**Focus Container Freight Station Limited v Kenya Ports Authority (Environment & Land Case E052 of 2022) [2023] KEELC 18545 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18545 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE E052 OF 2022**

**LL NAIKUNI, J**

**JUNE 12, 2023**

**BETWEEN**

**FOCUS CONTAINER FREIGHT STATION LIMITED ..... PLAINTIFF**

**AND**

**KENYA PORTS AUTHORITY ..... DEFENDANT**

**RULING**

## I. Introduction

1. The ruling of this Honorable Court pertains to four (4) Notice of applications out of which two of them dated 13th May, 2022 and 30th November, 2022 filed by "Focus Containers Freight Station Limited" the Plaintiff herein, whilst "the Kenya Ports Authority – the Defendant herein filed the other two ( 2 ) applications dated 7th December, 2022 and 14th April, 2023 respectively. It will be noted that parties engaged effectively in all these applications by filing respective responses. The Honorable Court will be dealing with each one of them separately for ease of reference and flow.

## II. The Notice of Motion Applications dated 13th May, 2022 and 30th November, 2022 by the Plaintiff/Applicant

2. The Plaintiff/Applicant brought these two (2) applications under the provisions of Order 40 Rule 1(a), 2 and 4; and Order 51 Rule 15 of the Civil Procedure Rules, 2010 Sections 1A,1B and 3A of the *Civil Procedure Act*.

3. The Plaintiff/Applicant sought for the following orders:-

    a. Spent.

    b. That pending hearing and determination of this Application, or until further orders of this Honorable Court, a temporary injunction do issue restraining the Defendant, its agents,

workers, contractors or other persons acting under its instructions from further developing, building, and/or erecting any structures on the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

c. That pending hearing and determination of this Application, or until further orders of this Honorable Court, a temporary injunction do issue restraining the Defendant, its agents, workers, contractors, or other persons acting under its instructions from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

d. That pending hearing and determination of this suit, or until further orders of this Honorable Court, a temporary injunction do issue restraining the Defendant, its agents, workers, contractors or other persons acting under its instructions from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

e. That pending hearing and determination of this application, an order of mandatory injunction be issued ordering the Defendant, its servants, agents and any other person purporting to act under its authority or instructions to vacate the property known as LR Number MN/VI/3711 situate within Mombasa County.

f. That pending hearing and determination of this suit, an order of mandatory injunction be issued ordering the Defendant, its servants, agents and any other person purporting to act under its authority or instructions to vacate the property known as LR Number MN/VI/3711 situate within Mombasa County.

g. THAT the costs of this Application be provided for.

4. The application is premised on the following grounds:

a. The Plaintiff is the lawful registered proprietor of all that parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County(Hereinafter referred to as "The Suit Property").

b. Pursuant to a letter dated 28th March 2018, the Defendant approached the Plaintiff expressing interest in acquiring a portion of the Property through private treaty for purposes of construction of the Kipevu Oil Storage Facility (the Project).

c. By a letter dated 26th May 2018, the Plaintiff confirmed that it had no objection to the acquisition of the portion of the Property and requested to be informed of the procedures for the proposed acquisition.

d. On the basis of the aforementioned consensus and pursuant to an express request by the Defendant, the Plaintiff, in a show and demonstration of good faith, permitted the Defendant on 1st February 2019 to take possession and commence works on a portion of the Property on the strict understanding that the Defendant was putting in place mechanisms to acquire the portion of the Property for the purposes of the Project and the Defendant would ensure thatthe Plaintiff was adequately compensated.

e. Despite demonstrating good faith and allowing the Defendant to take possession of the portion of the Property it intended to acquire, the Defendant has deliberately delayed and avoided and failed, refused, and neglected to compensate and pay the Plaintiff for the portion of the Property that it intends to acquire for the Project.

f. Despite several reminders, the Defendant had not demonstrated any intention to acquire the Property and clearly intended to illegally, and unconstitutionally dispossess the Plaintiff of the Property.

g. The Plaintiff issued a demand letter dated 9th February 2022, demanding that the Defendant and/or its contractors or agents immediately stop all works on the Property and delivery of vacant possession within 14 days from the date of the demand if no progress was demonstrated towards acquisition of the Property, the Defendant has refused to accede to the demand.

h. In or around 10th May 2022, and in blatant disregard of the Plaintiff's aforementioned demand, the Defendant and/or its contractors and/or agents hurriedly commenced construction of a boundary wall on the Project portion and which construction was and/or is still ongoing as of the date of this application.

i. The Defendant had, without any colour of right, dispossessed the Plaintiff of its lawfully acquired Property in breach of Article 40 of *the Constitution* of Kenya, 2010 under false pretense and has continued to derive benefit from a property it doesn't own. The Defendant now intends to permanently and unconstitutionally deprive the Plaintiff of its lawfully owned property.

j. Unless urgent injunctive orders were issued to prevent the Defendant from entering into or accessing or continuing to develop the Property and orders to exit the Property, the Defendant would continue to illegally trespass onto and develop the Property and deprive the Plaintiff of its constitutional right to property.

k. The Plaintiff had "a prima facie' case as the Plaintiff was the legal and absolute registered owner of the Property with the Defendant having no colour of right whatsoever. No amount of damages could compensate the Plaintiff for the encroachment of the Property since the value of the Property was in the millions and the Defendant never had the ability to compensate the Plaintiff.

l. It was in the interest of justice and fairness that the orders sought herein are granted.

**III. The Notice of Motion Applications dated 30th November, 2022 by the Plaintiff/Applicant**

5. The Plaintiff/Applicant brought these two (2) applications under the provisions of Order 40 Rule 1(a), 2 and 4; and Order 51 rule 15 of the Civil Procedure Rules, 2010 Sections 1A,1B and 3A of the *Civil Procedure Act*.

6. The Plaintiff/Applicant sought for the following orders:-

a. Spent.

b. That pending hearing and determination of this Application, or until further orders of this Honourable Court, a temporary injunction do issue restraining the Defendant, its agents, workers, contractors or other persons acting under its instructions from further developing, building, and/or erecting any structures on the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

c. That pending hearing and determination of this Application, or until further orders of this Honourable Court, a temporary injunction do issue restraining the Defendant, its agents, workers, contractors, or other persons acting under its instructions from trespassing, entering

into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

d. That pending hearing and determination of this suit, or until further orders of this Honourable Court, a temporary injunction do issue restraining the Defendant, its agents, workers, contractors or other persons acting under its instructions from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

e. That pending hearing and determination of this application, an order of mandatory injunction be issued ordering the Defendant, its servants, agents and any other person purporting to act under its authority or instructions to vacate the property known as LR Number MN/VI/3711 situate within Mombasa County.

f. That pending hearing and determination of this suit, an order of mandatory injunction be issued ordering the Defendant, its servants, agents and any other person purporting to act under its authority or instructions to vacate the property known as LR Number MN/VI/3711 situate within Mombasa County.

g. That the costs of this Application be provided for.

7. The application by the Plaintiff/Applicant was premised on the grounds, testimonial facts and the averments made out under the 27 Paragraphed Supporting Affidavit of Mohamed Anwar Abdirahman Haji Abass together with three (3) annexures. The Applicant averred that:

a. He was the director of Focus Container Freight Station Limited, the Plaintiff herein.

b. At all material times the Plaintiff was and still is the registered proprietor of all that parcel of land known as LR Number MN/VI/3711 (Hereinafter referred to as "The Property").

c. The Plaintiff held the Property on a Grant no. 21520 from the Government of Kenya for the unexpired period of the term of 99 years with effect from 1st June 1991, on terms, and conditions set out in the said Grant.

d. The Property measured approximately 7.321 hectares and is situated in Mombasa County along the Kipevu Industrial Area.

e. The Plaintiff acquired the leasehold interest from Industrial and Commercial Development Corporation on or about 10th November 2009 and upon the said acquisition, it lawfully constructed office blocks, go-down blocks, and warehousing facilities from which it had been carrying out its storage, warehousing, and business of a container freight station over the years.

f. By virtue of the aforementioned registration, it was at all material times the absolute and indefeasible owner of the leasehold interest comprised in the Property and were entitled to enjoy all the rights and privileges belonging or appurtenant thereto including but not limited to right to possession and quiet enjoyment thereof without any hindrance or restriction.

g. Pursuant to a letter dated 28th March 2018, the Defendant approached the Plaintiff expressing interest in acquiring a portion of the Property through a private treaty for purposes of construction of the Kipevu Oil Storage Facility Project(Hereinafter referred to "The KOSFT Project").The Defendant informed the Plaintiff that the Project was meant to form part of the Mombasa Port Area Development Zone. The Deponent referred Court to the contents under Page 7 of the annexures for a copy of the letter dated 28th March 2018.

h. The Plaintiff responded by a letter dated 26th May 2018, confirming that it had no objection to the acquisition of the portion of the Property and requested to be informed of the procedures for the proposed acquisition. He further referred Court to the contents under Page 8 of the annexures for a copy of the letter dated 26th May 2018.

i. On the basis of the aforementioned consensus and pursuant to an express request by the Defendant, the Plaintiff, in good faith, permitted the Defendant to take possession and indeed commenced works on a portion of the Property on the strict understanding that the Defendant was putting in place mechanisms to acquire the said portion and ensure that the Plaintiff was adequately compensated.

j. The Plaintiff had a legitimate expectation that the acquisition would be carried out and implemented in a lawful, fair, and equitable manner and that the Plaintiff would adequately and/or justly be compensated within reasonable time before the Project was completed.

k. Acting on this legitimate expectation, the Plaintiff through its letter dated 19th February 2021 and 17th May 2021 requested for the Defendant to finalize the acquisition process and compensate them within 60 days. The Plaintiff also requested the Defendant to issue them with a letter of commitment concerning the acquisition of the Property, the indicative timelines, and the requirements of the Plaintiff towards this process of acquisition. Additionally, the Deponent referred Court to the contents under Pages 9 to 10 of the annexures for copies of the letters dated 19th February 2021 and 17th May 2021.

l. In its letter of 19th July 2021, the Plaintiff expressed its disappointment that despite the many requests the Defendant had not given them an update on the acquisition process of the landand demanded for the prompt payment of the compensation for the Property. The Plaintiff asked the Defendant to make a commitment either through an irrevocable letter undertaking to make full payment before commissioning the project, the gazettement of the intention to acquire land or the payment of down payment for works to proceed. He further referred to the contents under Pages 11 to 12 of the annexures for a copy of the letter dated 19th July 2021.

m. In addition, the Defendant was a State Corporation whose financial operations and budgets for undertaking the Project ought to have been approved and set aside before commencement of the Project.Despite the Plaintiff demonstrating good faith, to date, the Defendant had deliberately delayed and avoided or failed/refused/neglected to compensate and pay the Plaintiff for the acquisition of the portion of the Property that had been earmarked as part of the Project.

n. On or about 9th February 2022,the Plaintiff, through its Advocates on record, wrote to the Defendant demanding, "inter alia', that the Defendant and/or its contractors immediately stop all ongoing works on the Property and delivery of vacate possession within fourteen (14) days from 9th February 2022 if no progress was demonstrated towards acquisition of the Property (the Demand). He made reference to the contents founded under Pages 13 to 14 of the annexures for a copy of the Demand letter dated 9th February 2022.

o. Despite demand having been made, the Defendant has refused to accede to the Demand letter or make any commitments towards the acquisition of the Project Property and/or the Defendant has delayed and avoided to take any tangible steps towards formalizing the acquisition or compensating the Plaintiff for the Project Property it wished to acquire.The Defendant had no intention to acquire the Property and intended to illegally, and unconstitutionally deprive the Plaintiff of its lawfully owned property.

p. In or around 10th May 2022 and in blatant disregard of the Demand Letter by the Plaintiff, the Defendant and/or its contractors and/or agents hurriedly commenced construction of a boundary wall on the Project portion and which construction was and is still ongoing as of the date of this application. He referred Court to the contents under Pages 15 to 21 of the annexures for copies of photographs of the Property before the construction of the boundary wall as well as photographs demonstrating the ongoing construction of the boundary wall.

q. The Defendant's action of taking and/or remaining in possession of the Project Property andfurther developing the Property without the consent nor authority of the Plaintiff amounted to trespass and an unlawful acquisition of property. The action of trespass meted by the Defendant was continuing as at the date of filing of this Suit.

r. As a result of the presence of the Defendant on the Property, the Plaintiff had lost the use of its right to property and had been deprived of the ability to fully utilize the Property for its intended use as detailed hereinbelow:

i. At the time of purchase of the Property, the Plaintiff intended to construct office blocks, go-down blocks, and warehousing facilities on the entire Property, including the Project Portion, for its own use as well as to earn revenue by providing storage facilities to third parties, at a fee.

ii. The Plaintiff has extensively developed part of Property by developing the aforementioned office blocks and storage facilities from which it has been carrying out its business of a container freight station. However, the Plaintiff is unable to fully develop the Property as the Defendant has trespassed on a portion thereof by building on the Project Portion.

s). The Plaintiff would like to embark on development of the remaining portion of the Property was its constitutional right and it was therefore imperative that urgent orders were issued to prevent the Defendant from entering into or accessing or developing the Property since it had no proprietary interest in the Property whatsoever.

t). Unless urgent injunctive orders were issued to prevent the Defendant from entering into or accessing or developing the Property and orders to exit the Property, the Defendant would continue to illegally trespass onto the Property and deprive the Plaintiff of its constitutional right to property.

q). It was in the interest of justice and fairness that the orders sought herein be granted.

**IV. The Defendant/Respondent's case**

8. On 30th May, 2022, the Defendant filed 6 Paragraphed grounds of opposition dated 27th May, 2022 on the following grounds: -

i. The application had been brought in bad faith and the Plaintiff was guilty of lack of condor and material non - disclosure.

ii. The application sought substantive and conclusive orders which should not be granted at preliminary stages without granting both parties an audience.

iii. The application was an abuse of the Court process and sought only to hamper the Defendant's performance of its contractual obligations thereby unjustifiably exposing the Defendant and the public to immense losses in respect of contractual penalties and damages.

iv. The Application offended public interest and sought to circumvent the provisions of *the Constitution* of Kenya 2010 as well as the *Land Act* No. 6 of 2012 with respect to deprivation of private interests in land for a public purpose and in the public interest.

v. Threshold for grant of temporary and mandatory injunctive orders as depicted in the Plaintiff's pleadings, the application never met the required standards since the Plaintiff stood to suffer no prejudice or irreparable harm whatsoever, that could not be compensated by way of damages.

vi. The application was frivolous, vexatious and an abuse of the Court process and should be struck out with costs to the Defendant.

9. In addition to the said Grounds of Opposition, the Defendant also responded to the applications filed by Plaintiff/Applicants through filing a 36 Paragraphed of the Replying Affidavit sworn by John Chau Mwangi, an employee of the Defendant working as the Senior Estates and Rating Officer at the Contracts and Conveyancing Departments dated 3rd June, 2022 where he averred that:

a. The Advocate on record for the Defendant/Respondent had shown him the Plaint and the verifying Affidavit dated 13th May 2022 together with the Notice of Motion and Supporting Affidavit deponed by Mohammed Anwar Abdirahman Haji Abass dated 13th May 2022 as well, which he had read and understood and wished to respond on behalf of the Defendant/ Respondent.

b. The suit property (MN/VI/3711) is registered in the name of Focus Container Freight Station, the Plaintiff/Applicant herein, and measured approximately 7.321 Ha (approximately 18.090 acres) under a leasehold interest for the remainder of a term of 99 years with effect from 1st June 2009. (Attached herewith and marked "JM – 1" was a copy of the Certificate of Postal Search).

c. The suit property was situated in Kipevu area, adjacent to the Kenya Pipeline Company (KPC) facility and was near the Kipevu Sewerage Treatment Plant abutting the Mombasa Port boundary in the Kipevu area accessible through Gate 18 of the Defendant/Respondents Port premises. (Attached herewith and marked as "JM – 2" was a copy of satellite image of the suit property).

d. The facilities developed on the plot were previously used for Cargo Freight Services (hereinafter referred to as "The CSF") business, as Focus CFS was amongst the privately owned, KPA licensed Container Freight Stations that were engaged by the Authority to handle cargo owing to cargo congestion in the Port. However, CFS' operations had since scaled down owing to expansion of the Port's capacity to handle cargo.

e. The suit property was to be partly acquired either through Private treaty or in the alternative through Compulsory acquisition if the former failed, for the construction and implementation of the Kipevu Oil Terminal(Hereinafter referred to as "KOT") project.

f. The inception and concept designs for the KOT project were prepared in the year 2012. Part of the designs was a reference design that defined the optimal location of the KOT Beach Valve Station (hereinafter referred to as "BVS") and was submitted by the KOT Consultant in September 2016.

g. The Head of Projects Development and Management (HPD&M) wrote to the Head of Contracts & Conveyancing (HC&C), both employees of the Defendant/Respondent, on 25th September 2017 on the need to acquire a section of the Plot 3711 (Part) for purposes of

construction of the Beach Valve station as part of the KOT project. (Attached herewith and marked as "JM – 3" was a copy of the letter dated 25th September 2017).

h. In February 2018, a report on the Common User Manifold(CUM) for Oil Marketers pipelines was submitted to the Defendant/Respondent, highlighting additional features to the KOT project, which highlighted the need to acquire land for the Oil Marketers to connect to the Common User Manifold (CUM). The report identified the suit property herein (Page 13 at item number 5.1.3) as ideal for the intended Common User Manifold (CUM) and the proposed adjoining pipelines. (Attached herewith and marked as "JM – 4" as a copy of the report).

i. The Head of Projects Development & Management of the Defendant/Respondent wrote to Head of Contracts and Conveyancing of the Defendant/Respondent, clarifying that the total acreage of land required for construction of the Beach Valve Station (BVS) for the Kipevu Oil Terminal Project (KOT), was 0.4Ha. The letter was accompanied by a general layout illustrating the exact location where the proposed BVS would be situated. (Attached herewith and marked as "JM – 5" was a copy of the letter dated 7th February 2018).

j. The Defendant/Respondent wrote to Plaintiff/Applicant vide letter dated 28th March 2018 informing them that part of the suit property was earmarked for acquisition by the Defendant/Respondent for the construction of the Kipevu Oil Facility. (Attached herewith and marked as "JM – 6" was a copy of the letter dated 28th March 2018). The Defendant/Respondent vide a letter dated 31st May 2018, requested the Director of Valuation in the Ministry of Lands & Physical Planning to value the 0.4Ha portion of the suit property, delineated in the drawing as received from the projects department as illustrated in appendix marked as "JM – 6" above. (Attached herewith and marked as "JM – 7" was a copy of the letter to the Director of Valuation dated 31st May 2018). The Director of Valuation responded to the request for valuation by the Defendant/Respondent vide a cover letter dated 24th October 2018, forwarding the Valuation report as requested. (Attached herewith and marked as "JM – 8" were copies of the cover letter and the Valuation Report).

k. The Valuation Report in appendix marked as "JM – 9" above, indicated that the portion of the land required was valued at a sum of Kenya Shillings One Hundred and Five Million (Kshs. 105,000,000/=), at the rate of a sum of Kenya Shillings One Hundred and Twenty Million (Kshs. 120,000,000/=) per acre. The Head of Projects Development & Management thereafter wrote to the Legal Services Division of the Defendant/Respondent, vide a letter dated 10th February 2020, communicating that the area of land required to accommodate construction of the Common User Manifold (CUM) and Beach Valve Station (BVS) in the suit Kipevu Oil Terminal Project, had increased from the initially requested for 0.4Ha to 0.65Ha. (Attached herewith and marked as "JM – 9" is a copy of the letter dated 10th February 2020).

l. On behalf of the Legal Services, the Head of Contracts & Conveyancing of the Defendant/Respondent wrote to Head of Projects Development & Management of the Defendant/Respondent, requesting for confirmation with certainty the exact size of land required for the KOT project's Common User Manifold (CUM) and the Beach Valve Station (BVS) and whether there was a budget for the proposed acquisition. (Attached herewith and marked as "JM – 10" was a copy of dated 14th of February 2020). The Head of Contracts & Conveyancing received an email correspondence on the 25th February 2021 provided that the portion of the suit property required had increased to 1.81Ha. The email correspondence had a satellite image

enclosed, that delineated the arearequired for the project. (Attached herewith and marked as "JM – 11" was a copy of the email correspondence).

m. The Plaintiff/Applicant vide a letter dated 19th February 2021, demanded finalization of the acquisition of the subject plot and compensation as communicated to them on the 28th March 2018. (Attached herewith and marked as "JM – 12" was a copy of the letter dated 19th February 2021). The Plaintiff/Applicant sent a further letter on 20th April 2021, informing the Defendant/Respondent that they were still keen on the Authority finalizing the compensation for the suit property. Additionally, while noting that they owed the Defendant/Respondent a sum of Kenya Shillings Three Hundred Million (Kshs. 300, 000, 000.00/=) on account of billing for container freight station operations, the Plaintiff/Applicant proposed the offsetting of the amounts due from them in the final compensation amount. (Attached herewith and marked as "JM – 13" was a copy of the letter dated 20th April 2021 indicating that the Plaintiff acknowledgedowing the Defendant/Applicant outstanding balances).

n. The Head of Contracts & Conveyancing of the Defendant/Respondent wrote to the Plaintiff/Applicant on a without prejudice basis on 8th June 2021, communicating that Defendant/Respondent still retained interest in acquiring the land and that a larger portion of the land extending to 1.81Ha was required. (Attached herewith and marked as "JM – 14" was a copy of the letter dated 8th June 2021). The Plaintiff/Applicant made a further demand for compensation vide letter date 19th July 2021 which letter was responded to by the Head of Contracts & Conveyancing of the Defendant/Respondent on 26th July 2021 on without prejudice basis, stating that the Defendant/Respondent was seeking budget to progress the intended acquisition and compensation to finalization. (Attached herewith and marked as "JM – 15" were copies of the letters dated 19th July 2021 and 26th July 2021).

o. The Land Use & Development Committee (LU&DC) of the Defendant/Respondent held a meeting on the 1st of February 2019, was briefed on the intended acquisition of plot 3711(Part), at the time being an area extending to 0.4 acres as requested by HPD&M. The LU&DC considered and deliberated on the issue and recommended the request for consideration by the Board of Directors. In a meeting held on the 31st March 2021 the Land Use & Development Committee considered and recommended for consideration and approval by the Board, for the intended acquisition of 1.81Ha or 4.47Acres following a review of the area required for the KOT project by the HPD & M. The Committee further resolved that legally, the route to follow for acquisition of the land was through compulsory land acquisition forum under the National Land Commission.

p. After the meeting of the Land Use & Development Committee (LU & DC) on the 31st March 2021, Management of the Defendant/Respondent conducted a site visit to the suit property for inspection and valuation, to guide the planning and budgeting process for the intended acquisition. From inspection of the suit property, a Valuation Report prepared by the Defendant/ Applicants internal valuers dated 24th October 2018, appraised the 4.47acres portion of the suit property including the developments thereon at a sum of Kenya Shillings Seven Twenty Nine Million (Kshs. 729,000,000.00/=) retaining the value of the land at the rate of a sum of Kenya Shillings One Hundred and Twenty Million (Kshs.120,000,000.00/=) per acre as valued by the Government Valuer. (Attached herewith and marked as "JM – 16" is a copy of internal valuation report).

q. The Management of the Defendant/Respondent presented the request for the proposed acquisition for consideration by the Finance and Assets (F&A)Committee of the Board of

Directors on the 24th January 2022. The Finance & Assets Committee of the Board of Directors guided that the matter of compensation needed certainty on the compensation amounts for proper budgeting and consideration by the Board. The Committee further directed that Management wrote to the National Land Commission (Hereinafter referred to as "The NLC") requesting for valuation of the subject plot to enable consideration and decision on the matter.

r. The Defendant/Respondent duly wrote to the NLC on 2nd March 2022, requesting for valuation advisory over the subject plot. (Attached herewith and marked as "JM – 17" is a copy of the letter to NLC dated 2nd March 2022). The NLC in response to the Defendant/ Respondent's request visited the subject plot on the 16th May 2022 for inspection and valuation. The Defendant/Respondent was still awaiting the valuation report from the NLC on the subject plot. The Defendant/Respondent's Board of Directors during its 401st Special Board Meeting held in Nairobi on 9th May 2022, Management had sought a supplementary budget based on a desktop valuation. The Board of directors gave directions that Management prepares a comprehensive brief on the chronology of events leading up to the current state of the proposed acquisition and confirming with certainty the required area of the subject Plot No. 32. That the Advocate on record for the Defendant/Respondent had informed the Deponent that the suit filed by the Plaintiff/Applicant on 16th May 2022, sought stoppage of any operations or construction on the portion of the suit property to be acquired was premature and ill advised, as the process of compensation was underway.

s. The Defendant/Respondent had undertaken all due processes to justly compensate for the intended acquisition of the property, whose compensation amount would be resolved independent of the debt of a sum of Kenya Shillings Three Hundred Million (Kshs. 300, 000, 000.00) that the Plaintiff/Applicant owed the Defendant/Respondent.

t. Further, the Advocate on record for the Defendant/Respondent had informed the Deponent that the Defendant/Respondent would thereafter be requested by the Board of Directors, to formalize the process through gazettement for formalization and finalization of the acquisition, after the budget was approved.

**V. The Notice of Motion application dated 7th December, 2021 by the Defendant**

10. The Notice of Motion application dated 7th December, 2021 by the Defendant herein sought for the following orders:-

a. Spent

b. Spent

c. That pending hearing and determination of this application the Honorable Court be pleased to issue an order to suspend the implementation and to stay the execution of the Ex - Parte orders issued on 1st December, 2022 in respect to the Plaintiff's Notice of Motion application dated 30th November, 2022 and filed in court in 1st December, 2022 and any consequential orders arising therefrom.

d. That this Honorable Court be pleased to review, discharge and/or set aside all Ex - Parte orders issued on 1st December, 2022 in respect to the Plaintiff in Notice of Motion application dated 30th November, 2022 and filed in court on 1st December, 2022 and all consequential orders arising therefrom

e. That this Honorable Court be pleased to issue other or further orders as it may deem just and fit to serve the interest of justice.

f. That costs of this application be provided for.

12. The Defendant/Applicant application is premised on the grounds, testimonial facts and averments made out under the 25 Paragraphed Supporting Affidavit sworn by JOHN CHAU MWAI dated 7th December, 2022 together with the six (6) annexures marked as "KPA-1 to 6" annexed thereto. He deponed as follows:-

a. the Deponent was the Senior Estates and Rating Officer at the contracts and conveyancing Department at the Defendant herein hence well conversant with the matters on issue in this suit having been duly authorized and this competent to swear this Affidavit.

b. On 1st December, 2022, the Plaintiff filed in court of the Notice of Motion application dated 30th November, 2022 under the Certificate of urgency seeking for numerous orders including "inter alia" orders of temporary injunction restraining the Defendant's use and utilization of facilities developed on a partition of the Plaintiff's land and orders for striking out the Defendant's statement of Defence dated 10th June, 2022.

c. Upon Ex - Parte hearing of the Plaintiff's application, the court granted prayer number 2 of the Plaintiff's application pending "inter Parte" hearing on 8th December, 2022. The court order issued on 1st December, 2022 was part of the Record of this Honorable Court.

d. Prayer No. 2 of the Plaintiff's application provided that pending hearing and determination of this application or until further orders of the Honorable Court a temporary injunction do issue restraining the Defendant its agents, workers, contractors or other persons acting under its instructions from using and utilizing and/or any other manner from dealing with the building, machinery and other apparatus known as Kipevu Oli Terminal Facilities including the common used manifold and Beach Value station facilities located on the suit land

e. Unless the Honorable Court granted an order to suspend the implementation and to stay execution of the interim order of injunction issued Ex - Parte by the Court on 1st December, 2022 and thereafter an order to review discharge and/or set aside the Ex - Parte orders the operations of the entire KOT Project would be paralyzed thereby causing mass fuel shortage huge financial loses and extreme international reputational damages for the Port of Mombasa.

f. The New Kipevu Oil Terminal Project (KOT) was an ultra-modern oil terminal in the Port of Mombasa and a key public project of highly strategic importance to the Republic of Kenya. The project was part of the expansion Republic oil handling capacity key to securing future energy needs, whereby the critical components of the project being the common user manifold and Beach, value station were constructed over a partition of the suit land KOT Project and its components acted as the inter mediate through which petroleum products were imported into Kenya and the neighboring countries providing connectivity for suppliers from the Island Oil terminal to remote storage locations controlled by the Kenya Pipeline Company and other third party oil marketers/companies.

g. The Ex - Parte interim orders of injunction was extremely drastic in its very nature and the order had been obtained on the basis of gross material non- disclosure and misinterpretation of facts by the Plaintiff and if the Plaintiff was allowed to proceed to implement the orders and to levy execution of the said orders against the Defendant, then Defendant and the public would suffer loss that was irreparable and it would disrupt the overall functioning of the Plaintiff and

international trade, the implementation and execution of the said order of inunction would lead to a total collapse and crippling of the supply chain for petroleum products to Kenya and her neighbors.

h. The Plaintiffs failed to disclose to Honorable Court that indeed the portion of the suit property on which the KOT project was situated became public land the moment the process of Compulsory acquisition of the same commenced and that the only remedy available to the Plaintiff at law was the remedy of just compensation, and particularly the remedy of vacant possession and injunction was not available to the Plaintiff as against the Defendant in respect to the suit property.

i. The Plaintiff was the registered owner of the leasehold interest of 99 years from 1st June, 2009 over the suit property approximately 7.371 hectares situate within Mombasa County. In September, 2017 there were internal discussions held at the Defendant over the need to acquire a portion of the suit property for purposes of developing the KOT Project, consequently by way of a letter dated 28th March, 2018 the Defendant made a formal proposal to the Plaintiff of its intention to acquire a portion of the suit property by private treaty or in the alternative compulsory acquisition for purposes of development of KOT Project which was scheduled to commence construction in June, 2018.

j. The Plaintiff replied to the letter dated 28th March, 2018 vide a letter dated 26th May, 2018 informing the Defendant that there was no objection to such acquisition and that the Defendant was to communicate the procedures involved in the acquisition. After obtaining the approval of the Plaintiff the Defendant through the Cabinet Secretary National Treasury requested the National Land Commission to commence the process of compulsory acquisition of the suit property in line with the provisions of *the Constitution* and the *Land Act*, No. 6 of 2012 and the NLC procedures and it had already commenced the compulsory acquisition of a portion of the suit property which would pave way for payment of compensation – the Provisions of Section 120 (2) of the *Land Act*, No. 6 of 2012 allowed the state and Defendant to take possession and ownership of the suit property even when the process of compulsory acquisition of the property had not been completed and therefore the Defendants occupation and use of the suit land was with the knowledge of the Plaintiff and in accordance with the law.

k. The process of the compulsory acquisition of a portion of the suit land was commenced and the Defendant took possession thereof the said portion immediately became public land vested in the Defendant on behalf of the state, from all encumbrances and the same ceased to be private land and hence the question of delivery vacant possession directing and/or re vesting such acquired land to the Plaintiff did not arise even if compensation was not paid within the statutory stipulated period. Thus the order of injunction could not issue as prayed because the remedy of restoration repossession and/or restitution of possession of the portion of the suit property to the Plaintiff was no longer available and the only available remedy for the Plaintiff lied in the payment of just compensation in accordance with *the constitution* and the *Land Act*, No. 6 of 2012. The value of the suit land was clearly ascertainable and the remedy of compensation was *the constitution* and statutory remedy available to the Plaintiff and the process of compulsory acquisition of portion of the suit property was already underway despite the delay experienced in the process.

l. The delay or failure to make an award and pay compensation within a certain period never nullify the public interest in the acquired portion of the suit property, there were genuine reasons that had occasion the delay on the finalization of the compulsory acquisition of the portions of the suit property including inter alia changes in the required area of land earmarked

for acquisition initially quoted at 0.35HA to 1.81 HA and the Plaintiff was aware of the reasons for the delay. The Defendant had invested huge amounts of public funds in developing the portion of the suit property.

m. The public interest of the project undertook on the portion of the suit land for outweighed the private interest of the Plaintiff and the interim order of injunction was bound to result in the massive loss of the public loss of public funds and the same would injure the public interest – a sum approximately Kenya Shillings Fourty Billion (Kshs. 40,000,000,000/=) had been expanded from public coffers in funding the KOT project. It was fair to grant the orders sought by way staying the execution, review discharge and/or setting aside of the Ex - Parte orders issued by the court on 1st December, 2022.

**VI. The Replying Affidavit by the Plaintiff/Respondent to the Notice of Motion application dated 7th December, 2022.**

13. While opposing the Notice of Motion application dated 7th December, 2022 filed by the Defendant/ Applicant herein, the Plaintiff/Respondent filed an 11 Paragraphed Replying Affidavit sworn by Mohamed Anwar Abdirahaman Haji Abass dated 9th December, 2022. He averred that:-

a. He was a Director of the Plaintiff and fully conversant with the facts of the matter hence competent to swear this Affidavit.

b. The Application was misconceived unmerited and an abuse of the court process and it ought to be dismissed with costs.

c. He denied the allegation of gross material non-disclosure and misinterpretation of facts – on the contrary the Defendant had misled the court to be stating that the process of Compulsory acquisition had been commenced as envisaged under Sections 107 to 133 of the *Land Act* No. 6 of 2012 only commenced once a request for acquisition was submitted to the NLC for it's consideration was approved and a Notice of Intention to acquire was gazette by the NLC with a copy of delivered to the Plaintiff. No evidence had been tabled – following procedure as per the provisions of Sections 107 (1) and 111(1A) of the *Land Act* No. 6 of 2012 and Article 40 of *the Constitution* of Kenya 2010 required the Defendants as acquiring body to deposit compensation funds with the NLC prior to the acquisition of the suit property. No such evidence had been tabled as these are not truthful.

d. The sum of Kenya Shillings Fourty Billion (Kshs. 40,000,000,000/=) the Defendant claimed it had invested on the suit land in funding the KOT having started in March, 2018 or thereabouts was appealing to date the Plaintiff had not been compensated for the deprivation of its property – they had no regard to Private property rights – went against the principles of integrity accountability and lack of striking a balance between the public and private rights.

e. The continuous acquisition and occupation of the Plaintiff's land by the Defendant and operations of the property was anchored on the illegality and hence to set aside the interim orders would be tantamount to the court sanctioning the illegal occupation by the Defendant. There had been no justification to warrant lifting, discharging and/or setting aside the interim orders.

## VII. Supplementary Affidavit by the Defendant/Applicant

14. On 20th December, 2022, the Defendant/Applicant herein filed a 13 Paragraphed Supplementary Affidavit sworn by John Chau Mwangi, dated even date responding to the issues raised from the replying Affidavit by the Plaintiff/Respondent. He deponed as follows:-

    a. It was not true that the Defendant/Applicant had failed to take the necessary steps to commence and/or progress the process of the compulsory acquisition of the suit property as alleged. Accordingly, the said process had commenced only that it had been caught up by unexpected delays including "inter alia" changes in the required area of land earmarked for the acquisition and the Plaintiff was well aware of the reasons for the delay the same having been conveyed to them vide a letter dated 8th June 2021 by the Defendant.

    b. The Court to take judicial notice that by way of the Amended Executive Order No. 1 of 2020 issued on 7th August 2020 the Defendant was reorganized from its erstwhile parent Ministry of Transport, Infrastructure, Housing Urban Development and Public Works to the National Treasury and Planning and a further Executive Order No. 1 of 2022 was issued on 13th October, 2022 reorganizing the Defendant from the National treasury and Planning to Ministry of Roads and Transport. These changes had resulted the Defendant being subjected to various administrative bureaucracies aimed at giving effect to the reorganization of government and which bureaucracies had immensely affected and regular operations at the Defendant resulting in the delays in the implementation of some of the ongoing process and/or projects at the Defendant.

    c. While the said reorganization was ongoing, the Defendant had on several occasions prompted the Cabinet Secretary, National Treasury and Planning to engage the NLC to undertake the compulsory acquisition of the portion of the suit property as seen from the letters by the Defendant dated 24th June, 2022 and 3rd August, 2022.

    d. Indeed vide a letter dated 13th December, 2022 the Cabinet Secretary, Ministry of Road and Transport formally requested the NLC to commence and progress the compulsory acquisition of the portion of the suit land – a clear indication that the process of compensation for the Plaintiff had firmly been in progress notwithstanding the delay occasioned by the said reasons.

## VIII. Submissions

15. On diverse dates of 30th May, 2022, 21st July, 2022, 1st December, 2022, 8th December, 2022, 19th December, 2022 and 20th April, 2023 respectively while in the presence of all the parties, the Honorable Court would be informed that this was a matter that parties were exploring an out of court negotiation pursuant to the Provisions of Article 159 (2) (c) of *the Constitution* of Kenya 2010 and also willing to finalize on the already commenced process of compulsory acquisition of a portion of the land for the KOT by the Defendant in accordance with the Provisions of Article 40 (3) of *the Constitution* of Kenya 2010 and Sections 107 to 119 of *Land Act* No. 6 of 2012. Despite of this, it also became imperative that in the meantime that direction that the four (4) impugned Notice of Motion applications dated 13th May, 2022, 30th November, 2022, 7th December, 2022 and 14th April, 2023 simultaneously be disposed off by way of written submissions. Pursuant to that they all fully complied. Indeed, on 2nd May, 2023 the Learned Counsels M/s. Onesmus Advocate for the Plaintiff and Mr. Amakobe Advocate for the Defendant were accorded ample opportunity to articulate all the issues by way of highlighting the written submission a duty they professionally and efficiently executed with great devotions dedication and diligence and for ever the Honorable Court is grateful to them.

Thereafter the Honorable Court reserved the 6th June, 2023 as the date to deliver its Ruling thereof.

**A. The Written and Oral Submissions by the Plaintiff/Applicant**

16. On 26th January, 2023, the Learned Counsel for the Plaintiff/Applicant through the Law firm of Messrs. Anjwarwalla & Khanna LLP Company Advocates filed their consolidated written submissions dated 25th January, 2023 and 24th June, 2023 and filed on the same day. M/s. Onesmus Advocate commenced her submission by stating that the Plaintiff instituted this Suit by way of a Plaint dated 13th May 2022 (Hereinafter referred as "The Plaint"). Contemporaneously, the Learned Counsel held that with the Plaint, the Plaintiff filed the Application seeking injunctive reliefs against the Defendant. She underscored the fact that in response to the Application, the Defendant filed Grounds of Opposition dated 27th May 2022 and a Replying Affidavit on 6th June 2022 (Hereinafter referred to as "The Replying Affidavit"). As a guide, the Learned Counsel posed the following issues which she based on her submissions. These were:-

    a. Had the Plaintiff proved the requirement for granting temporary injunctive orders or otherwise.

    b. Whether the Plaintiff's application offended "the doctrine of Sub Judice" as claimed by the Defendant.

    c. Had the Plaintiff proved the requirement for granting Judgement on admission.

    d. Whether the Defendant's application was merited and/or whether the same had ben overtaken by events

10. Based on these issues intended to be considered by Court for determination, the Learned Counsel averred that from the Application and the responses filed by the Defendant, it was clear that the following facts were undisputed:-

    a. The Plaintiff is the lawful registered proprietor of all that parcel of land known as LR Number MN/VI/3711 situate within Mombasa County (the Property).

    b. As of the date of filing the suit, the Defendant was in occupation of the Property and/or a portion of the Property (the Project Portion).

    c. The Defendant admitted that it was in possession of the Project Portion after the Plaintiff granted it permission to occupy and start construction of its project on the understanding that the Defendant would commence the process of acquisition of the Project Portion.

    d. By a letter dated 9th February 2022 (the Demand), the Plaintiff, through its Advocates on record, wrote to the Defendant demanding that the Defendant and/or its contractors immediately stop all ongoing works on the Property and/or the Project Portion and deliver vacant possession of the Project Portion within fourteen (14) days from 9th February 2022.

    e. The Defendant failed to deliver vacant possession of the Project Portion to the Plaintiff, as demanded.

    f. As at 23rd February 2022, the Plaintiff had withdrawn its permission for the Defendant to continue to occupy, construct, develop and/or in any manner deal with the Property and/or the Project Portion. The Plaintiff sought to recover vacant possession of its the Project Property as it is clear that the Defendant has no intention whatsoever of acquiring the Project Portion.

11. The Learned Counsel submitted that on or around 10th May 2022 and in further blatant disregard of the demand letter, the Defendant and/or its contractors and/or agents hurriedly commenced construction of a boundary wall on the Project Portion and which construction was ongoing as of the date of instituting these proceedings. Reference is made to the photographs annexed to the Application for proof of this assertion. The Defendant has not denied that the photographs depict a wall that it constructed on the Project Portion.Accordingly, the Plaintiff sought for the following injunctive orders against the Defendant: -

    a. Temporary injunctive orders prohibiting the Defendant from continuing any and further construction on the Property pending hearing and determination of the suit.

    b. Mandatory injunctive orders restraining the Defendant from trespassing and accessing the Property pending hearing and determination of the suit.

12. The Learned Counsel argued that the Application was merited for the reasons set out hereunder. The principles for grant of temporary injunctions are now well settled. In the case of "Nguruman Ltd – Versus - Jan Bonde Nielsen & 2 Others(2014) eKLR, the Court of Appeal restated the principles pronounced in the case of "Giella – Versus - Cassman Brown & CO. Ltd(1973) EA 358 that an applicant is required to

    a. establish his case at a prima facie level,

    b. demonstrate irreparable injury if a temporary injunction is not granted; and

    c. if the Court is in doubt, it will decide an application for injunction on a balance of convenience.

13. The Learned Counsel further submitted that what amounted to "a prima facie case' was defined in the case of "MRAO – Versus - First American Bank of Kenya Limited and 2 others (2003) KLR 125 as:

    > " .. a genuine and arguable case. It is a case in which on the material presented to the 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."

14. The Learned Counsel's contention was whether the Plaintiff had demonstrated that a prima facie case existed and a right which had been infringed by the Defendant. The Counsel held as follows:-

    i. The Plaintiff had established that it was the lawful registered Proprietor of the Property. This was a fact conceded to by the Defendant (refer to Paragraph 3 of the Replying Affidavit).

    ii. It was not in dispute that sometime in the year 2018, the Defendant approached the Plaintiff expressing interest in acquiring the Project Portion.

    iii. It was also not in dispute that at the Defendant's express request on or around 1st February 2019 the Plaintiff, in good faith, permitted the Defendant to take possession and commenced works on the Project Portion on the strict understanding that the Defendant was putting in place mechanisms to acquire the Project Portion, and would acquire the Project Portion and would ensure that the Plaintiff was adequately compensated.

    iv. Despite several requests made by the Plaintiff over the years for prompt payment of compensation, to date, the Defendant has neither set in motion nor compensated the Plaintiff for the intended acquisition of the Project Portion.

    v. As at 23rd February 2022,the Defendant had no right of occupation of the Property. By a letter dated 9th February 2022,the Plaintiff through its Advocates on record, wrote to the Defendant

demanding that the Defendant and/or its contractors immediately stop all ongoing works on the Property and/or the Project Portion and deliver vacant possession within fourteen (14) days from 9th February 2022.

vi. In view of the aforementioned, the Defendant's continued occupation of the Property was unlawful and/or devoid of any legal basis. The Learned Counsel relied on the decision of the Honourable Mr. Justice Musinga (as he then was) in the case of "Delamere Estates Limited – Versus - Ndung'u Njai & 42 others [2006] eKLR where the Court stated that once permission to occupy land had ceased, the Defendants' continued occupation was without any colour of right and the Defendants must respect the Plaintiff's proprietary rights over the suit land as enshrined in law by vacating the land. Applying the same rationale to the present case, it was the Counsel's submission that the Defendant's continued occupation of the Project Portion had no legal basis and the Defendant was effectively trespassing on the Plaintiff's property. This Honourable Court ought to intervene to ensure the Defendant respected the Plaintiff's constitutional rights to the Property and/or Project Portion.

vii. Importantly, the Learned Counsel argued that the Defendant had failed to justify its occupation of the Project Portion but rather sought to rely on a process of compulsory acquisition that had never materialized and has yet to be commenced. It was trite law that possession could precede compulsory acquisition. The Defendant had taken possession of the Project Portion and kept the Plaintiff languishing without any compensation under the guise that it would happen one day. It was evident from the Defendant's dilatory tactics that it had no intention of legally acquiring the Project Portion. The Learned Counsel cited the case of "Bosire Ombwochi – Versus - Wilkister Moraa Boera [2015] eKLR, where the Honorable Mr. Justice S. Okong'o held that failure to challenge an applicant's title as well as to justify entry and occupation by a trespasser would satisfy the Court that "a prima facie case' had been established.

15. On whether the Plaintiff was guilty of material non – disclosure as claimed by the Defendant, the Leaned Counsel contended as follows:-

a. The Plaintiff fully disclosed all material facts touching on the suit and/or relevant to its application. The Plaintiff extensively address the acts of trespass alleged to have been committed by the Defendant including the infrastructure and machinery set up on the Project Portion.

b. Any facts touching on the benefit accruing to the Defendant as a result of its unlawful occupation and/or trespass to the Plaintiff's property was neither material nor relevant in dealing with the application by the Plaintiff.

c. Accordingly, the Counsel submitted that the material facts claimed to have been suppressed, concealed or not disclosed if any, were not relevant in dealing with the Plaintiff's application.

16. The Learned Counsel submitted that the Plaintiff had established "a prima facie case' of trespass with overwhelming chance of success against the Defendant. The Counsel asserted that the on the issue of irreparable loss, the Honourable Mr. Justice J. Mativo in the case of "Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR detailed what an applicant must show to prove that it has suffered irreparable harm;

> " a moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured."

17. This position was reiterated in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR where the Court of Appeal added as follows

> "an injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation,' of whatever amount, will never be adequate remedy."

18. The Learned Counsel contended the Plaintiff had and continues to suffer irreparable harm, as demonstrated below:-

    i. The Defendant had and continues to develop the Kipevu Oil Terminal project (the KOT Project) which required setting up of oil storage facilities within the Project Portion and construction of a boundary wall along the Project Portion.

    ii. At the time of filing of this suit and Application, the Defendant had commenced the construction of the boundary wall along the Project Portion. The Plaintiff was apprehensive that the Defendant would continue with the construction of the boundary wall and/or further development on the Project Portion in a bid to complete the KOT Project and proceed with its commissioning. This means that the Plaintiff will be dispossessed of the Project Portion.

    iii. The injury suffered by the Plaintiff of being deprived of its property is tangible and demonstratable and amounts to irreparable harm. She relied on the case of "Machareus Obaga Anunda – Versus - Kenya Electricity Transmission Co. Ltd[2015] eKLR, where the Mr. Justice S. Okong'o held that a Plaintiff disposed of its properties and/or being kept away from its properties by a trespasser stands to suffer irreparable harm.

    iv. It is impossible to quantify the Plaintiff's loss. For the past three (3)years and four (4) months since the Defendant took possession of the Property, the Plaintiff has been denied the ability to utilize its property whether through development, rent or sale. The loss of use suffered by the Plaintiff is not quantifiable. This loss continues every day that the Defendant is in occupation. We wish to add that the present proceedings are not monetary in nature rather the Plaintiff primarily seeks the recovery of the Property from a trespasser and such other consequential orders as may issued by this Honorable Court.

    v. Accordingly, the injury suffered by the Plaintiff cannot be compensated through monetary damages.

19. The Learned Counsel argued that the Defendant/Trespasser ought to give way by vacating the Property and/or Project Portion pending the determination of the dispute. They relied on the decision in the case of "Dismas Otella Osikoyo & 2 others – Versus - Thomas Barasa Kimani [2018] eKLR. In the matter, the Court referred and upheld the decision in Jaj Superpower Power Cash & Carry – Versus - Nairobi City Council & Others C.A. Civil Appeal No.111 of 2002 that

> "it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages."

20. The Learned Counsel reiterated that the injury and loss by the Plaintiff, which is currently continuing, cannot be sufficiently remedied by damages. The Learned Counsel submitted that on a balance of convenience, the Plaintiff has already established a prima facie case and that it will suffer irreparable loss if injunctive orders are not granted. Accordingly, the Plaintiff is deserving of interim injunctive reliefs and the question of balance of convenience does not arise. As pointed out by the Court of Appeal in

the case of "Nguruman Limited case "it is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise." Applying the rational to the instant case, this Honourable Court need not consider this third principle.

21. The Learned Counsel was of the view that without prejudice to the aforementioned, even if the Plaintiff was required to demonstrate that the balance of convenience tilts in its favour and not that of the Defendant, they submitted as follows:-

    a. At the time of purchase of the Property, the Plaintiff intended to construct office blocks, go-down blocks, and warehousing facilities on the entire Property, including the Project Portion, for its own use as well as to earn revenue by providing storage facilities to third parties, at a fee.

    b. The Plaintiff has extensively developed part of Property by developing the aforementioned office blocks and storage facilities from which it has been carrying out its business of a container freight station.

    c. Due to the Defendant's unlawful occupation of the Project Portion, the Plaintiff is unable to fully develop the Property for its use and/or to earn revenue, as aforementioned.

    d. The Defendant continues to change the layout of the Property. In the event the suit is determined in favour of the Plaintiff, the latter will be required to go to great lengths to restore the Project Portion to its former state. This would be a sheer waste of resources to ask a party to destroy what has been developed on the land when that development can be stopped in the first place.

    e. Conversely, in the unlikely event that the suit is determined in favour of the Defendant, then, it is our submission that the Defendant shall be able to continue with its construction and complete the KOT Project.

22. The Learned Counsel submitted that the balance of convenience tilts in favour of the Plaintiff. On the mandatory injunction the Learned Counsel submitted that the principles for granting mandatory injunctions are well settled. In the case of "Johnson M'Mwangera Njuki & 8 others – Versus - Wellington Sanga & 13 others [2021] eKLR, this Honourable Court outlined three principles that must be met, as follows: -

    a. The applicant must have a strong case for trial, and the standard is higher than that of a prima facie case that is often required for grant of a prohibitory injunction.

    b. The grant of interlocutory mandatory injunction is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

    c. The balance of convenience is in favour of the one seeking grant of relief of interlocutory mandatory injunction.

23. The Learned Counsel submitted that in the case of "Kenya Breweries Limited & another – Versus - Washington O.Okeyo [2002] eKLR the Court of Appeal further added that a mandatory injunction cannot be granted:

> " in the absence of special circumstances" at an interlocutory application. "However, if a case is clear and one which the court thinks it ought to be decided at once... a mandatory injunction will be granted."

24. The Learned Counsel submitted that taking the above into account, they submitted as follows:-

a. The Plaintiff has established special circumstances and/or clear case warranting the grant of mandatory injunctive orders. Reference is made to paragraphs (a) and (b) above.

b. The Plaintiff has established a strong case for trial, with a probability of success. Reliance is placed on paragraphs (B) (a) to (b).

c. The Plaintiff has established that it will suffer irreparable loss and that such loss could be compensated in terms of money. Reference is made to paragraphs (b) (c) to(f)above.

d. The balance of convenience tilted in favour of the Plaintiff. Reference was made to paragraphs (g)to (i) above

25. On whether the orders sought in the present application by the Plaintiff was "Sub – Judice" in the sense that they were similar to the ones sought in an earlier application dated 13th May, 2022. The Counsel stated as follows:-

The facts that necessitated the filing of the earlier application dated 13th May, 2022 differed from t eons causing the filing of the present application. Initially, the Contractors were undertaking construction works on the Project Portion which the Plaintiff sought to restrain. But now the Defendant had completed the construction works and currently utilizing the project to earn revenue. Besides, by that time the Defendant had not filed a Defence which they had now and admitting the Plaintiff's claim.

The prayers sought in the instant application were different from the prayers sought in the instant application. In the earlier application the Plaintiff was seeking to restrain construction from taking place while in this one they were seeking the Defendant from utilizing the KOT facilities. The issues in the two applications were distinct and separate and the Defendant had failed to establish that the two applications were similar. To buttress on this point, she cited the case of "Kenya National Commission on Human Rights – Versus – Attorney General (Supra) where the Court held that:

> "a party that seeks to invoke the doctrine of res Sub – Judice must therefore establish that there is more than one suit over the same subject matter"

26. Additionally, the Learned Counsel submitted that from the filed pleadings by the Defendant, they had made admissions on various issues. Thus, there was need for the Court to enter Judgement on admission. To begin with, she pointed out that the Defendant filed a Defence dated 10th June 2022. The Defence was a sham defence and was in fact an admission of the Plaintiff's case before this Court. Under Paragraph 2 and 4 of the Defence the Defendant admits the contents of Paragraph 3 of the Plaint that the Plaintiff was and still is the registered proprietor of the suit property. Further, the same was admitted in the contents of the Replying Affidavit sworn on 14th December, 2022 by John Chau Mwangi for the Defendant. The Defendant does not deny that it took possession and was in occupation of the Project Portion for several years now and had never set in motion the process of compensating the Plaintiff. The contents of Paragraphs 12 and 13 of the Relying Affidavit the deponent admits that the Defendant had constructed components of the KOT Project on the suit land and it was completely integrated and functioning. To support these issues of Judgement to be entered on admission, the Counsel sought reliance from the provision of Order 13 Rule 2 of the Civil procedure Rules, 2010, where once admission was made by a party to a suit, whether express or implied and through pleadings or otherwise, the other party was at liberty to apply to Court at any time for Judgement on account

of that admission. She cited the cases of "Choitram – Versus – Nazari (1984) eKLR where the Court, Madan JA held:-

> "……..admissions can be express or implied either on the pleadings or otherwise for instance correspondence. Much depends upon the language used…It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis …..if upon a purposive interpretation of either clearly written or clearly implied, or both, admissions of fact the case is plain and obvious there is no room for discretion to let the matter go to trial. The Court may not exercise its discretion in a manner which renders nugatory on express provisions of the law".

27. The Learned Counsel submitted that they wished to add that the only averment by the Defendant which was an implicit admission was that the process of compulsory acquisition would be undertaken. When that would start or conclude was not stated. In summary, the Defendant was effectively a trespasser on the Plaintiff's Property. Ordinarily, as already alluded to above, the issue of compensation comes at the tail end of the process of compulsory acquisition. If the process of compulsory acquisition has not been commenced and/or carried out lawfully, then, the issue of compensation does not arise. We thus submit that there is no lawful or legal justification for the Defendant to continue occupying the Plaintiff's Property and this Court ought to grant the orders sought in the Application.

28. The Learned Counsel concluded that in the circumstances, in this case, warrant the exercise of this Honourable Court's discretion to grant the injunctive orders sought in the Application. Further, it would be in the interest of justice for this Honourable Court to allow the Application as prayed. The Plaintiff was deserving of prayers sought in its Application and the Plaintiff prays that the Application be allowed as drawn.

**B. The Written and Oral Submissions with regard to the Notice of Motion application dated 13th May, 2022 & 30th November, 2022 by the Defendant's/Respondent's**

29. On 2nd February, 2023 the Learned Counsel for the Defendants through the Law firm of Messrs. Munyao, Muthama & Kashindi and Company Advocates filed their submissions dated even date. Mr. Amakobe Advocate commenced his submissions by providing an introduction and a detailed background to the matter whereby he informed Court that from the extensive project undertaken by the Defendant it has cost them approximately a sum of Kenya Shillings Fourty Billion (Kshs. 40, 000, 000, 000.00/=) which to him was from public coffers in funding the KOT project. Flowing from these facts, he submitted that vide the Notice of Motion application dated 30th November, 2022, he wished to rely on the following issues to be considered for its determination. These are:-

    a. Whether the Plaintiff's application dated 30th November, 2022 offended the Doctrine of "Res Sub – Judice;

    b. Whether the Plaintiff was entitled to the grant of orders of temporary injunction as sought in the application dated 30th November, 2022;

    c. Whether the Defendant's Statement of Defence dated 10th June, 2022 raised bona fide triable issues necessitating trial.

30. To begin with, on whether the Plaintiff's application dated 30th November, 2022 offended the Doctrine of "Res Sub – Judice" contrary to the provision of Sections 6, 5 and 89 of the *Civil Procedure Act*, Cap. 21. He held it was a settled the doctrine of Sub – Judice applied to both suits and applications within

the same suit and applications with an overriding objectives finality in litigation and finality to judicial decisions. The Counsel submitted that the said application offended this doctrine as the matters in issue in this application were subject of litigation between the same parties and were directly and substantially in a previous application dated 13th May, 2022> The Learned Counsel sought guidance from the legal reasoning in the Court of Appeal case of "Uhuru Highway Development Limited - Versus - Central bank of Kenya & 2 others (1996) eKLR which held:-

> "There must be an end to applications of similar nature, that is to further, under the principles of Res Judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be mandated by new applications filed after the original one is dismissed. There must be an end to interlocutory applications as much as there ought to be an end to ligation. It is this precise problem that Section 89 of the *Civil Procedure Act* caters for"

31. He averred that the by the time the Plaintiff filed this application there was another one pending determination before this Court dated 13th May, 2022. He held that both of them are over the same subject matter and seek identical reliefs. Indeed, that on 30th May, 2022 this Court issued orders for the status quo to be maintained. To the Counsel this meant there should be no more construction taking place on the suit land pending the hearing and determination of the application. Indeed, there was no difficulty in adhering to the said order as all the constructions activities had already been completed and certainly commissioning of the new Kipevu project by the President would not amount to being a breach of the Court order as envisaged by the Plaintiff. However, he opined that by filing the instant application it appeared that Plaintiff selectively and erroneously interpreted the said Court orders. He further asserted that the Plaintiff ought to have sought to arrest the delivery of the ruling and amend its application rather than filing a fresh application. By so doing it was over burdening the Judiciary with multiplicity of cases. Finally, the Counsel held that the instant application was grossly misconceived, incompetent and bad in law and ought too be struck out and/or stayed pending the hearing and determination of the application dated 13th May, 2022.

32. Secondly, on whether the Plaintiff was entitled to the grant of orders of temporary injunction as sought in the application dated 30th November, 2022. Refreing to the principles set out under the famous cases of "Giella – Versus – Cassman Brown (1973) EA 358 and MRAO Limited – Versus - First American Bank of Kenya & 2 Others (2013) eKLR, the Learned Counsel submitted that having demonstrated that the this instant application was "Sub judice" the one of 13th May, 2022, the Plaintiff would not be able to demonstrate having prima facie with probability of success and therefore the Plaintiff's application dated 30th November, 2022 defaulted on the first hurdle for the grant of an application. The Plaintiff sought for the issuance of temporary injunctive orders to restrain the Defendant from further developing, building and/or erecting any structures on the parcel of land known as Land Reference No.MN/VI/3711 situated within Mombasa County, pending hearing and determination of the Application as well as pending hearing and determination of the suit. The application further seeks temporary injunctive orders to restrain the defendant from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference No.MN/VI/3711 situated within Mombasa County. These among other order sought therein.

33. The Learned Counsel submitted that the application was resisted vide the Defendant's Grounds of Opposition dated 27th May 2022 and filed on 30th May 2022 as well as the Replying Affidavit of John Chau Mwangi sworn on 3rd June 2022 and filed on 6th June 2022, pleadings of which they reiterate.

34. The Learned Counsel submitted that on the brief background of the matter that the suit parcel, MN/VI/3711, is registered in the name of Focus Container Freight Station, the Plaintiff herein, and extends

to approximately 7.321 Ha, being a leasehold interest for the remainder of a term of 99 years with effect from 1st June 2009. It is situated in Kipevu area, adjacent to the Kenya Pipeline Company (KPC) facility and is near the Kipevu Sewerage Treatment Plant abutting the Mombasa Port boundary in the Kipevu area accessible through the KPA Gate 18 of in the Mombasa Port premises. The suit property was to be partly acquired by the defendant for the development of the Kipevu Oil Terminal (KOT) project facilities, either through private treaty ofthe parties or in the alternative through compulsory acquisition if the former fails. It is noteworthy that the concept designs for the KOT project were prepared in 2012 where part of the designs was a reference design that defined the optimal location of the KOT Beach Valve Station (BVS) and Common User Manifold (CUM),which were submitted by the KOT Consultant in September 2016.The designs indicated that the most optimal location for the establishment of the BVS and the CUM components of the project were at a portion of the suit property parcel (MN/VI/3711). The need to acquire a section of plot (MN/VI/3711) for purposes of construction of the BVS and CUM was therefore discussed internally in by the defendant's relevant offices. In February 2018, a report on the Common User Manifold (CUM) for Oil Marketers pipelines was submitted to the Defendant, highlighting additional features to the KOT project, which illustrated the need to acquire land for the Oil Marketers to connect to the Common User Manifold (CUM).

35. The Learned Counsel submitted that in light of the foregoing need, the Defendant wrote a letter dated 28th March 2018 to the plaintiff, communicating that part of the suit property was earmarked for acquisition by the defendant for the construction of the Kipevu Oil Terminal project. Vide its letter dated 26th May 2018, the plaintiff acceded to this request and granted the defendant access to the suit parcel, pending the acquisition process. Therefore, construction of the components of the KOT project on the land commenced and progressed, as parties engaged in negotiations on compensation. To inform the negotiations on quantum for compensation, the defendant requested the Director of Valuation in the Ministry of Lands & Physical Planning to conduct a valuation of the 0.4 Ha portion of the suit property parcel (MN/VI/3711) which had initially been earmarked for acquisition. The Director of Valuation furnished his report forwarded vide a cover letter dated 24th October 2018,valuing the portion of the suit parcel measuring 0.865 acres at a sum of Kenya Shillings One Hundred and Five Million (Kshs. 105,000,000/=). His estimate of the value per acer was given at a sum of Kenya Shillings One Hundred and Twenty Million (Kshs. 120,000,000/=) per acre then, being the year 2018.

36. The Learned Counsel contended that as construction of two components of the KOT project progressed, it emerged that a larger portion of the parcel would be required to implement the project as per the designs. This therefore changed dynamics of the negotiations as the portion to be acquired increased. It was settled that the required portion of the suit property required increased to 1.81Ha (or 4.471 Acres). While that process was ongoing, the Plaintiff wrote a letter dated 19th February 2021 to the Defendant, demanding finalization of the acquisition of the parcel and compensation as communicated to them on the 28th March 2018.Parties exchanged further correspondences in pursuit of negotiations whereby as depicted in the plaintiff's letter of 20th April 2021, the plaintiff requested the defendant to offset the outstanding debts owing to the plaintiff, from the imminent compensation payable for the portion to be acquired, which therefore allowed theplaintiff to continue its operations seamlessly, as the process of acquisition progressed. This was in light of the Plaintiff's indebtedness to the tune of Kenya Shillings Three Hundred Million (Kshs. 300, 000, 000.00/=) on account of billing for container freight station operations.

37. The Learned Counsel averred that vide a letter of 8th June 2021, the defendant informed the defendant that a larger portion of its land extending to 1.81Ha was required for the project. Further correspondences were exchanged and the defendant, on 26th July 2021, informed the Plaintiff on

without prejudice basis, that the defendant was seeking budget to progress the intended acquisition and compensation to finalization of the process. In its internal deliberations, the defendant also carried out an internal valuation process with a view to informing its budgetary allocation. The valuation report is annexed to the Replying Affidavit of John Chau Mwangi as "JM – 16". Subsequently on 2nd March 2022, the defendant wrote to the National Land Commission requesting for valuation advisory over the subject plot, in order to inform the budgetary decision factoring in the elements required of acquisition of private land by a public body. In the regard, the NLC visited the subject plot on the 16th May 2022 for inspection and valuation, report of which is yet to be presented to the Defendant. Nonetheless, the defendant has already commenced the process of compulsory acquisition by requesting its parent Ministry to request the NLC to forthwith commence the process of acquisition of the portion of the suit property measuring approximately 1.81 Ha.

38. The Learned Counsel submitted that in totality, we humbly submit based on the foregoing, that parties have been negotiating from a commercial perspective with a view to reaching an adequate compensation which is just and fair, while also safeguarding the commercial relations of the parties whereby the Plaintiff's debt would be offset from the impending compensation. They submitted that the plaintiff expressly allowed the Defendant to implement a public project on the suit parcel in the understanding that the only outstanding factor was compensation for the portion utilized and required for the project. It is therefore our humble submission that the instant application ought to be disallowed, in order that the process of compulsory acquisition process that has already been commenced progresses in accordance with the law.

39. On the issue of whether the Plaintiff had demonstrated there was "a prima facie case" with probability of success the Learned Counsel submitted that as demonstrated from the onset, the intentions of the parties with respect to the suit parcel was to ensure continuity of the project on the part of the defendant and to also ensure seamless continuity of operations on the Plaintiff's part. At the center of their discussions is acquisition by the defendant of a portion of the plaintiff's parcel for value, compensation of which would be used partially to set off the debt owed by the Plaintiff to the Defendant. Indeed the correspondences of parties, copies of which are annexed to the Replying Affidavit of John Chau Mwangi, clearly illustrated this position. As described in the first letter of 28th March 2018, acquisition of the portion needed for the project would be either through private treaty or through compulsory acquisition in accordance with *the constitution* and the law.

40. His contention was that against the foregoing backdrop, we therefore submit that the Plaintiff's suit for trespass was ill-advised, in light of the agreements and conduct of the parties from the onset, whereby the Plaintiff expressly allowed the defendant to commence and progress construction works on the parcel of land as parties discussed the attendant compensation. He urged the Court to be guided by its decision where, sitting on an appellate jurisdiction in the cases of "M'Mukanya – Versus - M'Mbijiwe (1984) eKLR 761; 29 Others; "Elizabeth Wambui Githinji & 29 others - Versus – Kenya Urban Roads Authority & 4 Others (2019) eKLR";, it held in the case of "Bank of Africa Kenya Limited – Versus - John Ndung'u Gachara [2022] eKLR correctly that:

> " 42. .....The Respondent at the time of charging the suit property was no doubt aware of the consequences in the event of default in servicing the loan facility. The Appellant was entitled to exercise its statutory power of sale conferred under the charge provided the appropriate procedure was followed. In the court's view, and having regard to the material placed before the lower court, the Appellant adhered to and followed due process in seeking to realise its security. In the circumstances the Respondent did not establish he had a prima facie case with a probability of success.

43. The principles for grant of a temporary injunction are sequential such that if an applicant fails to demonstrate he has a prima facie case with a probability of success then the application must fail and there would be no necessity to consider the other two conditions relating to whether there would be irreparable damage suffered or the balance of convenience. On the evidence, I am satisfied the learned trial magistrate erred in the consideration and application of the principles for grant of a temporary injunction. The learned trial magistrate placed too much premium on who between the two parties stood to suffer greater harm and/or damage if the injunction was not granted. In my view that was a misdirection since the respondent had to satisfy the first condition, that he had a prima facie case before the court could consider whether, he could be adequately compensated by an award of damages if the injunction was not granted and he was successful at the trial.

44. As this court has held that the Respondent did not prove or demonstrate he had a prima facie case with probability of success, the injunction granted in his favour by the lower court was not merited and the same is hereby set aside and vacated."

41. The Learned Counsel urged the Court to be bound by the decision of the Court of Appeal in the case of: "Lucy Wangui Gachara – Versus - Minudi Okemba Lore [2015] eKLR, where borrowing from Indian jurisprudence, the Court held thus:

> "Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In Bharat Petroleum Corp Ltd – Versus - Haro Chand Sachdeva,air 2003, Gupta, J. of the Delhi High Court observed as follows:
>
> "While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued onlyin rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."

42. The submissions by Learned Counsel was that the Plaintiff had not demonstrated that it had a prima facie case with probability of success. Therefore, he urged this Honorable Court to disallow the application dated 13th May 2022 forthwith, as the process of compulsory acquisition and compensation progresses.

43. On the issue of whether the Plaintiff stood to suffer irreparable loss should the orders sought not be granted, the Learned Counsel urged the Court to consider the position of parties all along, that indeed the only outstanding issue in their arrangement as depicted from their negotiations and exchange of correspondences, was the issue of compensation for the portion of land used by the Defendant with the Plaintiff's permission for the implementation of a public project. So much so, that the process of compulsory acquisition that had already been commenced, settled this dispute with finality and in any event, the Plaintiff did not stand to suffer any irreparable loss at all. The Plaintiff would be compensated adequately and in accordance with the law, for the portion of its land where the project had been implemented.It was trite law that in an application such as the one before Court, the applicant must demonstrate that it shall suffer irreparable loss that could not be compensated by way

of damages, should the orders not be granted. To the Counsel, the Plaintiff/Applicant in this case had not discharged this burden. It did not stand to suffer any irreparable loss becauseas depicted in the correspondences and conduct of parties, it was only monetary compensation that was outstanding, taking that a portion of its land had already been utilized by the Defendant. He reiterated that the process of compensation for the acquisition of the land belonging to the Plaintiff had already been commenced in accordance with the law governing compulsory acquisition. Therefore, he urged that the application be disallowed in light of the ongoing acquisition and compensation process.

44. To buttress his point, the Learned Counsel persuaded the Honorable Court to be guided by its decision in "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai [2018] eKLR where it was correctly held as follows:-

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

45. On the issue of who the balance of convenience tilted to the Learned Counsel submitted that as demonstrated in the Replying Affidavit, the Kipevu Oil Terminal (KOT) project sat at the heart of this suit, being a public project implemented by the Government of Kenya through the Defendant in order to increase the capacity of the Port of Mombasa to accommodate Oil tankers thereby ensuring steady and adequate supply of oil in the country and the hinterland. It was an immense project geared whose net effect was to reduce the cost of fuel and petroleum products and to ensure adequate availability. It was therefore paramount that the project ought not to be halted at this stage, as it would greatly hamper the Defendant's and indeed the public's finances, strategic and operational performance, much to the detriment of the citizenry. The Plaintiff/Applicant's proprietary rights were well settled and safeguarded in law through the process of compulsory acquisition, which had since commenced. It was therefore fair that the Defendant be allowed to reap the benefits of the project that had already been implemented on the land, as the quantum of compensation due and payable to the Plaintiff was determined in accordance with the statutory provisions.

46. The Learned Counsel opined that as depicted under Pages 15 to 20 of the Plaintiff's application, the photographs annexed to the Supporting Affidavit of Mohamed Anwar Abdirahimm Haji Abas clearly demonstrated that the construction of the project on the land had been concluded and a perimeter wall delineating the portion used had been erected. Therefore, for these reason, the learned Counsel called for the Court to be guided by the decision in the case of "Nehemiah Charles Omwoyo – Versus - Attorney General & 2 others [2021] eKLR where the Court correctly held that:

> 17. On the other hand, the 2nd Respondent has adequately demonstrated through evidence that it has a valid title over the suit property. The 2nd Respondent has urged that it will suffer great harm if the orders sought are granted. This is due to the fact that it has invested a lot of resources in the construction of the Kisii cooling storage facility, which is a public interest project meant to serve the residents of Kiamokama. The 2nd Respondent through photographic evidence has demonstrated that the construction of the said project is 90% complete. Thus the balance of convenience tilts in favor of refusing to grant the orders sought, as granting the injunction would cause irreparable damage to the 2nd

Respondent whose project is meant to benefit the residents of Kiamokama and the general public.

47. The Learned Counsel admitted that there was no doubt that the Defendant was in possession of the suit land. He averred that it had completed extensive developments thereon costing taxpayers colossal amounts of public funds. The operations of the New Kipevu Oil Terminal carry an overwhelming public interest as the new facilities therein aim to ease the perpetual challenge of fuel transport and availability within the Republic and its neighbours. According to him, with the current operations at the KOT project, it was too late in the day for an injunction to serve any useful purposes. To him, it was prudent for the Court to allow the process of payment of compensation to the Plaintiff to progress without an injunction hanging over the head of the Defendant. To buttress on this point he cited the cases of "Kenya Electricity Transmission Company Limited – Versus – Marula Estate Limited (2018) eKLR and Maisha Nishike Limited – Versus – Commissioner of lands & 3 Others Ex – Parte (2011).

48. In the long run, he submitted that that the balance of convenience tilted in favour of the Defendant to disallow the application which shouldered the public interests as postulated above.

49. The Learned Counsel proceeded to counter the prayer number 4 of the application by the Plaintiff seeking to have the Court to strike out the Defence and enter Judgement on admission in favour of the Plaintiff. He was of the view that the Defendant's Defence dated 10th June, 2022 raised bona fide and triable necessitating for a full trial. To him these were the triable issues brought out and eventually need to be heard by this Court. They were:-

    a. Whether having obtained the Plaintiff's consent, any acts taken and/or continued to be taken by the Defendant on the portion of the suit property amount to trespass.

    b. Whether the law conferred authority to the Defendant for acquisition of land for public purpose;

    c. Whether the legal remedy available to the Plaintiff exclusively lied in the payment of compensation for the compulsory acquisition of the portion of the suit land;

    d. Whether the remedy of restoration, repossession and/or restitution of possession of the portion of the suit property to the Plaintiff was a remedy available under the law.

    e. Whether the remedy of an injunction was available to the Plaintiff.

    f. Whether the suit herein was premature in the face of the provisions of Article 159 (2 ) ( c ) of *the Constitution*, Section 20 ( 2 ) of the *Environment and Land Court Act*, 2011 and Section 62 of the *Kenya Ports Authority Act*, Cap. 391 Laws of Kenya.

50. To him striking out of suit was provided for under the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 and held that it was discretionary of the Court and ought to be applied sparingly in plain and obvious cases where the pleading was so hopeless beyond cure of amendment and where there was no reasonable Defence or bona fide triable issues which needed to be tried. To support its argument he relied on several cases including "Kivanga Estates Limited – Versus – National Bank of Kenya Limited (2017) eKLR; D.T Dibbie & Co. (Kenya) Limited – Versus – Muchina (1982) eKLR; "Saudi Arabian Airlines Corporation – Versus – Sean Express Services Limited (2014) eKLR; and "Cassam & Another – Versus – Sachania & Another (Civil Appeal 63 of 1981) (1982) KECA 1 KLR.

51. In conclusion the Learned Counsels submitted that none of the three principles had been met in the Plaintiff's instant application. They urged the Court not to disallow the Notice of Motion application dated 13th May 2022 and be pleased to dismiss it.

**C. The written and oral submissions on the Notice of Motion application dated 7th December, 2022 by the Defendant/Applicant.**

52. On 2nd February, 2023 the Learned Counsel for the Defendant/Applicant the law firm of Messrs. Munyao Muthama & Kashimali Advocates filed their written submissions with regard to the Notice of Motion application dated 7th December, 2022. Mr. Amakobe Advocate commenced the submissions by providing court with a detailed introduction and background in terms of the facts of the case. Flowing from this the Learned Counsel submitted under the following three (3) broad issues.

Firstly, the Plaintiff obtained the interim ex-parte orders issued on 1st December, 2022 on dint of non-disclosure and misrepresentation of material facts. To him all applications were to be heard inter partes as provided for under Order 51 Rule 3 of the Civil Procedure Rules 2010. Further, it was expected that the Plaintiff seeking temporary injunction orders would disclose all material facts. To buttress this point the counsel relied on the decision of Uhuru Highway Development Ltd. – Versus- Central Bank of Kenya & Others (1995) eKLR.

He held that it was not in dispute that on 4th August, 2022 the President of the Republic officially commissioned/launched operations at the Kipevu Oil Terminal but which Plaintiff held this was in breach of a court order issued on 30th May, 2022 and more particularly the status quo orders stopping any further acts of construction on the suit property and hence it based on that they sought and were granted the ex-parte injunction orders on 1st December, 2022. He held that the Plaintiff failed to give a full and frank disclosure of all the material facts. To him from the Notice of Motion application dated 13th May, 2022, court issued various orders and in particular the status quo and the averments of the Plaintiff's claim of ownership of the suit property and the Defendant's acquisition of a portion of the suit property without fulfilling the Plaintiff's legitimate expectations of payment of compensation. Towards all this, the Plaintiff failed to disclose that the actual construction of the KOT Project was concluded before the Plaintiff filed the suit and the project was already in use by the time the Plaintiff filed suit.

Further the Learned Counsel averred that the Plaintiff misrepresented facts by stating that the Defendant disrupted the status quo when the president commissioned/launched the project – posting a picture that the KOT project commenced operations when it was commissioned. Yet in actual fact it was already in operation and the launch by the President was just a ceremonial occasion that never involved construction. The suit portion of land where the KOT Project was situated was part of the Plaintiff's land.

He refuted that the Defendant was a trespasser into the land as they took possession with the full knowledge of the Plaintiff. The Plaintiff knew the full architectural plan and operations of the new KOT – which are intermediary in nature. The Defendant had fully developed the portion of land taken and they had an obligation to compensate the Plaintiff through an award to be made by the National Land Commission. He argued that the remedy was on interest and not evictions of the Defendant.

Secondly, the Learned Counsel argued that the court ought to suspend the implementation and to stay the execution of the interim "ex-parte" orders issued on 1st December, 2022 in respect of the Notice of Motion application dated 30th November, 2022 by the Plaintiff. He held that obtaining of this orders was irregular as the said application was "Sub-Judice" to the Plaintiff's previous application dated 13th May,2022 which remained pending determination by court and it was an abuse of the due process of court.

Thirdly, the Learned Counsel submitted that the court ought to review discharge and/or set aside the interim ex-parte orders issued on 1st December, 2022 based on the legal principles under Order 40 Rule 4(1) and (2), (6) and (7) and Order 51 Rule 15 of the Civil Procedure Rules 2010.

To buttress this point the Learned Counsel cited the cases of Jane Ngonyo Muhia –Versus- Abdalla & 3 Others (2010) eKLR, Jane Kemunto Mayaka –Versus- Municipal Council of Nairobi & 4 Others (2006) eKLR, Pithon Waweru Maina –Versus- Thiaka Mugiria (1983) eKLR where the court held:-

> " Firstly, there are no limits or restrictions on the Judge's discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given it by the rules. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of Justice".

53. He averred that the New Kipevu Oil Terminal and its constituents' facilities was complete and operational. It's a facility of its own kind in Africa with their usage and operations affecting parties beyond litigation from the decision of ÁMir Suleiman –Versus- Amboseli Resort Ltd. (2004) eKLR, it held injunction at interlocutory stage of the suit should always opt for the lower rather than the higher risk of injustice and hence urged court to set aside the interim orders.

**IX. Issues for Determination.**

54. I have carefully read through and considered the pleadings herein being the Notice of Motion applications dated 13th May, 2022 and 30th November, 2022 by the Plaintiff and the other dated 7th December, 2022 & 14th April, 2023 by the Defendant, the responses, the written and oral submissions, the plethora authorities cited by the parties herein, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statures. In order to arrive at an informed, reasonable, fair, just and equitable decision, the Honorable Court has crystalized the subject matter into three (3) salient for determination as follows:-

a. Whether the four (4) Notice of Motion applications dated 13th May, 2022 & 30th November, 2022 by the Plaintiff/Applicant and the others dated 7th December, 2022 and 14th April, 2023 by the Defendant/Applicant herein meet threshold required of a temporary injunction under Order 40 Rules 1 (a), 2 and 4 and to set aside, discharge and/or vary the orders pursuant to Order 40 Rules 6 & 7 of the Civil Procedures Rules, 2010.

b. Whether the parties herein - Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage and/or the Defendant/Applicant granted the reliefs sought.

c. Who will bear the Costs of Notice of Motion applications 13th May, 2022, 30th November, 2022, 7th December, 2022 and 14th April, 2023.

**X. Analysis and Determination**

**Issue No. a). Whether the two (2) Notice of Motion applications dated 30th November, 2022 & 13th May, 2022 by the Plaintiff/Applicant and the other dated 7th December, 2022 & 14th April, 2023 by the Defendant/Applicant herein meet threshold required of a temporary injunction**

**under Order 40 Rules 1(a), 2 and 4 and to set aside, discharge and/or vary the orders pursuant to Order 40 Rules 6 & 7 of the Civil Procedures Rules, 2010.**

55. Under this sub – heading, the Court will be tackling the four (4) applications dated 13th May, 2022 & 30th November, 2022 and 7th December, 2022 and 14th April, 2023 respectively. The application dated 30th November, 2022 herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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.

56. The principles applicable in an application for an injunction were laid out in the celebrated case of: "Giella – Versus - Cassman Brown & Co Ltd (1973) EA 358, where it was stated:-

> " 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 be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

57. The three conditions set out in Giella (supra), need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR,

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

58. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd & 2 others (2003) KLR 125,

> " So what is a prima facie case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would 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"

59. It is not in dispute that the Plaintiff/Applicant is the absolute, lawful and registered Proprietor of all that parcel of land known as LR Number MN/VI/3711 situate within Mombasa County (the Property). Ideally, their indefeasible rights, title and ineterst on the land is well vested under the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. As of the date of filing the suit, the Defendant was in occupation of the Property and/or a portion of the Property (the Project Portion). Furthermore, its is instructive that the Defendant admits that it is in possession of the Project Portion after the Plaintiff granted it permission to occupy and start construction of its project on the understanding that the Defendant would commence the process of acquisition of the Project Portion.By a letter dated 9th February 2022 (the Demand),the Plaintiff, through its Advocates on record, wrote to the Defendant demanding that the Defendant and/or its contractors immediately stop all ongoing works on the Property and/or the Project Portion and deliver vacant possession of the Project Portion within fourteen (14) days from 9th February 2022.

60. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1, the court held that:-

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

61. Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited the court held that:-

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

62. In the present case, Defendant failed to deliver vacant possession of the Project portion to the Plaintiff as demanded. As at 23rd February 2022, the Plaintiff had withdrawn its permission for the Defendant to continue to occupy, construct, develop and/or in any manner deal with the Property and/or the Project Portion. The Plaintiff seeks to recover vacant possession of its the Project Property as it is clear that the Defendant has no intention whatsoever of acquiring the Project Portion.

63. Regarding this first condition though, the Plaintiff has established that it is the lawful registered Proprietor of the Property. This is a fact conceded to by the Defendant (refer to paragraph 3 of the Replying Affidavit). It is not in dispute that sometime in 2018, the Defendant approached the Plaintiff expressing interest in acquiring the Project Portion. It is also not in dispute that at the Defendant's express request on or around 1st February 2019 the Plaintiff, in good faith, permitted the Defendant to take possession and commence works on the Project Portion on the strict understanding that the Defendant was putting in place mechanisms to acquire the Project Portion, and would acquire the Project Portion and would ensure that the Plaintiff was adequately compensated.Despite several requests made by the Plaintiff over the years for prompt payment of compensation, to date, the

Defendant has neither set in motion nor compensated the Plaintiff for the intended acquisition of the Project Portion.

64. From their submissions the Plaintiff states that the Defendant has failed to justify its occupation of the Project Portion but rather seeks to rely on a process of compulsory acquisition that has never materialized and has yet to be commenced. It is trite law that possession cannot precede compulsory acquisition. The Defendant has taken possession of the Project Portion and kept the Plaintiff languishing without any compensation under the guise that it will happen one day. It is evident from the Defendant's dilatory tactics that it has no intention of legally acquiring the Project Portion. In these circumstances, I find that the Applicant has established that she has a prima facie case with a probability of success.

65. With regards to the second limb of the Court of Appeal in the case of "Nguruman Limited (supra), held that:-

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

66. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicant's property is at risk and it has a right to vacant possession.The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR provides an explanation for what is meant by irreparable injury and it states:-

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

67. Quite clearly, the Applicant would not be able to be compensated through damages as he has shown the court that its rights to the suit property by the by the continuous occupation . He has therefore satisfied the second condition as laid down in Giella's case.

68. Thirdly, the Plaintiffs have to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) EKLR which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants

if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

69. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR, the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

70. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because he is an innocent purchaser for value. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated:-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

71. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the registration of title in the name of the Plaintiff/Applicant. I have also not had the opportunity to interrogate the annexures to the Defendant/Respondent's replying affidavit.

72. In the case of "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya ) Limited & Another [2019) eKLR where the court in deciding on an injunction application stated:-

> " circumstances for consideration before granting a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts..."

73. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended

by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant have met the criteria for grant of orders of temporary injunction.

**Issue No. b). Whether the Plaintiff/Applicant should be granted orders of Mandatory injunction at the interlocutory stage.**

74. Under this Sub – heading, I will now consider the question of whether mandatory injunction orders can be issued at the interlocutory stage. Unlike temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different. They are perpetual in nature and ordinarily issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under the provisions of Sections 1A, 3 & 3 A of the Civil Procedure Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. In the cases of: Joseph Kaloki t/a Royal Family Assembly – Versus - Nancy Atieno Ouma [2020] eKLR and "Malier Unissa Karim – Versus - Edward Oluoch Odumbe (2015) eKLR Court held as follows:-

> " The test for granting a Mandatory Injunction is different from that enunciated in the "Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "Kenya Breweries Limited -Versus - Washington Okeyo (2002) EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
>
> "A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".
>
> Further the same Court of appeal in the case of:- "Jay Super Power Cash and Carry Limited – Versus - Nairobi City Council and 20 others CA 111/2002" held that:-
>
> > " This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".
>
> The Court also reaffirmed its decision in the case of:- Shariff Abdi Hassan – Versus - Nadhif Jama Adan [2006] eKLR where it stated that:
>
> > " The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to

ensure that justice is meted out without the need to wait for full hearing of the entire case."

75. Additionally, the law on Mandatory Injunctive Orders was laid down in the case of "Civil Appeal 19 of 1998, Andrew Kamau Mucuha – Versus - Ripples Limited. The Court of Appeal in the latter held as follows:

> "A Mandatory Injunction ought not be granted on an Interlocutory Application in the absence or special circumstances and then only in clear cases either where the court that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a Mandatory Interlocutory Injunction, they had to feel a higher degree of assurance that at the trial it would appear that the Injunction had rightly been granted that being a different and higher standard than was required for a Prohibitory Injunction."

76. Similarly,, in the case of:- Nation Media Group & 2 others – Versus - John Harun Mwau (2014) eKLR, the Court of Appeal said:-

> "It is trite law that for an Interlocutory Mandatory Injunction to issue, an Applicant must demonstrate existence of special circumstances. A different standard higher than that in Prohibitory Injunction is required before an Interlocutory Mandatory Injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated a Temporary Injunction can only be granted in exceptional and in the clearest of cases."

77. From these elaborate and plethora precedents, the Court is fully convinced that graphically the Plaintiff/Applicant herein has proved there was:

i) Existence of special circumstance.

ii) Exceptional and clearest of cases.

iii Whether the Defendant is trying to steal a march against the Plaintiffs.

78. The special circumstance to warrant the issuing of Mandatory Injunction is in form of the facts of the case herein. The decisions of the Court of Appeal offer guidance on this point. Indeed, I am totally convinced that special circumstances exist in this matter in that the suit property belongs to the Plaintiff and the Defendant has already taken possession caused construction of development on it of colossal sum of finances without compensating the Plaintiff that may warrant the grant of a mandatory injunction. Certainly, there is no doubt in my mind that this a clear, plain and straightforward matter that it ought to be decided at once and for all. Indeed, there will be no other issues to be deliberated on during the full trial. For the Defendant to insists that there are triable issues to be adjudicated, with all due respect, I discern that they are just trying to steal the match against the Plaintiff who has already been made to suffer unnecessarily. It is a case of a second bite at the Cherry. That should not be allowed to happen in the given circumstances. In all fairness, it is imperative that to save on Judicial resources – time, man hour and finances by making a final determination at this stage.

79. Suffice it to say, I wish to reiterate that there is an admission by all the parties herein that the Plaintiff are the legal and registered proprietors of the suit land. Further that the Defendant is already caused massive construction the suit land and already using it for its own purposes. Out of all these the Defendant has failed to compensate the Plaintiff as required by law. At this stage, and based on the

surrounding facts and inferences adduced herein, there is no way I can fail to discern that the Defendant has no claim over the suit property. Indeed, I am guided by the English sayings "What is Good for the Goose is good for the Gendeur" and "You cannot eat the cake and continue having it". Clearly, the Defendant seem to have specialized and perfected in the best art of procrastination in this matter at the chagrin of the Plaintiff. Therefore, in the spirit of the Legal maxim, Justice must not only be done but seen to be done, hence I proceed to grant orders of Mandatory injunctions.

80. Additionally, the Honorable Court wishes to provide justification on the issue of Judgement on admissions. As a matter of facts, the Defendant filed a Defence dated 10th June 2022. From the face value, I fully concur with the Learned Counsel for the Plaintiff that the Defence was in fact an admission of the Plaintiff's case before this Court. Under the contents of Paragraphs 2 and 4 of the Defence the Defendant admits the contents of Paragraph 3 of the Plaint that the Plaintiff was and still is the registered proprietor of the suit property. Further, the same was admitted in the contents of the Replying Affidavit sworn on 14th December, 2022 by John Chau Mwangi for the Defendant. The Defendant does not deny that it took possession and was in occupation of the Project Portion for several years now and had never set in motion the process of compensating the Plaintiff. The contents of Paragraphs 12 and 13 of the Relying Affidavit the deponent admits that the Defendant had constructed components of the KOT Project on the suit land and it was completely integrated and functioning. To me, based on these clear, plain and unambiguous admissions, there are no triable issues to be adjudicated on during the full trial and once again in order to save on Judicial time, I proceed to straight away invoke the provision of Order 13 of the Civil Procedure Rules, 2010, where once admission was made by a party to a suit, whether express or implied and through pleadings or otherwise, the other party was at liberty to apply to Court at any time for Judgement on account of that admission. I am compelled to lift the legal ratio from the case of "Choitram – Versus – Nazari (Supra) cited by the Learned Counsel for the Plaintiff as being quite relevant. I further add the cases of "Cassam – Versus Sachn (1982) KLR 191; Agricultural Finance Corporation – Versus – Assurance (In receivership) CA No. 271 of 1996, Nairobi; & Mwaura Karuga – Versus – Embakasi Ranching Co, Limited HCC No, 260 where the Courts held:-

> " Granting Judgement on admission of facts is a discretionary power which must be exercised sparingly and only where the admission is clear and unequivocal....."

81. With the guidance from these decisions, It is my own view that as per the provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010 that parties are bound by their own pleadings. I stress the umpteenth times that the surround facts and inferences of this case are graphically clear, unambiguous, unequivocal and/or unconditional. For these reasons, therefore, the Honorable Court has no hesitation having already granted Mandatory injunction but to proceed further and enter Judgement on admission in favour of the Plaintiff accordingly.

**Issue No. c). Who will bear the Costs of Notice of Motion application 13th May, 2022, 30th November, 2022, 7th December, 2022 and 14th April, 2023.**

82. It is well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of legal act and/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 follow the evet it means the result emerging from the legal action or proceedings herein. This position was supported from the various decisions of This legal position was supported in the cases of "Reid Hewett & Co – Versus – Joseph AIR 1918 CAL; Myres – Versus Defries (18180) 5 ExD 180; the Court of Appeal cases of "Hussein Jan Mohammed & Sons – Versus – Twentshe Overseas Trading Co. Limited (1967) EA 28;" "Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant –

Versus - Ihururu Dairy Farmers Co-operative Society Limited Judicial Review application no 6 of 2014 and the Supreme Court case of "Jasbir Rai Singh – Versus – Tarchalan Singh" (2014) eKLR where the Court held as follows: -

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

83. In this case, where the Honorable Court has already concluded that the Plaintiff/Applicant has fulfilled the conditions set out under Order 40 Rule 1, 2 and 4 of the Civil Procedure Rules, 2010, the existence of the ingredients for granting Mandatory Injunction and there being Judgement on Admission from the filed pleadings by the Defendant herein and as per the provision of Order 13 (1) and ( 2) of the Civil Procedure Rules, 2010, therefore, it goes without saying that this application shall be deemed to have merit and is hereby allowed with costs to the Plaintiff as against the Defendant herein.

**XI. Conclusion & disposition**

84. Ultimately, having conducted such an elaborate analysis to the crystalized issues herein emanating from the four (4) interlocutory applications herein by both the Plaintiff and the Defendant herein, the Honorable Court has carefully considered and weighed the conflicting parties' interest on the preponderance of probability. Out of that, clearly, the Plaintiff has demonstrated its a case against the Defendant herein. Nonetheless, the Court has also taken great cognizance of the circumstances of the case whereby the KOT Project is marred and guided by great Public Interest, Public order, Public safety and Security and Public Policy there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

a. That the Notice of Motion application dated 13th May, 2022 and 30th November, 2022 by the Plaintiff/Applicant herein be and is hereby found to have merit and hence allowed in its entirety but to be effective from the 12th September, 2023 whereby:-

   i) an order of Temporary injunction do issue restraining the Defendant, its agents, workers, contractors or other persons acting under its instructions from further developing, building, and/or erecting any structures on the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

   ii). a temporary order do issue restraining the Defendant, its agents, workers, contractors, or other persons acting under its instructions from trespassing, entering into and/or occupying in any other manner from interfering with the parcel of land known as Land Reference Number MN/VI/3711 situate within Mombasa County.

   iii). Judgement on admission to be entered in favour of the Plaintiff pursuant to the provision of Order 13 Rules (1) and (2) of the Civil Procedure Rules, 2010.

b. That an order for Mandatory injunction compelling the Defendant/Respondent its servants, agents and any other person purporting to act under its authority or instructions to vacate the property known as LR Number MN/VI/3711 situate within Mombasa County but subject to the fulfilment of the following conditions:-

   i. The Defendant herein and in the interest of public order and interest granted a three (3) Months grace period to have commenced and finalized the process of the

acquisition – compulsory or private treaty) of the portion of the suit land for its KOT Project through the following set out framework and/or Work Plan.

ii. The Plaintiff and the Defendant to enter into a Mutual Sale Agreement between the Plaintiff and Defendant terms and conditions stipulated thereof guided by the conventional conveyancing and legal principles for the acquisition of the suit land or portion of it.

iii. The Plaintiff and Defendant herein to mutually prepare and agree on a Joint Valuation of the suit land or a Portion of it for purposes of disposition of the said property or part of it.

iv. The Plaintiff and Defendant to agree on making a reasonable deposit payment to the Plaintiff of the agreed award as compensation upon execution of the agreement.

c. That in the Notice of Motion Application dated 7th December, 2022 and 14th April, 2023 respectively by the Defendant herein be and is hereby dismissed with costs.

d. That the cost of the application dated 13th may, 2022 and 30th November, 2022 herein and the suit is awarded to the Plaintiff/Applicant to be borne by the Defendant herein.

It Is So Ordered Accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF JUNE 2023**.

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**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. M/s. Onesmus Advocate for the Plaintiff.

c. Mr. Amakobe Advocates for the Defendant.