



REPUBLIC OF KENYA



Kamau & another v Sava Builders Limited & another (Civil Suit E109 of 2023) [2023] KEELC 19297 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E109 OF 2023**

JO MBOYA, J

JULY 31, 2023

BETWEEN

ROBERT WACHIRA KAMAU 1ST PLAINTIFF

ROCKEY AFRICA LIMITED 2ND PLAINTIFF

AND

PHANUEL B INVESTMENT LIMITED 1ST DEFENDANT

SAVA BUILDERS LIMITED 2ND DEFENDANT

RULING

Introduction and Background

1. Vide Notice of Motion Application dated the 7th June 2023; the 1st Defendant/Applicant has approached the Honourable court seeking various reliefs, whose details are as hereunder;
 - i. Spent.
 - ii. That this Honourable Court be pleased to vacate and or set aside Orders issued on 27th March 2023; and confirmed on 6th June, 2023; pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to vacate and or set aside Orders issued on 27th March 2023; and confirmed on 6th June, 2023 pending the hearing and determination of this suit.
 - iv. That this Honourable Court be pleased to direct the Plaintiffs to grant access to the 1st Defendant to undertake the repairs for the damaged areas pending the hearing and determination of this application.
 - v. That this Honourable Court be pleased to vacate and or set aside Orders issued on 27th March 2023 and confirmed on 6th June, 2023 pending the hearing and determination of this suit.



- vi. That the OCS Kileleshwa Police Station be and is hereby ordered to at all times be present to ensure the orders issued herein are obeyed.
- vii. That cost of this Application be in cause.
2. The instant Application is anchored on numerous grounds, whose details have been enumerated at the foot of the impugned Application. Further and in addition, the Application herein is supported by affidavit of one Jayadev Kuniyil, sworn on the 7th June 2023; and to which the Deponent has attached three documents.
3. Upon being served with the instant Application, the Plaintiff/Respondents have responded thereto vide two Replying affidavits, to wit, the Replying affidavit of Okapesi Shabaan, Advocate, sworn on the 16th June 2023; and Robert Wachira Kamau, sworn on even date, respectively.
4. For good measure, the two Replying Affidavits have alluded to and averred that the Plaintiffs/ Respondents have since carried out and undertaken assessment pertaining to and concerning the extent of the Damage occasioned to the Plaintiffs/Respondents' property, as a result of the impugned activities by and on behalf of the Defendants/Applicants.
5. In particular, the affidavit of one Robert Wachira Kamau, who is the 1st Plaintiff/Respondent adverts to the sum of Kes.11, 400, 000/= only to be the value of the damages which have been occasioned by and at the instance of the Defendants/Applicants herein.
6. Be that as it may, the instant Application came up for hearing on the 20th June 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose the current Application by way of written submissions. In this regard, the Honourable court thereafter directed and set timelines within which the Parties were to file and exchange written submissions.
7. First forward, it is instructive to point out that the 1st Defendant/Applicant duly proceeded to and filed his written submissions dated the 22nd June 2023; whereas the Plaintiff/Respondent filed written submissions dated the 11th July 2023.
8. However, it is instructive to point out that the written submissions by and on behalf of the Plaintiffs/ Respondents relate to the Application dated the 14th March 2023; and not the Application which is the subject of determination and in any, the Application in respect of which directions were taken.

Submissions by the Parties

a. 1st Defendant's/Applicant's Submissions

9. The 1st Defendant/Applicant filed written submissions dated the 22nd June 2023; and in respect of which same has raised, highlighted and canvassed two salient issues for consideration by the Honourable court.
10. Firstly, Learned counsel for the First Defendant/ Respondent has submitted that there was no sufficient basis and/or justification for the grant and/or issuance of the orders made on the 27th March 2023. In this regard, Learned counsel has therefore implored the Honourable court to set aside and/or vacate the impugned orders.
11. Further and in addition, Learned counsel for the 1st Defendant/Applicant has submitted that the impugned orders made on the 27th March 2023; were made Ex-Parte and hence the Honorable court is seized and possessed of the requisite Jurisdiction and discretion to set aside and/or vacate same, where sufficient cause and/or basis is demonstrated and/or shown by the Applicant.



12. Additionally, Learned counsel for the Applicant has submitted that even though the Applicant has been ready and willing to undertake the repairs relating to the damages complained of by the Plaintiffs/ Respondents; the Plaintiffs/ Respondents herein have denied and/or deprived the Applicant of a right of access to the suit property with a view to commencing and undertaking the requisite repairs.
13. On the other hand, Learned counsel for the Applicant has also pointed out that the Applicant herein engaged and retained a valuer to undertake assessment relating to the extent of the damages complained of by the Plaintiffs/ Respondents and thereafter the valuer returned a value of Kes.484, 000/= only; as reflective of the costs of undertaking the repairs.
14. Notwithstanding the foregoing, Learned counsel for the Applicant has further submitted that the Plaintiffs/ Respondents with a view to extorting money from the Applicant have themselves undertaken an assessment and have come out with a valuation in the sum of Kes.11, 400, 000/= only as reflective of (sic) the value of the repairs.
15. Arising from the foregoing, Learned counsel for the Applicant now submits that there is a stalemate, which has prevented and/or precluded the Applicant herein from undertaking the necessary repairs. However, Learned counsel for the Applicant contends that the non-implication of the proposed repairs has been occasioned by the hardline position/ stance taken by the Plaintiffs/ Respondents.
16. Secondly, Learned counsel for the Applicant has submitted that the orders of Temporary injunction which were issued and or granted on the 27th March 2023, have had the effect of stopping the entire construction, which has economic consequence and impact on both the Applicant and the contractor.
17. Furthermore, Learned counsel for the Applicant has submitted that by the time the injunctive orders were being granted, the structural works over and in respect of the suit property had been fully concluded and what was outstanding were merely the finishing and minor works; which would not affect the Plaintiffs'/ Respondents' property.
18. In any event, Learned counsel for the Applicant has submitted that the kind of loss and damages, which the Plaintiffs/ Respondents are claiming are capable of being assessed and thereafter settled in monetary terms.
19. Based on the foregoing, Learned counsel for the Applicant has therefore contended that the Plaintiffs/ Respondents herein ought not to rely on the injunctive orders with a view to stopping the construction being undertaken by the Applicant herein, and furthermore, to use the injunctive orders for purposes of extortion.
20. In view of the foregoing, Learned counsel for the Applicant has therefore implored the Honourable Court to find and hold that the instant Application is meritorious and thereafter to grant same.

b. Plaintiffs'/respondents' Submissions:

21. Though the advocate for the Parties agreed and covenanted that it is the Application dated the 7th June 2023, which was to be canvassed and disposed of vide written submissions; the Plaintiffs/ Respondents herein have chosen to file written submissions in respect of the Application dated the 14th March 2023 and not otherwise.
22. Furthermore, it is instructive to state and underscore that the Application dated the 14th March 2023; came up for hearing on the 27th March 2023; and same was compromised on terms, whose details are well known to the advocates for the Parties, Learned counsel for the Plaintiffs/ Respondents, not excepted.



23. Nevertheless, because the said submissions have been placed before the court, I am obligated to reproduced the salient features of the named submissions, for the sake of completeness of record and to avert any accusation that the Honourable court disregarded submissions filed by and on behalf of the Plaintiffs/Respondents.
24. Notably, the submissions filed by and on behalf of the Plaintiffs/Respondents, have raised and highlighted three salient issues for consideration by the Honourable court. Firstly, Learned counsel for the Plaintiffs/Respondents has submitted that the Honorable court ought to proceed and to grant an order of Permanent Injunction to restrain and/or prohibit the 1st Defendant from continuing with the construction and dumping of the debris on the Plaintiffs' property.
25. Furthermore, Learned counsel for the Respondents has submitted that the actions and/or activities complained of and which have been occasioned by the Defendants herein, constitutes and amounts to trespass.
26. In support of the foregoing submissions, Learned counsel foR the Plaintiffs/REspondents have cited and Relied on, inter-alia, the case of *Roda S Kiilu versus Jiangxi & Hydropower Construction Co Ltd* (2019)eKLR, Winfield & Jolowics 11th Edition and Clerk Lindell on torts, 17th Edition, respectively, to anchor the contention that the impugned activities constitutes the tort of trespass.
27. Secondly, Learned counsel for the Respondents has submitted that the actions complained of by the Plaintiffs/Respondents have arisen as a result of the negligence of the Defendants herein and thus the Defendants are guilty of the tort of trespass and nuisance, respectively.
28. In support of the contention that the impugned activities complained of have arisen as a result of the negligence by the Defendants, Learned counsel has cited and relied on inter-alia, the holding in the case of *Nakuru Industries Ltd versus S S Metta & Sons* (2016)eKLR and *Re- Estate of John Douglas Omondi; (Deceased)* (2022) KEELC 110 (KLR), respectively.
29. Thirdly, Learned counsel for the Plaintiffs/Respondents has submitted that the Plaintiffs/ Respondents herein are similarly entitled to recompense and damages arising from trespass and nuisance occasioned by the Defendants herein.
30. Further and in addition, Learned counsel for the Plaintiffs has submitted that the Plaintiffs have suffered damages which has since been assessed by a designated Engineer appointed and retained by the Plaintiffs. In this regard, Learned counsel has contended that the assessed value of the damages amounts to the sum of Kes.11, 400, 000/- only, which amount is stated to be justifiable and hence payable.
31. In short, Learned counsel for the Plaintiff/Respondents has implored the Honourable court to proceed and decree the payment of the sum of Kes. 11, 400, 000/= only as reasonable compensation on account of trespass.

Issues for Determination

32. Having reviewed the Application dated the 7th June 2023; which is the Application under consideration and upon taking into account the Response filed by the Plaintiffs/Respondents; and similarly having considered the written submissions filed, the following issues do arise and are thus pertinent for consideration;
 - i. Whether the orders made on the 27th March 2023; were Ex-parte orders either as contended by the Applicant or otherwise.



- ii. Whether the Honorable court is seized of the requisite Jurisdiction and mandate to grant an order of Permanent of Injunction and for payment of General Damages for Trespass, albeit at an Interlocutory stage.
- iii. Whether the sufficient cause and/or basis has been established and/or demonstrated to warrant the discharge/vacation of the orders issued on the 27th March 2023.

Analysis and Determination

Issue Number 1. Whether the orders made on the 27th March 2023; were Ex-parte Orders either as contended by the Applicant or otherwise.

33. The Learned counsel for the Applicant has contended that the orders which were made by the Honorable court on the 27th March 2023, were Ex-parte orders and hence same are amenable to be set aside and/or discharge pursuant to and by dint of the provision of Order 12 Rule 7 of the Civil Procedure Rules.
34. Further and in addition, Learned counsel has ventured forward and reproduced Order 12 Rule 7 of the *Civil Procedure Rules*, in the body of his written submissions. In this regard, Learned counsel has thereafter contended that insofar as the impugned orders were made Ex-parte, same are liable to be set aside and/or vacated.
35. Nevertheless, despite contending that the impugned orders which were made on the 27th March 2023; were made Ex-parte, the said counsel has on the other hand admitted and acknowledged that the orders issued on the 27th March 2023, arose from a consent and were entered into between the advocates for the Parties.
36. To be able to understand the position adverted to and relating to the fact that the impugned orders were entered into by consent, it is instructive to reproduce ground two of the Application beforehand.
37. For good measure, ground two of the Application states as hereunder;

“The orders issued by the court on the 27th March 2023 as a result of a consent by the advocates for the 1st Defendant to remedy damages caused to the Plaintiff’s property has become unenforceable”
38. From the contents of ground two, (whose contents have been reproduced elsewhere), it is evident and apparent that the orders issued and made on the 27th March 2023, were actually issued in the presence of counsel for the 1st Defendant/Applicant and in any event, by consent of the Parties.
39. Consequently and in the premises, it cannot now lie in the mouth of Learned counsel for the 1st Defendant/Applicant to contend and or purport that the impugned orders were Ex-parte orders or otherwise. Clearly, such postulation by and or behalf of Learned counsel for the 1st Defendant constitutes a misnomer.
40. Furthermore, it is important to restate and reiterate that when the matter came up on the 27th March 2023; the Parties herein were duly represented by advocates, engaged and/or retained, to represent is the interest of the Parties.
41. Additionally, on the same date, Learned counsel for the 1st Defendant/Applicant addressed the Honourable court that the 1st defendant/Applicant has agreed to undertake repairs in respect of the damages within a duration of 60 days.



42. Further and in addition, Learned counsel conceded that in default to undertake the impugned repairs, then an order of Temporary injunction will ensue, automatically.
43. Arising from the representations/ submissions made by and on behalf of the advocates for the respective Parties; the Honourable Court proceeded and recorded a consent in the following terms
- i. The Application dated the 14th March 2023; be and is hereby marked as compromised/settled on terms.
 - ii. The Defendants/Respondents be and are hereby granted 60 days to carry out and/or undertake the repairs complained of by the Plaintiff/Applicants.
 - iii. In default to carry out and undertake the repairs complained of within the terms of clause (ii) hereof, an interim order of injunction shall issue automatically and the Defendants/ Respondents shall be restrained from carrying out from undertaking any further construction on the named property until and unless same does comply with and abide by the terms of approval duly issued by the City Planning Authority and National Environment and Management Authority.
 - iv. Costs of the Application shall abide the outcome of the suit.
44. In my humble view, there is no gainsaying that the order, (whose terms I have reproduced herein before), were made by consent and in the presence of the advocates for the respective Parties. Consequently and for good measure, the impugned orders were not Ex-party in nature or otherwise.
45. To surmise, my answer to issue number one is that the contention by and/or behalf of the Applicant that the impugned orders were Ex-parte is certainly misconceived, mistaken and erroneous.

Issue Number 2. Whether the Honorable Court is seized of the requisite Jurisdiction and mandate to grant an order of Permanent of Injunction and for payment of General Damages for Trespass, albeit at an Interlocutory stage.

46. Before venturing to address and adjudicate upon the issue herein, it is imperative to recall and reiterate that the Application dated the 14th March 2023; which the Learned counsel for the Plaintiffs/ Respondents has canvassed and ventilated at the foot of the submissions dated the 11th July 2023; was indeed disposed of vide consent entered into and endorsed by the court on the 27th March 2023.
47. Consequently and to the extent that the said Application had been compromised and settled by consent of the Parties, whose details are well known to the advocates, the said Application ceased to exist; and therefore cannot attract further arguments by Learned counsel for the Plaintiffs/ Respondents or at all.
48. In my humble view, the submissions dated the 11th July 2023 and which advert to the Application dated the 14th March 2023, are misleading, erroneous and legally untenable. In this regard, same be and are hereby expunged from the record of the court.
49. Other than the fact that the said submissions relates to an Application which had hitherto been disposed of by consent; it is also instructive to underscore that Learned counsel has spent a great deal of time and energy canvassing the question of issuance of an Order of Permanent injunction and payment of General damages in the sum of Kes.11, 400, 000/= Only, on account of trespass.



50. Nevertheless, it is common knowledge that an order of Permanent injunction can only issue and/or be granted after a plenary hearing, where the disputants have tendered evidence and been subjected to necessary cross examination by the adverse Party.
51. Additionally, it is also trite, established and hackneyed that an order of Permanent injunction, which is distinct from an interim/temporary injunction; cannot issue and or be granted at an interlocutory stage, whatsoever.
52. Consequently and in the premises, where Learned counsel for the Plaintiff invites this Honorable court to grant an order of Permanent injunction, albeit at an interlocutory stage, then certainly such an invitation amounts to an absurdity and cannot therefore be acceded to by a conscientious of a court of law.
53. To anchor the exposition of the law alluded to and enumerated in the preceding paragraph, it suffices to adopt and reiterate the erudite analysis of the law as contained in the case of *Bandari Investments & Co. Ltd versus Martin Chiponda & 139 others*[2022] eKLR, where the Honorable court, (Per Justice [Lukas Leperes Naikuni, Judge; stated as hereunder;
38. Whether the 1st and 18th Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. 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, in that they are perpetual and 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 Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Code*, 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.
54. From the foregoing dictum, which I share, it is instructive to note that an order of Permanent injunction can only issue upon the hearing and determination of the suit. For good measure, same issues at the tail end and not at the onset nor midstream.
55. Other than the foregoing, Learned counsel for the Plaintiff/Respondents has also implored the Honourable court to proceed and grant an order awarding to and in favor of the Plaintiff/Respondents the sum of Kes.11, 400, 000/= only, on account of General damages for trespass and nuisance.
56. However, I must confess that it appears that Learned counsel for the Plaintiffs/Respondents, is not privy to the legal position as to when damages for trespass can be assessed and/or awarded. Nevertheless, it suffices to point out that an award of General damages, can only be undertaken at the tail end of the case, subject to proof of liability by the adverse Party.
57. Similarly, even assuming that the claim for Kes.11, 400, 000/= only, is an award on account of Special damages, it is not lost on this Honourable court that same must also be particularly pleaded and then specifically proved, albeit in the course of and during the plenary hearing.
58. In short, I am unable to decree the reliefs sought vide the submissions of Learned counsel for the Plaintiffs/Respondents. For good measure, I beg to state and highlight that the claims at the foot of the submissions by Learned counsel for the Plaintiffs/Respondents, are grossly misconceived and in any event, same amounts to placing the Wagon before the Horse, which is a Legal anathema.



Issue Number 3. Whether the sufficient cause and/or basis has been established and/or demonstrated to warrant the discharge/vacation of the orders issued on the 27th March 2023.

59. It is important to recall and recollect that the Parties herein had hitherto agreed and thereafter consented that the Defendants do proceed to undertake the repairs pertaining to and concerning the damages caused and/or occasioned to the Plaintiffs'/Respondents' Property. Further and in any event, it was agreed that the repairs were to be carried out and or undertaken within a circumscribed timeline.
60. Be that as it may, it is worthy to state and underscore that the repairs pertaining to and or concerning the damages caused to the Plaintiff's property, could only be carried out and or undertaken subject to the Plaintiffs'/Respondents' granting right of access to the Applicant, so as to be able to carry out and undertake the designated repairs
61. Put differently, the intended repairs could not be commenced and/or carried out, if the Plaintiffs remained adamant and failed to afford the Applicant the right of access to the impugned property or otherwise. Indeed, if access is denied then the entire intention to commence and undertake repairs stands frustrated.
62. In respect of the instant matter, the Applicant has averred in the supporting affidavit that subsequent to entry into and execution of the consent, same has made concerted efforts to procure and obtain access to the Plaintiffs property with a view to undertaking the repairs, but the Plaintiffs'/Respondents' herein have declined to avail access.
63. In any event, it is important to underscore that the various depositions, alluded to and enumerated in the body of the supporting affidavit have neither been challenged nor controverted. For good measure, the Plaintiffs'/Respondents' seem to concede the fact that same have denied the Applicant access to the suit property.
64. On the other hand, it is also apparent that there is a stalemate between the Plaintiffs/Respondents, who contend that the extent of repairs shall require the sum of Kes.11, 400, 000/= only, whereas the Applicant's position is that the repairs in question would require Kes.484, 000/= only.
65. Instructively, both the Plaintiffs/Respondents and the Applicant herein have since procured and availed to the Honourable court separate and distinct Reports alluding to the costs of undertaking the impugned repairs.
66. Furthermore, it is the Applicants position that the Report by and on behalf of the Plaintiffs/Respondents which indicate the costs of repairs to be kes.11, 400, 000/= only, is extortionist in nature and calculated to attract unjust enrichment.
67. On the part of the Plaintiffs/Respondents, same contends that the amount to be spent by the Applicant herein towards undertaking the repairs is unrealistic and mediocre in all aspects, when compared with the nature of Damages in question.
68. Perhaps, it is necessary to reproduce the position taken by the Plaintiffs/Respondents verbatim. In this regard, paragraphs 14, 15 and 19 of the Replying affidavit are instructive and pertinent.

Paragraph 14.

That if truth is a virtue and honesty is to be upheld, the Damage costs by the 1st and 2nd Defendants/Respondents in comparison with the proposed repairs are in comparable, unprofessional, unrealistic and mediocre in all aspect and in equal measure. The averments of



building a three-bedroom bungalow and fully furnishing the same are farfetched and proof and/or lack of merit and this Honorable court is called upon to ignore the same.

Paragraph 15.

That in the alternative and without prejudice, we have severally proposed a joint survey exercise where all parties shall suggest meaningful and logical repairs suggestions pursuant to the prevailing market sources of goods and fair costing. On the contrary, the 1st and 2nd Defendants/ Respondents are insisting on being granted unfettered and unrestricted access to gain entry and unilaterally to take repair as they deem fit to their whims

Paragraph 19.

That indeed and the same has been exemplified countless times in number that the 1st and 2nd Defendants/Respondents are not eager, keen or interested in an honest negotiation leading to an amicable and acceptable settlement in the interests of saving the precious Judicial time and to foster good neighborliness, clean environment and tranquility, truth be told, we are no out to unjustly benefit on any predicament abound.

69. From the paragraphs, whose contents have been reproduced herein before, it is evident and apparent that what is a stake and/or play is a clash of egos and a supremacy fight between the Plaintiffs/ Respondents on one hand and the Defendants/Applicants; on the other hand.
70. Nevertheless, the dispute before hand also appears to have assumed a monetary perspective and/ or implication whereby the question relates to the amount of money, if any, to be expended on undertaking the repairs.
71. To my mind and taking into account the rivaling perspectives, which have been ventilated by the Parties herein, it becomes crystal clear that the dispute is one that would require the subject matter to undergo a full trial so that the court can listen to the evidence by the Parties and thereafter determine the true costs of the repairs/ Damages in question.
72. Additionally, the Honourable court would also be in a position to assess and where necessary to make an award on account of General damages for trespass and nuisance, albeit subject to proof, in the usual manner.
73. However, the question that now needs to be answered is whether the order of injunction on the 27th March 2023, is serving the interest of justice or whether same is being abused by the Plaintiffs/ Respondents, for purposes of achieving collateral advantage.
74. Having taken into account the position by the Applicant and upon juxtaposing same against the named paragraphs in the Replying affidavit by the 1st Plaintiff/Respondent, it is evident that upon procuring the orders of injunction, the Plaintiffs'/Respondents' have declined to grant access to the Applicant to undertake the repairs.
75. Essentially, there is no way that the Applicant herein can gain entry into and undertake the intended repairs, if access is denied and/or refused.
76. Furthermore, the Plaintiffs/Respondents cannot be heard to say that the Applicant has not been keen to commence and undertake the intended repairs or better still are keen to spend a mediocre amount of money on the repairs; yet the Plaintiffs/Respondents have themselves refused to avail access.
77. Surely, the Plaintiffs'/Respondents' cannot approbate and reprobate at the same time. Indeed, such an action would tantamount to an abuse of the Due process of the Honourable court.



78. In my humble view, it was incumbent upon the Plaintiffs/Respondents' to avail access to the Applicant to facilitate the commencement of the repairs and thereafter, upon conclusion of the repairs to undertake a joint evaluation exercise to ascertain the propriety of the repairs undertaken or otherwise.
79. Insofar as the Plaintiffs'/Respondents' have refused to avail access to the Applicant herein to do what was covenanted in terms of the orders made/issued on the 27th March 2023, it therefore becomes imperative to find and hold that the impugned orders have been frustrated by and at the instance of the Plaintiffs/Respondents.
80. Consequently and in the premises, the orders which were issued on the 27th March 2023; and especially the limb relating to the grant of Temporary injunction becomes liable to be vacated and/or discharged.
81. In this respect, I am alive to the fact that the Honorable court is seized of the requisite Jurisdiction and indeed discretion to set aside and/or vacate orders of temporary injunction where it is shown and/or established that same is being abused. See the provision of Order 40 Rule 7 of the Civil Procedure Rules, 2010.
82. For good measure, it is instructive to reproduce the named provisions and same are reproduced as hereunder;

Order for injunction may be discharged, varied, or set aside [Order 40, rule 7.]

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

83. Finally, I also beg to state and underscore that where a Party misuses and or abuses a court order then the court issuing the impugned order has an inherent Jurisdiction to vacate, rescind and/or set aside the orders under reference.
84. Indeed, the inherent Jurisdiction of the Honourable court is meant to enable the court to supervise and police any orders issued by same and to ensure that the Rule of law and the General Administration of Justice are adhered to and complied with by the parties and at all times.
85. To be able to understand the import and tenor of the inherent Jurisdiction of the Honourable court, it is instructive to cite and reiterate Halbury's Laws of England, 4th Edition Volume 37 Para 14; under the heading "Inherent Jurisdiction of the Court" at Page 23;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper



vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

86. Invariably, it cannot lie in the mouth of the Plaintiffs/Respondents’ to seek justice in terms of recompense, while at the same time blocking the adverse Party from undertaking the repairs, which had been mutually agreed upon and/or consented to at the foot of the orders made on the 27th March 2023.
87. In a nutshell, such a position reflects abuse and misuse of lawful court orders and by extension the Due process of the Honourable court. Consequently, such a situation merits redress by invocation of the Inherent Jurisdiction of the court.

Final Disposition

88. Having reviewed the issues which were enumerated herein, it is now appropriate to proclaim the dispositive and/or determinative orders pertaining to and/or concerning the Application dated the 7th June 2023, which was the subject of the instant ruling.
89. Be that as it may, whilst dealing with issues number three, this Honourable court has come to the conclusion that the orders of Temporary injunction procured and obtained on the 27th March 2023; have not only been abused and misused by the Plaintiffs/Respondents, but same appear to have outlived their intended purpose.
90. Consequently and in the premises, the Application dated the 7th June 2023; be and is hereby allowed in terms of prayer 3 only. For good measure, the orders of temporary injunction which were issued on the 27th March 2023; be and is hereby vacated and/or discharged.
91. As concerns costs of the Application, I direct that same shall abide the outcome of the main suit; which is still pending before the Honorable court.
92. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Mr. Clinton Kimanzi for the 1st Defendant/Applicant.

Ms. Bitok h/b for Mr. Saad for the 2nd Defendant.

N/A for the Plaintiffs/Respondents.

