



**Kisomba v Mcharo (Environment & Land Case E010 of 2023)
[2024] KEELC 7423 (KLR) (Environment and Land) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E010 OF 2023
EK WABWOTO, J
NOVEMBER 8, 2024**

BETWEEN

COSMUS ROPAKI KISOMBA PLAINTIFF

AND

CALEB MUNDE MCHARO DEFENDANT

JUDGMENT

1. By a plaint dated 5th October 2022, the Plaintiff seeks for the following reliefs against the Defendant:-
 - a. An order declaring the plaintiff as the legal and bona fide owner of a portion of the suit property measuring approximately 47 ½ Acres;
 - b. An order directing the Land Registrar, Taita Taveta County to cancel the name of the defendant from the register in respect of the portion of the suit property measuring 47 ½ Acres and register the plaintiff as the proprietor of that portion thereof.
 - c. Costs of this suit and interests.
 - d. Any other relief that this honourable court deems fit to grant.
2. The suit was contested by the Defendant who filed a Statement of Defence dated 7th September 2023 seeking for dismissal of the Plaintiff's suit.

The Plaintiff's case

3. It was the Plaintiff's case that he acquired the suit property sometimes in 1990 when he inherited the same from his deceased father Mzee Kisomba Kisau and has been farming on that land since when he discovered that the Defendant had been issued with a title. The Plaintiff averred that no portion of the land had been sold to the Defendant or the Defendant's mother either by himself or his father.



4. It was averred that the dispute was referred to the Council of Elders who in 2019 decided in favour of the Plaintiff when they confirmed the Plaintiff as the owner of the suit parcel and that the Defendant's mother had only purchased 22 ½ acres from Mr. Mwaegwa which land was and is distinct and separate from the Plaintiff's land. It was further averred that despite being fully aware of the correct position on the ground, the Defendant wrongfully, fraudulently and without a just cause had the suit property registered in his name and a title deed issued. The following particulars of fraud were pleaded:-
- i. Causing the suit property to be registered in his name while fully aware that his mother only purchased a portion measuring 22 ½ acres from Mr. Mwaegwa.
 - ii. Misrepresenting himself as a bonafide owner of the whole of the suit property.
 - iii. Accepting to have the whole of the suit property registered in his name.
 - iv. Causing to be registered in his name the Plaintiff's portion measuring approximately 47 ½ acres.
 - v. Colluding with the Project Manager and the land officers to register him as the proprietor of the whole of the suit property including the Plaintiff's portion of land measuring approximately 47 ½ acres.
5. During trial, five witnesses testified on behalf of the Plaintiff. The Plaintiff testified as PW1. He relied and adopted his witness statement dated 5th October 2022 in his evidence in chief. It was his testimony that the Defendant encroached on his land. The Defendant's mother never made any payment to Mwaegwa. He also stated that the Defendant has occupied his portion yet he has his own land and that problems began when title deeds were issued. He also relied and produced the Plaintiff's bundle of documents dated 5th October 2022 and he urged the court to direct the Plaintiff to return his land.
6. When cross-examined by the Counsel for the Defendant, he stated that he inherited the land from his father even though he didn't have any evidence to confirm the same. He also stated that he did not have any photos to confirm that he used to farm on the land. When asked about the agreement, he stated that he only participated as a witness.
7. On re-examination, he stated that Mwaegwa was his neighbour and that was why he was called to witness the agreement. He also stated that Stella bought the land from Mwaegwa. He further stated that he complained to the Surveyor and the Project Manager but no action was taken. He also stated that he does not stay on the suit property.
8. On cross-examination by the court which sought further clarification, he stated that the agreement did not have the property number. He used the land between 1967 to 1980 and he left completely leaving the property vacant with no habitants. He also stated that he went back between 1992 to 2000.
9. Mwaegwa Mwadime testified as PW2. He adopted and relied on his witness statement dated 20th May 2024 in his evidence in chief. He stated that he does not know the Defendant since he was given the land by Ropaki and that he was tilling on the land when Stella Kafusi the Defendant's mother came and requested for a place on the land to drill a borehole, upon which he gave her 1 acre and they entered into an agreement for the same. It was his testimony that Stella paid a sum of Kshs. 50,000/= after signing the agreement and at that time the land did not have a title deed.
10. He also stated that his father was unwell at that time and he needed money for his treatment. He further stated that Stella came back and requested that she be given 22 ½ acres which he agreed for a purchase price of Kshs. 450,000/= for the entire 22 ½ acres. It was his testimony that the said amount has not been paid to date despite the land being transferred to the Defendant. He also stated that the



- Defendant's family have their own property different from the suit property. He further stated that the suit property should be owned by the Plaintiff.
11. Upon cross-examination, he stated that he has tilled the land for many years and his children were born on the said land. He also stated that the land did not have a title deed when the agreement was done but the land was subsequently surveyed and a title deed issued. He also stated that his property was demolished and he moved out after that. He reiterated that the land belongs to the Plaintiff and he had given them money to assist them when their mother was unwell and he was offered the land as an appreciation. He further stated that he has not been paid any money to date. When asked about who is currently residing on the property he stated that the Defendant is currently in occupation.
 12. In brief re-examination, he stated that he entered into an agreement with the Defendant's mother because he was the one who had the land at that time.
 13. Patrick Mwasi testified as PW3. He adopted his witness statement dated 20th May 2024 and relied on the same in his evidence in chief.
 14. When cross-examined, he stated that the land belongs to the Plaintiff though the Defendant is currently residing on the land. He stated that the Defendant does not own the land because they only sought permission to drill a borehole.
 15. Mwanake Mlaghelaghe testified as PW4. He relied and adopted his witness statement dated 20th May 2024 in his evidence in chief. It was his testimony that the land belongs to the Plaintiff.
 16. When cross-examined, he stated that he has a title deed for his land but he does not believe that the same was issued regularly. He also stated that he was not present when the land was surveyed. He further stated that the Defendant is still staying on the land.
 17. Ronald Mwasi testified as PW5 and was the last witness to testify on behalf of the Plaintiff. He relied on his witness statement dated 20th May 2024. He stated that he is a member of the Taita Taveta Council of Elders and that they had tried to resolve and mediate the dispute between the parties. He stated that the land belonged to Mwaegwa who sold it to Stella. According to him Mwaegwa had gotten the land from the Plaintiff's mother.
 18. On cross-examination, he stated that he had tried to resolve the dispute. Mwaegwa was the owner of the land and he showed them the documents. He also stated that when they went to the site, they saw the borehole which had been drilled. Ropaki had not done any development and he had another property in the area. He also stated that the land in dispute belongs to Mwaegwa. He also stated that they had recommended that Stella remains in her land and not on the disputed portion. He further stated that the land belonged to Mwaegwa who had been given the land by the Plaintiff's mother when the land had not been adjudicated.

The Defendant's case

19. The Defendant filed a Statement of Defence dated 7th September 2023. The Defendant averred that he was registered as a beneficiary of the suit property pursuant to Section 134 of the *Land Act* No. 6 of 2012 and a title deed was duly issued on 12th November 2021. It was also averred that the Plaintiff has cited Stella Kafusi and Mwaegwa who are not parties to the suit and hence the same amounts to a violation of their right to be heard. In his defence, the Defendant prayed for dismissal of the suit with costs.
20. During trial, two witness testified on behalf of the defence. Caleb Munde Mcharo the Defendant testified as DW1. He relied and adopted his witness statement dated 28th February 2024 in his evidence



in chief. It was his testimony that the land in question belonged to his late father Evans Kafusi even before he was born. The land had several developments including the borehole. He also stated that the developments in question were done over time. The adjudication process took some and they were actually farming on the land when the adjudication was done. He also produced the Defendant's bundle of documents dated 8th April 2024 and he prayed that they be allowed to continue occupying the land.

21. On cross-examination, he stated that he is the registered owner of the land and they got the land in 2021. He also stated that the borehole serves the entire community. He did not attend the meeting called to resolve the dispute.
22. He further stated in cross-examination that he was present when adjudication was done, and his name was registered on behalf of the family in trust. He also stated that the land was never sold to them since it was their land. They never did succession. He also stated that he was involved when the borehole was drilled. He denied ever signing any agreement.
23. When re-examined, he stated that there was no sale agreement. The agreement in question was an agreement to do a borehole for the benefit of the community.
24. Mwangi K. Wanjohi testified as DW2 and the last defence witness. He relied on his witness statement dated 3rd March 2024 in his evidence in chief. He stated that he was the Project Manager for the Mwachabo Settlement scheme and he was there for 16 years. He stated that the proper procedure was followed during adjudication until title was issued. He also stated that each party accepted the process and was happy with the same. He further stated that the Plaintiff has 2 properties and each person knows their boundaries. He also stated that the suit land was under Evans Kafusi who passed away before issuance of the title and the family agreed that the land should be registered in trust in the Defendant's name.
25. He stated that the late Kafusi was already on the land and they could not destabilize people who were already on the land.
26. On cross-examination, he stated that the adjudication process started when there were already people on the land who knew their boundaries. He also stated that during the process, several complaints were received from several people including the Plaintiff. He also stated that the Defendant's family agreed the land to be registered in his name. He also stated that succession could not be done because that land was previously public land.
27. On re-examination, he stated that he could not remember receiving a letter from the Plaintiff saying that they had been on the land since 1968. He also stated that the Plaintiff has two different parcels in the scheme and has been a great beneficiary in the process and is equally happy with the same.

The Plaintiff's submissions

28. Upon close of the parties' respective cases, both parties' field written submissions. The Plaintiff filed written submissions dated 11th September 2024 while the Defendant filed written submissions dated 20th September 2024. The Plaintiff submitted on the following issues:-
 - i. Whether the Plaintiff is the legal owner of the disputed portion of the suit property herein measuring approximately 47 ½ acres.
 - ii. Whether the Defendant acquired the title to the disputed portion of the suit property herein fraudulently.



- iii. Whether the registration of the Defendant as the owner of the suit property should be cancelled.
 - iv. Costs.
29. It was submitted that the evidence before court confirmed that the Plaintiff is the owner of the suit property having acquired it lawfully from his father Mzee Kisomba Kisau sometimes in 1990. It was also submitted that the Defendant's mother purchased only 22 ½ acre portion of land from Mr. Mwaegwa PW2 for a sum of KShs. 450,000/= hence the Defendant cannot lay claim to the 47 ½ acres of land. It was further submitted that the Defendant could only lay claim to 22 ½ acres and not the entire parcel.
 30. It was also submitted that despite the resolution from the Council of Elders, the Defendant fraudulently registered himself as the owner of the land. It was also submitted that no documents were produced to prove that the Defendant's father owned the suit property before adjudication as alleged. There was also no evidence that the Defendant's father had been on the land before registration at a time when it was occupied by the Plaintiff. The cases of Munyu Maina =Versus= Hiram Gathiha Maina (2013) eKLR and Vijay Morjaria =Versus= Nansigh Madhusingh Darbar & Another (2000) eKLR were cited in support.
 31. The Plaintiff also submitted that the Plaintiff had clearly demonstrated how he came to own the property and the land measuring 47 ½ acres and how the Defendant was registered as the proprietor of the suit property in a fraudulent manner and through misrepresentation of material facts citing Sections 24, 25 and 26 of the Land Registration Act, it was submitted that title can be subject to challenge on the grounds of fraud or misrepresentation and the Plaintiff has proved that the title was irregularly obtained and the same should be cancelled.
 32. The Plaintiff urged the court to grant the reliefs sought together with costs of the suit.

The Defendant's submissions

33. The Defendant submitted on the following issues:-
 - i. Whether the Defendant is the bona fide owner of Taita Taveta/mwachabo Pahse Ii S. Scheme/230.
 - ii. Whether the agreement dated 18th June 2017 between Stella Kafusi and Mwaegwa Mwadime has any legal effect towards the ownership of the suit property.
 - iii. Costs.
34. It was submitted that DW2 Mwangi Wanjohi had explained in detail the process used to identify and record the squatters living in Mwachabo area and that the project was done in strict adherence to Section 134 of the Government Land Act Cap 280 of the Laws of Kenya.
35. It was submitted that the Plaintiff and all his witnesses are beneficiaries of the Mwachabo Settlement Scheme a fact which was not disputed by the Plaintiff. The case of Bandi =Versus= Dzomo & 76 Others (Civil Appeal 16 of 2020) (2022) KECA 584 (KLR) (25 June 2022) (Judgment) was cited in support.
36. In regard to the agreement dated 18th June 2017 it was argued that the agreement was not enforceable since both parties were squatters in the land since at that time of the agreement the land was Government land.
37. The Defendant urged the court to dismiss the suit with costs.



Analysis and Determination

38. The court has considered the pleadings, the evidence adduced and submissions filed by the parties and proceeds to determine the following salient issues in respect to this suit:-
- i. Whether the Plaintiff has proved the particulars of fraud as pleaded herein.
 - ii. Whether the Plaintiff is the legal owner of the disputed portion of the suit parcel herein measuring 47 ½ acres.
 - iii. Whether the agreement dated 18th June 2017 between Stella Kafusi and Mwaega Mwadime has any legal effect towards the ownership of the suit property.
 - iv. Whether the Plaintiff is entitled to the prayers sought.
 - v. What orders should issue as to costs.

Issue No. (i)

Whether the Plaintiff has proved the particulars of fraud pleaded herein

39. The Plaintiff pleaded fraud on the part of the Defendant at paragraph 11 of his plaint. The same were particularized as follows:-
- i. Causing the suit property to be registered in his name while fully aware that his mother only purchased a portion measuring 22 ½ acres from one Mr. Mwaegwa.
 - ii. Misrepresenting himself as a bona fide owner of the whole of the suit property.
 - iii. Accepting to have the whole of the suit property registered in his name.
 - iv. Causing to be registered in his name the Plaintiff's portion measuring approximately 47 ½ acres.
 - v. Colluding with the Project Manager and the land officers to register him as proprietor of the whole of the suit property including the Plaintiff's portion of land measuring approximately 47 ½ acres.
40. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendant. Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.
41. The Plaintiff enumerated the particulars of fraud. The basis for claiming fraud is that the Defendant despite being aware that he was the bonafide owner of the land unlawfully and fraudulently and without any just cause had the suit property registered in his name and a title deed issued taking up the portion of land measuring 47 ½ acres. The Plaintiff in his submissions submitted that Plaintiff had proprietary interest in the land which the Defendant was aware but chose to ignore the same and register the land in his name.
42. From the analysis of the evidence that was tendered, there was clear evidence that the Plaintiff had an interest in the suit property before the same was registered in the name of the Defendant. The Defendant was only entitled to the portion that had been acquired by her mother amounting to 22 ½ acres. This position was confirmed by the evidence given by PW2 and PW5 and as such the Defendant's



family being totally aware of this position ought to have considered the same at the time of registration of the suit property in his name. In view of the foregoing, this court is satisfied that the Plaintiff has proved the particulars of fraud as pleaded as against the Defendant.

Issue No. (ii)

Who between the Plaintiff and the Defendant is the legal owner of the disputed portion of the suit property herein measuring approximately 47 ½ acres

43. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows;

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - a. of any description; and
 - b. in any part of Kenya.

44. The dispute before this court is that both the Plaintiff and Defendant have laid claim to the suit property herein. The Plaintiff laying claiming to the disputed portion measuring 47 ½ acres while the Defendant laying claim to the entire parcel which is currently registered in his name. Where a court is faced with two competing interests over the same suit property, it must look into the root of ownership of the said suit property. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

45. Equally it is not automatic that simply accepting titles as conclusive, incontestable and indefeasible or the concomitant argument that in the face of two or more competing titles, the first in time automatically prevails. It is not enough to wave an instrument of title or rest easy on the former rock of chronological primacy. What must now be established by he who would prevail is the solidity of the root of title. No flowery foliage, absent a sturdy and settled root speaking to a regular and legal process preceding the product that is the title, will avail the holder. That much is now the law pronounced in a lengthening line of authorities such as *Munyuu Maina vs Hiram Gathiha Maina* [2013] eKLR And *Funzi Development Ltd & Others vs Country Council of Kwale* [2014] eKLR, and by the Supreme Court in its authoritative and all-binding decision of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR

46. As earlier stated and without appearing to be repetitive, a court when faced with two competing interests over the same land has to make an investigation so that it can be discovered who is the bonafide and lawful owner. This investigation must start at the root of the title and follow all processes and procedures that brought forth the interests of each party to the land. 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 case solely on the title document that they hold. The Court of Appeal in the case of Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:

“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of Fahiye & 2 others – v- Omar & 4 others [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05), it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”

45. The Supreme Court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not protected under Article 40 of *the Constitution* on the protection of right to property. It held as follows in *Dina Management Limited vs. County Government of Mombasa & 5 others* (supra):

“Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

45. Section 26 of the *Land Registration Act, Act No. 3 of 2012*, provides that a title which was acquired by way of fraud or misrepresentation, where a person is proved to be a party can be attacked. So too a title which was acquired illegally, procedurally or through a corrupt scheme. The said Section is drawn as follows: -

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
45. From the analysis of the evidence adduced herein, it is not in dispute that the Plaintiff is not claiming the entire parcel registered in the names of the Defendant measuring 28.31 Ha (Approximately 70 acres). The Plaintiff is only claiming 47 ½ acres of the same which he had an interest before the same was registered in the names of the Defendant.
46. Before this Court determines who is the bonafide owner of the said parcel it is important to trace the root of the said title. From the evidence tendered herein the said land was only registered on 12th November 2021 when the same was registered entirely in the names of the Defendant.
47. During trial, the Plaintiff adduced evidence of how he acquired the said parcel from his late father. The Plaintiff equally adduced evidence in form of letters and minutes of the meeting by the Council of Elders which indeed confirmed that he had a stake and interest in the suit property before the same was registered in the names of the Defendant. The evidence of PW3 was crucial to the confirmation of the same since he made extensive reference to the report and documents that the Council of Elders considered in resolving the dispute between the parties. While the Defendant on the other hand averred that the land was owned by his later father, Evans Kafusi, he was unable to adduce any evidence ascertaining whether his late father owned the entire parcel including the 47 ½ acres being claimed by the Plaintiff yet there was evidence to the effect that his mother had entered into an agreement for acquisition of some portion of the same.
48. In respect to the resolution of the Taita Taveta Council of Elders which was produced in evidence and confirmed by PW3 that the same had been determined in favour of the Plaintiff, this court upon making reference to the said report also notes that the said resolution was adduced in evidence was a form of alternative dispute resolution mechanism. Under Article 159 (2) (c) of *the Constitution*, this Court is required to recognise and promote Alternative Justice System and the traditional dispute resolutions mechanism fall under the Alternative Justice System. Under Section 20 of the *Environment and Land Court Act*, the Court on its own motion can adopt and implement the alternative dispute resolution which includes the traditional dispute resolution mechanisms. See the cases of; *Kitur & another (Suing on behalf of the Estate of Stephen Kitur) v Kitur & another (Environment & Land Case 68 of 2021) [2023] KEELC 78 (KLR) (19 January 2023) (Judgment)* and *Kinyanjui & 97 others v Trustees (Environment & Land Case 263 of 2012) [2023] KEELC 15966 (KLR) (1 March 2023) (Ruling)*.
49. In the circumstances, it is the finding of this court that the Plaintiff is the bonafide owner of the disputed portion of the suit parcel measuring approximately 47 ½ acres.

Issue No. (iii)

Whether the agreement dated 18th June 2017 between Stella Kafusi and Mwaegwa has any legal effect

45. This issue was raised by the Defendant in his submissions. The Defendant argued that the said agreement was done before the said land was adjudicated and registration done and hence the land was public land upon which the agreement was void and enforceable.
46. The Court has considered the said issue as submitted by the Defendant. However from the evidence that was tendered herein, the Defendant’s mother Stela Kafusi was a beneficiary of the said agreement despite the fact that the suit parcel had not been registered at the time of the said agreement. Through the said agreement the Defendant’s mother was able to acquire the portion of land owned by Mwaegwa which had been acquired from the Plaintiff.



47. It is trite law that parties are bound by the terms of the agreement and Court of law cannot rewrite the same. While Mr. Mwaegwa may not have acquired title to the suit property at that time, it was not in dispute that he had been offered the said portion at the time of transacting and as such the Defendant's mother knew very well what exactly they had consented to.

48. This Court in considering the parties intention as demonstrated in the said agreement, it is evident that the Defendant having benefited from the same cannot turn back and urge this Court to find that such agreement is null and void. Hence therefore the Defendant's submissions on the said agreement are misplaced and this Court subsequently rejects the said line of argument.

Issue No. (iv)

Whether the Plaintiff is entitled to the reliefs sought

45. The Plaintiff sought for various reliefs as pleaded in his plaint.

46. The court has already held that the Plaintiff was able to prove that he is the bona fide owner of the 47 ½ acres of the disputed portion of the suit parcel. Section 80(1) of the *Land Registration Act* comes into play and being guided by the said provision of the law, this court is satisfied that the Plaintiff has made a case for the grant of the reliefs sought.

47. In respect to costs, the Court is granted discretion under Section 27 of the *Civil Procedure Act* to award costs. Evidently, costs usually follow the events unless special circumstances present themselves. The Plaintiff, herein has succeeded in making his case and getting orders as outlined above. The Plaintiff being the successful litigant is entitled to costs of this suit to be borne by the Defendant herein and no special circumstances have been demonstrated to enable this court consider otherwise.

Final Orders

45. In conclusion, it is the finding of this court that the Plaintiff has proved his case to the required standard and judgment is hereby entered in favour of the Plaintiff as against the Defendant as follows:-

- i. A declaration be and is hereby issued that the Plaintiff is the legal and bonafide owner of the portion of the suit property measuring 47 ½ acres of Taita Taveta/Mwachabo Phase II S. Scheme/230.
- ii. An order is hereby issued for the excision and registration of 47½ acres out of Taita Taveta/Mwachabo Phase II S. Scheme/230 in the name of Cosmus Ropaki Kisomba, the Plaintiff herein and the remainder of the land to be registered in the name of Caleb Munde Mcharo, the Defendant herein.
- iii. The Plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 8TH DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Wambura for the Plaintiff.

Mr. Kamau for the Defendant.

Court Assistants: Mary Ngoira and Norah Chao.

