



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kingsgate Management Company Limited v Charagu & another (Environment and Land Appeal 55 of 2019) [2023] KEELC 16576 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16576 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 55 OF 2019**

**A NYUKURI, J  
MARCH 15, 2023**

**BETWEEN**

**KINGSGATE MANAGEMENT COMPANY LIMITED ..... APPELLANT**

**AND**

**FLORENCE WANGARI CHARAGU ..... 1<sup>ST</sup> RESPONDENT**

**ISAAC KAMAU MUIRURI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling on the application dated 10th July, 2019 delivered by Honourable E. Michieka P.M, on 7th November 2019, in Mavoko CMC ELC No. 22 of 2018)*

**JUDGMENT**

**Introduction**

1. This is an interlocutory appeal against the ruling of Hon. E. Michieka, Principal Magistrate at Mavoko, delivered on 7<sup>th</sup> November 2019, in Mavoko CMC ELC No. 22 of 2018. In that ruling, the court granted a temporary injunction in favour of the Respondent herein, restraining the Appellant from inter alia, constructing a perimeter wall along the road abutting the Respondents' property LR. No. 12715/3104. That decision aggrieved the Appellant who filed a Memorandum of Appeal dated 16<sup>th</sup> November 2019 raising the following grounds;
  1. The learned magistrate erred in law by delivering a flat ruling on the application dated 10<sup>th</sup> July 2019 devoid of the necessary ingredients as he failed to state any and all the points/issues for determination, the decision thereon and the reasons for the decision and has therefore occasioned failure of justice.
  2. The learned magistrate erred in law and in fact by granting an interlocutory injunction yet the respondent did not meet the requirements for grant of injunctive orders in the circumstances.



3. The learned magistrate erred in law and in fact by disregarding the Machakos County Government Surveyor's report dated 23<sup>rd</sup> August 2019 tabled in evidence by consent of the parties.
  4. The learned magistrate erred in law and in fact by disregarding the submissions and the evidence adduced by the Appellant.
  5. The learned magistrate erred in law and in fact in holding that the Respondent had established a prima facie case for grant of injunction at an interlocutory stage.
  6. The learned magistrate therefore erred in law and fact when he allowed the Respondents' application.
2. Subsequently, the Appellant sought the following orders;
- a. The appeal be allowed and the ruling on the application dated 10<sup>th</sup> July 2019 delivered by Honourable E. Michieka on the 7<sup>th</sup> November 2019, be set aside;
  - b. The costs of this appeal;
  - c. Any further or other alternative relief and or order that this court may deem fit and just to grant.

### **Background**

3. On 10<sup>th</sup> July 2018, the Plaintiffs (Respondents herein) filed a plaint dated even date in Mavoko CMC ELC NO. 22 of 2018, against the Defendant (Appellant herein) alleging that the 1<sup>st</sup> Plaintiff was the registered proprietor of LR. No. 12715/3104 situated in Syokimau while the Defendant was the registered proprietor of LR. No. 12715/503 also situated in Syokimau. The Plaintiffs averred that their Parcel No. LR. No. 12715/3104 was a subdivision of Parcel No. LR No. 12715/504 which abuts the Defendant's Parcel Number LR. No. 12715/503. According to the Plaintiffs, to access Parcel No. 12715/503 there is a road that touches on the Plaintiffs' property and that that road was in the original Syokimau Plans, was surrendered as a public road and does not form part of LR. No. 12715/503 owned by the Defendant. The Plaintiffs alleged that the Defendants were constructing a wall along the road which would result in blocking the Plaintiffs from accessing their property. They therefore sought for a permanent injunction to restrain the Defendants from blocking the alleged access road. They also sought for costs.
4. Simultaneous with the filing of the plaint, the Plaintiffs also filed a Notice of Motion dated 10<sup>th</sup> July 2018 seeking the following orders;
  - a. Spent.
  - b. That the Respondents' whether by its directors, agents, servants or any one of them howsoever be restrained by an injunction from removing the Plaintiffs' gate or blocking the main entrance to property known as LR. No. 12715/3104 owned by the Plaintiffs or erecting a permanent wall or barrier blocking the said entrance to the Plaintiffs property or converting the road fronting the Plaintiffs main entrance into private use or in any other way denying the Plaintiffs access to their property or interfering with the Plaintiffs quite use and enjoyment of the said LR. No. 12715/3104 and interfere with the drainage systems in place and the environment pending interpartes hearing and final determination of this suit.
  - c. The costs of this application be provided for.



5. The application was premised on the affidavit sworn by the Plaintiffs on 10<sup>th</sup> July 2018. It was the Plaintiffs' case that the 1<sup>st</sup> Plaintiff was the registered proprietor of LR. NO. 12715/3104. They annexed a copy of their title as annexure "FWC1". That the deed plan which was annexure marked "FWC2" showed that their plot had roads on both sides. According to them, the Survey Plan for the subdivision of LR. No. 12715/504 showed that there was a road fronting LR. No. 12715/3104. That based on that information, they applied for building approvals and that their main gate faced the road leading to LR. NO. 12715/503 which is owned by the Defendant. They stated that the area is swampy and there is drainage that was parallel to the said road. That on 1<sup>st</sup> November 2017, 18<sup>th</sup> May 2018 and 29<sup>th</sup> June 2018, by way of letters, the Defendant threatened to erect a perimeter wall running parallel to the said road, thus uprooting the Plaintiffs' gate and their main entrance. They annexed the letters as annexure "FWC 3". According to them, erecting a perimeter wall will result in flooding of their premises in view of the location of the wall.
6. The Plaintiffs maintained that the road in dispute formed part of surrender to the Government and was not available for private use. They attached annexure "FWC4" being copies of Survey Plans and building approvals to support their allegation. They faulted the Defendant's intention to construct a wall stating that they did not demonstrate approvals from NEMA and the County Government as the project will have environmental impact on adjoining parcels. They claimed that they have used the said road since 2008.
7. The application was opposed. Suleman Sodha, the Chairman of Kingsgate Estate Residents and agent of Defendant filed two replying affidavits dated 24<sup>th</sup> July 2018 and 3<sup>rd</sup> August 2018 respectively. He stated that he was the agent of the Defendant and had authority to depone as shown by annexures "SS1". He stated that the Defendant was not the registered lessor of LR. NO. 12715/503 as the same was registered in the name of Vekaria Kerai. He attached annexure "SS5" being the copy of grant. He stated that the parcel measures 5 acres and that there are eighty houses constructed by the developer and sold to the residents, the current owners. That upon construction of their houses, they obtained approvals from the Physical Planner to construct a perimeter wall as evidenced by annexure "SS2". That the Plaintiffs were notified of intention to construct a wall and that they have a front gate which they use. That the Plaintiffs sought more time to enable them use the entry of the Defendants to access their property through their estate access gate manned 24 hours for security, which access is maintained by the Defendant with a service charge paid by members. He attached annexure "SS3" as evidence of the request to use the access road. That the request was rejected by members as it compromised their security.
8. He also stated that they were in the process of digging waste water disposal trench along the side of the road when they were stopped. That the Plaintiffs were guilty of coming to court with unclean hands by failing to disclose that they have a legal access road to their property.
9. Upon hearing the application, the learned trial magistrate found that the Plaintiffs had made out a case for the orders sought and that the court took the course that appears to carry the lower risk of injustice should it turn out to be wrong and being persuaded that that course lay in granting the orders sought, the court allowed the application dated 10<sup>th</sup> July 2018 and granted the orders of injunction as sought with no order as to costs.
10. It is that decision that provoked the instant appeal.
11. The appeal was canvassed by way of written submissions. On record are the Appellant's submissions dated 10<sup>th</sup> March 2022 and the Respondents' submissions dated 29<sup>th</sup> March 2022.



## **Appellant's Submissions**

12. Counsel for the Appellant submitted that the principles for grant of injunctions were set out in the case of *Giella v. Cassman Brown* [1973] EA 358 and that these are;
  - a. That the Applicant must establish a prima facie case with a probability of success;
  - b. The Applicant must demonstrate irreparable injury if the injunction is not granted; and
  - c. Where there is a doubt, the court must decide the application on a balance of convenience.
13. Reliance was also placed on the case of *Mrao Ltd v. First American Bank of Kenya Ltd* [2003] eKLR, on the definition of what constitutes a prima facie case. The court was also referred to the case of *Robert Mugo Wa Karanja v. Ecobank (Kenya) Limited & Another* [2019] eKLR, on what should be considered before grant of a temporary injunction.
14. Counsel contended that the Respondent failed to discharge their duty in that the access road falls within the perimeter boundaries of the Respondents' property namely LR. No. 12715/503 as shown in the maps and even in the Surveyor's report. Counsel argued that the Respondent had not proved ownership of the property LR. No. 12715/503 or a right of access into the Appellant's property and that therefore, their application ought to have failed.
15. On the question of irreparable damage, counsel submitted that the Respondents did not prove the nature of damage that they would suffer if the application was not granted. Counsel pointed out that the Respondents had an access road purposely demarcated for their access to the main road and that even if the application was not allowed, he would still access his plot from the main road through the valid access.
16. According to the Appellant, the balance of convenience fell in their favour as the access road was their private access road which is secured and maintained by the Appellants for access by members of the estate situated on LR. No. 12715/503.
17. Counsel observed that a party seeking equitable remedy like an injunction must be honest and candid. Reliance was placed on the case of *Kenleb Cons Ltd v. New Gatitu Service Station Ltd & Another* [1990] eKLR, for the proposition that a party seeking an injunction must make full and frank disclosure of all the relevant facts.
18. Counsel submitted that while the Respondents alleged that they had no other access road to their property, the County Surveyor visited the site and confirmed that the Respondents had an access road within Plot Number LR. No. 12715/504, which is where their title originated as the Respondents' property LR. No. 12715/31504 was a subdivision of LR. No. 12715/504. Counsel concluded that the Respondents failed to demonstrate that they deserved grant of orders of injunction.

## **Respondents' Submissions**

19. Counsel for the Respondents submitted that the Respondents were owners of LR. No. 12715/3104 which was a subdivision of LR. No. 12715/504. Further, that the entrance to the Respondents' property fronts a road leading to the Appellant's property known as LR. No. 12715/503. They stated that the road inside LR. No. 12715/503 was part of the surrendered land during the initial subdivision of LR. No. 12715/503 and LR. No. 12715/504.
20. Counsel contended that at the hearing, the Appellant failed to produce the deed plan for their parcel to enable the court to know the exact dimension of LR. No. 12715/503. An invitation was made to



the court to make an adverse inference that had the said document been produced then the actual measurements of LR. No. 12715/503 would have been determined and that the said road is not part of the Appellant's property.

21. Counsel argued that the exact acreage of LR. No. 12715/503 is 2.024 Ha which is the same as all the adjacent parcels before subdivision and that therefore if the road was part of the Appellant's property, the acreage thereof would be more than 2.023 Ha. Counsel argued that the court visited the site and that the road in front of the Respondents house is a common road and that the Respondents can only access their house through the said road. Counsel maintained that the said road was surrendered to the Government.
22. Counsel argued that the Appellant ought to have produced a deed file and not opted for a resurvey by the District Land Surveyor as the resurvey is not for ownership documents. Counsel faulted the survey report filed in court on 23<sup>rd</sup> August 2019 as the same did not attach any official documents from the Lands Office. According to counsel, the area map was presented to court and that the part marked F, E and back to A forms part of the road in dispute and that the District Surveyor failed to acknowledge that beacons D and E are shared by LR. No. 12715/503 and LR. No. 12715/504.
23. It was further submitted for the Respondents that the Plots within LR. NO. 12715/504 bordering Section E, F and A all have a right of easement over the Sections E, F and A. Further submissions were made that under CAP 299, the access road would form part of the surrender to the Government and would have its own separate deed plan from that of LR. No. 12715/503 and LR. No. 12715/504.
24. It was maintained for the Respondents that the Respondents' deed plan attached to the title LR. NO. 12715/3104 has access roads at both the front and the rear, and that the front of the Respondents' residence faces the access road marked EFA which they have used for many years as of right without interference by the Appellant. Counsel argued that the road in dispute was an easement and that the Respondents had a legal right of access to their property. They argued that they met the conditions for grant of injunction and that the closure of their main entrance would fundamentally change the design of their residence and thereby cause irreparable loss.

### **Analysis and Determination**

25. I have carefully considered the appeal, the submissions made by the parties and the entire record of the trial court. The single issue that arise for determination is whether the Respondents demonstrated conditions for grant of temporary injunction.
26. This being a first appeal, the duty of this court as a first appellate court is to re-evaluate, re-analyze and reconsider the evidence presented in the lower court afresh and to draw its own independent conclusions. See *Peters v. Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
27. The Appellant faulted the learned trial magistrate's decision on grounds that it did not have the necessary ingredients, failed to state the issues and the reasons for the decision.
28. Under Order 21 Rules 4 and 5 of the Civil Procedure Rules, a court's decision must contain a summary of the case, the points and or issues for determination, the decision and the reasons for the decision. In addition, there ought to be a finding for every framed issue, with the reasons for the finding.
29. Turning to the decision of the learned trial magistrate which is at pages 88 and 89 of the record, the trial court rendered itself as follows;



The Plaintiffs sought an order of interlocutory injunction restraining the Respondents from removing his gate, blocking the main entrance to their property, and erecting a permanent wall or barrier blocking the Plaintiff's ingress to their property. I have considered the evidence and I have noted the survey report.

The test for grant of injunction was laid down in *Giella v. Cassman Brown* which provided that an applicant for injunction had to prove that he had a prima facie case, show that he would suffer irreparable damage which cannot be compensated by damages and finally the balance of convenience lies in his favour.

In this case, I am persuaded that the Plaintiff has made out a case for the orders sought. The fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice should it turn out to be wrong. In this case, granting the orders sought would carry a lower risk of injustice.

I therefore allow the application dated 10<sup>th</sup> July 2018 in its entirety with no order as to costs.

30. Having considered the ruling of the trial court as stated herein above, it is clear that no issues were framed and no reasons were given by the court as the basis of its decision. While the learned trial magistrate stated that he was persuaded that the Plaintiff had made out a case for grant of the orders sought, the court failed to outline the facts and or evidence which were the basis of the persuasion. I therefore agree with the Appellant's submissions and I find that the learned magistrate decision did not comply with the law.

31. On whether the Respondents met conditions for grant of injunctions, the principles for grant of temporary injunction are well settled. Order 40 Rule 1 of the Civil Procedure Rules provides for the jurisdiction of the court to grant temporary injunction as follows;

Where in any suit it is proved by affidavit or otherwise –

- a. That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or
- b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

32. Therefore, where the Applicant demonstrates that a disputed property is in danger of being wasted, damaged or alienated by another party in a way that will obstruct or delay execution of the decree, the court may grant an injunction to prevent the wastage or damage to the disputed property.

33. Elements for grant of temporary injunction are well settled. In the case of *Giella v. Cassman Brown & Company Limited* [1973] EA 238, the court held as follows;

First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

34. In the case of *American Cyanamid v. Ethicom Limited* [1975] AC 396, the court held as follows;



If there is no prima facie case on the point essential to entitle the Plaintiff to complain of the Defendants proposed activities, that is the end of any claim to interlocutory relief.

35. A prima facie case was described in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, as follows;

A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

36. Essentially therefore, to obtain a temporary injunction, an Applicant must demonstrate the following conditions;

- a. That they have a prima facie case (a genuine arguable case) with a probability of success.
- b. That if the injunction is not granted, they stand to suffer irreparable injury that cannot be compensated in damages;
- c. Where the court is in doubt, it ought to decide the application on a balance of convenience.

37. In the instant appeal, it was the Respondents' case that in the subdivision scheme that created titles LR. No. 12715/503 and LR No. 12715/504, there was a road created that leads to parcel number LR. No. 12715/503 and abuts LR. No. 12715/504 and that she has a right as all other title holders holding titles abutting the said road to access her plot through that road. Further that the Appellant has threatened to fence off the road claiming the same is part of LR. No. 12715/503, which if allowed will change the design of their residence causing them irreparable loss due to flooding.

38. On the other hand, the Appellants position is that LR. No. 12715/502 is registered in the name of Vekaria Kerai Development Limited and that the said property has eighty houses constructed by the developer and sold to the current owners of the houses of which Suleman Sodha the deponent and agent of the Defendant is one of the owners thereof. According to them, their plan to put up a perimeter wall was approved by the County Government of Machakos. They maintain that the Respondents' gate exists on the access road yet he has a legal and front gate which he ought to use. They stated that they had put up their estate's gate manned 24 hours for security and which they charge service charge and that the Respondents had sought permission to be allowed to use the road. Their position being that the Respondents have a legal access road which they don't want to use.

39. It is not disputed that the Respondents' title LR. No. 12715/3104 was created from LR. NO. 12715/504. It is also not disputed that title numbers 12715/503 and 12715/504 were created from one subdivision scheme. Having compared the Respondents' annexure marked "FWC4" at page 14 of the record showing the subdivision scheme creating LR. Nos 12715/503 and 12715/504 as against the Surveyors report filed in court by consent of the parties and dated 23<sup>rd</sup> August 2019, it is clear that on "FWC4" produced by the Respondents, there are beacons marked A-B-C-D-E. There is no beacon directly opposite beacon marked E on the boundary created by beacons A and B. Therefore, the findings made in the Surveyor's report dated 23<sup>rd</sup> August 2019 is in tandem with the survey plans dated 10<sup>th</sup> February 1987 produced by the Respondent which means that the disputed road is part of Parcel No. LR. No. 12715/503 and though the same is a road, it is within the Appellant's parcel. Land registered under Registered Titles Act has fixed boundaries marked by beacons and the beacons on land Parcel No. 12715/503 clearly show that the disputed road is inside the said parcel.

40. The Respondent alleged in their supporting affidavit in paragraph 9 thereof at page 7 of the record that the disputed road was part of a surrender to the Government. No evidence of such surrender



was presented. As can be seen from the Respondents' annexure at page 67 of the record, land that is surrendered for purposes of a road is clearly shown in the survey plan and properly identified by an LR. No. In the instant matter, no. LR. No. for the alleged surrendered road was provided by the Respondents.

41. While the Respondents pleaded that the disputed road was a public road granting them access rights, they submitted that the road was public road having been surrendered to the Government and also that they had acquired easement rights. From the pleadings on record and what was before the trial court, the issue of easement never arose and was never mentioned either in the pleadings or what was addressed in the submissions. Therefore, raising the issue of easement at this appellate stage when the issue did not arise before the trial court is not proper. It is trite that a party is bound by their pleadings and issues for determination arise from pleadings.
42. An access right accruing from an easement is different from a right created where there is a public road, which is a public land. An easement is an interest in land owned by another person allowing another land owner the right to use the land without owning it.
43. The Black's Law Dictionary, 11<sup>th</sup> Edition, defines easement as follows;  

An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). The land benefitting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or licence, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land. The primary recognized easements are (1) a right of way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate.
44. In view of the above, it is therefore my finding that the issue of easement which was only argued on appeal by the Respondents was never mentioned and never arose in respect of the pleadings before the trial court and therefore the same cannot be raised at this stage before this court.
45. Having stated that the issue before court was whether the disputed road was a public road or part of LR. No. 12715/503, and having found that the Respondents' own evidence being annexure marked "FWC4" showed the beacons on LR. No. 12715/503 were A-B-C-D-E-F, which are in tandem with the findings of the County Surveyor's report, showing that the disputed road was inside LR. No. 12715/503 and the Respondents' failure to show that the disputed road was surrendered to the Government as a public road, it is my finding that the Respondents failed to demonstrate a prima facie case with a probability of success.
46. The Appellant also faulted the findings of the learned trial magistrate on grounds that the court failed to take into account the County Surveyor's report dated 23<sup>rd</sup> August 2019, which evidence had been filed pursuant to the parties' consent. As regards the Surveyor's report, the Respondents argued that the same failed to acknowledge that beacons D and E were shared by LR. No. 12715/503 and LR. No. 12715/504. In their submissions, the Respondents also faulted the Surveyor's report on grounds that it was prepared without a court order and that they do not understand the purpose of the report.
47. I have considered the trial court record and I note that on 20<sup>th</sup> June 2019, both parties agreed in court before the trial magistrate for the County Surveyor to visit the suit properties and file a report. The trial record shows that the request was granted by the court and an order was extracted and issued on 19<sup>th</sup> July 2019. The record at page 62 shows the County Surveyor's report dated 23<sup>rd</sup> August 2019



which indicates that the same was done pursuant to the order dated 19<sup>th</sup> July 2019. Therefore, the Respondents submissions that the Surveyor's report was prepared without a court order and that they do not understand its purpose when they were in court on 20<sup>th</sup> June 2019 seeking for orders to have the surveyor visit the suit property, are misleading and dishonest.

48. The report made reference to a map extract and information found on F/R No. 180/551 at the Central Registry Nairobi. The Respondents have not presented any evidence contrary to the Surveyor's report or to show that the maps in their possession give a different position from the Surveyor's report. As earlier pointed out in this judgment, the Respondents' own annexure "FWC4" shows where the beacons of LR. No.12715/503 are, and from the analysis of this court, those beacons are on the same location as was found by the Surveyor in his report dated 23<sup>rd</sup> August 2019. The County Surveyor's report was filed in court on 29<sup>th</sup> August 2019. The proceedings of the trial court clearly show that on 5<sup>th</sup> September 2019, when counsel for both parties appeared in court, they informed court that the Surveyor's report had been filed and they proceeded to file submissions in respect of the application.
49. It is therefore clear that the proceedings before the trial court, that the parties sought and obtained an order to have a Surveyor's report in respect to the issue as to whether the disputed road was public road or part of LR No. 12715/503. That report was filed prior to the parties filing their respective submissions and before the court could determine the matter and or made its decision.
50. As the issue before court raised a technical matter which needed an expert's opinion/evidence, in this case a surveyor's report to determine the issue in dispute, it was necessary that an expert with knowledge of the matters in issue gives their opinion in court to assist the court to make an informed decision. Courts are not bound by expert evidence but expert evidence is to be given a high regard by the courts, and unless there are plausible reasons that evidence ought not be rejected.
51. In the case of Juliet Karisa v. Joseph Barawa & Another Civil Appeal No. 108 of 1988 (Unreported), the Court of Appeal stated as follows;  
  
Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.
52. The duty of an expert witness is to provide independent assistance to the court by providing nonpartisan, unbiased and objective opinion as relates to the matters in question within their expertise. This duty is owed to the court and supersedes any obligation the expert has to the party on whose instructions the opinion was prepared. (See Christopher Ndaru Kagina v. Esther Mbandi Kagina & Another [2016] eKLR.
53. Having considered the impugned decision, I note that the trial court failed to take into account the County Surveyor's report dated 23<sup>rd</sup> August 2019. Although the trial court was not bound by the findings of the surveyor, that report was entitled to the highest possible regard. Therefore, when the trial court failed to take into account the opinion of the surveyor, the court was duty bound to give reasons for rejecting the report. This was important in this matter considering that the report was filed by consent of both parties and pursuant to the order of the court.
54. It is therefore my finding that the learned trial magistrate erred in fact and in law in failing to take into account the evidence in the County Surveyor's report dated 23<sup>rd</sup> August 2019 and filed on 29<sup>th</sup> August 2019, without giving any or any cogent reason.
55. A court must reach its own independent opinion based on the totality of the entire evidence even after considering an expert opinion, because expert opinions ought not be looked at in isolation. In the case



of Stephen Wang'ondu v. The Ark Limited High Court Civil Appeal No. 2 of 2014, the court stated four elements to consider while considering expert evidence, as follows;

1. Expert evidence does not trump all other evidence, hence it ought to be tested against known facts.
  2. Expert evidence must not be considered in a vacuum; it ought not be artificially separated from the rest of the evidence. There must be an interaction between the facts and the expert opinion.
  3. Where there are conflicting expert opinions, it is the responsibility of the court to test them against the background of all the other evidence for the court to decide which expert evidence is preferred.
  4. The court ought to consider all the evidence in the case, including the expert evidence before making findings of fact.
56. Having considered the evidence of the expert opinion as contained in the County Surveyor's report against undisputed facts in the Respondents' annexure "FWC4", I note that the position of the beacons marked as A, B, C, D, E and F are the beacons placed around Parcel LR. No. 12715/503, which demonstrate that the disputed road is within LR. No. 12715/503 and therefore I accept the evidence of the County Surveyor as confirming the Appellant's position that the disputed road is not a public road but a road created inside LR. No. 12715/503. In addition, the evidence produced by the Respondents at page 14 of the record shows clearly where there are roads whereof the width of the roads are clearly indicated and that does not include the disputed road.
57. In view of the above and taking into account the entire evidence including the expert opinion of the County Surveyor, it is clear that the disputed road is not a public road and that the same is part of LR. No. 12715/503 and hence no prima facie case with a probability of success was demonstrated by the Respondents.
58. In the premises, there was no prima facie case demonstrated by the Respondents upon which orders of temporary injunction could be issued. Therefore, the trial court fell into error in granting the injunction as the Respondents had not met the conditions for the grant thereof.
59. The upshot is that the appeal is allowed and the trial court's decision granting a temporary injunction in favour of the Respondents is set aside and substituted with an order dismissing the Notice of Motion dated 10<sup>th</sup> July 2019. The costs of the appeal shall be borne by the Respondents.
60. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15<sup>TH</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Olonde for Respondents

Ms. Odera holding brief for Mr. Chege for Appellant

Court Assistant – Josephine

