, one of the several defects in this Petition is that of non-joinder of necessary parties.³³ A Court ought not to decide a



case without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large. True, Rule 5 (b) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 201334 provides inter alia that a Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute. However, at this late hour it may be prejudicial to the Respondents to invoke Rule 5 (c) for the court to order addition or substitution of parties. In my event, the Petitioners never addressed this issue....”.

178. According to the Learned Counsel that left the Honourable Court with the Plaintiff who acquired the suit property in the year 2012. The Learned Counsel submitted that the claim for adverse possession could not be raised against the Plaintiff. By ordinary calculation, 12 years before 2021 takes them back to the year 2009. As at that date, the Plaintiff had no interest with the suit property. During the cross-examination of DW - 1, he was severally asked why he never had any document relating to this land with a date earlier than the year 2016. He stated having none. In the exhibits of all the Defendants' activities including Petition to a National Land Commission came in December, 2015.

179. The Counsel was guided by the legal rationale found in the case of:- “*Mtana Lewa v Kabindi Ngala Mwagandi* [2015]eKLR”. In this case the Court of Appeal had this to say;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.



- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

180. The Learned Counsel invited the court to defence Exhibit No. 3 where for the very first time, some of the Defendants appear to be applying to be allocated some three hundred (300) acres within the Nguu Tatu area. The Learned Counsel submitted that adverse possession in relation to the Plaintiff never arose at all. A disclosure was made by Counsel for the 1st and 18th Defendants when he requested this matter to be mediated together with another suit where the Defendants had sued the family of Hussein Dairy. The Learned Counsel referred to the proceedings of 9th March, 2022. This was case No ELC No. 301 of 2015 It was known to the Plaintiffs that this court was the same court which was hearing the suit by the squatters against the family of Hussein Dairy. In the evidence of these Defendants they confirmed that no survey was done. Some claimed as many as 300 acres. In their very own documents they laid claims to 3 other properties belonging to non-parties. The Learned Counsel relied on the case of “*Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR” where the court had this to say;

“The burden was on the Appellant to produce the certified extracts of title in respect of the suit properties. In the absence of the extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted. Moreover, the Appellant did not prove the location of the distinct portion of the land he is claiming or its acreage. He does not say whether the portion he is claiming was comprised in the original title LR No 1756 or LR No 1757. He does not further say whether the portion of the land he is claiming is comprised in now LR No 1757/5, 1757/6, 1756/7 or 1756/8. Evidently, two original titles LR Nos 1756 and 1757 comprising of Mwani Ranch and even the four sub-divisions are expansive and it is difficult to locate the portion claimed by the appellant. There is no evidence that the alleged forty acres were surveyed, demarcated and excised from the expansive ranch. In paragraph 4 of the supporting affidavit the appellant deposes that he and other people have been in possession of the forty and twenty acres thereby implying that he is not in exclusive possession of the land he claims.

In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres.

181. Further, from the Plaintiff’s witness statement, PW - 1 produced as an Exhibit being typed proceedings in the criminal case “SPMCC PCR No. 822 of 2015 Shanzu. The complainant in this matter was the family of Hussein Dairy and the accused persons involved some of the Respondents. He invited the court to look at the page 160 of that bundle which was a summary of site visits. At the top was the Chairman a Mr. Chiponda. At the middle of that page his evidence was captured where he stated that he lived there with his family for many years. Over leaf at page 161, where the court noted what was inside his house. There was also the name of the Treasurer John Shauri and other committee members. The report of the said the site visit was mentioned in the Judgment of the court which appeared between pages 196 to 219. At page 206 was a summary of issues which the court was to determine and at page 211 at the bottom, the name of the Chairman and Treasurer who were parties mentioned.
182. At page 214, the court framed the question whether the members of Nguu Tatu Community Based Organization including the accused persons were squatters? At page 215, the court came into conclusion that they were invaders and criminals perpetuating impunity to disinherit the complainant



of private property. The Learned Counsel urged the court to find that these squatters were indeed in Plot No. 819 and they only came to the suit property after they were evicted by the family of Hussein Dairy between the year 2015 and 2018. They were just invaders and criminals. For that reason, the Learned Counsel submitted that the Plaintiff was entitled to vacant possession and quiet possession.

183. Under the content of Paragraph 16 of the Plaintiff, the Plaintiff set out the particulars of trespass. Equally, in their very own document the Defendants admitted to have trespassed into the suit property at different times. The Court of Appeal had pronounced itself on this to the effect that once trespass was proved, damages are payable even without the burden of proving those damages. The Learned Counsel relied on the case of “*Kenya Power & Lighting Company Limited v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated))[2022] KECA 104 (KLR) (4 February 2022) (Judgment) Neutral citation:[2022] KECA 104 (KLR)”. At paragraph 23 the Court of Appeal had this to say:-

“23 Turning to the applicable law, the appellant relies on Halsbury’s Laws of England 4th Edition Vol. 45 at para 26 page 1503 on the guidelines that guide the court when assessing and awarding damages for trespass, namely, where there is no proof of actual damage, the aggrieved party is entitled to recover nominal damages; where the trespass has caused the aggrieved party actual damage, he is entitled to receive such amount as will compensate him for his loss; where the trespasser has made use of the aggrieved party’s land, the aggrieved party is entitled to recover by way of damages such sums as would reasonably be paid for that use; where there is an oppressive, arbitrary or unconstitutional trespass by the trespasser or where the trespasser cynically disregards the rights of the aggrieved party on the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded; and lastly, if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased”.

184. On the other hand, the Plaintiff pleaded loss and damages as a result of the demolitions of their perimeter wall. It was shown that the demolitions were done on:-

- a. 21st March, 2018 it cost them - Kshs. 1,485,000.00/-.
- b. 1st April, 2020 it cost them - Kshs.1,775,340.56/-.
- c. 10th October, 2020 it cost them - Kshs. 1,938,460.00/-.
- d. 1st April, 2021 it cost them - Kshs.1,700,000.00/-.
- e. 19th April, 2021 it cost them - Kshs. 2,938,460.00/-.
- f. 30th April, 2021 it cost them - Kshs. 5,100,000.00/-.
- g. 28th August, 2021 it cost them - Kshs. 5,656,450/-

This totals to a sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Hundred and Ten and fifty six cents – (Kshs. 20,593,710.56/-).

185. PW-1 testified about the demolition of the wall. When the court conducted a site visit it noted in its report the abundant evidence of the demolition of the wall. PW - 2 appeared and produced a report on the calculation of what was spent to reconstruct the portions of the wall demolished as shown in paragraph 106. The Learned Counsel submitted that these were damages which the Defendants



(except Defendant no.1 33) should be ordered to pay. As shown earlier, in the year 2019 the court issued orders in Petition No. 15 of 2017 as follows: -

- a. That the 1st, 2nd and 3rd Respondents be and are hereby compelled to provide the 5th Respondent Oriole Investment Limited or such other Contractors appointed by the Petitioner with sufficient uniformed and armed police officers while constructing the perimeter wall on Plot LR Sub Division No. 817 (original Number 324/2 (section 11/MN) and in securing the perimeter wall from demolition.
- b. That an order of injunction be and is hereby issued restraining the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th 18th 19th, 20th, 21st, 22nd and 23rd operating as Kaguta Self Help Group, Nguu Tatu Self Help Group and others all other invaders currently occupying Plot Lr Sub-division No. 817 (original Number 324/2 (section II/MN) from interfering with the construction of the perimeter wall, demolishing the perimeter wall, subdividing, selling, constructing or in any other manner whatsoever dealing with Plot LR Sub-division No. 817(original Number 324/2 (section II/MN)except for purposes of accessing their structures.

186. From the evidence by PW - 1, he informed the court that only a few structures remained in the suit property by December, 2020. These were the ones destroyed by the rival groups. At the same time, PW - 1 demonstrated how the wall was destroyed on several occasions when there existed a valid court order. The Learned Counsel submitted that, that was contempt by the squatters/invaders. The law was that court orders were never issued in vain. The Defendants could not disobey a lawful court order by demolishing the wall and expect to get away with it. The Learned Counsel relied on the case of "[Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR", the court had this to say:-

"In *Nthabiseng Phoko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015).Nkabinde, J observed that:-

"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

59. In the case of *Canadian Metal Co. Limited v Canadian Broadcasting Corp* (N0.2) [1975] 48 D.LR (30), the court stated that;

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn...if the remedies that the courts grant to correct..... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."

60. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean



nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in *Carey v Laiken* [2015] SCC 17 that; “Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect”

61. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. (*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983 2nd February 1990). And in *Hon. Martin Nvaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.
 62. It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim”.
187. The Learned Counsel submitted that this claim was pleaded and proved to the required standard and the same should be allowed. On issue (h) on whether the 1st and 18th Defendants had proved their Counter - Claim within the required standard and if so the remedies available to the 1st and 18th Defendants, the Learned Counsel submitted that the Counter - Claim was by two Defendants. These were the 1st and the 18th Defendants. They had earlier demonstrated that there was no authority to act on behalf of other squatters. The Learned Counsel also asserted that the Defendants had not proved adverse possession against the plaintiff. They had also demonstrated that the suit property is registered under Cap 281 (now Repealed).
188. The case by the Plaintiff was premised on the fact that Kenya was democracy which ought to be guided by the rule of Law. Under the Constitution and statutes there was no provision for acquisition of land through violence as invaders. The Defendants accept that the Plaintiff acquired the property in year 2012. For that reason, prescriptive rights had not accrued to them even as at the date of the hearing of the case. The Counter - Claim by the two Defendants was based on morality and mercy. In the defence by the other Defendants, they did not seem to know that the suit property is registered under Cap. 281 (now repealed) Further they never want to accept that the Plaintiff had rights protected under the provision Article 40 of the Constitution of Kenya, 2010. Under this provision of Article, the only avenue of challenging those rights was to prove that (6) The rights under this provision of Article never extend to any property that had been found to have been unlawfully acquired. The Defendants never pleaded this in their defenses and never produced any evidence. The Defendants based their claim on socio-economic rights to try and urge the court to disregard the rights of the Plaintiff under the provision of Article 40. The court had decided otherwise by stating that “ recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the



land of another” The Learned Counsel referred to the case of “*Moi Education Centre Co. Limited v William Musembi & 16 others* (2017) eKLR” page 14.:-

At page 4 of the authority the court noted as follows;

- “ 4. The evictees averred that they peacefully co - existed with the Appellant’s school on the property until 10th May 2013 when “about 300 hooligans armed with crude weapons were deployed” “to demolish and evict” them from the property under the superintendence and assistance of about 40 armed police officers; that between 17th May 2013 and 10th June 2013 a gang of about 300 hooligans guarded by about 40 police officers again raided the evictees” homes in the two villages and destroyed all their homes and property using a bulldozer and crude implements and evicted all the evictees from the property; that after carrying out the eviction, the Appellant erected a perimeter wall enclosing the area previously occupied by the evictees; that the evictees were then constrained to erect “temporary flimsy dwelling structures in the small empty space left between the school and the Wilson Airport where there (sic) were living in squalor to date.”
5. The evictees claimed that the demolition and eviction was carried out without notice, warning, consultation, justification or any valid court order without and according them alternative shelter; that they make a living as petty traders, vendors, labourers and as casual domestic workers in the villages and in the surrounding estates and in the industrial area; that as a result of the eviction they lost their jobs and means of livelihood; and that the education of their children who were attending public primary schools in the area was severely disrupted.
38. In reaching the conclusion that the evictees were not lawfully evicted from the property, the Judge clearly appreciated that they (the evictees) are not the owners of the property. To that extent, therefore, the complaint that the Judge failed to have regard to the Appellant’s property rights is not well founded. There is, however, a different aspect of the Appellant’s complaint hinging on Article 40 of the Constitution to which we shall return later in this judgment.....
41. We turn now to consider what seems to be the central question in this appeal, that is, whether the Appellant required a court order to carry out the eviction and whether the Appellant had justifiable cause for carrying out the evictions. Those questions are linked to the question, to which we have to an extent already alluded, whether the Judge appreciated the Appellant’s property rights under Article 40 of the Constitution and whether there was sufficient proof before the court of violation of the evictees” rights.
42. In addressing those questions, we bear in mind, and proceed on the basis: that there is no contention that the Appellant is the registered proprietor of the



property; and that the Appellant accepts that it did in fact evict the evictees from the property with the superintendence of police and in the process demolished their houses and business structures”.

And at page 14

“.....Lenaola, J (as he then was) articulated the argument by positing that “it does not matter that the Petitioners do not hold title to the suit premises and even if they had been occupying shanties, the 1st Respondent was duty bound to respect their right to adequate housing as well as their right to dignity.” After reviewing those decisions, this Court concluded as follows:

“136. We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. The Constitution in the Bill of Rights recognizes and protects the right to private property. Whereas socio-economic rights are:

1 See *Susan Waithera Kariuki & 4 others v Town Clerk Nairobi City Council & 2 others*, Petition No. 66 of 2011; *Satrose Ayuma & 11 others v The Registered Trustees of Kenya Railways Staff Retirement Pension Scheme & 2 others*, Nairobi HC Petition No. 65 of 2010; *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security*, Constitutional Petition No.2 of 2011; *Veronica Njeri Waweru & 4 others v The City Council of Nairobi & others*, Nairobi Petition No. 58 of 2011 recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. In Latin, socio-economic rights cannot confer rights in alieno solo. Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the *Limitation of Actions Act* (Cap 22 of the Laws of Kenya). Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic right, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineer, take away and re-distribute property rights.



Subject to Article 25 of the Constitution, all provisions in the Bill of Right are to be treated as equal with no one provision overriding another” [Emphasis ours]

189. The Learned Counsel posited that the alleged structures were all illegal. None of the Defendants produced approved plans from the County Government of Mombasa. The Learned Counsel submitted that the order authorizing the 1st and 18th Defendants to enter the suit property never insulate them from complying with the law. They relied on the provision of Section 30 of the Physical Planning Act Number Cap. 286 provides that:-

‘30. Development permission

- (1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section 33.
- (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding five years or to both. cap. 286 Physical Planning [Rev.2012] [Issue 1] P17-19
- (3) Any dealing in connection with any development in respect of which an offence is committed under this section shall be null and void and such development shall be discontinued.
- (4) Notwithstanding the provisions of subsection (2)-(a) the local authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;(b)if on the expiry of the ninety days’ notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer.
- (5) Subject to subsection (7) no licensing authority shall grant, under any written law, a licence for commercial or industrial use or occupation of any building, or in respect of any premises or land, for which no development permission had been granted by the respective local authority.
- (6) For the purposes of subsection (5)-(a) commercial use includes shops, offices, hotels, restaurants, bars, kiosks, markets and similar business enterprises and trade but does not include petroleum filling stations; (b) industrial use includes manufacturing, processing, distilling and brewing, warehousing and storage, workshops and garages, mining and quarrying and other similar industrial activities including petroleum filling stations.
- (7) No local authority shall grant a development permission for any of the purposes mentioned in subsection (5) without a certificate of compliance issued to the applicant by the Director or an officer authorized by him in that behalf.
- (8) Any person who contravenes subsection (5), or (7), shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand shillings or to an imprisonment not exceeding twelve months or to both.

190. Whatever structures the Defendants may have constructed on the suit property were null and void. They reiterated the words in the case of “Omega Enterprises (Kenya) Limited v Kenya Tourist



Development Corporation Limited & 2 Others [1998] eKLR” where the three Judges of this Court wrote their findings and quoted the case “*Macfoy v United Africa Co. Ltd*” had this to say:-

“In *Macfoy v United Africa Co. Ltd* [1961]3 All ER 1169 Lord Denning delivering the opinion of the Privy Council at page 1172(1)said;

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

191. The Learned Counsel asserted that it was immoral for the court to reward those who have blatantly breached the law and punish law abiding citizens by ordering compensation. Further, none of the Defendants produced a single receipt to demonstrate the least value of expense. Indeed, if the receipts were not available, the Defendants would have produced a valuation report by a licensed valuer. There was no material or data placed before the court to assist the court in determining value of structures of the 1st and 18th Defendants. The Court was invited to order that the Defendants be allowed to enter the suit property and build their homes. This was a huge dream by the Defendants. There was no foundation upon which the court could overlook the clear provisions of Article 40 of the Constitution. The Defendants never discharge their burden of proof under that the provision of Article. In the site visit report by the court on 19th November 2021, they respond as follows;



| Item | Observation by the court | Their reply |
|------|--|---|
| 1 | The land measures -59.5 acres or thereabout | Confirmed |
| 2 | There is a 6ft tall concrete perimeter wall well-constructed around the land | Confirmed |
| 3 | There were no activity taking place on the land as at the moment. It was quiet and serene. | Confirmed |
| 4 | There were about 200 people around the area but very peaceful | Only 5 testified. The rest did not give authority |
| 5 | We learnt that there existed a well-documented Bill of Quantities (BQ) report available it had been used as evidence in the various court cases. | Produced by PW 2 |
| 7 | The land is Land Reference Number.817.There are other parcels land surrounding it being LR No. 819 about 350 acres which belongs to one Mr:Hussein Daily Limited on the Southern part. He has sold to many people including this parcel to Bandari Holding Limited. There were also other parcels of land being Land Reference Numbers 818, 820 & 823 on the northern part of the suit land. | Evidence produced by both Plaintiff and defendants around these issues with little variations |
| 8 | There are a few indigenous trees scattered all over the suit land-These includes the acacia, Neem,Tamarind trees, several | PW 1 testified that before purchase the suit property was a farm. |



| | | |
|----|--|--|
| | homesteads with euphobia short fences, some banana stems, scattered Cassava plantations and some organic vegetables among the few we could identify | The defence witnesses alleged they had planted some trees |
| 9 | From what appeared to have been human settlements prior to the main demolitions and forceful eviction taking place. | PW 1 testified that eviction not done by plaintiff but by rival group of defendants Defence evidence that eviction took place at night |
| 10 | There were a few concrete electricity poles which we learnt had been put up by the World Bank for electricity supply to the people who lived on the land | PW1 Informed court that these were all illegal connections |
| | | Defence did not lay evidence on this. |
| 11 | We noticed approximately 5 water manholes which we learnt were mounted by the Mombasa Water Supply Corporation'. | These are on the road reserve taking water to Mombasa Island. This explanation was given at the site visit. |

192. Part of the claim in the Counter - Claim was a complaint against the National Police Service. The police have a constitutional duty to protect property rights. In the order issued by Munyao J on 1st February, 2021, it gave the police the right to oversee the implementation of that order. Again, in the order of 18th July, 2019, in Petition No. 15 of 2017 the court had directed the police to ensure the wall was not demolished. In the evidence of PW - 1, he informed the court that when the two factions clashed violently, there were demolitions which were done. This was when the police intervened and chased away the warring parties. At the same time, using the orders of this court issued on 1st February, 2021, the police kept off the Defendants from ever entering the suit property. The Learned Counsel relied on the case of "[Florence Amunga Omukanda & Another v Attorney General & 2 others](#) [2016] eKLR". The court had this to say:-

" 47. It is our view that section 14 of the *Police Service Act* and now Section 24 of the *National Police Service Act* impose a negative obligation on the part of the Government in general and the police in particular not to violate the rights and fundamental freedoms but also imposes a positive obligation on the part of the said agencies to protect the people from threat of violation of the said rights and fundamental freedoms. To this extent and as to whether the state is liable for violations of fundamental rights and freedoms by private and or third



parties, we are guided by the decision in *Association of Victims of Post Electoral Violence and Inter rights v Cameroon* [19] where it was held that:

“The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the commission ruled that the negligence of a state to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the charter which would be attributable to this state even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private individuals....According to the permanent jurisprudence of the commission, Article 1, imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributed to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.”

48. This principle of positive obligation has also been recognized by the European Court of Human Rights in *Mahmut Kaya v Turkey* [20] where it was held that:

“the court recalls that the first sentence of Article 231 enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.....this involves a primary duty of the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from criminal act against individual.”

49. Happily, for us, in relation to Kenyan law we will not be reinventing the wheel. The issue as to whether the police owed its citizens a duty to prevent the



post-election violence was elaborately discussed by a three judge bench in the Charles Murigu Murithii case where it was held that:

“....having determined that the state has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order, we have come to the inevitable conclusion that the state would in appropriate cases be held liable in cases where violations of the rights enriched in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated.”

50. As to how the duty of care would be activated, the court in that case found that the police had an obligation to facilitate and create a peaceful environment which would ensure that every citizen enjoyed his fundamental rights and freedoms. The Court also examined the extent of that obligation and concluded that the police had a general duty of care to all its citizens. However, the police would be held liable to a citizen when that individual can demonstrate that the police owed him a special duty of care. As to how an individual can demonstrate that special duty of care that would make the police liable, the learned judges in the Charles Murigu Murithii case stated that;

“the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which Police protection had been assured.”

193. This authority demonstrated clearly the role of the National Police Service in protecting private property. The plaintiffs in the counter-claim have to demonstrate that the Police acted outside these powers. Unfortunately, that evidence was never placed before the court.
194. In conclusion, the Learned Counsel urged the court to allow the Plaintiff's claim as prayed. In relation to damages, they urged the court to order payment of a sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Ten Hundred and Fifty Six cents (Kshs. 20,593,710.56/=) as damages for the demolition of the wall. He also urged the court to dismiss the Counter - Claim by the Defendant Number 1 and 18. He urged the Honourable Court to allow the prayer for the police protection taking into account the insecurity of the area. The cost of the suit to be borne by Defendants numbers 1 to 139.

B. The Written submissions of the 19th to 139th Defendants

195. The 19th to 139th Defendants through the Law firm of Messrs. Mkan & Company Advocates filed their written submissions dated 12th February, 2024. Mr. Mkan Advocate commenced his submission by stating that the case before the Honourable Court involved a dispute over the ownership of the suit land between the Plaintiff on one hand and the Defendants on the other hand.
196. According to the Learned Counsel, the background of the matter was that the Plaintiff claimed ownership of Plot No.817{Orig. 342/21Sec11 MN. The Plaintiffs are the registered owners under the certificate of title presented in court and claim to have bought the same from Hussein Diary whereas



the Defendants claimed ownership by having been born and brought up on the suit property hence it was their ancestral land.

197. Further, the Learned Counsel averred that the Plaintiff's case was through two witnesses who testified before the court, PW – 1 and PW – 2 respectively. PW - 1 testified and narrated how they purchased the suit property and produced nine (9) Plaintiff's exhibits. Their testimony was that the Plaintiff bought the suit property in the year 2012 and later reneged by stating that the suit property was acquired before PW – 1 became a director. Hence, he never signed the transfer nor the sale agreement. He further stated that due diligence was done before the purchase of the suit property was undertaken but failed to indicate what was done that amounted to due diligence. He further confirmed that no company minutes or resolution were filed in court approving the purchase of the property. PW - 2 testified and produced a document whose content could not be verified as it never indicated who signed it. It never indicated whether the author was licensed to do or carry out the said work. He further confirmed that the report was intended for Bandari the Plaintiff herein. PW - 2 described himself as a land Valuer yet from the document presented and produced in court under the contents of Paragraph 4, he was described as a Quantity Surveyor. Hence, it was not easy to know what exactly was his designation - a Land Valuer or a quantity surveyor.
198. It was the Learned Counsel's contention that the Plaintiff failed to explain how they acquired this property when in fact the Defendants were already in occupation of the same. He opined that the provision of Article 61 of the Constitution of Kenya 2010 provided that all land in Kenya belonged to the people of Kenya collectively as a Nation, as communities, and as individuals. The right to property is a fundamental human right protected under Article 40 of the Constitution of Kenya 2010.
199. Therefore, it was his submission that to prove ownership of land in Kenya, a party must avail a title deed or official records, property tax receipts, purchase contract, and any search before purchase of the suit property which the Plaintiff failed to do.
200. On its defence, the Defendants called several witnesses who testified. They stated how they have been residing and or living on the suit property ever since. They had built residential houses and other amenities in the area but the same were illegally and wrongfully demolished or destroyed by the Plaintiff or their agents. Since then they had been denied access to the suit land. They further testified that at no time had the Defendants' occupation on the suit property interfere with or notify of the sale of the suit property to the Plaintiff or acquisition of the same. It was the Defendant's submission that the Plaintiff jointly and severally unlawfully invaded and took possession of the suit property to the exclusion of the Defendants thereby denying them their constitutional rights to own property as enshrined under the Constitution of Kenya 2010. It's the defense assertion that the Plaintiff failed to prove in court they legally acquired and/or owned the suit property. It was also evident from the testimony and documents produced by the Plaintiff in court clearly showed that the Plaintiff acquired or obtained the suit property illegally and by misrepresenting facts to the Land registrar to have the property be registered in their name. Hence, the Plaintiff acquired the suit property illegally, irregularly and unprocedurally. On the other hand, the Defendants claimed ownership of the suit property. They prayed that the same be declared as their property.
201. Additionally, the Learned Counsel submitted on "the doctrine of Res Judicata". The Learned Counsel held that this was a Latin term for judged matter and referred to a concept in common law civil procedure. According to him, it was applicable whereby case there had been a final Judgment and that it was no longer a subject to appeal. The legal doctrine meant to bar (or preclude) relitigating of a claim between the same parties over the same matter. It was a matter that had been adjudicated on by a competent court and therefore may not be pursued further by the same parties as it was a matter that had been finally decided on its merits and could not be litigated again between the same parties. The



principle of Res judicata played a pivotal role in ensuring the finality and certainty of judicial decisions and to maintain the integrity of the legal proceedings. The same principle was incorporated in the laws of Kenya. The same was fully reflected under the provision of Section 7 of the *Civil Procedure Act*, Cap. 21.

202. Therefore, the Learned Counsel contended that the essence of this doctrine was that for a matter to be subject to litigation in and of adjudication by a court of competent jurisdiction. The court would require the parties to the suit to bring forward their whole case and not permit the same parties to open the same of litigation in respect of a matter which might have been brought forward as part of the subject. All this was intended to avoid multiplicity of decisions made over the same subject matter and on the same issues.
203. Thus, it was the Learned Counsel's submission that in the instant case, the Honorable Court lacked jurisdiction to entertain this suit. In saying so, he averred that all issues arising thereof had already been conversed on by the parties on Constitutional Petition (Mombasa) No. 15 of 2017 between the Plaintiffs and the Defendants. The issues had been finally adjudicated on and/or determined upon by a court of competent jurisdiction.
204. Additionally, the Learned Counsel submitted on "the doctrine of Sub – Judice",. He argued that the term "Sub – Judice" means "under judicial consideration or before the court for consideration or before a Judge or Court of law awaiting judicial determination". This rule limits comments and disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury. They further submitted that this doctrine prevented a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as the previously instituted suit between the same parties pending before the same court or another court with jurisdiction to determine it. This is captured under the provision of Section 6 of the *Civil Procedure Act* Cap 21 Laws of Kenya.
205. Thus, it was their submissions that this suit was similar to Environment and Land (Mombasa) case No.160 of 2021 as it related to the same suit Property and issues raised therein which were similar to the one pending herein. This rule was meant to stop filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter to avoid abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same subject matter.
206. On the principle of estoppel, the Learned Counsel submitted that the principle precluded a person from asserting something contrary to what was implied by a previous action or statement of the person or by a previous pertinent judicial determination. The term Estoppel refers to a legal principle that prevents someone from arguing something or asserting a right that contradicts what they previously said or agreed to by law. They therefore stated that since all issues in this suit had been heard on merit and determined in the ELC Constitutional Petition (Mombasa) No.15 of 2017, the Court was now stopped from issuing fresh determination over the same subject matter. This is captured under the provision of Section 8 of The *Civil Procedure Act*, Cap. 21 Laws of Kenya thus:-

“Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action.”

207. It was the Learned Counsel's submission that estoppel legally prevented people from making contradictory claims or actions as opposed to something they may have said or done in the past. The Law firm of Messrs. Mwamunye Mzungu Solomon Advocates LLP Came on record in place of the law firm of M/s. Munyithya, Mutugi, Umara & Muzna Advocates and immediately filed Notice



Of Withdrawal Of Suit on 12th November 2021 and served the same on all parties to the suit. This notice was brought under the provision of Order 25 Rule 1 of the Civil Procedure Rules, 2010 which provides:-

“At any time before the setting down of the suit, the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of the claim, and which and such discontinuance or withdrawal shall not be a defense to any subsequent action.”

208. The Learned Counsel submitted that by the wards of the Notice of Withdrawal stated that the Plaintiff had fully withdrawn the suit against the Defendants and since the Plaintiff failed to ignore to reinstate the same. There was no suit before the court to litigate over. In conclusion, the Learned Counsel urged the Honourable Court to dismiss this suit as the Plaintiff had failed to prove its or his case on a balance of probability as required in law.

VI. Analysis and Determination

209. I have carefully read and considered the filed Further Amended Plaintiff, Amended Counter - Claim, the Supporting documents, responses with supporting documents, written submissions and the cited authorities by all parties in light of the entire record and the relevant provision of the Constitution of Kenya, 2010 and the Statutes.

210. In order for the Honourable Court to arrive at an informed, just, fair and reasonable decision, I have distilled the following as the four (4) issues for determination. These are:-

- a. Whether this Honourable Court has the jurisdiction to hear and determine this matter by virtue of the doctrine of Res Judicata, Sub - Judice and Estoppel?
- b. Whether the parties herein are entitled to the reliefs Sought from the Further Amended Plaintiff and Counter - Claim?
- c. Whether as per the Amended Counter - Claim the Defendants have successfully pleaded possession by way of Land Adverse possession?
- d. Who will bear the costs of the Further Amended Plaintiff and the Counter claim.

Issue No. a). Whether this Honourable Court has the jurisdiction to hear and determine this matter by virtue of the doctrine of Res Judicata, Sub – Judice and Estoppel.

211. Under this sub – title, the Honourable Court decipheres that the main substratum in this matter is based on the claim of legal ownership to the suit property. In the course of making that determination, the jurisdiction of this Court has been challenged based on “the doctrine of Res Judicata, Sub – Judice and Estoppel”. In the given circumstances, the Honourable Court has undertaken to critically examine all these issues as a matter of precedence. However, before embarking on the analysis of crafted issues afore stated, it is imperative that the Honorable Court extrapolates on the facts of the case briefly. This is rather a protracted, complex and convoluted almost a replica of “a cat and mouse” game matter. From the filed pleadings, it is on a claim of land within an informal settlement area. While on the one hand the Plaintiff claims to be the absolute and legal owner to the suit land and having acquired an indefeasible title, rights and interest over it based on the principle of bona fide purchaser on notice for value, the Defendants claim the land based on ancestral inheritance and from a thin veil and/or membrane through the doctrine land adverse possession. It’s a dispute that has degenerated into occasional mass destruction of properties, loss of human life, evictions and institution of series of civil and criminal



cases before the court of law. The situation has been dire almost depicting what the famous English Philosopher Thomas Hobbes once described as “Short, Nasty and Brutish”! I dare say no more.

212. First and foremost, I wish to deal with the issue of Jurisdiction of this Court. It is trite law that the issue of jurisdiction should be tackled the minute the court becomes aware of its existence. In the celebrated case of Civil Appeal No. 50 of 1989 - “Owners of the MV Vessel “Lilian “S” v Caltex Oil Limited”, Justice Nyarangi opined as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

213. Additionally, the Supreme Court in the case of: “Samuel Kamau & Another v Kenya Commercial Bank and Two Others – Sup. Ct. Civil Application No. 2 of 2011” opined as follows:

“A court’s jurisdiction follows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, is not one of procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings”.

214. The Environment and Land Court in Kenya is a superior court established under the provision of Article 162 (2) (b) of the Constitution of Kenya, 2010. Its primary purpose is to hear and determine disputes related to environmental matters and the use, occupation, and title to land. The Environment and Land Court exercises its jurisdiction throughout Kenya. It has both original and appellate jurisdiction to handle disputes in accordance with Article 162 (2) (b) of the Constitution and the provisions of the Environment and Land Court Act no. 19 of 2011 (ELCA). Article 162 of the Constitution as read with Section 13 (1) and 13 (2) of the Environment and Land Court Act (ELC Act) states:

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

- (2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;



- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.

215. Additionally, the provision of Section 13 (7) of the Act outlines the reliefs that may be granted by the Court as it deems fit and just, including:- (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.”

216. This position was eruditely re-stated by the Supreme Court in “Petition No. 5 of 2015 (Between the Republic as Appellant and Karisa Chengo and two others as Respondents)”. The court quoted Lord Denning in the case of:- “*Benjamin Leonard Mcfoy United African Company Limited* (UK) [1962] AC 152” in the privy council as opining:

“If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

217. In their submissions, the Defendants averred that the instant suit was either offended “the doctrine of Res Judicata and Sub – Judice” or otherwise an abuse of Court process. The Learned Counsel for the 19th to 139th Defendants anchored his argument on the fact that from the filed Constitutional Petition No. 15 of 2017 filed by the same Plaintiff and after it was heard on merit, on 28th January, 2021 it was dismissed by this Court. According to the Counsel, the Constitutional Petition was a claim for recovery of the suit land on the same grounds as the present claim. Being aggrieved by the said decision, the Plaintiff had since preferred and was actively prosecuting an appeal before the Court of Appeal. In these circumstances, the Counsel contended, the present claim was either res judicata or filed in contravention of the sub judice rule and was therefore an abuse of the court process. The Defendants sought or would be seeking to have this action struck out on these grounds. On the other hand, the Counsel asserted that from the evidence adduced by the Defendants, it created an impression that depicted that they were in open, exclusive, and continuous peaceful possession (nec vi, nec cram nec precario) of the suit land for over 12 years before the Plaintiff reportedly purchased Sub - Plot 817/ Section II/MN in 2012 from the previous title holders. The previous title holders’ rights in and over the suit land had by the time of the said purchase been extinguished, and the title was and still is held in trust for the defendants. The Plaintiff and the previous title owners from who it claimed to have derived title by purchase have litigated over the said suit land in previous proceedings, against the 1st and 18th Defendants, among other which proceedings have either been concluded, dismissed or are pending herein as shown in:-

- a. ELC (Mombasa) Case No. 201 of 2013 - *Ibrahim K. Baya & 12 Others v Mohamed Kassam & 7 Others*, for a claim for recovery of Plot 819/I1/MN against the title owners.
- b. ELC (Mombasa) No. 298 of 2013 (OS) *Muhambi Kalinga & 188 Others v Mohamed Kassam & 4 Others*, for a claim for Plot 819/II/MN against the title holders.
- c. Constitutional Petition (Mombasa) Number 74 of 2014 *Kazungu Katana & 382 Others v Mohamed Kassam & 6 Others*, for a claim for recovery of Plot No. 324, 382,817 and 819, / all of Section II Mainland North.



- d. ELC (Mombasa) No. 301 of 2015, *Martin Chiponda and 860 Others v Mohamed Kassam & 4 Others*, for a claim of recovery of Plot Numbers. 324, 382, 817 and 819 all of Section II Mainland North.
 - e. CMCC (Mombasa) No. 1686 of 2016 *Bandari Investments Co., Limited v Hashim Loma Baya Omar Juma; Shida Charo; Kashindo; Nahodha John; Chris*. The Plaintiff obtained eviction orders ex-parte before a court without jurisdiction.
 - f. HC (Mombasa) JR No. 7 of 2017 *Republic v Hon. E. Mutunga, SRM; Hon. Attorney General; OCPD Kisauni and OCS Kiembeni Police Station Ex-parte Dalu Chigamba Munga and Ephraim Kitsao Baya*. A claim to call up to the High Court for quashing the Plaintiff's eviction decree in CMCC No.1686/2016.
 - g. ELC Constitutional Petition (Mombasa) Number 15 of 2017-*Bandari Investments Co. Limited v National Police Service and 22 Others*. This was a claim for recovery of the same land on the same facts. It was dismissed on 28th January, 2021. The Plaintiff had since appealed that decision by filing a notice of appeal on the bed of the same court file.
 - h. Mombasa Court of Appeal Civil Appeal (Mombasa) No. 21 of 2018 - *Martin Chiponda & 4 Others v Bandari Investments Co. Limited and 6 Others*, an interim appeal by the Defendants from the order of 19th December, 2017 by ELC, Mombasa in ELC Petition No.15 of 2017, aforesaid. It was dismissed on 20th September, 2018.
 - i. CA Civil Application (Mombasa) No. E033 of 2021 - *Martin Chiponda and Others v Bandari Investments Co. Limited*, - an application to strike out the notice of appeal for want of timely service of notice of appeal on the applicants or their advocates. The President of the Court of Appeal had sanctioned the empaneling of a five (5) Judges bench to hear this application.
 - J Court of Appeal (Mombasa) Civil Application No. E034 of 2021-*Bandari Investments Co. Limited v Martin Chiponda and Others*.
218. The Plaintiff and the title owners from whom it reportedly derived the alleged title in and over the suit land have also set in train several criminal proceedings in:
- a. Shanzu Criminal Case No. 822 of 2015-Rep.v Michael Fondo and 10 Others, a charge of trespass on the suit land.
 - b. Upon conviction, the accused persons appealed, and the appeal is pending hearing and determination before the High Court, Mombasa.
 - c. Shanzu Criminal Case Number 1 1252 of 2015 *Republic v Samuel Chivatsi*, a charge of injuring animals on the larger parcel 324 of Section II MN.
 - d. Shanzu Criminal Case No.1040 of 2016 *Rep. 1 Joba Athumani Saba* (a charge of disobeying lawful court orders issued in Shanzu Criminal Case number 822/2015, regarding the same land.
219. By reason of the matters aforesaid the 1st and 18th Defendants would aver that the present suit alia the doctrines of res judicata, sub judice, Prohibition of multiplicity of suits, Lis pendens administration of civil and criminal justice. The orders issued in the Constitutional Petition could survive the Plaintiff's illegal and fraudulent activities of demolition of the Defendants' structures, dishonestly burying and deleting evidence of such structures, and eventual taking of possession of the suit land during the



pendency of these and other proceedings, thereby permanently dispossessing the defendants and depriving them equality of arms in this contest. The plaintiff is put to the strict proof thereof.

220. According to the Defendants, the jurisdiction of this court is disputed on account of the plea of Res Judicata, and lis pendens now that Constitutional Petition (Mombasa) Number 15 of 2017 was dismissed on 28th January, 2021, and there is pending an intended appeal before the Court of Appeal which if ultimately successful, would either grant the plaintiff the same prayers as sought herein, or restore the Constitutional Petition for re-hearing before this court, probably differently constituted. They further argued that the Amended Plaint otherwise never disclosed a reasonable cause of action against the 1st and 18th Defendants. In response to the Plaintiff's plea in Paragraph 20 of the Further Amended Plaint the Defendants averred that the defence and the cause of action pleaded in the Counter - Claim survive the deceased.
221. While countering this argument, the Learned Counsel for the Plaintiff posited that from the Plaint, the Plaintiff disclosed that it had filed Constitutional Petition No. 15 of 2017 Mombasa. The copy of that Petition was produced as an Exhibit by the 19th to the 132nd Defendants. The Learned Counsel for the Plaintiff, invited the court to look at the prayers sought in the said Petition and the first 7 prayers were declarations based on public law and not prayers within the realm of private law. Their foundation was the Constitution under the Bill of Rights. The remaining prayers (h) was for injunction against Kaguta Self Help Group, Nguu Tatu Self Help Group from entering into, occupying or in any manner whatsoever from interfering with the Petitioners use of the suit property. Those prayers were also based on the remedies under the provision of Article 23 of the Constitution. The Learned Counsel relied on several authorities to show the distinction between Constitutional Petitions and ordinary suits.
222. On whether the Judgement from the Constitution Petition was based on the merit on ownership of the suit land or not, the Honourable Court associates itself the case of "[*Bethwell Allan Omondi Okal v Telkom \(K\) Ltd*](#) (Supra)", where the Honourable judge in the matter rendered himself as follow:-

"While I am alive to this Court's unlimited jurisdiction under Article 165(3) (a) of the Constitution, I do not think as can be seen elsewhere above that the Petitioner has raised any constitutional matters to warrant the intervention of the Court under Article 165 (3) (a). In any event, this Court in International Center for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 held that the unlimited original jurisdiction of this Court could not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances such as the one raised by the Petitioners. The Court of Appeal has also upheld this reasoning in Speaker of National Assembly v Njenga Karume// [2008]1 KLR 425, where it held that:-

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

223. I have critically gone through the Judgment by my brother Justice Sila delivered on on 28th January, 2021 in favour of the Defendants herein. In his view the Judge found that the Petitioner should have filed an ordinary suit rather than filing a Constitutional Petition. In other words, the Judge based his argument on "the doctrine of Constitutional avoidance". My brother in the Judgment opined as follows:-

" 32 it is therefore an established principle that where a person has remedies in ordinary civil law, all remedies provided for in statute, he needs to pursue those remedies and follow the provisions of the laid down statutes rather



than invoking the Constitution. Indeed, in many instances a Constitutional petition is not the best avenue to take, where there is an established remedy and procedure, for it may happen that there are facts in contention which can only be tested when the suit is heard in the manner that Civil suits are ordinarily conducted.

33 It does appear to me that the basis of this petition is that there are persons who have invaded the land of the petitioner.....Eviction from land and a permanent injunction to bar a person from certain land are matters that are routinely heard through ordinary civil suits commenced by way of plaint.

34. ...

35. My position is that the petitioner ought to have filed an ordinary civil suit rather than a Constitutional Petition.....If in deed there is question whether the 6th to the 23rd Respondents are in adverse possession that is a question that can only be determined through a hearing in an ordinary Civil Suit.

36.

37.

43. Prayer (g) is for eviction and prayer (h) is seeking a permanent injunction against the 6th to 23rd Respondents. I have already held that if the Petitioner wants these prayers, then the avenue is to file a civil suit for determination.”

224. I have further noted that the 1st and 18th Defendants in the Counter - Claim, have averred that the Plaintiff filed the said Petition seeking to evict squatters from the suit land. The same was dismissed on 28th January, 2021 and later the 1st Defendant filed an appeal and now the current suit. By an order of a single Judge of the Court of Appeal made on 4th December, 2021 the Plaintiff by original action was granted leave to amend and serve a notice of appeal.

225. The Defendants relied on the following particulars of abuse of court process:-

- a. Instituting different actions over the same subject matter simultaneously in different court;
- b. An improper use of an order in a similar suit in Mombasa ELC No.160 of 2021 to demolish and evict the 1st and 2nd Plaintiffs (in the Counter – Claim).
- c. Employing of judicial process in a malicious or in a desire to misuse or pervert to the irritation and annoyance of the Plaintiffs in the Counter - Claim.
- d. Instituting another suit regarding the same matter and securing an order which resulted to eviction and demolition
- e. The 1st Defendant is guilty of abuse of court process as it was aware of the order issued on 19th August, 2021 and yet it went ahead and demolished the 1st and 2nd Plaintiffs’ houses after the order had been served on it.
- f. Disobeying the orders issued by this Honourable court on 19th August, 2021 with knowledge of the presence of the 1st and 2nd Plaintiffs’ actual possession of the suit land.



226. The doctrine of Res – Judicata is governed by the provision of Section 7 of the *Civil Procedure Act*, Cap. 21. It provides “inter alia”:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

227. The *Civil Procedure Act* also provides explanations with respect to the application of the Res - Judicata rule. Explanations 1-3 are in the following terms:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by

228. The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice. In the case of “Christopher Kenyariri v Salama Beach (2017) eKLR”, the court clearly stated the ingredients to be satisfied when determining res judicata thus: -

“...the following elements must be satisfied...in conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit
- b. Former suit between same parties or parties under whom they or any of them claim
- c. Those parties are litigating under the same title
- d. The issue was heard and finally determined.
- e. The court was competent to try the subsequent suit in which the suit is raised.”

229. The Court is therefore called upon to look at the issues raised in the Constitution Petition (Mombasa) No. 15 of 2018 evaluate the issues in the Judgment alleged to have settled the issues in the instant suit and establish whether the instant suit is res judicata. From the Judgement, it graphically evident that no hearing per excellence in terms of adducing of the evidence and examining the same that took place at all. Furthermore, the Court never had an opportunity to adjudicate or consider the evidence placed before it prior to it making a decision on merit on the issues raised before it with regard to ownership pf the suit land. That issue remained to be determined todote, It is for that reason that it proposed that the Petitioners institute an appropriate suit before a court of competent jurisdiction to hear and determine the that specific issue. And that was the pith and substance of this instant case. Be that as



it may, the Judgment delivered by a court not competent to deliver it cannot operate as res judicata, since such a Judgment was not of any effect. It is well settled position in law that if a decision has been rendered between the same parties by a court, which had no jurisdiction to entertain and decide the suit, does not operate as res judicata between the same parties by a court, which had no jurisdiction to entertain and decide the suit, it does not operate as res judicata between the same parties in subsequent proceedings. The court which has no jurisdiction in law cannot be conferred with the jurisdiction by applying principles of res judicata. It is well settled that there can be no estoppel on a pure question of law.

230. In a nutshell, therefore, to this end the Court is not convinced that Constitutional Petition 15 of 2018's determination constitutes the doctrine of Res Judicata as the same was instituted without constitutional avoidance in mind. Therefore, the Court did not have the jurisdiction to entertain the same as was opined in "[Mwanaisha Kiriale Mohamed & another v Alfred Wafua Okuku & 2 others](#) [2014] eKLR". The instant suit is properly before this Court which is clothed with the Jurisdiction to hear and determine it.
231. On the issue of Sub - Judice, the Defendants' counsel in their submissions urged that the term Sub - Judice means "under judicial consideration or before the court for consideration or before a judge or court of law awaiting judicial determination". This rule limits comments and disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury. They further submitted that this doctrine prevented a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same as the previously instituted suit between the same parties pending before the same court or another court with jurisdiction to determine it. This is captured in the provision of Section 6 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya:-

Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

232. It is therefore clear that for a party to maintain a plea of Sub - Judice, they must present evidence to show that the suit relates to the same parties or parties litigating under the same title, and the matter in issue is substantially the same as that in an earlier filed suit. It therefore follows that to prove that a suit is Sub - Judice, it will be necessary that pleadings in respect of a previously instituted suit, are exhibited, for the court to determine whether the parties and the issues are the same.
233. This Court takes cognizance that the issue has been raised while the matter was at the Judgment stage. Simply put, it would require the Court to stay its proceedings which clearly means the delivery of the Judgment and I wonder awaiting the outcome of which other cases. For instance, this Court holds the view that it cannot categorically say that the Civil and criminal matters before the lower courts would affect the outcome of this case and hence affect the determination of the matters before this Honourable Court, leave alone the delivery of its Judgment. I therefore find that the doctrine of Sub - Judice is misplaced, unfounded and hence fails on this matter. I shall therefore proceed to examine the other issues in this matter.



Issue No. b). Whether the parties are entitled to the reliefs sought from the filed Further Amended Plaintiff and the Counter Claim.

234. Under this sub title, the main substratum in this suit is on the legal proprietorship to the suit land between the Plaintiff and Hussein Dairy herein on the one hand and the Defendants on the other hand. Prior to that, it is instructive to re – produce the report of the site visit conducted by Court herein.

VII. The site visit report

Republic Of Kenya

In The Environment & Land Court

At Mombasa

Elc No. 16 Of 2021

Bandari Investments & Co. Ltd..... Plaintiff

v

Martin Chiponda & 139 Others..... Defendants

The Site Report At The Nguu Tatu (3 Hills) Kiembeni – Kisauni
Constituency The County Of Mombasa At 10.30 A.m. On 19th November,
2021

(Meeting started with a Mijikenda prayer)

I.

Present

(I) Court:- Hon. Justice L.L. Naikuni

Court Assistants: Miss. Yumna Hassan – ELC Ct.
No. 3

Mr. Willis Rabongo – ELC Ct. No. 1

(ii) Advocates:-

1. Mr. Joseph Munyithia for the Plaintiffs and their
Representatives. These were:-

(a) Johnson Kogio – Vice Chairman

(b) Joseph Bee – CEO. of Bandari
Investment

(c) Mr. Nelson Kajumbi – Court Clerk
for Mr. Munyithia’s Law firm

2. Mr. Makan Advocate for the 2nd, 19th to 139th
Defendants and their Representatives. These were:-

a. Bishop Francis Lenzano;

b. Mr. Samson Kingi;

c. Mr. Omar Nzaro;



- d. Mr. Joseph Juma – Human Rights Representative
- III. Mr. S.M. Kimani Advocate for the 1st and 18th Defendants and their Representatives. These were:-
(M/s. Kimani holding brief for Mr. Kimani who was not present
 - a. Mr. Martin Chiponda – 1st Defendant
 - b. Mr. Kazungu Katana Katia – 18th Defendant
 - IV. In Attendance
 - (a) Mzee wa Mtaa – Mr. Emmanuel Ndo
 - (b) M/s. Beatrice Kenga – former Secretary Nguu Tatu – Community Based Organization (CBO)
 - (c) Mr. Swale Baken – Army (Driver).
 - V. The Advocates from the Hon Attorney General offices for the 140th Defendant.
 - a. Mr. Nguyo Wachira – Advocate
 - b. Mr. Emmanuel Makuto – Advocate
 - VI. The Security team
 - (a) Sub-County Commander – Kisauni Mr. Juma Lodi
 - (b) Chief Inspector – Kiembeni Police Station Mr. Samson Kibet
 - (c) In total there were 45 Police Officers – as the Security team and three (3) Surveillance vehicles.
 - VII. The Purpose Of The Site Visit
The purpose for the site visit was explained in details by the Judge.
It was explained that pursuant to a court directive and in view of the numerous activities reported to be taking place on the suit property particularly the ongoing demolitions and evictions. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. It became imperative to invoke the provisions of Order 18 Rule 11 and 40 Rule 10 of *Civil Procedure Rules*, to wit:-



Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

And Order 40 Rule 10(1)(a) of the *Civil Procedure Rules* to wit:-

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

Ideally the site visit – “the Locus in quo” was with a view of gathering further evidence on the above stated arising the main issue – of the alleged evictions and demolitions onto the suit land to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor on the veracity of the evidence adduced already this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence test the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process.

VIII. The Procedure

It was explained the team would commence by fully appreciating the maps available to move round the suit land from one plot or at least where the shelters were constructed to the other.

At each plot, the team led by court would primarily be verifying, examining and inspecting the following parameters.

- a. The acreage and size of the plot and the surroundings.
- b. Any existing development in form of structures.
- c. The occupying land owners and their contacts.



- d. The existence of any new constructions.
- e. Any other observation that may be of value to the evidence and the ongoing constructions.

IX. Observations and Concerns

Mr. Munyithia Advocate was concerned about the people who seemed to be sagging and gathering in numbers around the site land in every given time. He felt that these people if not controlled would be a security menace and in particular in as far as the safety of the people, property and the perimeter wall was concerned.

- The issue was arrested by the advise and the assurance provided by the County Commander.

X. The Site Visit Per Excellence

Before embarking on the physical tour around the site land, the team gathered these information. These were:-

- a. The land measures – 59.5 acres or thereabout.
- b. There was a 6ft tall concrete perimeter water well-constructed around the land.
- c. There was no activity taking place on the land as at the moment. It is quiet and serene.
- d. There were about 200 people around the area but very peaceful
- e. The team learnt that there existed a well-documented Bill of Quantities (BQ) report available it had been used as evidence in the various court cases.
- f. There was no Mutation form, title deed nor a map for the area.
- g. The land is Land Reference Number. 817. The land is sloppy and not fully even with nice vegetation of brownish light soil. There were other parcels land surrounding it being LR No. 819 about 350 acres which belonged to one Mr. Hussein Dairy Limited on the Southern part. He had sold to many people including this parcel to Bandari Holding Limited. There were also other parcels of land being Land Reference No. 818, 820 & 823 on the northern part of the suit land. There is a well-built Mosque at the left hand side corner of the gate. It was built on Land No. 818.



- h. In Southern West – Exists the famous Bamburi Cement Sanctuary. On the Northern/Right – there is a 9 meters wide earth/rough road linking the Nyali Bridge. Towards the ocean which belonged to Thathini Limited it's full of squatters.
- i. On the way to the suit land, close to 5 to 10 Kilometers from the tarmac road there is visible the Kiembeni Estate full of permanent structures on it and Ngatubi Village which we learnt has a pending case before the Environment and Land Court Mombasa.
- J There were a few indigenous trees scattered all over the suit land – These includes the acacia, Neem, Tamarind trees, some banana stems, scattered Cassava plantations and some organic vegetables among the few we could identify. There were also some phobia fences here and there. From what appeared to have been human settlements prior to the man demolitions and eviction taking place.
- k. Evidently, there were several human settlements, but no structures were now left following the recent demolition having taken place. There were several building debris an indication of evidence or recent demolitions of some semi-permanent and permanent structures with a pit latrine and evidence of recent human waste.
- l. There was a long green swampy area in the middle of the land.
- m. There were a few concrete electricity poles which we learnt had been put up by the World Bank for electricity supply to the people who lived on the land. We noticed approximately 5 water manholes which we learnt were mounted by the Mombasa Water Supply Corporation.

X. The Walk Around The Land

We all took an elaborate walk along the land and were able to see the following features:-

- a. There were several debris of demolished structures – the shelters measured between 5 X 7 and 40 X 60Ft. These were for the following persons:-
 - (i) Shelter No. 1 Debris of a 4 bedroomed house and some furniture left



- (ii) 2nd Shelter – Debris of shelter that had belonged to Mama Mzee – Nazi Ngalla with a few banana plantations. She left on 28th October, 2021. There were a few beacons – The Plaintiffs held they were intended for the sale of the land while the Defendants explained they were used for demarcating/or marks for each allottee of the plots there as everyone had a portion of land there.
- (iii) The 3rd Shelter – Debris unfinished foundation house – 10 X 10 feet.
- There were several heaps of concrete ballasts and other building materials which the Plaintiffs explained were used for the building of the perimeter wall.
- (v) The 4th Shelter – 12 X 9ft. rental = at Kshs. 500 per month. It belonged to Mr. Daniel Kalama Washe. It was evident, that he planted several cassava plantations. We noticed that there were evidence of the wide spread demolitions of the perimeter wall supposedly with an attempt to re-enter into the land. There was a 3 bed capacity permanently built hospital using soft light brown machine cut blocks. We were informed it was constructed by the Arab Emirates. They were the same sponsors who build the Mosque which was also demolished. There is evidence of a deep pit latrine. We learnt there was a full report at the Shanzu Criminal Court. We learnt that the Plaintiff bought land in the year 2012. There were no people on it by then but with the change of directors, people started coming in. The Plaintiff which is registered as co-operative SACCO has 19,000 membership
- (vi) The 5th Shelter – there are a few Muarubaini trees and a lot of torn clothes and furniture scattered all over



and an external toilet. It belonged to Mr. Edward Nzai.

- (vii) The 6th Shelter – it's a 2 bedroomed shelter belonged to Mr. Moses Chiponda – the son to the 1st Defendant. He is 27 years old a cook at Travelers Hotel. It has an external pit latrine.
- (viii) The 7th Shelter is for Mr. Mohamed Ali. It's a wide space we learnt with some shops and a water shallow well.
- (ix) The 8th Shelter – belonged to Mr. Kelvin Musau. There was a concrete water tank dry though with two compartments. The Plaintiff informed us that it was built for water storage during the construction of the perimeter wall. There three (3) were metallic containers blue painted fabricated and –partitioned into four (4) serving as offices, and shelter for the officers and cells for the law breakers. They were strategically placed at different corners of the suit land. It was reported that initially there had been one access road to the land. It would serve particularly for school going children from the suit land to some nearby schools namely:- Konkodi & Mtopanga Primary Schools. Initially it had been allowed by the Plaintiffs but later on it got sealed off meaning no more access road to and from the land at all. There were visible caterpillar or huge machinery foot print marks on the ground an indication of the machines used for the demolition of the structures just recently – 28.10.2021. There were concrete electric poles erected and a heap of them filed up at different places ready to start supplying electricity. It was reported that they were being done by World Bank who had started connecting and supplying



with intention of electricity to the habitants there.

(x) 9th & 10th Shelter – Debris of seemingly 2 roomed house of 50 X 60 Ft – it belonged to Samson Kingi. We learnt who lived there from the year 2010. It was approximately 30 meters from the wall. At the corner of the wall on the far extreme and right hand side from the main gate there are signs of the wall having been demolished at some point – estimated to have been 1 Kilometer wide of demolition and the repair done we were informed indeed this was the main cause for filing the Plaintiff's application dated for the contempt proceedings of this court order by the Plaintiff and which was still pending hearing and final determination.

(xi) The 10th Shelter – for Mr. Wainaina Ngano – There existed a 4 X 6 Ft shelter and several other debris we learnt were of stores and an phobia fence. We learnt he was such a vibrant farmer who reared poultry, pigs and cultivated several crops on his land. He would trade with the farm products to the inhabitants there. He appeared a popular person from the perception we received.

We learnt that this was the 2nd wall; causing it to move towards the road that led to Hala Park – Bamburi Sanctuary. The wall now interfered with the said access road.

(xii) The 14th Shelter – for Mama Mwali Lulu – Pit latrine

(xii) The 15th shelter for Rashidi Menza. He lived there from the year 2010. There were several other debris for the 14th to 40th Shelters with mini fence of Phobia and a heap of 9 X 9 Machine cut building blocks which we learnt belonged to a certain fundi. He had intentions of building up a



permanent residence there but was stopped by the security officers due to the matters still pending in court

In general we noted the debris of structures the 41st to 60th shelters which belonged to these persons – Felix Gona- a huge house and he had a motor vehicle.

Robert Tupapa An access road in between Mama Debra Kazungu Salimu Cheban A church known as Good Harvest Church Pastor Peris Tura Katana The shelter debris of Mama Getrude Chilango with 3 old mango tree plantations Sadiki Tinga Others were Aruki Martin Chibonda – 1st Defendant had a large section with a fence, pit latrine and traces of poultry farming Mathias Jandi Beatrice Penda Michael Penda Beatrice Kenga Patrick Kaingwa Omar Ngano – 5 meters from the perimeter wall. Recent affected by the demolitions Traces of 150 meters wall demolition. There was a loud beacon planted with a number 756 on it. There was a nursery school by the CBO – Also demolished. The school was called Nauta CBO School. They would supply the Community with Clean Water for Human Consumption and a playing field for the school going children. All flattened and only debris visible. There was a mosque inside the land and a toilet and water point. An old worship Carpet was visible. The mosque was demolished. There was a 2nd Church but also demolished. Name not known. We learnt that the suit land had over 300 people inside it before the demolition who were squatters and lived there from the year 2012 close to 10 years

XI. Conclusion



The site visit ended at 12.30 p.m. After the long walk, we gathered around as a team for a quick postmortem reflection. We agreed as follows that:-

- a. Mr. Chiponda and M/s. Beatrice would communicate and relay the message on the purpose for the site visit and what took place during the visit to all the affected persons as accurate as possible.
- b. The Chairman and Company of the Plaintiff would also inform their members.
- c. There should be peace and tranquility to prevail pending the hearing and determination of the two (2) cases ELC. No. 16 of 2021 and 160 of 2021. Both the Plaintiff and the Defendants to be advised accordingly by their Advocates and representatives.
- d. Parties were encouraged to explore an amicable out of Court settlement and negotiations pursuant to the provisions of Article 159 (2) (c) of Laws of Kenya. Should this take place a consent to be recorded and adopted as an order of the court and may lead to the conclusion of the litigation process over the subject matter.
- e. Parties were assured the matter would be expedited and concluded being such an emotive matter. Indeed the matter was already alive with:-
 - i. Some concrete, pragmatic direction given by court and which included this site visit of 19th November, 2021.
 - ii. A mention for taking a ruling date of the application was fixed for 24th January, 2022.
 - iii. When further direction would be taken.
- f. In total we saw approximately 50 shelters/debris scattered all over and particularly on the upper side of the right side of the land from the main gate. They were occupying approximately 25 to 30 acres while the other 30 acres was left unoccupied area.
- g. We profusely thanked the security team for the excellent work in ensuring that the site visit was conducted in a very conducive, peaceful and harmonious atmosphere despite of the matter being volatile, tense and emotive.



Site Visit Report Signed And Dated At Mombasa
This7thday Of December, 2021
Hon. Justice L.I. Naikuni
Environment & Land Court At
Mombasa

235. The Honourable Court will examine if the parties herein were entitled to the suit property. As regards the Plaintiff and the Defendants, whether they have a valid title to the suit land. I will commence with the Plaintiff. The issue would be whether Hussein Dairy passed the Plaintiff a good title and whether the Plaintiff was a bona fide purchaser of title. Black's Law Dictionary, 8th edition defines "bona fide purchaser" as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

236. Further, I have relied on the case of "*Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR" where the Honourable Court cited with authority the Ugandan Case of "*Katende v Haridar & Company Ltd* (2008)2EA 173" it was held that:-

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine,(he) must prove that

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

237. From the record, although the suit land was registered under the *Registration of Title Act*, Cap. 281 (now repealed), the provision of Section 107 of the *Land Registration Act*, No. 3 of 2012 being a translation Clause allows the application its provisions to any other land regime. Legally speaking, Section 23 of the *Registration of Titles Act*, Cap. 281 read as follows:-

23.

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and



indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

- (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

238. However, the provision of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012 are directly applicable to the instant case being the ones that addresses the issues of ownership of land. Section 24(a) of the [Land Registration Act](#) provides as follows:-

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

239. When a person’s ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. In the case of “Hubert L. Martin & 2 Others v Margaret J Kamar & 5 Others [2016] eKLR”, where the Court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

240. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the legal and absolute registered owner to the land with all the indefeasible title, rights and interest ed vested in him/ her by law unless it is challenged on the ground of fraud or omission or misrepresentation to which the person is proved to be a party; or as provided for under the provision of Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

241. This court in considering this matter referred to the case of “[Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another](#) (2013) eKLR” where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”



242. In the testimony of the Plaintiff's case, the witnesses, PW - 1 who was the director/ shareholder and chairman of Bandari Sacco stated that they conducted due diligence and being satisfied that there were no encumbrances and that the land was vacant of any persons, they executed a sale Agreement terms and conditions stipulated thereof with the vendor on Mr. Dairy. They bought land in the year 2012 to date its 10 years. From the title it can be seen from whom they purchased the land from. The certificate of title was the same document in their list of documents. Hence they knew who sold the land to them. They were only two individuals who were on the land. He did not know where the rest were living. and upon observing all the statutory requirements the land was eventually registered in their names and the Certificate of Title was issued accordingly bestowing them with the legal and absolute ownership to the suit land thereof. In the course of his testimony produced a Certificate of Title dated 26th October, 2012 under Entry No. 10 Marked as Plaintiff Exhibit No. 6, official receipt on payment of stamp duty for the suit land marked as Plaintiff Exhibit No. 5. PW - 1 reiterated that it was later on that the Defendants trespassed onto the land claiming it to be their ancestral and. The Plaintiff was compelled to conduct investigations of these people who had entered on the land and which led to the amendment of the Plaint. They added 139 people they were no longer on the land. He did not know where some of them were from. These people had semi – permanent structures on the land and that was the reason why they came to court. They filed two (2) suits and they had one resolution to file these suits. After the Court's Judgement they preferred an appeal. Upon obtaining approval from the County Government, decided to construct the perimeter wall around the land. The suits and appeal were ongoing all intended to stop the parties from destroying the perimeter wall. PW – 1 stated that he had not seen any title in the names of the 1st to 139th Defendants. He had not seen any judgment giving land to the 1st to 139th Defendants.

243. While at this point, I have sought refuge from the case of "[*Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others*](#) [2015] eKLR" Justice Sila Munyao held that:

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."

244. I am in agreement with Munyao J that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown.



Furthermore, the Defendants themselves included in their documents a copy of the certificate of title showing that the Plaintiff acquired the property in 2012. Certainly, I discern that the Plaintiff herein is the legal and absolute proprietor to the suit land with all the indefeasible title, rights and interest vested in him by the provisions of the law specifically Sections 24, 25 and 26 of the land Registration Act, No. 3 of 2012. Juxtapose, the real title holder having led evidence that they neither sold nor transferred the suit land to the Defendants is “prima facie evidence” that the Honourable Court will be guided by. Thus, from the adduced evidence, the Honourable Court is persuaded that the land belong to the Plaintiff.

Issue No. c). Whether as per the Amended Counter - Claim the Defendants have successfully pleaded possession by way of adverse possession.

245. Having found and held that the Plaintiff is the bona fide legal owner of the suit property, under this sub title, the Honourable Court is going to examine if the Defendants had acquired the suit property being their ancestral land within the larger portion of the Nguu Tatu all measuring approximately 300 acres and/or in a very thin membrane through adverse possession. The herculean question here is on whether the Defendants have demonstrated through empirical evidence how this land belonged to them through ancestral land rights as beneficiaries and/or have they met the threshold for grant title through land adverse possession.
246. With regard to the ancestral land rights, there was no singular documentary or otherwise that was placed before the Court to prove this assertion. Apart from a few witnesses who seem to be confusing the suit land from the larger portion of land known as Nguu Tatu and which measures 300 acres. Like in most parcels of land found within the Coastal region and in particular the Constituency of Kisauni, the Court fully empathized with the Defendants as their claim seemed to border on a complaint on displacement, dispossession and deprivation of their land from historical injustices. Ideally, this complaint being so genuine ought to have been formally lodged at the proper statutory body – the national land Commission which has a constitutional mandated to deal with such matters through conducting investigations and making recommendations under the provision of Article 67 (e) of the Constitution of Kenya, 2010 and not this Court as a first instance. Thus, the claim over the suit land pursuant to the grounds of ancestral land rights by the Defendants herein have not been substantiated and hence remain unfounded, misplaced and baseless to say the least. On the other hand the claim of the land under the land adverse possession. To begin with, it is instructive to note that from the filed pleadings, none of the Defendants pleaded to be granted land under this doctrine as it is required by law. Parties are bound by their pleadings. Nonetheless, for the benefit of doubt, the Court in all fairness, has decided to deliberate on it briefly. It is trite that a claim for adverse possession is attached to land and not title and it matters not that the land was owned. This was the position in the case of “Maweu v Liu Ranching & Farming Co - operative Society [1985] eKLR” as quoted in “Civil Appeal No 164 of 2011 Gachuma Gacheru v Maina Kabuchwa [2016] eKLR” where the Court held

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

247. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above. It is the Applicants’ case that she has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Applicant. This Court concurs with the sentiments of Justice Kuloba J,



(as he then was,) in “Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR”, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

248. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, Section 13 of the same *Act*, provides that adverse possession is the exception to this limitation:

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

249. Finally, the provision of Section 38 of the *Act* provides that:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

250. The principle of adverse possession was more elaborately set out in the case of “*Wambugu v Njuguna* [1983] KLR 172”, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

251. And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory



period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

252. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. Set the findings of the Court in Malindi App No. 56 of 2014 “[Mtana Lewa v Kabindi Ngala Mwagandi](#) [2015] eKLR” where it held;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

253. Further, in the case “[Mbira v Gachubi](#) (2002) 1 EALR 137”: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

254. The Court notes that the land in question was registered in the name of the Plaintiff. The 1st and 18th Defendants (1st and 2nd Plaintiff by way of counterclaim) prayed for:-

- a. The 1st and 18th Defendants pray that the plaintiff’s suit by original action is dismissed with costs on the higher scale, for the attempts to overreach, steal a march and brazen breach of court orders; and or for being res judicata.
- b. An order for reinstatement and restoration of their structures on the suit land is ordered.
- c. Compensation for damage to property.
- d. Award of exemplary damages for loss and damage occasioned by abuse of the court process.
- e. Costs of the suit
- f. Any other order the court deems fit.

255. Without diverging too much on the evidence, the 1st to 139th Defendants through their witnesses told the court that they have been staying on the suit property for more than 12 years thereby adversely possessing the property. It was also the witnesses’ evidence that on several occasions they had been evicted and the owner of the land had at some point built a perimeter wall. DW - 2 confirmed that Hussein Dairy knew he was in suit property when Hussein Dairy asked him to move to Plot No. 817/2/MN. DW 3 told the court in the year 2013, Hussein Dairy used to have a dispute with them due the grazing rights of his livestock. The cases were pending. She was still living at Nguu Tatu on Plot No. 819. It was different from Plot No. 818. The Plot 819 belonged to Hussein Dairy.

256. It is trite that claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See “[Mombasa Teachers Co-operative Savings](#)”



Credit Society Limited v Robert Mubambi Katana & 15 others [2018] eKLR”), where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”

257. The 1st and 139th Defendants’ occupation having been permissive, it will follow that a claim for adverse may not issue. The Defendants did not provide any evidence to show that they had permanent structures in the suit property. From the Site Visit (“Locus in Quo”) conducted by the Honourable Court, the court made the following graphic observations:-

“IX. Observations and Concerns

Mr. Munyithia Advocate was concerned about the people who seemed to be sagging and gathering in numbers around the site land in every given time. He felt that these people if not controlled would be a security menace and in particular in as far as the safety of the people, property and the perimeter wall was concerned.

- The issue was arrested by the advice and the assurance provided by the County Commander.

X. The Site Visit Per Excellence

Before embarking on the physical tour around the site land, the team gathered these information. These were:-

- a. The land measures – 59.5 acres or thereabout.
- b. There was a 6ft tall concrete perimeter water well-constructed around the land.
- c. There was no activity taking place on the land as at the moment. It is quiet and serene.
- d. There were about 200 people around the area but very peaceful
- e. The team learnt that there existed a well-documented Bill of Quantities (BQ) report available it had been used as evidence in the various court cases.
- f. There was no Mutation form, title deed nor a map for the area.
- g. The land is Land Reference Number. 817. The land is sloppy and not fully even with nice vegetation of brownish light soil. There were other parcels land surrounding it being LR No. 819 about 350 acres which belonged to one Mr. Hussein Dairy Limited on the Southern part. He had sold to many people including this parcel to Bandari Holding Limited. There were also other parcels of land being Land Reference No. 818, 820 & 823 on the northern part of the suit land. There is a well-built Mosque at the left hand side corner of the gate. It was built on Land No. 818.



- h. In Southern West – Exists the famous Bamburi Cement Sanctuary. On the Northern/Right – there is a 9 meters wide earth/rough road linking the Nyali Bridge. Towards the ocean which belonged to Thathini Limited it's full of squatters.
- i. On the way to the suit land, close to 5 to 10 Kilometers from the tarmac road there is visible the Kiembeni Estate full of permanent structures on it and Ngatubi Village which we learnt has a pending case before the Environment and Land Court Mombasa.
- J There were a few indigenous trees scattered all over the suit land – These includes the acacia, Neem, Tamarind trees, some banana stems, scattered Cassava plantations and some organic vegetables among the few we could identify. There were also some phobia fences here and there. From what appeared to have been human settlements prior to the man demolitions and eviction taking place.
- k. Evidently, there were several human settlements, but no structures were now left following the recent demolition having taken place. There were several building debris an indication of evidence or recent demolitions of some semi-permanent and permanent structures with a pit latrine and evidence of recent human waste.
- l. There was a long green swampy area in the middle of the land.
- m. There were a few concrete electricity poles which we learnt had been put up by the World Bank for electricity supply to the people who lived on the land. We noticed approximately 5 water manholes which we learnt were mounted by the Mombasa Water Supply Corporation.

258. The Court also noted that there was a perimeter wall around the suit property an indication that the owner of the land was hell bent on keeping intruders out of the property.

259. Additionally, for a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in “*Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another* [2015] eKLR” where the Court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]

260. With all due respect, the this Court discern and hold that the Defendants have not on a balance of probability established that they met the threshold for the grant of adverse possession, therefore the Amended Counter - Claim by the 1st and 18th Defendants dated 21st July, 2023 hereby stands dismissed.



261. Further, the Court has also conducted a keen observation of the legal and legitimacy of the suit “ELC No. 160 of 2021 – Bandari Sacco Limited v Vincent Lusige & 16 others”. This suit was filed in August, 2021 through the law firm of Messrs. Mwamunye Mzungu Solomon LLP. The court has noted from the pleadings filed the Plaintiff sought for ownership of the suit land. On 17th August, 2021 they filed an application seeking for the injunctive orders. They were directed to serve and appear in Court on 29th September, 2021 for “Inter parte”. On the material date, M/s. Mwanyika Advocate holding brief for Mr. Mzungu Advocate appeared for the Plaintiff while M/s. Arika Advocate was for 16 Defendants and undertook to file replies and come back on 13th October, 2021. However, on the said date the Advocate for the Defendants never appeared and the Honourable Court granted the orders sought. It was from these orders that the Defendants were evicted. From the records, it will be noted that these suits were never consolidated and that the law firm immediately filed Notice of withdrawal of suit on 12th November 2021 and served the same on all parties to the suit. This notice was brought under the provision of Order 25 Rule 1 of the *Civil Procedure Rules*, 2010. The Court found this to be utterly unprofessional bordering on sharp practice. Luckily, these issues were fully addressed and the Defendants were reinstated onto the suit land. Despite of all this, the Honourable Court noted that no tangible evidence was produced from this suit adding value to the suit. For that reason, therefore, the suit he and is hereby dismissed with costs.

ISSUE No. d. Whether the parties herein are entitled to reliefs sought from the Further Amended Plaintiff and the Amended Counter claim herein.

262. Having concluded that the Plaintiff is bona fide legal proprietor of the suit property, and having dismissed the Defendants’ amended counter claim, the Honourable Court is left to examine whether the Plaintiff is entitled to the prayers sought in the amended plaint. Just to remind the parties, the Plaintiff sought the following:-

- a. A permanent injunction restraining the 1st to 132nd Defendants from entering upon, remaining continuing in occupation, constructing, destroying quiet possession and enjoyment of the suit property, namely, Plot Subdivision No. 817(Original number 324/2) Section II MN.
- b. A mandatory injunction compelling the 1st to 132nd Defendants by constructions erected on the suit property, remove and dispose the materials in default the plaintiff be at liberty to demolish, remove and dispose the dispose of the materials at the defendants costs.
- c. Vacant possession of property.
- d. An order for compensation of the value of destroyed wall since February 2018.
- e. An order directing the 133rd Defendant through the County Commander Mombasa, OCPD Kisauni and the OCS Kiembeni to ensure full implementation of the Decree.
- f. Costs of the suit together with interest.

263. On the prayer for mandatory and permanent injunction, the Plaintiff has claimed that the Defendants have trespassed the suit property for a very long time. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

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



264. Trespass is described under the [Trespass Act](#) Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (Emphasis mine)
265. A continuing trespass is defined in [Jowitt's Dictionary Of English Law](#) 2nd Edition as follows:-
- “A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land”.
266. Under this Sub-title, the Honourable Court will examine if for the order of permanent injunction restraining the Defendants from dealing with suit property should be given. Korir, J aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of “[Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib](#) (2018) eKLR” when he stated thus:-
- “A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights 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 plaintiff to be protected.”
267. In this case, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner. As such this prayer is meritorious. The principles on Injunction were established in the celebrated case of “[Giella v Cassman Brown & Co. Ltd](#) (1973) EA 358”.
268. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the [Civil Procedure Code](#), 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
269. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honourable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.
270. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “[Malier Unissa Karim v Edward Oluoch Odumbe](#) (2015) eKLR as follows:-
- “The test for granting a Mandatory Injunction is different from that enunciated in the “[Giella v Cassman Brown](#) case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “[Kenya Breweries Ltd v Washington Okeyo](#) (2002) EA 109” had



the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

271. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

272. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of “Locabail International Finance Limited v Agro Export and others (1986) All ER 906”, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

273. From the facts herein, I reiterate that the Plaintiff is the bona fide purchaser and legal proprietor of the suit land which follows that the same is “prima facie” evidence and legal inclination to the suit property; I proceed to grant prayer one and two of the further Amended Plaintiff. Consequently, I will proceed to find that the Defendants either by themselves, agents, servants and /or anyone claiming under the defendants should be permanently restrained from entering, trespassing onto, cultivating, building structures thereon, interfering with and/or in any other manner dealing with the suit premises.

274. On the issue of vacant possession, Property sold with vacant possession must be empty of existing tenants or other occupiers (whether or not occupation is authorized), and all goods and rubbish (subject to the de minimis rule) that substantially prevent or interfere with the enjoyment of a substantial part of the property on or before completion. The prayer for vacant possession is granted.

275. On the issue for compensation for of the value of destroyed wall since February 2018, PW - 1 told the Court that his name was Kelvin Kiprotich Biwott, between 2018 to 2010 he was involved in the building of a Perimeter wall as project manager, his duties being to oversee the proper management, drawing, specifications costs and time agree between the contractor and the client on various occasion called by the CEO. of Bandari Investments who told him some sections of the wall was demolished Page 121 to 141 of the Bundle of the statement by PW-1 – Page 121 the damage report – 1st April, 2020 he prepared the report. He found a section of wall damage worth a sum of Kenya Shillings One Million Seven Seventy Five Thousand Three Fourty Hundred and Fifty Six Cents (Kshs. 1,775,340.56/-) – Plaintiff Exhibit 12. PW - 1 was called by the CEO. Damage Demolished Report – Kenya Shillings One Million Nine Thirty Eight Thousand Four Sixty Hundred (Kshs. 1,938,460/=) ‘Plaintiff Exhibit



No. 13 on Page 122. On Page 123 and 124 are the damage report page 125. The report was dated 2nd April, 2021. He found the wall damaged and the damage was more than a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000/=) as per Plaintiff Exhibit No. 14. Pages 126, 127 and 128 was the same report. On page 129 was another report for damage – he took photos a sum of Kenya Shillings Two Million Nine Thirty Eight Thousand Four Sixty Hundred (Kshs. 2,938,460/=). Plaintiff Exhibit No. 15. Page 132 – A report dated 30th April, 2021 he took photographs and prepared a report – a sum of Kenya Shillings Five Million and One Hundred (Kshs. 5,000,100/=). On the other hand, the plaintiff pleaded loss and damages as a result of the demolitions of their perimeter wall. It was shown that the demolitions were done on:-

- a. 21st March, 2018 it cost them Kshs. 1,485,000.00
- b. 1st April, 2020 it cost them Kshs.1,775,340.56
- c. 10th October, 2020 it cost them Kshs. 1,938,460.00
- d. 1st April, 2021 it cost them Kshs.1,700,000.00
- e. 19th April, 2021 it cost them Kshs. 2,938,460.00
- f. 30th April, 2021 it cost them Kshs. 5,100,000.00
- g. 28th August, 2021 it cost them Kshs. 5,656,450/-

This came to a total sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Ten Hundred and Fifty Six Cents) (Kshs. 20,593,710.56/=).

276. Undoubtedly, the Honourable Court has already established that the suit property belongs to the Plaintiff. Thus, it is settled law that where a party claims for special damages. Strict proof of special damages is not defined but under the provision of Section 12 of the *Evidence Act* (Cap 80) provides:

“In suits in which damages are claimed, one fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.”

277. In tort damages are awarded as a way to compensate a party for the loss he or she had incurred due to a wrongful action on the part of the other party. The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. From the evidence on record, the Plaintiff has proved the damage of the perimeter wall and equated it at a sum of Kenya Shillings Eleven Million Five Seventy Seven Thousand and Twenty (Kshs. 11,577,020/-).

278. In the terminology given in Mac Gregor on Damages, Fifteenth Edition para 21 is that:-

“Special damages, are given in respect of any consequences reasonably and probably arising from the breach complained of”

279. And para 23 provides:

“Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly.”



280. In MacGregor on Damages 15th Ed (Sweet & Maxwell) 1968 Paragraph 1790 on page 1791 it is stated:

“The evidence in proof of special damages must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. Thus, had there been a sufficient allegation of special damage in all the cases where its proof has been refused because of the plaintiff’s failure to plead specific instances, the plaintiff would still have been required to give evidence of these specific instances to prove the special damages.”

281. As to the quantum, it is true that special damages must be proved, but I do not accept that damages can only be proved by supporting documentary evidence. For these reasons, I fully accept the PW - 1’s evidence on quantum in its entirety. I proceed to award the Plaintiff special damages of sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Ten Hundred and Fifty Six Cents) (Kshs. 20,593,710.56/=). which is the sum amount of the damage caused on the perimeter wall.

ISSUE No. e). Who will bear the costs of the Further amended Plaintiff and the Counter claim.

282. The issue of Costs is the discretion of Court. 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”.

283. The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow 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.....”

284. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the Plaintiff herein has successfully established their case and thus they are entitled to Costs for the Further Amended Plaintiff and the dismissed Amended Counter - Claim thereof.

VIII. Conclusion and Disposition

285. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the Plaintiff against the 1st to 139th Defendants herein in terms of the Further Amended Plaintiff dated 22nd June, 2023 in its entirety.
- b. That the suit ELC No. 160 of 2022 by the Plaintiff through a Plaintiff dated 16th August, 2021 and the Amended Counter - Claim amended on 21st July, 2023 by the 1st and 18th Defendants be and are hereby dismissed with costs.
- c. That a permanent injunction be and is hereby made restraining the 1st to 139th Defendants from entering upon, remaining continuing in occupation, constructing, destroying quiet



possession and enjoyment of the suit property, namely, Plot Sub - division No. 817 (Original number 324/2) Section II MN.

- d. That a mandatory injunction be and is hereby compelling the 1st to 139th Defendants by constructions erected on the suit property, remove and dispose the materials in default the Plaintiff be at liberty to demolish, remove and dispose of the materials at the Defendants costs.
- e. That an order be and is hereby made for vacant possession of Plot Sub - division No.8172012 for the sole purpose of the Plaintiff's peaceful and quiet enjoyment.
- f. That this Honourable Court do and hereby makes an order for the payment of a total sum of Kenya Shillings Twenty Million Five Ninety Three Thousand Seven Ten Hundred and Fifty Six Cents (Kshs 20,593,710.56/-) for compensation of the value of destroyed wall since February 2018.
- g. That an order be and is hereby issued by this Honourable Court directing the 133rd Defendant through the County Commander Mombasa, OCPD Kisauni and the OCS Kiambeni to ensure full implementation of the Decree.
- h. That the costs to be borne by the 1st to 18th Defendants and 19th to 139th Defendants herein to be awarded to the Plaintiff for the Further Amended Plaintiff and the dismissed Amended Counter - claim thereof.

It Is So Ordered Accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 23RD DAY OF APRIL 2024.

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HON. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:-

- a. Mr. Mohammed Omar – the Court Assistant.
- b. Mr. J Munyithya Advocate for the Plaintiff in ELC No. 16 of 2021.
- c. No appearance for the 1st and 18th Defendants in ELC No. 16 of 2021 .
- d. Mr. Mkan Advocates for the 19th to 139th Defendants in ELC No. 16 of 2021.
- e. Mr. Kemei Advocate for the 140th Defendants.
- f. No appearance for the ELC No. 160 of 2021.

