

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**CONSTITUTION PETITION NO. E007 OF 2022**

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR COURT UNDER ARTICLE 23 (1), ARTICLE 162 (1), (2) (b), ARTICLE 165 (2) (d) (ii) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION, BREACH AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA,2010**

**AND**

**IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF KENYA,2010**

**BETWEEN**

**SHAZMEER ENTERPRISES LIMITED.....PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF  
MOMBASA.....RESPONDENT**

**R U L I N G**

**I. Introduction**

1. A Notice of Motion application dated 17<sup>th</sup> February, 2022 was filed by the Petitioner - “*Shazmeer Enterprises Limited*” against the Respondent herein on the same day by way of a Certificate of Urgency. The application was brought under the provisions of under the provision of Article 23 of the Constitution of Kenya, 2010 and Rules 3, 13,19, 23(1) and (2)and 24 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules,2013 (“The Mutunga Rules”).

## **II. The Petitioner/Applicant’s case**

2. The Petitioner/Applicant sought for the following orders:

**(a) Spent.**

**(b) Pending the hearing and determination of this application inter partes, there be and is hereby issued a conservatory order to prohibit and restrain the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as Mombasa/M.S/BLOCK 1/1674.**

**(c) The Officer Commanding Station (OCS) of Likoni Police Station to ensure compliance with this court’s orders herein and that peace and law and order is maintained at all times.**

**(d) Pending the hearing and determination of this application there be and is hereby issued an order compelling the**

**Respondent to block the murrum access road created by the Respondent on the property known as Mombasa/M.S/BLOCK 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person.**

**(e) Pending the hearing and determination of this Petition there be and is hereby issued an order compelling the Respondent to block the murrum access road created by the Respondent on the property known as Mombasa/M.S/BLOCK 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person.**

**(f) Pending the hearing and determination of this Petition there be and is hereby issued a conservatory order to prohibit and restrain the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/M.S/BLOCK 1/1674.**

**(g) Costs of this application be borne by the Respondent.**

3. The Application was premised on the grounds, testimonial facts and the averments founded under the 38<sup>th</sup> Paragraphed Supporting Affidavit sworn by Mr. ALNOOR HABIB JIWAN and dated the 17<sup>th</sup> February, 2022 together with the 19 annexetues

Marked as "AJ - 1 to 19" annexed thereto. He deposed as follows:-

- i. He was a Director of the Petitioner Company, aware of the facts herein and duly authorized to swear this Affidavit.
- ii. The Petitioner/Applicant was the registered owner of the leasehold interest of the property known as Mombasa/MS/BLOCK 1/1674 situate in Likoni in Mombasa County (hereinafter "The Suit Property"). Annexed herewith and marked as "AJ - 2" was a true copy of the Certificate of Lease.
- iii. The Petitioner owned the suit property for leasehold term of 99 years with effect from 1<sup>st</sup> July 1992 from the Government of Kenya. Annexed herewith and marked as "AJ - 3" were a true copy of the Lease.
- iv. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide access road cutting through the suit property. Annexed herewith and marked as "AJ - 4" were a true copy of a Survey Report dated 10<sup>th</sup> June 2016 which does not show the road; marked as "AJ - 5" and "AJ - 6" respectively were photographs and a survey Report dated 7<sup>th</sup> February 2021 both showing the access road after it was created by the Respondent and marked as "AJ 7" was a Certificate of Photographs.

- v. The road was created illegally because the suit property is not a public property or a road reserve and has no provision for the access in the official map. Annexed herewith and marked as "AJ - 8" was a true copy of the official map which did not contain the access road.
- vi. The creation of the public access road on the suit property was done by the Respondent illegally because it was not authorized and sanctioned by the Petitioner/Applicant and the road was created on a private property belonging to the Petitioner/Applicant.
- vii. The Respondent trespassed on the suit property by illegally accessing the same, entering thereon and creating the access road.
- viii. Vide a letter dated 31<sup>st</sup> December 2021, the Petitioner/Applicant demanded that the Respondent desists from the trespass and its illegal acts but the Respondent declined to comply. Annexed herewith and marked as "AJ - 9" was a true copy of the Petitioner's letter dated 31<sup>st</sup> December 2021.
- ix. Previously, there had been numerous and spirited attempts by third parties, instigated and incited by the Respondent, to trespass upon and illegally take away the suit property from the Petitioner.

- x. Sometime in about August 2010, six (6) individuals trespassed on the suit property prompting the Petitioner to sue them in the case of "**Mombasa High Court Civil Suit no. 299 of 2010: Shazmeer Enterprises Limited - Versus - Mwinyi Dao & 5 others**" in which an order was issued on 16th July 2012 by Justice M.K Ibrahim (as he then was) to restrain the Defendants from trespassing on the suit property. Annexed herewith and marked as "AJ 10" is a true copy of the Ruling delivered by Justice M.K Ibrahim on 16<sup>th</sup> July 2012.
- xi. The National Land Commission attempted to repossess the suit property from the Petitioner through a Notice published in the Daily Nation Newspaper of 23<sup>rd</sup> January 2018 requiring the Petitioner to vacate the suit property within 90 days.
- xii. The Petitioner challenged the decision of the National Land Commission (NLC) in court vide a civil suit "**Petition No. 8 of 2018: Shazmeer Enterprises limited - Versus - the National Land Commission**" in which a judgement was delivered in the Petitioner's favour by Justice C.K Yano on 31<sup>st</sup> October 2019 and the Notice by the NLC was quashed. Annexed herewith and marked as "AJ 11" is a true copy of the judgement delivered by Justice C.K Yano on 31<sup>st</sup> October 2019.
- xiii. Before creating the impugned access road, the Respondent herein had previously claimed that there was an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. In order to achieve its ulterior objective and advance the false narrative that there is an access road

passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner.

- xiv. Sometime in February 2019, following the incitement and instigation by the Respondent, the local residents under the umbrella body known as Likoni Community for Development organised a demonstration against the Petitioner on the allegation that the Petitioner had blocked an alleged access road which was supposed to pass through the suit property to the Likoni Ferry. Annexed herewith and marked as "AJ 12" is a true copy of an undated letter written by Likoni Community for Development notifying the OCS of Likoni Police Station of the demonstration. Further and in addition, the Respondent has been working with the NLC under the guise of unblocking public access road allegedly passing through the suit property. Vide a letter dated 24<sup>th</sup> March 2016, the Respondent working in cahoots with the NLC expressed its intention to unblock a purported access road on the suit property.
- xv. The Respondent, despite threatening and frustrating the Petitioner, did not execute its threats because we protested its actions. The matter then went quiet for about for (4) months until 29<sup>th</sup> July 2016 when the Respondent wrote to various Government officers and instructed them to open the alleged access road on the Petitioner's property. Annexed herewith and marked "AJ 13" is a true copy of a letter dated 29<sup>th</sup> February 2016 by the National Land Commission,

marked as “AJ 14” is a true copy of the Respondent's letter dated 24th March 2016 and marked as “AJ 15” is a true copy of the Respondent's letter dated 29<sup>th</sup> July 2016.

- xvi. The letters mentioned in the preceding paragraphs, written by the Respondent, the NLC and the Likoni Community for Development erroneously referred to Plot Number CR 393/MS/1 while the intended property was the suit property herein owned by the Petitioner. The letters referred to above were addressed to ALBA PETROLEUM which was a sister to the Petitioner/Applicant's Company and which companies were both owned by myself. The letters were served upon myself as the owners of the two companies. The Respondent together with other Government entities such as the NLC and the local residents of the Likoni area have piled immense pressure on the Petitioner to open a public road on the suit property yet none exists thereon.
- xvii. Due to the fact that the suit property was not fenced at the material time, members of the public found it convenient to pass through the property on their way to Likoni Ferry. As a result, a small footpath was created on the suit property. In order to prevent the footpath from becoming a major public access road, we decided to erect a boundary wall around the property in the year 2012. The construction of the boundary wall was duly approved by Municipal Council of Mombasa, the Respondent's predecessors. Annexed herewith and marked “AJ 16” is a true copy of a letter dated 25<sup>th</sup>

September 2012 by the Town Clerk of Municipal Council of Mombasa confirming the approval.

- xviii. In the said letter dated 25<sup>th</sup> September 2012, the Town Clerk of the defunct Municipal Council of Mombasa confirmed that there was no road reserve on the suit property save for power line and telephone way leave. In order to be certain that there was no road reserve on the suit property, the Petitioner commissioned a Government Surveyor to undertake a survey and give a detailed report. Annexed herewith and marked "AJ 17" was a true copy of the Petitioner's letter dated 17<sup>th</sup> September 2012 addressed to the Government Surveyor.
- xix. The Provincial Surveyor undertook survey of the suit property on 18<sup>th</sup> September 2012 which clearly indicated that there was no access road through the suit property. Annexed herewith and marked "AJ 18" is a true copy of the Survey Report by the Provincial Surveyor dated 26<sup>th</sup> September 2012. The said Survey Report by the Provincial Surveyor clearly indicated that the footpath running through the suit property was not official and could therefore not be used. Despite the survey reports by both the private and Government surveyors showing that there is no access road through the suit property, the Respondent had always insisted that there was a public access road cutting through the suit property which the Respondent had always threatened to unblock and open.

- xx. The Respondent put its threats into reality on or about 30<sup>th</sup> December 2021 when the Respondent through its employees visited the suit property and used a tractor to create a murrum access road cutting through the suit property. Refer to the photographs and Survey Report and marked above as “Aj 5” and “Aj 6” respectively. The Respondent’s actions of creating a public access on the Petitioner’s private property was illegal and in violation of the Petitioner’s constitutional rights to property. Further the Respondent’s actions of creating a public access road on the Petitioner’s private property amount to compulsory acquisition of the Petitioner’s private property from public use without paying any compensation to the Petitioner.
- xxi. The Respondent, its employees and agents have made it impossible for the Petitioner to quietly and peaceably occupy, use and enjoy the suit property through the following actions of the Respondent:
- i. Creating public access road on the suit property when there is none.
  - ii. Inciting members of the public and the local residents of Likoni to demonstrate and rebel against the Petitioner.
  - iii. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
- xxii. On 27<sup>th</sup> January 2022, one of the officers from the Respondent’s Lands, Planning and Housing Department by the name of SAID MAASUD accompanied by Likoni member of County Assembly (MCA), MWAKA BAKARI aka MAMA

MWAKA stormed the suit property in the company of angry mob and removed the temporary barrier which the Petitioner had put in place to block the murram access road illegally created by the Respondent. They harassed and threatened the Petitioner's employees who were guarding the suit property. Annexed herewith and marked as "AJ 19" were photographs showing the named persons on the suit property and jointly marked as "AJ 20" were statements of the Petitioner's witnesses who witnessed the trespass and invasion by the named persons.

- xxiii. The Respondent had permitted members of the public to use and access the road created on the suit property hence there is a need to compel the Respondent to block the road and stop members of the public and other persons from using the said road. It is in the interest of justice that the orders sought herein are granted to protect and safeguard the Petitioner's constitutional rights to own, occupy and use the suit property without any interference from the Respondent, its employees, agents or any other person acting on behalf of the Respondent.

### **III. The Respondent's case**

4. In a 5 Paragraphed Grounds of Opposition dated 30<sup>th</sup> March, 2022 the Respondent raised opposition against the Notice of Motion dated 17<sup>th</sup> February, 2022 as follows:-
- i. The orders sought are crafted in such a manner that if granted, they will effectively determine the whole suit as they are more of orders for a mandatory injunction.

- ii. The Applicant has not demonstrated how failure to grant conservatory orders affects the substratum of the petition.
- iii. It is evident that the Applicant seeks conservatory orders to protect private interests while jeopardizing the interests of members of public.
- iv. The Applicant has failed to demonstrate the irreparable loss that will occur if the orders sought are not granted pending the hearing and determination of the Petition.
- v. The Application lacks merit and should be dismissed.

#### **IV. SUBMISSIONS**

5. On 3<sup>rd</sup> October, 2022, while all the parties were all in court it was consented to canvassing that the Notice of Motion application dated 17<sup>th</sup> February, 2022 by way of written submissions and a ruling date was set on Notice. All the parties filed their written submissions.

##### **A. The Written Submission by the Petitioner/Applicant**

6. The Petitioners through the firm of Oluga & Company Advocates filed their submissions on 27<sup>th</sup> May, 2022. Mr. Oluga Advocate commenced by stating that the comprehensive and detailed written submissions by the Petitioner/Applicant herein were in

respect of their Application dated 17<sup>th</sup> February 2022 which sought the following orders:

- i. Spent.*
- ii. Spent.*
- iii. Spent*
- iv. Spent*
- v. Pending the hearing and determination of this Petition there be and is hereby issued an order compelling the Respondent to block the murram access road created by the Respondent on the property known as Mombasa/M.S/BLOCK 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person.*
- vi. Pending the hearing and determination of this Petition there be and is hereby issued a conservatory order to prohibit and restrain the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/M.S/BLOCK 1/1674.*
- vii. Costs of this application be borne by the Respondent.*

7. The Learned Counsel submitted that the Respondent never filed a Replying Affidavit but filed Grounds of Opposition dated 30th March 2022. He submitted that the brief facts were that the Petitioner is the registered owner of M/MS/Block I/1674 (hereinafter referred to as the "suit property"). On 30th

December 2021 the Respondent herein entered and trespassed into the Petitioner's property and paved a wide murram public road and thereafter threatened to. pave all the way to the ocean. As a result of the Respondent's actions including the deployment of its officers to the suit property, both the Respondent and local residents had made it impossible for the Petitioner to enjoy the suit property.

8. The Learned Counsel submitted that the Constitution provided that a person who instituted proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or was threatened may be granted "appropriate relief, including" a conservatory order under Article 23(3) (c). The applicable principles were elucidated upon by the Late Onguto, J in the case of "**Board of Management of Uhuru Secondary School - Versus - City County Director of Education & 2 Others [2015] eKLR**" as follows:

- i. Whether the applicant has demonstrated a prima facie case with a likelihood of success and that in the absence of the conservatory orders the applicant is likely to suffer prejudice;***
- ii. Whether a grant or a denial of the conservatory relief sought will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights;***
- iii. Whether if interim conservatory orders are not granted, the petition or its substratum will be rendered nugatory; and***

**iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny conservatory orders.**

9. Primarily, what was before this Honourable Court for determination according to the Learned Counsel was whether the Petitioner/Applicant had established a case for granting of the conservatory orders sought.

10. On the issue of whether the Petition has established a Prima Facie case and will suffer prejudice in the absence of conservatory orders the Learned Counsel submitted that despite filing a Grounds of Opposition the Respondent, there was nothing filed before this Court that controverts the fact that the Petitioner is the registered owner of the suit property. and that the Respondents trespassed into the property and paved a Mercadermized (Murrum) road for public use in fragrant violation of the Petitioner's constitutional right to property. In Board of Management of the case of "**Uhuru Secondary School - Versus - City County Director of Education & 2 Others (Supra)**" the Court held that the stated:

***"The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. Prima Facie case has been explained to mean that a serious question is to be tried in the suit..."***

11. The Learned Council argued that it was evident that the Petitioner's right to property was at risk of egregious infringement due to the deliberate and unlawful actions of the Respondent, who had not disputed the assertions contained in the present Application at all including the threat to pave the road all the way to the ocean. Therefore, the Petitioner stood to suffer immense prejudice should the Respondent not be stopped from acting in further violation of the Petitioner's right in respect to the suit property before the determination of the Petition. Furthermore, the issue of the Respondent's violation of the Petitioner's right was a grave matter to be determined at trial.
12. The Learned Counsel on the issue of whether granting the conservatory relief would enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights submitted that the Respondent whether by itself, its officers and/or others acting on its behalf violated the Petitioner's right to own property, and the right to be protected from being arbitrarily deprived of that property under Article 40 of the Constitution by trespassing into the suit property and deploying its officers to the suit property in furtherance of its infringement. This violation had been exacerbated by the fact that the Respondent's officers were deployed to the suit property to

perpetuate the use of the illegally paved road by the local residents. Without the Court's intervention at this stage the Petitioner's rights would continue to be violated as the Respondent's unlawful actions towards the Petitioner went unchecked.

13. On the issue of whether if the interim Conservatory orders are not granted, the Petition or its substratum would be rendered nugatory the Learned Counsel submitted that in case of ***Kitale Industries Limited - Versus - County Government of Nakuru; Kenya Railways Corporation( Interested Party) [2020] eKLR*** the Court aligned itself with the pronouncements of Odunga, J in case of ***Judicial Service Commission - Versus - Speaker of the National Assembly & another [2013] eKLR*** where he stated:

***“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”***

14. To buttress on this point, the Learned Counsel relied on the case of ***Martin Nyaga Wambora - Versus - Speaker of The County Of Assembly Of Embu & 3 Others [2014] eKLR*** the Court described the importance of this principle as follows:

**“60. To those erudite words / would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.**

**61. The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.”**

15. The Learned Counsel submitted that the danger posed by the Respondent's willful infringement of the Petitioner's right to property in the instant case was evident and remained undisputed by the Respondent. Furthermore, the Respondent has threatened to pave the road all the way to the ocean, thereby jeopardizing the Petitioner's right, access, use and enjoyment of the suit property pending the determination of the main Petition. In the case of **“Board of Management of Uhuru Secondary School - Versus - City County Director of Education & 2 Others (Supra)** the Court held:

**“29.Thirdly,flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice.”**

16. On the issue of whether public interest would be served by granting the Petitioner conservatory orders, the Learned Counsel submitted that the issue of considering public interest in

granting or denying conservatory orders were outlined by the Supreme Court in the case of **“Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 Others, Supreme Court Application NO. 5 of 2014 (2014) eKLR**, where the Court held that:-

**“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

17. The Learned Counsel submitted that in considering whether it was in public interest to grant conservatory orders, the Court must take into account, that public interest lies in preserving and protecting constitutional values. In the case of **“Law Society of Kenya - Versus - Officer of the Attorney General & another, Judicial Service Commission (Interested Party)[2020] eKLR**. Makau J stated:

**“27. On the issue of public interest; public interest lies in favour of preserving and protecting values and interest. I find this is a suitable suit in which, court ought to intervene by exercising its checks and balances... I find that public interest would thus be greatly jeopardized and compromised should the court decline to grant the interim orders preserving the substratum of the suit herein.”**

18. The Court also went on to pronounce itself as follows:

**“30.From the above-quoted provisions of the Constitution, it is clear that every member of the public whether individually or collectively is enjoined to respect, uphold and defend the**

***Constitution and any alleged violation of the Constitution by any individual is a very serious matter and an affront to the Constitutionalism, and sets a dangerous precedent in the violation of the constitution; which can, if not checked, result in serious harm to the country and every citizen. It is therefore proper and prudent for the Courts to act in public interest and consider granting the appropriate reliefs in the circumstances where such orders are deserved.”***

19. The Learned Counsel submitted that although the Respondent alleged at paragraph 3 of its Grounds of Opposition that the conservatory orders sought by the Petitioner would jeopardize the interests of the members of the public, no evidence or even details of such allegation was supplied by the Respondent. It remained a mere allegation which we do not wish to spend judicial time responding to. However, He reiterated that by granting the Petitioner herein the conservatory orders sought, the Court will be upholding the Constitution and serving public interest by affirming that the Respondent cannot arbitrarily deprive the Petitioner its rights as enshrined in Article 40 of the Constitution, as it has attempted to do in the present instance.
20. The Learned Counsel concluded that for the reasons stated above and in the interest of justice, and urged this Honourable Court to allow the Application.

### **B. The Written Submission by the Respondent**

21. On the 7<sup>th</sup> June, 2022, the Learned Counsel, the County Attorney office of the Respondent filed their written submissions dated 6<sup>th</sup> June, 2022 on 7<sup>th</sup> June, 2022. M/s. Kizingo Advocate commenced her elaborate submission by stating that the Petitioner sued the Respondent alleging trespass to property title no. Mombasa/MS/Block 1/1674 for allegedly establishing a murram road through the property. According to the pleadings, the road serves members of the public and has been justified on the ground that it serves to ease congestion arising from human and vehicle traffic witnessed at the Likoni channel.
22. The Learned Counsel submitted that the Respondent relied on the grounds of opposition filed on 30/3/2022. The Learned Counsel submitted that on the issue of failure to disclose material facts, the road, as admitted by the Petitioners without getting into the merits of the suit, serves the greater public. Whether or not the road is justified is an issue that will be handled during hearing of the main Petition. The suit property was a lease with paragraph 5 and 6 of the lease agreement of the lease marked as "AJ - 3" was not clear. The pleadings reveal that the Petitioners had put up a petrol station on the suit property. The issue was the existence of a public road cutting across the property which issue originated the suit. Paragraph 5

of the lease ought to show the use for which the property was meant. Further, paragraph 6 indicated the extent to which the buildings on the suit property was to cover. However, the contents made out under Paragraphs 5 and 6 of the Lease are such that it is not possible to tell the use for which the buildings on the suit property were to be subjected. Further, it is also not possible to state the area the buildings on the property were to cover. With this failure to disclose material facts, could there be a possibility that the buildings were to be such that access by members of the public through the property is allowed, owing to the situation at the Likoni Channel and further that the use for which the buildings were to be put into would not interfere with the access of members of the public through the property? Who knew the use is such that any developments thereon permitted an access road to members of the public? These were issues that would be ventilated during hearing of the main Petition.

23. The Learned Counsel submitted that grounds for granting of conservatory orders particularly in cases where private and public interests compete. The Court in the case of: "**Progress Welfare Association of Malindi & 3 others - Versus - County Government of Kilifi & 4 others[2020] eKLR** which they use as

persuasive authority indicated as follows when faced with an Application for conservatory orders like in the present case:

***“The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders.***

***The Court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant as was stated in the case of the Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General, Nairobi High Court Petition No. 16 of 2011; {2011}eKLR:***

***“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

24. The Learned Counsel submitted that on a prima facie case, the Petitioner admitted that the road has been justified on the grounds that it served to deal with the congestion witnessed in Likoni on a daily basis. Further, the situation with the contents of Paragraphs 5 and 6 of the Lease was such that the true position regarding the developments on the property could not be ascertained. They submitted that the probability tilted in favour of preserving the interests of the public who will be greatly affected by a conservatory order directing its closure. In any

event, the Petitioners had not disclosed the irreparable harm that it sought to prevent through the orders sought.

25. The Learned Counsel submitted that on the issue of private vis a vis public interest the court in the case of ***Progress Welfare Association of Malindi & 3 others - Versus - County Government of Kilifi & 4 others [2020] eKLR*** went on to state as follows:-

***“The Supreme Court in “Gitaru Peter Munya - Verus - Dickson Mwenda Kithinji & 2 others [2014] eKLR expressed itself on the matter as follows:***

***“Conservatory orders’ bear a more decided public Law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values. and the proportionate magnitudes, and priority levels attributable to the relevant causes ...”***

26. The Learned Counsel submitted that based on the reasoning of the Court above, it is in the interest of justice that the road remains accessible to the public before the issue of whether it being on the property is justified to effectively determine whether indeed its existence interferes with the Petitioners right to property. This is particularly important because the issue has

never been dealt with conclusively in the previous suits alluded to in the pleadings and further that the Respondent in whose jurisdiction the property falls has never been party to previous suits involving the suit property. In conclusion, it is our further submission that the Petitioners have not been able to prove that it's right to conservatory orders outweighs the interest of the public in having the road on the property before the suit is heard and determined with the participation of the Respondent. The Respondent is an important party in putting the issue to rest owing to the fact that it is in charge of all area plans within Mombasa County.

27. The Learned Counsel urged the court to find in favour of the Respondent and dismiss the Application with costs.

#### **IV. Analysis and Determination**

28. The Court has perused the filed pleadings, being the Notice of Motion application dated 17<sup>th</sup> February, 2022 by the Petitioner/Applicant herein, the replies, written submissions, myriad authorities cited and filed in respect of the instant application by the parties, the relevant provisions of the Constitution of Kenya, 2020 and statutes.

29. For the Court to arrive at an informed, reasonable, just and fair decision herein, the subject matter has been condensed into the following two (2) issues for its determination:-

a) ***Whether the Notice of Motion application dated 17<sup>th</sup> February, 2022 by the Petitioner/Applicant herein meets the threshold for granting of Conservatory orders sought.***

b) ***Who will bear the costs of the application.***

**ISSUE No. a). *Whether the Notice of Motion application dated 17<sup>th</sup> February, 2022 by the Petitioner/Applicant herein meets the threshold for granting of Conservatory orders sought.***

30. Under the provision of Article 23 (3) of the Constitution of Kenya 2010, empowers a court to grant several appropriate reliefs in any proceedings brought under Article 22 where there has been denial, infringement, violation or threat of a violation of a fundamental right or freedom enshrined thereof. The relief may include a conservatory order. Specifically, the law on the issuance of conservatory orders is well settled. But before proceeding further, there is need to under the meaning of “**Conservatory orders**”. Conservatory orders were defined in the case of “**Judicial Service Commission -Versus - Speaker of the National Assembly & Another (2013) eKLR** where the court held that;

***“Conservatory orders in my view are not ordinary civil remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individuals against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”***

31. The principles in regard to granting of interim conservatory orders were outlined by the Supreme court in the case of” ***“Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR*** which all the parties have cited herein as follows:

***“[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.***

32. Thus, the starting point is to determine whether the Applicant has established a prima facie case with a likelihood of success. In the case of:- ***Centre for Rights Education and Awareness (CREAW) & 7 others - Versus - Attorney General [2011] eKLR*** it was held that:

***“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner’s application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”***

33. When a court is called upon to determine whether ***“a prima facie case”*** has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of: ***“Board of Management of Uhuru Secondary School - Versus - City County Director of Education & 2 others [2015] eKLR*** the Court posited that:

***“26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”***

34. From the various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-

***a) First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the***

**absence of the conservatory orders, he/she is likely to suffer prejudice.**

**b) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.**

**c) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.**

**d) The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.**

35. Now applying these principles and legal rational to the instant case. The first issue for determination is whether the Petitioners have established "**a prima facie case**" that warrants the grant of conservatory orders. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.

36. A prima facie case was defined in the case of "**Kevin K Mwiti & Others - Versus - Kenya School of Law & Others (2015) eKLR**" where the court stated:-

**".....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues."**

37. From this instant case, the issue is whether the Petitioner/Applicant herein has shown that it has a case that

discloses arguable constitutional issues. Essentially, the subject of this Petition is all that parcel of land known as Land Reference numbers Mombasa/MS/BLOCK 1/1674. The Petitioner averred that they are the registered owner of the suit property. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide murrum public access road through the suit property. It has argued that the road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map. The Petitioner asserts that the Respondent has now threatened to finish working on the road by paving it all the way to the ocean, making it wider and tarmacking the same. It is their contention that the Respondent has also made it impossible for the Petitioner to use occupy and enjoy the suit property because the Respondent has deployed its officers on the suit property and the Respondent has been spreading malicious information that the suit property is a public land reserved for road construction and this has incited the local residents who have menacingly made it impossible for the Petitioner to occupy and use its property. They hold that the Respondent trespassed on

the suit property by illegally accessing the same, entering thereon and creating the public access road. Before creating the impugned access road, the Petitioner held that the Respondent herein had previously claimed that there was an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. According to the Petitioner, in order to achieve its ulterior objective and to advance the false narrative that there was a public access road passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner.

38. The Respondent through its grounds of opposition contended that the Petitioner/Applicant had not demonstrated how failure to grant conservatory orders affected the substratum of the Petition. In an application seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of ***Kenya Association of Manufacturers & 2 Others - Versus - Cabinet Secretary - Ministry of Environment and Natural Resources & 3 Others (2017) eKLR*** where the Court stated as follows:

***“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or***

***law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute.”***

39. It is evident from the Petitioner’s pleading that the Petitioners are contesting the Respondent entered onto and trespassed on the suit property and paved a wide murrum public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map.

40. Before granting conservatory orders, the court is required to evaluate the pleadings and determine whether the denial of conservatory orders will prejudice the applicants. In the case of ***Centre for Rights Education & Awareness(CREAW)& Another supra*** the Court held that:-

***“A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation, are being violated or will be violated and that such violations, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent the violation of rights and fundamental freedoms and preserve the subject matter pending the hearing and determination of a pending cause or petition.”***

41. At this stage, the Applicant is required to establish a prima facie case with a likelihood of success. If the court were to determine

the issues raised, it would amount to determining the Petition at the interlocutory stage. Based on the facts adduced so far, I am satisfied and find that the Petitioner/Applicant has well established a prima facie case to warrant this Court to grant it the conservatory orders they seek.

42. On the issue as to whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order. Once again based on the surrounding facts and inferences herein, I find that it will be served better by preserving the Petitioner's title until issues of whether or not the Respondent has trespassed by making an access road across the suit property are heard and determined.

43. The provision of Article 165(3)(b) of the Constitution grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated to the interpretation of the Constitution.

44. The law as to what amounts to a substantial question of law is now well settled. In the case of **Sir Chuntal - Versus - Mehta** and **"Sons Ltd - Versus - - The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314** the Supreme Court of India defined the elements of a substantial question of law were stated as follows:

***"The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be***

***whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of the law.”***

45. Similarly, in the case of: ***“Maina Kiai & 2 Others - Versus - Independent Electoral and Boundaries Commission & Another (2017) eKLR*** the Court outlined the ingredients that determine whether a matter is a substantial point of law.
46. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. A party seeking certification must lay a basis for the certification.
47. It is my own view that the Petitioner/Applicant herein has demonstrated to the Court that the Petition raises a substantial point of law whose determination will have a significant bearing on the public interest. Being that the access road is for public use and if the Respondent erroneously trespassed to have it there the members of the public using it will be affected.

48. The Respondent submitted that based on the reasoning in the case of "***Gitaru (Supra)***". According, they strongly submitted that it was in the interest of justice that the road remains accessible to the public before the issue of whether it being on the property is justified to effectively determine whether indeed its existence interferes with the Petitioners right to property. This is particularly important because the issue has never been dealt with conclusively in the previous suits alluded to in the pleadings and further that the Respondent in whose jurisdiction the property falls has never been party to previous suits involving the suit property. The Petitioner on the other hand submitted that the Petitioner's right to property is at risk of egregious infringement due to the deliberate and unlawful actions of the Respondent, who has not disputed the assertions contained in the present Application at all including the threat to pave the road all the way to the ocean. For all these reasons, therefore, the Court fully appreciates that the Conservatory orders sought by the Petitioner/Applicant are appropriately available to them. It feels inadequate to deny them. They ought to be granted accordingly.

**ISSUE No. b). Who will bear the Costs of the application**

49. It is not well established that and from Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Court. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.
50. The Proviso of the Provisions of Section 27(1) of the Civil Procedure Act Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (*see the Supreme Court Case of Jasbir Rai Singh Rai - Versus- Tarhochan Singh (2014) eKLR, Cecilia Karuru Ngayu - Versus - Barclays bank of Kenya & Ano. (2016), Kenya Sugar Board - Versus - Ndungu Gathini (2013) eKLR; and Mary Wambui Munene -Versus- Ihururu Dairy Cooperative Societies eKLR (2014)*)
52. In the instant case the Petitioner has succeeded in protecting its case and gotten the orders sought and they would be entitled to costs. However, taking that the matter is still proceedings to full trial let the costs of the application be assessed at the conclusion of the Petition, to be in the cause.

## **V. Conclusion & Disposition**

**53.** Consequently, having conducted such an elaborate analysis to the framed issues, the Honorable Court is satisfied that the that the Notice of Motion application dated and filed on the 17<sup>th</sup> February, 2022 by the Petitioner/Applicant herein is merited and is hereby allowed entirely for the sole purpose of the preservation of the suit property in the following terms:-

- a) THAT this Honorable Court do hereby issues a Conservatory order prohibiting and restraining the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/M.S/BLOCK 1/1674 pending the hearing and determination of this Petition.**
- b) THAT this Honourable Court do hereby order that the Officer Commanding Station (OCS) of Likoni Police Station to ensure full compliance with this court's orders herein and that peace and law and order is maintained at all times.**
- c) THAT an order of this Honorable Court be and is hereby issued compelling the Respondent to block the murrum access road created by the Respondent on the property known as Mombasa/MS/BLOCK 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person pending the hearing and determination of this Petition.**

**d) THAT for expediency sake, the Petition be set down for hearing within the next One hundred and Eighty (180) days from the date of delivery of this Ruling hereof commencing from 3<sup>rd</sup> October, 2023. There be a mention on 22<sup>nd</sup> May, 2022 for purposes of holding a Pre - Trial Conference and taking direction for the means and mode of the disposal of the filed main Petition hereof.**

**e) THAT the costs of this Petition to be in the cause.**

**IT IS SO ORDERED ACCORDINGLY.**

**RULING DELIVERED, THROUGH MICROSOFT VIRTUAL TEAM,  
SIGNED AND DATED AT MOMBASA THIS .....27<sup>TH</sup> .....  
DAY OF .....MARCH....., 2023.**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)  
ENVIROMENT AND LAND COURT  
MOMBASA**

**In the presence of:**

- a) M/s. Yumna, Court Assistant;
- b) Mr. Oluga Advocate for the Petitioner/Applicant.
- c) M/s. Kizingo Advocate for the Respondent.