



**Highland Plaza Limited v Child Welfare Society of Kenya (Environment and Land
Case 26 of 2022) [2025] KEELC 7747 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7747 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 26 OF 2022
LL NAIKUNI, J
NOVEMBER 7, 2025

BETWEEN
HIGHLAND PLAZA LIMITED PLAINTIFF
AND
CHILD WELFARE SOCIETY OF KENYA DEFENDANT

JUDGMENT

I. Preliminaries

1. Before this Honourable Court is a Judgement that pertains to the Civil suit instituted by Highland Plaza Limited, the Plaintiff herein. It was by way of a Plaintiff dated 3rd March, 2022. The suit was against Child Welfare Society of Kenya, the Defendant herein.
2. Upon filing of the Plaintiff, the Defendant responded through filing of a Statement of Defence and Counter - Claim dated 30th June, 2022. The Plaintiff further filed a response to the Defence and Defence to the Counter - Claim dated 8th July, 2022 respectively.
3. It is instructive to note that in the course of the proceedings, the parties agreed by consensus to have the Honourable Court conduct a site visit (“Locus In Quo”) pursuant to the relevant provision of the Law – Order 18 Rule 11 of the Civil procedure Rules, 2010. Subsequently, on 14th July, 2023 the visit took place and a report was prepared and it is attached to this Judgement for ease of reference thereof.

II. Description of the Parties

4. The Plaintiff was described as a company duly incorporated in Kenya with Limited liability under the Companies Act, cap. 486, with its registered office in Nairobi. While the Defendant was described in the Plaintiff as a State Corporation vide Legal Notice N0.58 of 23/05/2014.

III. Court directions before the hearing



5. On 27th June, 2022, after confirming that the Plaintiff had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 28th March, 2023. The Plaintiff called its witnesses being PW - 1 to PW - 3 and closed their case on 17th November, 2024 and the Defendant called their witnesses and marked their cases closed on the same day.

IV. The Plaintiff's case

6. The Plaintiff's case as per its filed Plaintiff was that it is the proprietor of the Leasehold interest comprised in the parcel of land known as Mombasa/Block IX/238 situate at Makande within Mombasa Island (Hereinafter referred to as "The Suit Property") being the first registered owner. Until recently, the Defendant had occupied the plot neighboring the suit property and had co-existed harmoniously with the Plaintiff. The Defendant had now without lawful excuse and/or without consent or authority of the Plaintiff encroached upon the Plaintiff's land and put up unlawful structures thereon and intends to occupy the same.
7. According to the Plaintiff, the Defendant's act amounted to actionable trespass. The Plaintiff had reminded the Defendant of his proprietary interests but which the Defendant had blatantly ignored. The Defendant continued to interfere with the suit property and trespassing therein by erecting structures with the intention of occupying the same.
8. Additionally, as far as it concerned the Plaintiff there was no suit pending and there had not been previous proceedings between the parties hereto relative to the subject matter hereof. Despite demands issued, the Defendant had failed, refused and/ or neglected to comply therewith hence this action. The suit property was situated at Mombasa within the Honourable Court's jurisdiction.
9. For the reasons therefore, the Plaintiff prayed for Judgment to be entered against the Defendant for: -
 - a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece or parcel of land known as Mombasa/Block IX/238.
 - b. A declaration that the alleged occupation and possession of the suit land by the Defendant is illegal, unlawful, null and void.
 - c. An order of permanent injunction restraining the Defendant either by themselves, their employees, servants and/or agents from continuing to occupy, trespassing on, erecting structures and/or in any other manner interfering with the Plaintiff's quiet enjoyment and possession of the suit land.
 - d. An order directing the Defendant to ensure that they demolish their structures in the suit premises and hand over vacant possession to the Plaintiff, at their cost.
 - e. An order of eviction against the Defendant, their employees, leases, servants and/or agents.
 - f. An order directing the Officer Commanding Station (OCS) Mombasa Police Station to provide security and ensure compliance with the orders herein.
 - g. General damages for loss of user, income, mesne profits,
 - h. Cost of the suit.
 - i. Any other relief that the Honourable Court deems fit or appropriate to grant.
10. As indicated above, the Plaintiff responded to the Defence and Counter – Claim. It averred as follows that: -



- a. In response to the contents under Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of the Defense, the Plaintiff reiterated the contents of Paragraphs 3, 4, 5, 6, 7 and 8 of the Plaintiff and further stated that it was the lawful Lessee from the Government of all that land known as Mombasa/Block IX/238.
- b. In response to the averments made under Paragraphs 11, 12 and 13 of the Defense, the Plaintiff stated that there were no old structures, shades and children play kits erected by the Defendant that sat on the suit premises and further that only the newly constructed block encroached on a part of the Plaintiff's land being Mombasa/Block IX/238.
- c. On the Counter - Claim, the Plaintiff averred that: -
 - i. Save where expressly herein admitted, the Plaintiff denied each and every allegation in the Counter - Claim as if the same were herein set out verbatim and traversed seriatim.
 - ii. The Plaintiff denied the contents of Paragraphs 17 to 24 of the Counter - Claim.
 - iii. The Plaintiff denied the contents of Paragraphs 25 to 29 of the Counter - Claim and stated that the Defendant had never been in exclusive and actual occupation of Mombasa/ Block IX/238 but has erected a building that had encroached on a part of Mombasa/Block IX/238.
 - iv. The Plaintiff reiterated the contents of the Plaintiff dated 3rd March, 2022.
 - v. The jurisdiction of this Honourable Court was admitted.
 - vi. Consequently, the Plaintiff averred that the Defendant was not entitled to any of the prayers sought in the Counter - Claim or at all
- d. The Plaintiff prayed that the Defendant's Defense and Counter - Claim be dismissed with costs and Judgment be entered for the Plaintiff as prayed in the Plaintiff.

11. The Plaintiff called PW - 1 on 17th November, 2025 at 1.00 pm where the witness testified that: -

A. Examination in Chief of PW - 1 by Ms. Rimunya Advocate.

12. PW - 1 was sworn and testified in English language. She identified herself as JOSEPHINE MNYAZI RAMA. She informed the court that she was the Land Registrar, Mombasa bearing - P/I No. 2015000316. She had been in Mombasa since the year 2019. It was her office that held record and held title to land Ref MSA/IX/238 – the suit land. She had with her both the Green and White card. They were in the name of Highland Plaza Limited – the Plaintiff herein. The lease was for 99 years. There were no sub – divisions and no encumbrances. It had a Deed of Indemnity for the reconstruction of the white and green card was missing, it was gazetted in the Kenya Gazette Notice No.9949218 of 28th September, 2018. According to her after 60 days another was reconstructed.

B. Cross Examination of PW - 1 by Mr. Odunga Advocate.

13. According to PW - 1, the documents in the correspondence file were:-

- a. Copy of the Deed of Indemnity.
- b. Copy of the title.
- c. Copy of the Lease.
- d. Copy of Grant Letter of Administration Cause No. 3309/2007 list issued 23rd April, 2008.



- e. Letter to Commissioner of Land addressed Land Registrar Mombasa 5th May, 2004
- f. Kenya Gazette Notice.

14. The witness told the court that the reason they had a white card was because it was Government land. There was no Letter of Allotment nor any no letter indicating the allocation of land to the Plaintiff. Despite of this, she admitted, the Government land was allocated to the Plaintiff. The purpose for Deed of Indemnity was not necessarily to indicate that the land was allocated irregularly. A company could not have any interest to land before registration.

C. Re - Examination of PW – 1 by Ms. Rimunya Advocate.

15. PW - 1 further told the court that a Land Registrar issued a title deed on the strength of the instructions from the Commissioner of Lands and in the recent days from the National Land Commission. The lease document was signed on 18th August, 1995. The notice of gazette was to notify all the public for them to raise any objection if at all. None was received.

A. Examination in Chief of PW - 2 by Ms. Rimunya Advocate.

16. PW - 2 was sworn and testified in English language. She identified herself as BEATRICE MGOI MBELA, a Citizen of Kenya with all the particulars as stated in the Kenya National identity card shown to Court. She was a director in the Plaintiff company and that she had recorded a witness statement on 21st June, 2022 which she wished to be adopted as her evidence in chief. Further, PW – 2 had filed 4 documents on 14th November, 2022. She was the Director of the Highlands Plaza Limited. Her husband died. Their neighbors run a school and she had title deed and lease of the land produced as "Plaintiff Exhibit No. 5". She had a survey map and it showed their plot – "Plaintiff Exhibit 14". They had been on the plot from the year 1990. They conducted due diligence and found that the land with reference to the letter dated 4th February, 2004 and 5th May, 2005 – "Plaintiff Exhibits 3 and 4".

17. PW - 2 told the court that they did a Deed of Indemnity as the lease was missing. The Deed of Indemnity was Plaintiff Exhibits 10 and 11 which was published in the Kenya Gazette for any objections to be raised. Despite of the gazettlement, no one came up with any objection. They included official searches produced – "Plaintiff Exhibits 6 and 12 respectively. They had the Deed Plan and the Survey Plan marked as "MFR-1 & 2". They had not done any sub - division nor leased the Land to any person or party. In the year 2007, her husband passed on. They went through the succession process and got Grant Letters of Administration produced as "Plaintiff Exhibit No. 1" and the company was incorporated in the year 1991 – the Certificate of Incorporation was produced as "Plaintiff Exhibit 2".

B. Cross Examination of PW - 2 Mr. Odunga Advocate.

18. PW - 2 re – affirmed that she was the Director of the Plaintiff Company. She did not have any resolution to represent the company and was not aware that the company and herself were a separate and distinct entity. With reference to the indemnity, the witness told the court that it showed at Paragraph 2 that the company was allocated the land on 18th July, 1991. With reference to the letter by the Commissioner of land dated 5th May, 2020. She did not have a Letter of Allotment. The letters were issued to her husband and he was the one who made the payment. The land was allocated to her husband and he allocated it to the Plaintiff after paying for it.

19. The land was transferred from her husband to the Company. The documents were availed at the lands. The land was transferred in the year 1991. The company was incorporated in September 1991; clearly the company did not exist but she could not answer that question. The documents given to



the Government were supplied by Highland Plaza. Darius Mbela was the Chairman and a Director of Highland Plaza. The lease was registered in the year 2004. She was in court as a director of the company although she was not involved in the application.

20. PW - 2 told the court that the Defendant had a Children Centre, they had a school. The Plaintiff had come to court as the Defendant had trespassed. She had seen the Defendant were issued with a Letter of Allotment dated 1987. According to their documents its them who were given the land. The Plaintiff had been in occupation on the land from the year 1991 but there were many squatters on the land. They had a case in Court on that issue. She filed a letter dated 13th December, 2000 by Children Welfare Society of Kenya indicating that they were in occupation from that time.
21. With reference to a letter dated 23rd July, 2001 by the Municipal Council of Mombasa, the witness told the court that it was sent to the late Rose Tuba Family. She resided on their land with their permission.

C. Re - Examination of PW - 2 by Ms. Rimunya Advocate.

22. PW - 2 told the court with reference to the letter by the then Commissioner of Lands, Ms. Judy Okungu dated 5th May, 2020 (see contents), its confirmed the lease was paid for. The witness confirmed that the company was registered in September 1991 and the land was allocated in July 1991. The lease was issued on 17th May, 2004 and by then Highland Plaza was already registered. According to her, the Deed of Indemnity the contents at Paragraph 10, the parcel was found but the Green card was missing. They registered the Deed of Indemnity – no one occupied it. The Child Welfare had put up a dormitory on their land; it was done in the year 2022 and not 1985 as alleged. Their Letter of Allotment was dated 1987. From the Deed Plan the parcel of land – 238 was November 1990. The witness was issued with an allotment letter in the year 1990. Mama Rosa leased no block MSA/IX/238 with their consent. The letter by Municipal Council they referred on land MSA/IX/238.
23. PW - 2 confirmed that she made several letters to the DCIO mainly on the encroachment of the land e.g. Safaricom Limited having mounted the communication masts etc. It was not on the ownership. She had the original Certificate of Lease dated 17th May, 2004. She produced it in court. The original Certificate of the title deed was shown to both the Defendants and their Advocates, i.e. the Trustee.
24. On 14th November, 2024 at 2.30 pm the Plaintiff called PW 3 who testified as follows: -

A. Examination in Chief of PW - 3 by Mr. Mummin Advocate.

25. PW - 3 was sworn and testified in English language. He was called WALID ABBAS. He stated being a Land Surveyor attached in the office of the Coast Regional Land Survey Office. He the Land Surveyor engaged by the Plaintiff to carry out a land survey. Subsequently, he undertook the surveying exercise and prepared a report dated 24th April, 2023. The purpose for the survey was to re-establish the boundary of the land MI/IX/238 and to identify any development in Makande Makupa. It was sub-divided into Plot numbers 446 to 459 and it was on FR. No. 448/39.
26. According to the witness, the conclusion was that Mji was Salama/Child Welfare was on Plot No. MI/IX/457. It was a sub - plot of an original plot No. MI/IX/238. They produced the report as Plaintiff Exhibit -19.

B. Cross Examination of PW - 3 by Mr. O. M. Otieno Advocate.

27. The witness told the court that he worked with the Coast Regional Office in Mombasa. The Children Welfare is on Plot No. MI/IX/457 (Original No. MI/IX/238. The MI/IX/238 was sub-divided into 446 to 450. He did not know when it was done but it was by a private surveyor – Mr. Edward Kiguru. But he did not know under whose instruction. He did not know whether this sub – division were



cancelled. He did not know the position of the Plot No. 238. He was hired to ascertain the position of the Child Welfare's plot. He did not know of their acreage. There were many people on the land but he did not know them nor the buildings on the land.

28. The Plaintiff through its counsel Mr. Mummin marked their case closed on 15th November, 2024.

V. The Defendant's Case

29. The Defendant responded to the Plaintiff's claim through the Statement of Defense and Counter - Claim where the Defendant denied the contents of paragraph 3 of the Plaintiff and put the Plaintiff to strict proof of the averments thereof. The Defendant stated that it was the lawful allottee from the Government of Kenya of all "The Suit Property". The Defendant in further response to Paragraph 3 of the Plaintiff averred that it had occupied the suit property since the year 1956 when it first opened its Mombasa Municipality and Coastal Branch as a place of safety for the care of the needy children and the inaugural meeting for the said Coastal Branch was held on 2nd May 1956.
30. The Defendant stated that following its continued occupation and utilization of the suit property for the benefit and care of needy and vulnerable children, the Government vide an Letter of Allotment. The Defendant denied the contents of Paragraph 4 of the Plaintiff and stated that it had remained in occupation of the suit premises which apart from the new accommodation block also had old structures, shades and children playing kits and put the Plaintiff to strict proof of any contrary averments.
31. The Defendant denied the contents of Paragraphs 5 and 6 as pleaded and puts the Plaintiff to strict proof. The Defendant averred that it had remained in physical occupation and use of the suit property since the Mombasa Branch was established. A Children Home called Mji wa Salama was set up and managed by the Branch. It was completed way back in the year 1971 and officially opened by the Minister of Co - operatives and Social services the same year.
32. The Defendant averred that the Government officially issued it with an allotment letter Ref:75892/X/31, dated 3rd February 1987 for the suit property following the Defendant's application for a formal allocation of the same vide the said letter having been in actual occupation and use. The Defendant further averred that it duly complied with the conditions for the allocation as to acceptance and payment of the requisite allocation fees of Kshs. 1,532. It accepted the allocation and forwarded a Banker's Cheque of Kshs. 1, 532 vide its letter dated 4th February 1987.
33. The Defendant averred that the Government through the Commissioner of Lands duly acknowledged receipt of the payment of the necessary allocation fees of Kshs. 1, 532 vide receipt number B 180911 dated 10th February 1987. The contents of paragraphs 7 and 8 were denied as the same were baseless and misleading. The Defendant averred that the claim by the Plaintiff was an illegal attempt to deprive and or dispossess it of the suit property premised on fraudulently acquired interest and ownership documents.
34. Further, the Defendant stated that apart from the newly constructed accommodation block for the children under its care and protection at the suit property, there are other old structures shades and children play kits therein demonstrating its long occupation and possession of the suit property. The Defendant stated that the claim that it constructed the new accommodation block with the intention of illegally occupying the suit property is misleading since it has never relinquished possession of the suit property and the accommodation block was constructed through Government and Donors' funding for the Benefit of the vulnerable Children under the Defendant's care and protection.



35. The Defendant further stated that any acquisition and registration of land anchored on illegal and fraudulent ownership documents does not enjoy any legal protection under the law particularly Article 40 of *the Constitution* and section 26 of the *Land Registration Act* 2012 and was thus of no legal effect. The Defendant admitted the contents of Paragraphs 9 and 10 but denied the contents of Paragraph 10 of the Plaintiff. Save for what was herein expressly admitted, the Defendant denied each and every allegation set out in the plaintiff filed herein as if the same were set out in a verbatim manner and traversed seriatim.

36. On the Counter - Claim, the Defendant reiterated the contents of Paragraphs 1 to 15 of the Statement of Defence. The Defendant averred that was the lawful allottee from the Government of the suit property herein where it had established a Children's home and/ or Care Centre and had remained in actual, uninterrupted and peaceful occupation of the same since the year 1956. The Defendant averred that whereas the Mombasa Branch was established in the year 1956, the Branch set up a children home on the suit property which was completed in the year 1971 and officially opened by the then Minister in charge of Co-Operatives and Social Services the same year.

37. The Children Home was run by the Defendant mostly through Government grants, support from the Mombasa Municipality, members' contributions and donations from well wishes. The Defendant averred that the Government officially issued it with an allotment letter for the property Ref: 75892/X/31, dated 3rd February 1987 following its application for a formal allocation about 3 decades after it had occupied the same with the consent of the Government and established the children home thereon. The Defendant avers that it duly accepted the allocation vide its letter dated 4th February 1987 and complied with the condition as to payment of allocation fees of Kshs. 1,532 and was issued with a receipt Serial No. B 180911 dated 10th February 1987 acknowledging the receipt of the allocation fees.

38. The Commissioner of Lands vide a letter dated 19th February 1987 Ref: 118894/4 wrote to the Director of Surveys informing him that the Defendant had duly accepted the allocation of the suit property and complied with the conditions thereof to facilitate the necessary surveys and or registrations. The Defendant averred that it had remained in actual occupation and use of the suit property following the taking of occupation and subsequent allocation of the same to it in 1987 accumulatively for a period of about six (6) decades. Following the alienation and lawful allocation of the suit property to the 1st Defendant in 1987 and compliance with the conditions thereof, the suit property was not available for allocation to any other party or person including the Plaintiff herein as alleged.

39. According to the Defendant, without prejudice to the foregoing narration on acquisition of the suit property, the Plaintiff's claim over the property is deemed extinguished by operation of the law by virtue of the limitation of actions the Defendant having been in actual, open, exclusive, uninterrupted and peaceful occupation of the suit property with the knowledge of the Plaintiff who purports to have been registered as the owner thereof on 17th May 2004 which was about 18 years now. The Defendant averred that the schemes being deployed by the Plaintiff and its agents including the filing of this instant suit are aimed at depriving and or dispossessing it of the suit property and expose it and the minors to irreparable loss and harm.

40. The Defendant was apprehensive that unless the Honourable Court intervened:-

- Its right to acquire and own the suit property as envisaged under Article 40 of *the Constitution* shall be infringed upon by the Plaintiff herein without regard.



- ii. The needy children under its care and protection shall be unlawfully evicted from the suit property and the development projects thereon mostly funded by the public and donations from well-wishers shall be damaged and or put to waste.
- iii. It shall suffer irreparable loss and damage and the minors under its care and protection shall be rendered destitute and homeless

41. The Defendant averred that it was entitled to exclusive occupation and possession of the suit property as against the Plaintiff herein having demonstrated that it acquired the same lawfully from the Government and has been in actual, exclusive, peaceful and uninterrupted occupation and use of the same for about six (6) decades now. The Plaintiff by its conduct and predisposition shall interfere with the Defendant's quiet possession and enjoyment of the suit property for the benefit of the needy children in violation of its right under Article 40 of *the Constitution* unless restrained by this Court. The suit property was located in Mombasa County and the cause of action arose within the jurisdiction of this Honourable Court.

42. The Defendant prayed that the Plaintiff's Plaintiff filed herein be dismissed with costs & Judgment be entered in favor of the Defendant in terms of the Counter - Claim filed herein as follows:-

- a. A declaration that the Defendant is the lawful allottee and acquired valid interest over property known as Mombasa Municipality Block IX/238 from the Government and is entitled to absolute ownership, possession and occupation thereof to the exclusion of the Plaintiff.
- b. A permanent injunction be issued restraining the Plaintiff whether by its directors, agents, employees, and or servants or otherwise howsoever acting on its instructions from trespassing, remaining upon, alienating, charging, leasing, disposing of, or in any manner howsoever interfering with the Defendant's right as to ownership, occupation, quiet and peaceful possession and utilization of property known as Mombasa Municipality Block IX/238.
- c. A declaration be and is hereby made that any purported title documents held by the Plaintiff relating to all that property known as Mombasa Municipality Block IX/238 are illegal, null and void and stand revoked forthwith.
- d. In alternative to prayers (i) to (iii) above, a declaration do issue that the Defendant has acquired valid interests over all that parcel of land known as Mombasa Municipality Block IX/238 by virtue of *Limitation of Actions Act* and is entitled to absolute ownership and possession thereof having occupied the same openly, uninterrupted, peacefully and with the knowledge of the Plaintiff for over 12 years and the Plaintiff's interests over the suit property if any stand extinguished.
- e. Costs of the suit.
- f. Any other relief that the court may deem fit and just to grant in the circumstances.

43. On 15th November, 2024, the Defendant's advocate Mr. O.M. Otieno Advocate had the following opening remarks where he stated that: -

A. Opening Statement by Mr. O.M. Otieno Advocate:-

44. The Learned Counsel stated that their case was that the Plaintiff had no ownership to the property. The suit land was public land reserved for Children Activities, file was created from Nairobi. In the process was high jacked by the Plaintiff and they took it. The Defendant had been in occupation from the year 1980. There was a document in the parcel file that showed the Plaintiff was given to the Plaintiff.



The Plaintiff was a trespasser and there were squatters on the land. There was a Counter - Claim. The Defendant had similar development in the county. They urged Court to have their prayers be allowed as prayed.

45. On 15th November, 2024 the Defendant called PW - 1 who told the court that as follows: -

B. Examination in Chief of DW - 1 by Mr. Otieno Advocate.

46. DW - 1 was sworn and testified in English language. He identified himself as CHARLES KIPKURUI NGETICH. He was the Deputy Chief Land Registrar and an Advocate of the High Court of Kenya. He joined the Ministry in April 2005, P/F. No. 200600428. He had worked at Ardhi House, of the Ministry of Lands & Settlement, Nairobi for 17 years and 2 years at Kwale and Kuria and 8 months in Migori.

47. DW - 1 told the court that he visited the land where there was the dispute. He availed the documents – i.e. list of documents from the correspondence file at around the year 1980. They had a very serious issue where the Plaintiff claims they were the owners of the land and the Child Welfare Society of Kenya – Defendant.

48. According to the witness, the history of the matter started from the issuance of a Letter of Allotment dated 3rd February, 1987. It was allocated to Child Welfare Society of Kenya. Registered Trustees – Ref. no. 75892/X/31 Registered and Mombasa Municipality Plot No. 238 Section IX – Area 0.3890HA Animal Tent of Kshs. 72/- . With reference to the special condition no. 5 it was for the purpose of the land was for buildings to be used only for Educational purposes. Defendant Exhibit – 1 was the Letter of Allotment. He produced the special condition as Defendant Exhibit 2.

49. DW - 1 told the court that the letter of allotment was accepted and payment was done. A letter conveyancing acceptance letter dated 19th February, 1987. With reference to the letter dated 11th July, 2023 by Mr. F.N. Orare the Chief Land Registrar – forwarding 10 documents to the District Land Registrar to receive and act the said documents. They are still at the Nairobi Headquarters. These were (Refer). The witness highlighted No. 5 payment receipt No. E180911 dated 10th February, 1987 for Kenya Shillings One Thousand Five Thirty Two Hundred (Kshs. 1,532/-) the total sum for the Letter of Allotment. The Defendant produced the following documents: -Defendant Letter of Allotment & Special Conditions dated 3rd February, 1987;Defendant Exhibit 3(f) – Letter conveyancing acceptance dated 19th February, 1987;Defendant Exhibit 3(i) Letter forwarding the DF 3(a) and (b). – They are letter by the Commissioner of Land. They are un-surveyed land. It is Letter dated 6th March, 1991 forwarding lease to the Land Registrar.Defendant Exhibit – 3 (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) Letter dated 11th July, 2023Defendant Exhibit 3(e) were the Receipts.Defendant Exhibit 3(h) – Certificate of Stamp Duty

50. The witness told the court that the documents were obtained from the correspondence file held in Nairobi Headquarters. There was only one parcel No. 238. The Memorandum of Registration of transfer of Land – allowed the Land Registrar to register the land to the required Allottee – Lessor is Government of Kenya, Lessee – Child Welfare Society of Kenya. There was no allottee called Highland Plaza Ltd. The issue of double allocation emanated from the district level and not the Headquarters in Nairobi.

51. According to the witness from his own assessment the lawful owner was lessor was Government of Kenya and the Lessee was the Child Welfare Society of Kenya. In the correspondence file there were no documents for Highland Plaza Limited. From the Mombasa Land Registry showed the documents were forgery.



52. There were no lawful acquisition of the land without following the proper procedure. For one to get a letter of allotment one had to make an application to be allocated land. The Defendant made the application while they were already on the land as Tudor School from the year 1950. Hence the application to be allocated land was just a formality.

53. With reference to the paragraph 3 of the Plaintiff – Child Welfare trespassed on the land in the year 2022. The Defendant had been in occupation of the land for many years from 1987. Further to the reference the information by the Land Surveyor, the witness told the court that the land reference no. 238 had been sub – divided to various parcels 440 to 459 there would be need for PPF form, another PDP was prepared.

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

54. DW - 1 told the court that it was not possible to have two people registered in the same Certificate of lease. In Nairobi, the lessee registered was Child Welfare Society – there was no Certificate of Lease. He was not aware of the sub - division of the parcel No. 238 to several parcels. He had not seen the application for the Child Welfare Society to be allocated the land. When the Plaintiff lost their Certificate of Lease; he was informed it was advertised. He did not know whether the Child Welfare Society objected. The Child Welfare Society orally at the Land Registrar.

55. The Suit Property is located at Tudor area. With reference to a letter dated 19th February, 1987, the witness told the court that it referred to the Plot as Mombasa/Kizingo/Plot 238 IX – it could have been a typographical error or perhaps by then the Tudor area extended to Kizingo area.

D. Re-Examination of DW - 1 by Mr. O.M. Otieno Advocate.

56. DW - 1 confirmed that the Nairobi deal with the lease instrument but the Certificate of lease was at Mombasa. Here there was a conflict and the root of the title was questionable. The Notice for the loss of title – publication would not be challenged if the title was fraudulent.

A. Examination in Chief of DW - 2 by Mr. O.M. Otieno Advocate.

57. DW - 2 testified under oath and in English language. She identified herself as NORAH ALICE OLONDA. She was a Citizen of Kenya with all the particulars as indicated in the national identity card shown to Court. She worked for the Defendant as the Branch Administrative Officer – Mombasa Branch, his job entailed the day to day running activities of the branch. She was in charge of the branch. She recorded the witness statements dated 1st July, 2024 and she wished to rely on it as her evidence in this case. She confirmed that she was given authority to testify in this case. The authority in the bundle dated 1st July, 2024 – Defendant Exhibit 4. She also told the court that she had filed documents which support his case – filed on 30th June, 2022 and she relied on the 14 documents (Defendant Exhibit No. 5 to 18).

58. DW - 2 told the court that further she filed a Defence and Counter – Claim. She wished to have the prayers sought. She stated that the suit land belonged to the Defendant and if they took the land the Children would have to vacate. The Defendant was the lawful owner to the land. They had been in occupation from the year 1956 when it was established and children Home from the year 1981 from that time nobody had raised any objection upto now.

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

59. DW - 2 told the court that as a Branch Administrative Officer, with reference to document no. 10 they did not have the application for the allocation of the land. They did not have the documents – lease –



in their possession i.e. to show that they were the lessees from the Government of Kenya i.e. Certificate of lease in the name the Defendant. They only had the documents informed by the Ministry of Land. If an official search was to be conducted it would show the land belonged to the Defendant. They did not have a copy of the official search herein.

60. According to the witness she did not know whether the Plaintiff lost their title. The Defendant had never caused any investigation or raised a complaint on how the Plaintiff acquired the land – 238. The Plot number 238 measures 0.0890HA.

C. Re - Examination of DW - 2 by Mr. Otieno Advocate.

61. DW - 2 confirmed that she was aware that the Deputy Chief Land Registrar produced documents showing the ownership of the land. With reference to the Defendant Exhibit No. 3, she confirmed that this was the land. They had been in occupation of the land for a very long time. She was aware of the structures and people occupying the land including the Safaricom Mast. According to her, they were all trespassers on their land.

62. On 15th November, 2024, the Defendant marked their case closed through the Learned Counsel Mr. Otieno Advocate.

VI. Submissions

63. On 15th November, 2024, immediately after the closure of the Plaintiff and that of the Defendant, the Honorable Court directed the parties to canvass the claim by way of written submissions. Pursuant to that, the parties fully complied accordingly. Thereafter, the Honourable Court reserved a date for delivery of Judgment on notice accordingly.

A. The Written Submissions by the Plaintiff.

64. The Plaintiff through the Law firm of Messrs. Bunde Mangaro & co. Advocates filed their written submissions dated 26th December, 2024. Mr. Mummin Advocate commenced the submissions by providing the Court with brief background of the matter. The Learned Counsel stated that the Plaintiff filed this suit vide a Plaintiff dated 3rd March, 2022. The Plaintiff was filed together with a list of witnesses, witness statement and a list of documents and bundle of documents thereto. The Defendant entered appearance through their appointed counsel on 4th April, 2022. The Defendant filed a Statement of Defence on 30th June, 2022 together with a list of witnesses, witness statement and list of documents and bundle of documents thereto.

65. The Plaintiff filed supplementary lists of documents on 14th November, 2022 and 5th March, 2024. The Defendant filed a supplementary list of witnesses together with a witness statement dated 1st July, 2024. Further, the Defendant also filed a supplementary list of documents together with the bundle of documents thereto which list was also dated 1st July, 2024.

66. The matter was finally set down for hearing. The Plaintiff called a total of 3 witnesses being Beatrice Mbela the Director of the Plaintiff herein as PW - 2 who testified on 17th November, 2022, Josephine Mnyazi Rama, the Land Registrar Mombasa who testified as PW - 1 on the same day of 17th November, 2022 and Walid Abbas, the Land Surveyor who testified as PW - 3 on 14th November, 2024. The following documents were produced by the Plaintiff either by herself or through her witnesses:-

- PEXH.1- Grant of letters of administration.
- PEXH.2 - Certificate of incorporation.



- c. PEXH.3 - Letter from Commissioner of Lands dated 4th February, 2004.
- d. PEXH.4 - Letter from Commissioner of Lands dated 5th May, 2005.
- e. PEXH.5 - Lease and Certificate of Lease.
- f. PEXH.6 - Official search dated 25th July, 2005.
- g. PEXH.7- Deed Plan.
- h. PEXH.8- Survey Plan.
- i. PEXH.9- Letter to Registrar of titles dated 29/4/2016.
- j. PEXH.10- Deed of Indemnity dated 6/2/2017.
- k. PEXH.11- Kenya Gazette Notice No. 9949 dated 28/9/2018.
- l. PEXH.12- Certificate of Search dated 26th February, 2019.
- m. PEXH.13- Letter from the Survey of Kenya dated 2nd September, 2019.
- n. PEXH.14- Original Registry Index Map.
- o. PEXH.15 - Letter from Child Welfare Kenya dated 13th December, 2000.
- p. PEXH.16 - Letter dated 5th July, 2001.
- q. PEXH.17 - Letter from the Municipal Council of Mombasa dated 13th July, 2001.
- r. PEXH.18- Letters to DCI dated 11th November, 2021.
- s. PEXH.19- Copy of the Surveyor's report over the suit property.
- t. PEXH.20- Certificate of Postal search dated 25th September, 2023.

67. A site visit was also conducted on the 14th July, 2023 and a report issued by the Court on the 15th July, 2023 where the Honourable Court directed that parties do conduct an official search to confirm on the status of the suit property and that the Land Surveyor do supply the Court with the map and a small brief on the site visit. The Plaintiff complied with the courts direction and filed both a certificate of postal search which was dated 25th September, 2023 and a surveyor's report before court. The certificate of postal search still confirmed that the Plaintiff was the current registered owner of the leasehold interest in the suit property Mombasa/Block IX/238.

A summary of the Plaintiff's Case

68. The Plaintiff's case emanates as a result of encroachment and trespass by the Defendant onto the suit property which parcel of land lawfully belongs to the Plaintiff. The Plaintiff is the holder of a Certificate of Lease over the suit property being Mombasa/Block IX/238 which certificate was issued on the 17th May, 2004 to the Plaintiff. The Plaintiff's testimony regarding ownership over the suit property was corroborated by that of PW - 1- Josephine Mnyazi Rama, the Land Registrar Mombasa. PW - 1 testified that it was her office that holds the records over the suit property. Further, that it was her good office that held the white and green card and which both, showed the name of the Plaintiff herein – Highland Plaza Limited as the registered proprietor of leasehold interest. PW - 1 further testified that there were no encumbrances over the same save that the file had a Deed of Indemnity for the reconstruction of the white and green card as they were missing. She further stated that it was gazetted



in the Kenya Gazette vide Notice no. 9949218 of 28th September, 2018. Despite of this, no objections were raised by any party/person of interest where after another was constructed.

69. The testimony of PW - 1 and PW - 2 was buttressed by that of the PW - 3 – Mr. Walid Abbas, the Land Surveyor. He produced the surveyor's report which was exhibit: - P.EXH.19. PW - 3 confirmed that the Plaintiff was the registered owner of the Mombasa/Block IX/238 and that the survey was done to verify the location of the Defendant children home on the suit property. PW - 3 also stated that the suit property was sub - divided into numbers 446-459 (Original Number 238) and that the Defendant's children home was on sub - plot number 457. However, he stated that he did not know who planned the sub - division and that he was also unaware that the said sub - divisions had been cancelled.

A summary of the Defendant's case

70. The Defendant's case was that it was allotted the suit property by the Government of Kenya following their application after having stayed on the suit property since the year 1956. The Defendant stated that they first opened their coastal branch as a place for safety and care for children in the year 1956. They alleged to have been issued with a Letter of Allotment dated 3rd February, 1987. They further alleged that they duly paid the allocation fee vide a cheque on 4th March, 1987. However, the Defendant never brought before court a copy of their application for allotment over the suit property. It was indeed a common fact that acceptance through payment for allocation must be preceded by an application for allotment by the allottee themselves. This fact which the Defendants failed to prove and or showed before the court. The Defendants ought to have had such a document in their possession to actually prove that all the other documentation they had before court was in order.

71. The Learned Counsel stated that claiming ownership over property through allocation without proof of application for allotment clearly raised eye brows and questions as to the validity of the documents used to back the Defendant's claim and in turn whether the right of ownership was to be accorded to the Defendant.

72. The Learned Counsel raised an issue as to whether the Defendant was the legal proprietor of the leasehold interest in the suit property. He submitted that it was trite that legal ownership was different to physical possession. Ownership of land and or property was evidenced by the production of documentation that accords proprietorship and in particular as the subject matter herein was land, a title deed. However, due to the suit property being government land that is leased to the Plaintiff, it is a certificate of lease. The Plaintiff herein was issued with a Certificate of Lease over the suit property on the 17th May, 2004. To buttress on this point, the Learned Counsel referred Court to the provision of section 26 of the Land Registration Act, No. 3 of 2012. According to him, with regards to this provision of law, 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. The Defendant in challenging the Plaintiff's rightful proprietorship ought to have evidenced in court that the Plaintiff's Certificate of lease was a fruit of a poisonous tree in that it was secured through fraud or misrepresentation to which the plaintiff is proved to be a party or to show that it was acquired unprocedurally. For this, the Learned Counsel relied on the case of "Alice Chemutai Too – Versus - Nickoson Kipkurui Korir & 2 Others (2015) eKLR", where the Court opined:- "that a title can be impeached where it is established that the same was obtained fraudulently" to further denote that the Defendant was only required to prove the same as alleged that the Plaintiff's Certificate of Lease was a forgery which the Defendant failed to do so. To buttress the above position, the Counsel also invited the court to the provision of Sections 107 (1), (2) and 109 of the Evidence Act, Cap. 80 of the Laws of Kenya which deals with "the burden of proof". It states as under: Sections 107(1) and (2): That 1.)



Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and 2.) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Lastly, Section 109: Proof of particular fact; The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

73. DW - 2 being Norah Alice Okonda, being a worker of the Defendant who supervised day to day running of the children home as an administrator, during hearing testified and agreed that the Defendant was not in the possession of a Certificate of Lease over the suit property and that they had only been in occupation of part of the suit property. DW - 2 further went on to state that Defendant neither had an application for allotment. DW - 2, further went to state that also, that they did not object within sixty (60) days for which they ought to have raised an objection claiming interest over the suit property when the Plaintiff applied for the issuance of a new certificate of lease.
74. The Defendant also called the Deputy Chief Lands Registrar Nairobi who testified as DW - 1, namely Charles Kipkirui Ng'etich. Upon being asked, he stated that in this case, the Defendant was issued with an allotment letter without having made an application for allotment and he expounded that the land was unsurveyed yet it was already surveyed as the acreage was known. Further, under the Defendant's bundle of documents, this being the supplementary list of documents dated 1st July, 2024, which DW - 1 produced before court, the suit property was repeatedly referred to as MOMBASA/KIZINGO PLOT NO. 238/IX clearly showing that the Defendant's documents were indeed a forgery or could even be referring to a separate parcel of land in totality. When DW - 1 was asked why, he responded that he did not know why.
75. The Counsel asserted that, it was trite that when a person's title was called into question, the said proprietor had to show the root of his ownership. In the case of:- "Hebert L Martin & 2 Others – Versus - Margaret J Kamar & 5 Others {2016}" the Court held:-

"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."

76. On this limb, the Counsel submitted that the Plaintiff was able to prove their mode of acquisition of the suit property, the Plaintiff applied for allotment of the lease and was issued with letter of allotment and Certificate of Lease in turn. The Defendant never had a certificate of lease nor an application for allotment, the Defendant only had a Letter of Allotment which ordinarily could not stand on its own without an application for allotment by the allottee themselves.
77. He contended that any acquisition and registration of land anchored on illegal and fraudulent ownership documents does not enjoy any legal protection under the law particularly under the provision of Article 40 of Constitution of Kenya. The Defendant in their case alleged to have been occupation of the suit property for a period of about six decades (60 years) and also owned the suit



property yet failed to show in court in one instance that they were in possession of a certificate of lease over the suit property in their name. Further to that, the Defendants failed to also bring before court a certificate of postal search showing that at the particular date when a search was conducted, the Defendant's name appeared on the Certificate of Postal search as the current proprietor against the suit property. Thus, it was clear that the Defendant never enjoyed any rights of ownership over the suit property, and that the Defendant had actually infringed on the Plaintiff's right of ownership and possession of the suit property through their encroachment and trespass. It was for this reason that the Counsel submitted that the Plaintiff had proved his case on a balance of probabilities and that indeed was the lawful proprietor of the suit property. Thus, it was only fair that this Honourable Court safeguarded the right to property to the Plaintiff against the Defendant.

78. In conclusion, the Counsel urged this Honourable Court to dismiss the Defendant's Counter - Claim of ownership of the suit property and to grant the orders sought in the Plaintiff with costs..

B. The Written Submissions by the Defendant.

79. The Defendant herein through the Law firm of Messrs. O. M Otieno & Company Advocates filed their written submission dated 15th January, 2025. Mr. Otieno Advocate commenced their submission by recounting the facts of the case briefly. The Plaintiff herein mounted this suit against the Defendant herein vide the Plaintiff dated 3rd day of March, 2022, wherein the same had sought for Judgement to be entered against the Defendants herein, in the above stated terms.
80. According to the Learned Counsel, the Plaintiff contended that it is the proprietor of the leasehold in land otherwise known as MOMBASA/BLCK IX 238, situate at Makande within Mombasa Island. They alleged that the Defendant had been in occupation of adjacent land parcel and had co-existed harmoniously with the Plaintiff, and without lawful excuse and without consent and permission of the Plaintiff, the Defendant encroached on the Plaintiff's land and allegedly put up unlawful structures.
81. The Counsel asserted that the Plaintiff further argued that the Defendant has been informed of the Plaintiff's rights and interests over the suit property but it had lend a deaf ear and persisted on its interference. Thus they sought for the above order.
82. In bid to prove its case, the Plaintiff invited a total of 3 witnesses who testified in its favour. PW - 1 - the Land Registrar Mombasa, one Josephine Mnyanzi Rama, P/I No. 2015000316, stated that she had been a Land Registrar in Mombasa since the year 2019. She said that it was her office which held records on land for the County. That the Plaintiff held title in respect of MOMBASA/BLOCK/ IX/238 and green and white card reflected that the Plaintiff was the registered as owner of the subject parcel. However, the Counsel pointed out that PW - 1 did not allude he alleged sub - division of the suit land as alleged by PW - 3.
83. She equally stated that the file had a Deed of Indemnity and the register of the suit land went through reconstruction of the white and green card which were missing. That the same were gazetted vide Gazette notice number 9949218 of 28//2018. According to her, no objection was raised on the intention to reconstruct the Register. On cross – examination, PW - 1 stated that the documents in correspondence file had a copy of the file, copy of the lease, Grant of Letter of Administration issued on the 23/2008, letter of commissioner of Lands addressed to the Land Registrar dated the 5th May, 2005, the Kenya gazette. She stated that the reason they had a white card was because the parcel was a government land. She added that there was neither Letter of Allotment nor allocation of land in the file. She stated that the purpose of the Deed of indemnity is not necessarily to indicate that the land was allocated irregularly. She confirmed that a company could not have any interest land before registration (incorporation).



84. In re – examination, PW – 1 affirmed that the Land Registrar issued a title deed on strength of the instruction from the Commissioner of Lands and now days the National Land Commission. She assessed that the Lease document was dated 18th August 1995. That the gazette notice was to notify all the public for them to raise any objection but none was noted.

85. PW - 2 was one Beatrice Mgoi Mbela a holder of the national identity card bearing I/D number 1808160. She was a director of the Plaintiff. She stated that her husband was deceased. That the Plaintiff had been on the lands since the year 1990. That they conducted due diligence. She stated that they did a Deed of Indemnity as the lease was missing and that, after gazettement, no one came up with the objection. It was in the year 2007, that her husband passed on and they went through succession process and got the Grant Letters of Administration. She stated that the company was incorporated in 1991

86. On cross examination, PW – 2 informed Court that the Deed of Indemnity showed that the company was allocated land on the 18th day of July, 1991. She confirmed that she did not have a Letter of Allotment. She claimed the land was first allocated to her husband and transferred to the company.

87. She stated that the documents touching on their ownership are at the department of lands. She stated that the company was incorporated in September, 1991, and clearly, the company did not exist at the date of the alleged allotment but she could not answer how it acquired land before it was incorporated.

88. That the documents given to the Government (Land office Mombasa Registry) were supplied by Highland Plaza. That the lease was registered in the year 2004.

89. She stated that the Defendant was issued with a letter of allotment in the year 1987. According to the Letter of Allotment, it was the Defendant who was given the parcel in disputant. She stated that they had been on the land since the year 1991 but there were other squatters on the land too.

90. PW – 3 was a Land Surveyor – one Abas Walib. He confirmed and stated that he worked at the offices of the County Survey office and he stated to have undertaken to establish the boundary of parcel 238. He stated that parcel number MOMBASA/BLOCK IX/238, had been sub - divided into parcel numbers 446 – 459 but he was not aware of the owners or persons who sub - divided the land and neither was an evidence availed before the court. That the Defendant was in occupation of now what exist as 447, which was originally part of parcel 238. He stated that he was not sure of the acreage that the school occupied.

91. He stated that he was not aware who undertook sub - divisions and he was equally not aware that the purported sub - division was cancelled. He stated that he was not sure whether parcel 238 existed as it was. He said that there was a children's home and school on the ground but he was not aware of the acreage they occupied. He stated that there were more structures on the ground but he was not aware of the identity of the owners.

The Defence & Counter – Claim

92. The Defendant on the other hand mounted Defence vide the statement of the Defence and Counter - Claim dated the 30th day of June 2022, wherein the same denied the claim advanced by the Plaintiff and allegations advanced in the Plaintiff and invited the Plaintiff to strict proof and equally mounted Counter - Claim making the afore - stated prayers.



The Defendant's case

93. The Defendant lined up two witnesses, that is 1) DW – 1 - the Chief Land Registrar 2). DW – 2 - The current Administrator at the children facility situated on the suit land. DW - 1 testified and equally produced the documents obtained in the parcel file held at the Chief Land Registrar's office where all the records and parcel files hitherto held by the Commissioner for Land are currently domiciled. The office of Commissioner for Land was abolished upon promulgation of the new constitution and the National Land Commission briefly held brief for the subject office but the functions and role and all the records were later transferred and domiciled in the office of the Chief Land Registrar.
94. The chief land Registrar attended court to produce the parcel file touching on the allotment and ownership of parcel number MOMBASA/BLOCK IX/238, (see Exhibit 3(a-J)
95. The Chief land Registrar confirmed that the Defendant was the lawful allottee of a parcel of land otherwise known as MOMBASA/BLOCK XI 238, vide Exhibited as D3(d) Letter of Allotment referenced 75892/x/31 dated the 3rd day of February 1987. According to Exhibit 3(q) dated the 18th day of January 1988 vide item (d) parcel 238, was allocated to Child Welfare Society of Kenya Registered Trustees (F118894). He equally produced Exhibit e(b) memo dated 16th day of March 1977 (see date at the bottom of the document wherein it is stated as follows: -

“Plot N.28/X Mombasa Municipality – Chi Welfare Society of Kenya

Tea above Plot was allocated to child welfare Society of Kenya vid our letter of almost Rf 75892X/31 date 2.3.1987. Th offer was accepted and payment mad I measure 0.39Ha.

The special condition was produced as Exhibit 3(c) at Item5 reads as follows: -

“The Land buildings shall only be used for education purposes”

96. That vide the revenue receipt produced as Exhibit D3(e) reference number 180911, payment was indeed made which accords with the amount billed in the allotment letter issued to the Defendant. Exhibit 3(f) was the letter conveying acceptance of lease ref. 118894/4 dated the 19th day of February 1987, notifying the District Commissioner and the Town clerk and District Land Officer and the Mombasa Municipal valuation officer, informing them that the suit land was alienated to the Defendant. The Director of Survey was equally advised vide Exhibit D3(f)
97. The stamp duty certificate was duly issued upon payment of the stamp duty and the lease was duly forwarded to the Land Registrar Mombasa for Registration and Memorandum of Registration duly generated in favour of the Defendant.
98. The Witness stated that the land was allocated to the Defendant and the Plaintiff had never been allocated the suit land and the documents being uttered by the Plaintiff did not originate from the Land Commissioners office or the office of chief land Registrar.
99. DW - 2 confirmed that the suit land belonged to the Defendant as they were on the since the establishment of the branch in the year 1956, and the Government allocated it land for purposes of protection of vulnerable children who are homeless and in need of care and protection.
100. The Director of survey reverted vide the letter reference number CT/VOL 15/1854, directed to the Commissioner of Lands of Mombasa municipality advising of the completion of the survey process they undertook and generated RIM No.211/1.



101. That the Mombasa Branch of the Defendant in Mji wa Salama was established in the year 1954 and the children home was established in 1971, as narrated by DW - 2 as a consequence to which the suit property was allocated to it be the Government vide the written statement dated 1st day of July 2024, which she adopted as her evidence.
102. The Learned Counsel relied on three (3) issues to buttress his arguments in this submissions. Firstly, who was the lawful owner of the suit property and entitled the lawful owner of the suit property and who was entitled to the orders sought in the proceedings. The Counsel argued that the Plaintiff procured a registration of parcel of land otherwise know as MOMBASA/BLOCK XI/238 into her name and claimed the subject land vide the suit herein claiming it was the lawful owner.
103. The Defendant on the other hand had denied that claim and contended that the land was allocated to it for educational purposes and housing and safe keeping and protection of vulnerable children who need protection and care. The Defendant had contended that the Plaintiff and other individuals trespassed into the land and are occupying the same as squatters and the title being dangled in court by the Plaintiff was not lawfully acquired. The law on where a claim was advanced over the same parcel of land by two persons holding two sets of documents were advanced before the court, was now settled as was held in the case of “Teresia Wangari Mbugua – Versus - Jane Njeri Nduati & another [2020] eKLR: - as follows:-

“.... In this regard, the Plaintiff averred that the registration of the suit property in favour of the 1st Defendant was fraudulently done and the same ought to be impeached. 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. See case of Hubert L. Martin & 2 Others ...vs... 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 confirmed 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 this 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.

In the case of Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that: -

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



104. Secondly, who between the Plaintiff and 1st Defendant had certainly shown the root of her title? The Learned Counsel asserted that the Plaintiff's evidence was incoherent. Indeed, that PW - 2 stated as follows, in cross-examination: -

“Referred to indemnity, page 2 shows the company was allocated land on 18th July, 1991.

Referred to the letter by the Commissioner of Land dated the 5th May, 2020. I don't have letter of allotment. The letters were issued to my husband. My husband always used to pay. The land was allocated to my husband he later allocated to Highland Plaza. He paid for the land. The documents are available at the lands. The land was transferred in 1991..... the Company was incorporated in September 1991. Clearly the company did not exist but I cannot answer that question..... The documents given to the Government were supplied by Highland Plaza. The lease was registered in 2004.

105. PW - 1 also confirmed in cross-examination that the company could not acquire land before it comes into existence. DW - 1 who was an independent witness and the successor of the office of the erstwhile the Commissioner of Land, attended court and availed copy of the parcel file which showed clearly that the first entity to be allocated the suit land was the Defendant, the land was offered vide a Letter of Allotment, the same accepted the offer, payments made for both the charges required, stamp duty and other attendant requirement met in this regard. When a person's ownership to property was called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of “Hubert L. Martin & 2 others – Versus - Margaret J. Kamar (Supra) where the Court held that:-

‘A court when face 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 confirmed 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.

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106. Who between the Plaintiff and Defendant has certainly shown the root of her title? The Defendant had demonstrated that it was offered lease and accepted the offer and duly paid and undertook all the processes required and DW - 1 had availed to court memorandum of title showing that the suit property was registered in favour of the Defendant under the Registration of Titles Act as opposed to the Plaintiff whose root of title is pegged on and originated through the Deed of Indemnity. There was step by step followed culminating into the same being allocated to the Defendant and the use was restricted for education purposes the Plaintiff had not shown any change of user or for what purpose it was allegedly allotted the land.



107. The Plaintiff admitted that there was no way it could purportedly acquire the suit property by way of allotment on the 18th July, 1991, as reflected in its Deed of Indemnity which was used to initiate the construction of the green and white cards and lease in favour of the Plaintiff. The Land Registrar was also in concurrence that there was no way the Plaintiff who is a company would acquire or be allotted land before it came into existence as the Certificate of Incorporation presented to court shows that it was incorporated on the 10th day of September 1991, albeit search with the Registrar of Companies through eCitizen portal showed that the Plaintiff was incorporated on the 4th day of June 2010 vide number C. 47248. PW - 2 also stated that the documents which were used to create new records were supplied by the Plaintiff including Certificate of Lease and the same was on the basis of Deed of Indemnity. From the foregoing, it was clear that the root of the Plaintiff's title never went beyond the Deed of Indemnity and the Kenya gazette wherein it was alleged that they published the loss of title.

108. However, no proof was presented by the Plaintiff to confirm that any title ever existed prior to the gazettlement and any report was ever lodged with the police of the purported loss and title or records. The purported allotment was admitted by the Plaintiff to have been done before the Plaintiff was incorporated and the Chief Land Registrar denied that the Plaintiff or anybody else, other than the Defendant was ever allotted the suit land. On the other hand, the Plaintiff and her witness admitted that there was no way the Plaintiff would have been allocated land before it came into existence. Therefore, the foundation of the Plaintiff's title was illegal as the alleged allotment was purportedly made before the Plaintiff came into existence and the Deed of Indemnity could not therefore convey any rights or title over land and even the contention that the gazette notice publishing the loss was not objected to never helped as none could create interest in leasehold and all that was done by the Plaintiff with the assistance of Land Registrar Mombasa was null and void and an illegality which was incapable of vesting any right over the disputed land or sanitizing the Plaintiff's illegal creation of title in her favour.

109. PW - 2 appeared to have changed story, that her husband was first allotted the land and then caused the same to be transferred to the Plaintiff as no evidence was adduced before the court. The Chief Land Registrar was very clear in stating that it was only the Defendant who was allotted the suit land. This was backed by very clear evidence, which allotment was much earlier in point of time, before the Plaintiff started her process of acquisition which seemed to have been at the Land Registry in Mombasa contrary to the process whereby all leases would flow from the office of Land Commissioner down to the Land Registry at Mombasa.

110. The Defendant demonstrated to have been the first to be offered the allotment of land parcel number MOMBASA/BLOCK XI/238, and the same duly accepted and paid the required fees and the same was fully allotted but the process seems to have been sort circuited. The title issued to the Plaintiff through clever machination under unclear circumstances which was not backed by the law. The Plaintiff's ownership of title over the suit land could not clearly be demonstrated as its own witnesses had admitted that it could not have been allotted the suit land before it was incorporated. See the case of:- "Flavemart Enterprise Limited – Versus - Kenya Railways Corporation [2019] eKLR, wherein it was held as follows: -

"The same situation applies here. There is no evidence that the Plaintiff, after it's incorporation on 16th August 2011, entered into a new agreement with REAGATE DEVELOPMENT LIMITED with regard to the purchase of the suit property. On this issue, Counsel for the Plaintiff submits as follows: -"Your Lordship, the Defendant avers that the Plaintiff acquire the subject property before it was incorporated. We submit that the Plaintiff was previously operating as a business in the name FLAVEMART ENTERPRISES and later decided to change into a Limited Liability Company it went ahead to apply



for the same and paid the requisite charges. In essence the Plaintiff had already been recognized as existing before a Certificate of Incorporation was issued.” The truth of the matter however is that in the agreement dated 12th February 2011, the Plaintiff is described as FLAVEMART ENTERPRISES LIMITED and not FLAVEMART ENTERPRISES. These are two different entities and it is FLAVEMART ENTERPRISES LTD that was subsequently incorporated. Bearing in mind the fact the Plaintiff’s case is hinged on the claim that it purchased the suit property from REAGATE DEVELOPMENT LTD by an agreement dated 12th February 2011, it must now be clear that the agreement was a nullity and could not confer any interest in the suit property to the Plaintiff. The Plaintiff did not exist then. Everything that flows from a nullity is itself a nullity and cannot be allowed to stand – MACFOY – Versus - UNITED AFRICA CO LTD (1961) 3 ALL E.R 1169. The Plaintiff’s title to the suit property is therefore not protected by the provisions of Section 26 (1) of the Land Registration Act and can be impeached as sought by the Defendant in its Counter – Claim”.

111. The root of the Plaintiff’s title was a Deed of Indemnity and purported allotment before the Plaintiff’s came into existence/incorporation. Thus, the lease and all that was founded on it was an illegality and the Deed of Indemnity and purported publication of loss of title could not confer any better rights or title than the illegal alleged allotment as held in the above decision that illegal agreement could not confer any rights.
112. The law was that once allotment was made, the allotting authority could not allot to another person unless the allotment if was procedurally withdrawn as held in the decision of: - “Flavemart Enterprise Limited (Supra)” where it was held as follows: -

Thus, the Defendant was the lawful allottee and owner of the suit property as rightly held in the above cited case law. The Plaintiff’s suit should fail and the Defendant having demonstrated to be the lawful owner of the suit property was entitled to Judgement as sought in the Counter - Claim.

113. Finally, who should bear the costs of these proceedings. The costs of suit follow the event as provided in Section 27 of the Civil Procedure Act and the Plaintiff should bear both costs of the suit and Counter - Claim.
114. In conclusion, the Learned Counsel opined that the Plaintiff had failed to substantiate and prove its claim to the standard required in law and the Plaintiff’s suit should therefore be dismissed with costs. While on the other hand, the Defendant had demonstrated beyond any cloud of doubt that it is the lawful allottee of the suit property and thus entitled to quiet use and possession of the suit property and Judgment should be entered as prayed in the Counter - Claim with costs payable to the Defendant.

VII. Analysis and Determination

115. I have keenly assessed the filed pleadings by the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provision of the Constitution of Kenya and the statutes.
116. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. There are: -
 - a. Whether the suit properties (Plot No. Mombasa/ Block IX/238) were lawfully allocated to the parties herein.
 - b. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
 - c. Whether the Defendant is entitled to the orders sought in the Counter - Claim.



d. Who bears the costs of the suit?

ISSUE No. a) Whether the suit properties (Plot No. Mombasa/ Block IX/238) were lawfully allocated to the parties herein

64. The Site Visit report

65. As indicated above, the Honourable Court prepared a report after conducting the visit. Below is the full report reproduced verbatim for ease of reference.

REPUBLIC OF KENYA

ENVIRONMENT & LAND COURT AT MOMBASA

ELC. NO. 026 OF 2022

HIGHLAND PLAZA LIMITED

VERSUS –

CHILD WELFARE SOCIETY LIMITED

THE SITE VISIT (“Locus In Quo”) REPORT CONDUCTED AT MJI WA SALAMA AT TUDOR AREA WITHIN THE COUNTY OF MOMBASA ON 14TH JULY, 2023 AT 3.30 P.M.

I. Introduction.

- a. The team arrived at the site at around 3.30pm. It was briefed by the Judge on the main purpose of the site visit (“Locus in Quo”) and the manner in which to conduct themselves.
- b. The site is situated close to ten Kilometers within the township of the Main Island of Mombasa, just before the Kibarani bridge off on the way to the Moi International Airport, Mombasa, at Tudor Estate.
- c. Thereafter, the Honourable Court has prepared a Site report. It has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

II. Present.

1. Court.

- a. Justice Hon. Mr. L. L. Naikuni, Judge, the ELC No. 3.
- b. M/s. Yumna - the Court Assistant.
- c. Mr. George Omondi – the Judge’s Usher.
- d. Mr. John Mwaniki – Driver – Judiciary.

2. The Plaintiff.

- a. M/s. Omboga Advocate holding brief for M/s. Karanja – the Plaintiff’s Advocate.
- b. Mr. Gerald Mbaga.
- c. Mr. Mbela Lusweti.

3. The Defendant



- a. Mr. M.O. Otieno Advocate appearing together with Mr. O.S. Ochieng Advocate.
- b. M/s. Nora Okonda – Branch Administrator for Mji Wa Salama Child Welfare Society of Kenya.

4. The experts.

- a. Mr. Sospeter Ohanya – A Licensed Surveyor (NLC).
- b. Mr. Charles K. Ngetich – Deputy Chief Land Registrar. (Hereinafter referred to as “The Team”).

5. The Security Operatives

- a. Corporal Thiongo James – County Head Quarters.
- b. Robert Mongera – Judicial Police Unit.
- c. PC. Allan Oketch – Tononoka.
- d. PC. Albanas Kimathi Makupa Police.
- e. APC. John Mwaura – Mvita Police.
- f. PC. Michael Ero – Makupa Police.
- g. PC. Lilian Katama – Makupa Police.
- h. Edwin Kipsang – Makupa Police.
- i. Tsuma Mangale – The Area Chief.

III. The Purpose.

6. The Court informed the team the purpose of the site visit. It indicated that this was pursuant to a Court made on 25th April, 2023 in accordance with the provision of Section 173 of the Evidence Act, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 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”

While the provision of Order 40 Rule 10 (1) (a) provided 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.

IV. The Procedure

6. By consensus of the parties, they agreed that the Site Visit be conducted led by the Land Surveyor for the National Land Commission (NLC). The Surveyor was to provide the leadership during the Site Visit as an expert. It was agreed that the procedure upon which the site visit was to be as follows:-



- a. The use of a Topographical Map (Survey Plant Electronic) Sheet from the Survey of Kenya described as FR 205/134 dated 27th February, 1991 was used as a guide. It was the survey number 232
- b. The use of the GPS Satellite Google earth images.
- c. Walking a round the whole of the suit land. In so doing, it would identify the planted beacons hence establishing the boundaries of the suit land.

6. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.

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

8. Further, the parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media.

IV. The Observations.

6. Upon conducting an intensive inspection of the land suit the team arrive at the following observations. These are:-

- a. The place consists of well built structures. The area is full of permanent and old structures. It has a separate, neat and cleaned up compound. On it, there existed a storey building for Child Welfare Children. The team learnt there were all indication of an organized institution operating in there. It was for the welfare of children particularly the destitute – abandoned families and orphans.
- b. There is a wide playground. The team was able to witness a close to 220 to 353 children. They were all residing there. Most of them were playing.
- c. Generally, due to the congested buildings all squeezed within the small parcel of land, it was rather difficult to identify the beacons. Despite of this, the team would identify a few of them.
- d. The area was identified as K5, GM1, FK2, 3A and KE6 as shown from the sketch map herein below.
- e. Area size measures approximately 0.389 Hectare (an 1 acre or thereabout).

DMI FK2

Rhombus Shape

238

0. 389 3A



- f. The surrounding area comprised of Tudor Primary school and a tarmac road leading from main road and the Kenya Ports Authority staff quarters.
- g. 1st Beacon was marked as KE - 6 though it could not be visible as the area had been built with structures. Indeed, as stated above, none of the beacons could be seen due to the constructions on the land.
- h. There was presence of agricultural and livestock activities taking place within the suit land. For instance, there were a few herds of grade dairy cattle and cow shed; goats, presence of grown and old stamps of bougainvillea, mango, Mkilifi, assorted trees e.t.c.
 - i. There was a well built perimeter wall providing a boundary between the Child Welfare and other persons.
- j. On the other side of the perimeter wall erected by the Child Welfare, there were several story building apartments. The team was informed that one of them was by the name Mohamed who was a third party.
- k. Further, on the left hand side of the land was a constructed Safaricom 150 feet high telecommunication mast. It was surrounded by an 8 feet high concrete well raised perimeter wall for securing the mast with a small metallic gate.
- l. Plot No. DM - 1 is outside across the road heading to the KPA quarters which the team learnt belonged to a person called Kenyatta.
- m. The other beacon was on a five floored storey building with several apartments which the team learnt that it belonged to a person called Ondiek. The team learnt it was for rental houses and all were full of tenants. There was a large septic sewerage underground tank.
- n. All the structures were within Plot no. 238 and they have a case with the owners.
- o. There were several small kiosks for retail of the usual daily consumables such as bread and milk was one water supply vendor structure.
- p. All these people were claiming proprietary rights to the suit land.

V. The Conclusion of the Site Visit

- 6. At the conclusion of the site visit, the Honourable Court provided the team with the following directions:-
 - a. That all the parties were granted 14 days leave to file and serve any further documents which they wished.
 - b. That the parties directed to undertake official search to fully establish the status of the suit land and particularly the third parties/occupants on to enable them move Court seeking for appropriate reliefs for joinder of all the affected parties.
 - c. That any parties to be at liberty to consider joining any other party into the matter. For instance, Mr. Muarabu, Mr. Ondiek Evans e.t.c into the suit to avert the principles of natural justice and the right of fair hearing as was enshrined under the provision of the Articles 25 (c) and 50 ((1) & (2) of the Constitution of Kenya, 2010.



- d. That there be a mention of the matter on 26th July, 2023 for conducting a final Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and for expediency sake a hearing be held on 20th September, 2023.
- e. That the Land Surveyor to supply court with the Map and a small brief on the site visit.
- f. That the Honourable Court to prepare and supply all the parties with the final Site Visit report accordingly preferably before the hearing date.

There being no other business, the site visit was concluded at 5.00pm by a word of prayer.

THE SITE VISIT REPORT DATED AND SIGNED AT MOMBASA THIS15TH
DAY OFJUNE..... 2023.

.....

HON. JUSTICE L.L. NAIKUNI
ENVIRONMENT & LAND COURT AT
MOMBASA

- 117. Under this sub – title, the Court notes that the main substratum touches on and concerns the ownership over and in respect of the suit property which is currently referenced as Plot No. Mombasa/ Block IX/238. Consequently and insofar as the dispute touches on the legal ownership of the suit property. Therefore, its imperative to trace the origin and the initial allocation pertaining to and concerning what now constitutes the suit property.
- 118. To begin with, the Court observes that land in Kenya has been categorized under the provisions of Articles 62, 63 & 64 of the Constitution of Kenya, 2010 into three classifications – Public, Private and Community land. It is not in dispute that the suit land was Government land. Thus, the Honourable Court will critically examine on the aspects of the availability of the suit land for its allocation; the acquisition process, the registration of land and its effect in Kenya. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya. Section 7 states that title to land may be acquired through: -
 - i. Allocations;
 - ii. Land Adjudication process;
 - iii. Compulsory acquisition;
 - iv. Prescription;
 - v. Settlement programs;
 - vi. Transmissions;
 - vii. Transfers;
 - viii. Long term leases exceeding Twenty one years created out private land; or
 - ix. Any other manner prescribed in the Act of Parliament
- 119. The efficacy on the registration of land are governed under the provision of Sections 24, 25 and 26 (1) of the Land Registration Act, No. 3 of 2012. The registration of person as a proprietor vests in them the absolute rights and privileges. Section 24 provides that: -



Subject to this Act:-

- (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

120. Section 25 of Land Registration Act, No. 3 of 2012 provides that:-

Rights of a proprietor.

- (1) “The rights of proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”.

121. According to the provision of Section 26 (1) of the Land Registration Act (2012), it provides as follows:

“A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.

Section 26(2) provides that:-

“certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original”.

122. From the filed pleadings and the proceedings, there is no doubt that the suit property was Government land which were in the years 1993 to 1995 the law governing Government Land were the Government Land Act, cap. 280 and the Physical Planning Act, Cap. 303. Unalienated land would have to be set aside industrial, residential or commercial purposes. A Part Development Plan (PDP) (a smaller portion of the land) would have to be prepared from a Development Plan (DP) (a larger portion of the land). The procedure for the preparation of the PDP was provided for under Section 9 of the GLA for land where land was not required for public purpose the Commissioner of Lands would cause for the said land to be set aside. However, public purposes was not defined under Government Land Act, Cap. 280. The Town Land Adviser (Now Director) was called to plan and given an authority. The Director of Physical Planning would visit the ground and prepare a PDP and circulate it to various authority for comments from the DC, Clerks to the Local authorities and the Land Registrar. Once the comments were received by the Director would then hand them to the Commissioner of Land’s approval. Once that was done, the Commissioner of Lands would return a signed copy to the Director Physical Planning to enter to the register as the APPROVED PLAN in the register. Then the Director



of Physical Planning would send the Approval Planning and number to the Commissioner of Land. A PDP has a legend and it states the purposes and the sizes of the land. There is always a note whether the approval supercedes it or not; the dates and the words PDP; the names of the person who prepared it; the dates of the preparation and the reference numbers; the person who drew it; and the name of the Director who approved the PDP and the PDP approval numbers. If the PDP does not have an APPROVED PLAN numbers then it cannot be used to alienate a public land.

123. In this regard, there was no such evidence was shown having been applicable by the Plaintiff prior to the acquisition of the suit land. Indeed, the ownership of the leasehold title to the suit property are challenged. This was the reason the Plaintiff instituted this suit against the Defendant. The Plaintiff averred that it is the proprietor of the Leasehold interest comprised in the parcel of the suit property being the first registered owner. Until recently, the Defendant has occupied the plot neighbouring the suit property and has co-existed harmoniously with the Plaintiff/Applicant. The Defendants had now without lawful excuse and/ or without consent or authority of the Plaintiff encroached upon the Plaintiff's land and put up unlawful structures thereon and intends to occupy the same.
124. 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. See the case of "Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar (Supra)", 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."

125. However, this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures as stated out under the provision of Section 26(1) of the Land Registration Act, No, 3 of 2012. As may be observed, the law is extremely protective of title and provides only two instances for the 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 illegally, un-procedurally or through a corrupt scheme.
126. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
127. This case hinges on a classic "double allocation" of the same parcel of land, Mombasa/Block IX/238, by the government. The court must determine which party has a lawful claim.
128. To this end, it is worth recalling that the Plaintiff's case and claim is based on a Certificate of Lease dated 17th May 2004. This was issued upon filing of Deed of Indemnity arising from the loss of the white and green cards. They presented a reconstructed title deed (Green Card/White Card) after gazetting its loss



and there being no objection raised. On this end, whether a Certificate of Lease existed or not is a matter of conjecture. Indeed, the Learned Counsel for the Defendant contended that there never existed any such Certificate of lease at all presented by the then Commissioner of Lands as was required by law in the first place and what was the root of the title for the Plaintiff was the mere Deed of Indemnity. They also presented a surveyor's report (PW - 3) which, while establishing boundaries, was inconclusive on the core issue of ownership and even suggested the original plot had been sub - divided. The court notes that they hold a formally registered instrument of title. Under Section 26 of the Land Registration Act, a certificate of title is *prima facie* evidence of ownership and can only be challenged on specific grounds, like fraud or misrepresentation.

129. What the Court notices though is that the Land Registrar (PW - 1) confirmed the company was incorporated in September 1991. However, their own Deed of Indemnity and testimony (PW - 2) state the land was allocated to the company in July 1991. A company cannot receive an allocation before it legally exists. See the case of "Flavemart Enterprises Limited (Supra)" cited by the Learned Counsel for the Defendant. This severely undermines the legitimacy of their root of title.
130. I also note that there was lack of a Letter of Allotment evidence by the evidence of PW - 2 (a director) who admitted they did not possess the crucial Letter of Allotment, which is the foundational document for any allocation of government land. She stated her late husband handled it, but no copy was produced in court. PW - 2 also admitted that she had no board resolution to represent the company and her confusion about the company's separate legal identity damaged her credibility.
131. On the other hand the Defendant's case is built on prior occupation and a letter of allotment dated 3rd February, 1987. There was also proof of acceptance and payment of the stand premium (Receipt No. B 180911 dated 10th February 1987). I also take note that there was a letter from the Commissioner of Lands to the Director of Surveys (19th February 1987) instructing them to facilitate the survey and registration for the Defendant.
132. The testimony from the Deputy Chief Land Registrar (DW - 1) who audited the file and found no documents supporting the Plaintiff's allocation in the central registry in Nairobi. He testified that the lawful allocation was to the Defendant and implied the Plaintiff's documents originated from a potentially corrupt process at the district level.
133. I take notice that their allocation in year 1987 predates the Plaintiff's lease by 17 years and is supported by a complete paper trail. The Defendant also provided evidence of prior and continuous occupation being that they had been on the land since year 1956 establishing a children's home there in year 1971. This physical possession to this Court is a powerful fact in the favour of the Defendant. The Defendant also went ahead to call DW - 1, a senior, neutral government official, directly challenged the validity of the Plaintiff's title based on official records.
134. The Court also takes notice that the Defendant did not hold a formal Certificate of title/lease. DW - 2, their administrative officer, could not produce an official search in their name, relying instead on the allotment paperwork.
135. I have previously in this Judgment analyze the input of Section 26 of the Land Registration Act, No. 3 of 2012. The Plaintiff's title is challenged. The evidence of a prior allotment to another party (the Defendant) and the anomaly in the Plaintiff's incorporation date provide strong grounds to impeach the Plaintiff's title. The doctrine of prior allocation is being raised in this instant suit. Once the government lawfully allocated the land to the Defendant in year 1987 and the Defendant accepted and paid, the government's interest in that specific parcel was spent. It was not available for a second allocation to the Plaintiff in 1991/2004.



136. Further I take recognition that there had been adverse possession as per the *Limitation of Actions Act*. The Defendant argued this in their Counter - Claim. Having been in open, continuous possession since at least 1987 (well over 12 years), any right of action by the Plaintiff (or anyone else) to recover the land would be statute-barred under the *Limitation of Actions Act*, Cap. 22.

137. From the totality of the evidence tendered. It is evident and apparent that the central question is which party lawfully derived its interest from the government. The Defendant has produced a Letter of Allotment dated 3rd February 1987, proof of acceptance, and a payment receipt dated 10th February 1987. This constitutes a valid and complete allocation process. Furthermore, the Commissioner of Lands' letter to the Director of Surveys on 19th February 1987 confirms this allocation and sets the process of formalization in motion.

138. The Plaintiff, a private individual, on the other hand, bases its claim on a Certificate of Lease issued in 2004, stemming from an alleged allocation on 10th July 1991. However, PW - 2, the Plaintiff's director, admitted the company was not incorporated until September 1991. This casts heavy doubts on the legality of the title. A company cannot receive an allocation of land before it is legally constituted. This fatal inconsistency irreparably taints the Plaintiff's root of title. Furthermore, as already raised and explained to details herein above the acquisition of the suit property which was Government land has been highly questionable.

139. Be that as it may, the Plaintiff failed to produce any empirical documentary evidence to this effect being a copy of the PDP, approvals or consents or the initial Letter of Allotment, which were the bedrock of any claim over government land. Critically speaking, the main bone of contention by the Plaintiff to counter the claim by the Defendant through its Counter – Claim was merely to the fact that the Defendant never presented an application to be allocated the suit land being Government land. According to the Plaintiff, instead of presenting the said application, they admitted that unlike themselves, the Defendant only had a Letter of Allotment. Hence, the Plaintiff vehemently argued that their claim should be a nullity.

140. On the contrary, the Defendant, which is a public entity, presented an extremely solid and firm case. In particular, the testimony of DW - 1, the Deputy Chief Land Registrar, was compelling. His audit of the central file in Nairobi revealed no documentation supporting the Plaintiff's allocation, while the Defendant's allocation was properly documented and which were all produced as exhibits. This leads the court to a finding that the Defendant's allocation was lawful and regular, while the Plaintiff's purported allocation was irregular and unlawful. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land.

141. Under the provisions of Sections 107 to 109 of the *evidence Act*, the burden of proof is on the parties to prove that they lawfully acquired the interest in land for the suit property. To my mind, upon the allocation and/ or allotment of the designated plot to and in favour of the Defendant in 1987, the Defendant became the lawful and legitimate owner of the designated properties. By the time the Plaintiff was allotted the said land there was no interest in land to be passed to the plaintiff as the Defendant had already complied with the conditions of the said allotment letter. I find that the Plaintiff have not discharged the burden of proof and demonstrated to the required standard of proof that the allocation of the suit land and subsequent registration of the said property was lawfully done. That being said, the Plaintiff's subsequent acquisition of a title was irregular, unlawful, and null and void.

ISSUE No. b) Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

142. Under this sub - title, the Honourable Court is called in point to examine if the Plaintiff is entitled to the orders sought in the Plaintiff. The Court observes that the Plaintiff's entire case rests on its Certificate



of Lease. However, for the reasons stated above, this title is impeachable under Section 26 of the Land Registration Act. It was obtained through an irregular process and is founded on a factual impossibility (allocation to a non-existent entity). The first and paramount duty of this court is to do justice, and it will not allow an instrument of title, however formal, to sanctify an unlawful acquisition.

143. Consequently, the claims for declaration of ownership, injunction, eviction, demolition, and damages for trespass must fail. The Plaintiff has not proved its case on a balance of probabilities.
144. In the foregoing, it is the finding of this Honourable Court that the Plaintiff's suit is devoid of merit and is hereby dismissed with costs.

ISSUE c) Whether the Defendant is entitled to the orders sought in the Counter - Claim

145. Under this sub title, the Honourable Court shall analyze and make a determination on whether or not the Defendant has made out a case for the grant of the orders sought in the Counter claim. The Defendant has successfully proven it is the lawful allottee of the Suit Property. It has also demonstrated decades of continuous, open, and peaceful occupation of the land for a charitable purpose, dating back to the year 1956.
146. In the foregoing I find that the prayers in the Counter - Claim are well founded. The Court hereby grants the prayers as sought in the said Counter - Claim with regards to Prayers 1, 2, 3 and 5. Given the success of the primary prayers, the alternative prayer 4 on a claim of adverse possession is rendered moot and need not be determined.

ISSUE No. d) Who bears the costs of the suit?

147. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By the events it means the result and outcome of the legal proceedings and/or action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhamed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
148. In the case of:- "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held:-

"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

149. In the instant case, while the Plaintiff has failed to establish its case as per the required, the Defendant has been the successful party and thus is entitled to the costs of this suit and the Counter - Claim.



VIII. Conclusion and Disposition

150. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has not established its case against the Defendant with regards to the Plaintiff and the Defendant has proved their case against the Plaintiff in the Counter - Claim. Thus, the Court proceeds to make the following specific orders:

- a. That the suit by the Plaintiff by way of a Plaintiff dated 3rd March, 2022 be and is hereby dismissed with costs.
- b. That Judgment be and is hereby entered in favour of the Defendant as per the Counter - Claim dated 30th June, 2022 in terms of prayers (1), (2) and (3) of the Counterclaim with costs.
- c. That a declaration do and is hereby made that the Defendant is the lawful allottee and has acquired valid interest over property known as Mombasa Municipality Block IX/238 from the Government and is entitled to absolute ownership, possession and occupation thereof to the exclusion of the Plaintiff.
- d. That a permanent injunction do and is hereby issued restraining the Plaintiff whether by its directors, agents, employees, and or servants or otherwise howsoever acting on its instructions from trespassing, remaining upon, alienating, charging, leasing, disposing of, or in any manner howsoever interfering with the Defendant's right as to ownership, occupation, quiet and peaceful possession and utilization of property known as Mombasa Municipality Block IX/238.
- e. That a declaration be and is hereby made that any purported title documents held by the Plaintiff relating to all that property known as Mombasa Municipality Block IX/238 are illegal, null and void and stand revoked forthwith.
- f. That the costs of the suit and the Counter - Claim to be borne by the Plaintiff.

It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED
AND DATED AT MOMBASA THIS7THDAY OFNOVEMBER.....2025.**

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT

MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Mummin Advocate for the Plaintiff.



c. Mr. OM Otieno Advocate for the Defendant.



<https://new.kenyalaw.org/akn/ke/judgment/keelc/2025/7747/eng@2025-11-07>