



Grove Development Limited v Makongo t/a La Gusta Restaurant (Environment & Land Case E065 of 2024) [2025] KEELC 3313 (KLR) (8 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E065 OF 2024**

LL NAIKUNI, J

APRIL 8, 2025

BETWEEN

GROVE DEVELOPMENT LIMITED PLAINTIFF

AND

ALI BAKARI MAKONGO T/A LA GUSTA RESTAURANT DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called upon to make a determination of two (2) applications the first one being dated 15th October, 2024 by Grove Development Limited, the Plaintiff/Applicant herein. It was brought under the provisions of Articles 40 and 165 of *The Constitution* of Kenya 2010, Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, 2010, Sections 77 and 78(2) of the *Land Registration Act*, No. 3 of 2012 and Section 13 of The *Environment and Land Court Act* No. 19 of 2011.
2. The second application is the one dated 13th November, 2024 by Ali Bakari Makongo T/A La Gusta Restaurant, the Defendant/Applicant herein. It was under the dint of the provisions of Sections 1A,1B,3A of the *Civil Procedure Act*, Cap. 21, Order 51 Rule 1 and Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 and other enabling provisions.
3. Upon service of the Application dated 13th November, 2024 to the Plaintiff/Respondent, responded through a Replying affidavit sworn on 13th January, 2025.

II. The Plaintiff/ Applicant's case in the Notice of Motion application dated 15th October, 2024

4. The Applicant sought for the following orders: -
 - a. Spent.



- b. Spent.
 - c. That a temporary injunction do issue restraining the Respondent/Defendant by himself his agents, servants employees and or anybody claiming through or jointly with him from entering encroaching onto trespassing constructing damaging or degrading vegetation and or in any way interfering with the plaintiff's possession and proprietary rights over plots known as Kwale/ Diani Beach Blocks/ 1299,1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333 and 1334 which were originally Kwale/ Diani Beach Block/20) pending hearing and determination of this Application and suit.
 - d. That this Honourable Court be pleased to direct Officer Commanding Station Diani Police Station to enforce the orders of this Court.
 - e. Cost of this Application.
5. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 12 Paragraphed annexed affidavit of NITICHANDRA Krishnalal Pandya, a Director of the Plaintiff/Applicant Company herein. The Deponent averred that:
- a. The Plaintiff/Applicant was the registered owner of Kwale/Diani Beach Blocks/ 1299,1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1331, 1332, 1333 and 1334 (hereinafter referred to as 'The Suit Property') which were originally Kwale/Diani Beach Block/20) having bought leasehold interest in the suit property in 1994.
 - b. The Plaintiff/Applicant bought leasehold interest in the suit property (Originally Kwale/ Diani Block/20) on 28th October, 1995 from the initial owner Mrs. Elizabeth Arbuthnot Grant. Annexed and marked as "M-2" was a copy of the agreement for sale dated 28th October, 1994.
 - c. The Plaintiff's/Applicant's lease in the suit property was subsequently extended in 2019 for an additional term of 50 years and subdivision of Kwale/Diani Beach Block/20 eventually effected in to thirty – five (35) plots namely Kwale/Diani Beach Blocks/1299,1302,1303,1304,1305,1306,1307,1308,1309,1310,1311,1312,1313,1314,1315,1316,1317,1318, and 1334 which were now the subjects of this suit. (Annexed and marked as "M - 3" were bundle of Certificates of Lease of the Plaintiff/Applicant's suit property).
 - d. The Plaintiff just learnt that the Defendant/Respondent trespassed on the suit property, cleared vegetation, trees and commenced construction of both permanent and semi-permanent structures. Annexed and marked as "M - 4 (a) and (b)" were a bundle of photographs of the Defendant/Respondent's developments on the Plaintiff/Applicant's suit property and a Certificate of Electronic Evidence respectively.
 - e. The Plaintiff/Applicant had further discovered that the Defendant/Respondent was running a restaurant business on its suit property in the name of La Gusta Restaurant. Annexed and marked as "M - 5" was a copy of the Defendant/Respondent's Business Registration.
 - f. The Plaintiff/Applicant had never permitted the Defendant/Respondent to enter, cut trees, clear vegetation and undertake construction in its suit property and that the said entrance, cutting trees, clearing vegetation and construction was without the Plaintiff/Applicant's knowledge, consent or authority.



- g. The Defendant/Respondent had further invited his customers to further trespass on the suit property without the consent and approval of the Plaintiff/Applicant.
- h. The Defendant/Respondent was in the process of clearing mature trees of over 80 years and vegetation to give room for construction of more gazebos again without the consent and approval of the Plaintiff/Applicant.
- i. If the Defendant/Respondent was not enjoined, the Plaintiff/Applicant stood to suffer irreparably in the following ways: -
 - i. The Plaintiff stood the risk of facing contempt proceedings in Kwale ELC Case No. E254 OF 2022 (OS) in which this Court directed parties to maintain status quo.
 - ii. Continuous cutting of mature trees of over 80 years old and clearing vegetation for the Defendant's construction of gazebos and other structures threatens the Plaintiff's preferred use of its property.
 - iii. The Defendant/Respondent had engaged contractors who were undertaking construction on the suit property. This if not stopped had the possibility of limiting the Plaintiff/Applicant's right of use of its property in case the Defendant/Respondent and his contractors get entangled in a dispute or even a suit.
 - iv. The Defendant/Respondent's arbitrary nature of trespass and even undertaking construction on the Plaintiff/Applicant's parcel posits a greater risk in case he tries to let the portion to other unsuspecting members of the public
- j. They had unsuccessfully tried to engage the Defendant/Respondent who appears to be enjoying some form of protection from undisclosed Government Officials but he was determined to continue with the impugned trespass. Annexed and marked as "M – 6 (a) and (b)" were copies of letters dated 1st October, 2024 and 3rd October, 2024.
- k. The Defendant/Respondent would not suffer any prejudice whatsoever if the Orders sought in this Application were granted as he did not have any legal justification to be on the suit property.
- l. It was in the interest of justice that this Application was heard on priority basis in order to protect the Plaintiff/Applicants' interest in its property.

III. The Defendant's case in the Notice of Motion application dated 13th November, 2024

- 6. The Defendant sought the following orders:-
 - a. The Respondent's Suit ELC No. E 065 of 2024 dated 15th October 2024 be dismissed.
 - b. The cost of this Application be borne by the Respondent.
- 7. The application by the Applicant was premised on the grounds, facts and testimony on the face of the application and further supported by the 14 Paragraphed annexed affidavit of ALI BAKARI Makongo, a the Defendant/Applicant herein. The Deponent averred that:-
 - i. The Respondent filed suit ELC No. E065 dated 15th October 2024 under Certificate of Urgency ('the main suit') citing the Applicant herein as the Respondent/Defendant.
 - ii. Initially before the Respondent filed the main suit, it demanded that the Applicant vacate the land where Applicant's business was situated (subject property) through their letter



dated 2nd October 2024 on the ground that the Applicant was not the owner of the subject property. Annexed in the affidavit and Marked as “ABM – 1” was the copy of the Respondent’s Letter dated 2nd October 2024.

- iii. The Applicant, through his Advocate responded to the Respondent’s Demand Letter via his Response Letter dated 3rd October 2024 where he extensively elaborated that he was not the owner of the subject property and that he entered into a valid Tenancy Agreement with the real owners of the subject property who authorized him to carry out his business therein. Annexed in the affidavit and Marked as “ABM – 2” was the copy of the Applicant’s Response dated 3rd October 2024.
- iv. The Applicant entered into a Tenancy Agreement with Hatibu Mjaka Mtego, Hassan Rashid Mzinga, Rama Omari Chimwaga and Rama Ngoro Ngowa who were the representatives of the clans of Achiwa Kulo, Achina Saburi, Achina Ryaza who were the reversionary owners of the subject property under trusteeship of Kwale County Government, managed by the National Land Commission where the Applicant’s business named LA Gusta Restaurant was situated. Annexed in the affidavit and Marked as “ABM – 3” was the copy of the Applicant’s Tenancy Agreement.
- v. Further on the response to the Respondent, the Applicant directed the Respondent to take the issue of ownership claim of the subject property to the right people being Lessors/owners of the subject property who leased the same to him.
- vi. Despite clarifying to the Respondent that he was just a tenant in the subject property where my business is situated and not the owner, he was surprised when the Respondent sued him and used his response as part of its bundle of document in its main suit despite him coming clear on who were the right parties to sue or claim from. Annexed in the affidavit and Marked as “ABM – 4” was the copy of the Applicant Response used by the Respondent in its bundle of document in the main suit).
- vii. The Applicant herein was a total stranger to the averments and allegations made by the Respondent in the Respondent’s main suit as he was a mere tenant and not the owner of the subject property where his business was situated.
- viii. The Respondent’s main suit does not reveal any cause of action against the Applicant. The Applicant was a mere tenant by dint of a binding Tenancy Agreement with the Representatives of the owners of the land who authorized him to conduct his business in the subject property.
- ix. The Respondent had sued him since he was not the owner of the land where his business was situated, he was just a mere tenant who was doing business in the land backed with the above stated valid Tenancy Agreement.
- x. The Respondent’s suit dated 15th October, 2024 did not reveal any cause of action against them hence should be dismissed.
- xi. Should Respondent had any claims pertaining the ownership of the subject property where the Applicant’s Business was situated, it was in order to sue proper parties being the owners of the property and not the Applicant/Tenant.
- xii. The Applicant never had any relationship with the Respondent therefore, there can never be any cause of action or nexus between the Applicant and the Respondent on ownership claim where the Applicant’s business was located.



- xiii. Being that the Respondent has no cause of action against the Applicant, it was only fair and just for the Respondent suit dated 15th October 2024 to be dismissed with cost.
- xiv. It was in the interest of justice that the orders sought be in this Application be granted.

IV. The Response to the Notice of Motion application dated 13th November, 2024

8. The Plaintiff responded to the Notice of Motion application dated 13th November, 2024 through a 13 Paragraphed Replying Affidavit sworn by NITICHANDRA KRISHNALAL PANDYA, a Director of the Plaintiff Company herein on 13th January, 2025. The deponent averred that:-
 - a. Grove Development Limited is the registered owner of the suit property having bought leasehold interest in the suit property (Originally Kwale/Diani Block/20) on 28th October, 1995 from the initial owner Mrs. Elizabeth Arbuthnot Grant. Annexed and marked as “M-2” was a copy of the agreement for sale dated 28th October, 1994.
 - b. The Defendant admittedly entered into the suit property, cleared vegetation, trees and commenced construction of both permanent and semi-permanent structures without the Plaintiff’s knowledge, consent or authority. Annexed and marked as “M - 3 (a) and (b)” was a bundle of photographs of the Defendant’s developments on the Plaintiff’s suit property and a Certificate of Electronic Evidence respectively.
 - c. The Defendant established and continued to run a restaurant business on the suit property in the name of ‘La Gusta Restaurant’ without the Plaintiff’s consent or authority. Annexed and marked as “M - 4” was a copy of the Defendant’s Business Registration Particular.
 - d. The Defendant had barred the representatives of the Plaintiff from accessing their property and has vowed that they would never set foot on the premises as the premises was in Digo Land and not India (the origin of the Plaintiff’s representatives). Annexed and marked as “M - 5” was a screenshot of the Defendant’s WhatsApp messages.
 - e. Upon being served with the Plaintiff’s demand letter, the Defendant admitted to be in occupation of the Plaintiff’s parcel and vowed to continue trespassing, the Plaintiff’s demand letter notwithstanding. Annexed and marked as “M - 6” was a copy of the Defendant’s Response dated 3rd October, 2024.
 - f. The Plaintiff’s cause of action against the Defendant was the issue of trespass and not whatsoever ownership as the Defendant in his Application attempts to suggest. In any case the Deponent was aware that the issue of ownership of the suit parcel was sealed in 2015 and further cemented by this very Court in Grove Development Limited v County Government of Kwale & 2 Others ELCPET/E008/2023 on 21st May, 2024. Further, he was aware that this is not the first time Courts have been invited to deal with the alleged owners as in 2016 Hon. Emukule J. as he then was, considered and determined fully their alleged interest in the Plaintiff’s property. Any attempt to drag this Court into the issues of ownership would be res judicata. Annexed and marked as “M-7 (a),(b)and (c)” were copies of Judgment dated 21st May, 2024, Rulings dated 30th July, 2015 and 24th November, 2016 respectively.
 - g. The Defendant was mischievously attempting to hoodwink this Court by alleging that he is just a tenant. One would ask, what stopped him from carrying out the necessary due diligence of ascertaining ownership after being served with a letter of demand?



- h. The Defendant's assertion that he was a mere tenant and that he had been permitted to be on the suit property by the alleged owners was not a proper ground in Applications of this nature and much worse in a trespass claim due to the following reasons:-
 - i. The Defendant trespassed on to the Plaintiff's parcel without conducting the requisite searches to ascertain the real owner.
 - ii. The Defendant's Tenancy Agreement annexed and marked as "ABM - 3" was with reference to a different parcel Kwale/Diani Beach Block/ 194. He did not understand what the Defendant was doing on the Plaintiff's parcel.
 - iii. It was the Defendant personally and not any other person running a restaurant business, cutting down trees clearing vegetation, inviting others to trespass on to the Plaintiff's parcel. This has been admitted.
 - iv. If the Defendant is of the view that some other persons purporting to be owners should be joined as Defendants to these proceedings, nothing whatsoever bars him from filing the requisite application.
 - v. Non-joinder of the alleged persons as Defendants who in the first place are not relevant in a trespass suit is not a proper ground for the prayers sought. Misjoinder or non-joinder of parties cannot whatsoever be cured by an Application to strike out pleadings.
- i. The Defendant's Application was deliberately designed to convolute issues in an attempt to buy the Defendant more time for trespass.
- j. In further response, the deponent relied on his affidavit dated 15th October, 2024 in support of the Plaintiff's Notice of Motion dated the same date.

V. Submissions

- 9. On 22nd January, 2025 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 15th October, 2024 and 13th November, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 31st March, 2025 2025 by Court accordingly. Eventually, it was actually delivered on 8th April, 2025.

A. The Written Submissions by the Plaintiff/Applicant

- 10. The Plaintiff/Applicant through the Law firm of Messrs. Sitonik Advocates filed its written submissions dated 13th January, 2024. Mr. Kago Advocate submitted that the subject matter of this case was the property Kwale/Diani Beach Blocks/ 1299, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1331, 1332, 1333 and 1334 which were originally Kwale/Diani Beach Block/20). The present application seeks to restrain the Respondent/Defendant by himself his agents, servants employees and or anybody claiming through or jointly with him from entering encroaching onto trespassing constructing damaging or degrading vegetation and or in any way interfering with the Plaintiff's possession and proprietary rights over the plots even as we proceed to determine the issue of whether or not the Defendant has trespassed on to the Plaintiff's parcels on trial.



11. The Learned Counsel avered that they intended to rely on the Plaintiff's Notice of Motion application dated 15th October, 2024 and filed on, the accompanying Supporting Affidavit and annexures thereto. The only standing orders in the Notice of Motion application dated 15th October, 2024 were the above cited prayers numbers (2), (3), (4) and (5) respectively.

12. According to the Learned Counsel he intended on relying on the issue of whether the Plaintiff's Application had met the threshold set in "Giella – Versus - Cassman Brown Co. Ltd [1973] E.A.358". On analysis, the Learned Counsel submitted that the application invoked the principles of temporary injunctions which the Court of Appeal in "Giella – Versus - Cassman Brown Co. Ltd (Supra)" settled thus:-

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

13. On whether the Plaintiff had shown a prima facie case with a high probability of success, the Learned Counsel submitted that the Court of Appeal in the case of "Mrao Ltd – Versus - First American Bank of Kenya Ltd & 2 others", cited with approval in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others [2014] eKLR", defined a "Prima facie case" to mean:-

".....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... The party must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion... The Applicant need not establish title, it is enough if he can show a bona fide question to raise as to the existence of the right which he alleges.

14. Similarly, he cited the case of:- "Habib Bank AG Zurich – Versus - Eugene Marion Yakub, CA NO. 43 OF 1982" this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:-

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

15. The Plaintiff had a clear and unmistakable right to property which has been demonstrated in the following ways:-

Through its Supporting Affidavit, the Plaintiff has established that it bought leasehold interest in the suit property (Originally Kwale/ Diani Block/20) on 28th October, 1995. Agreement for sale dated 28th October, 1994 was annexed and marked "M-2".

Additionally, the Plaintiff's/Applicant has sufficiently proven that the lease in the suit property was subsequently extended in 2019 for an additional term of 50 years and subdivision of Kwale/Diani Beach Block/20 eventually effected in to thirty-five (35) plots namely Kwale/Diani Beach/Blocks/ 1299, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309,



1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1331, 1332, 1333 and 1334 which were previously Kwale/Diani Beach Block/20 and which are now the subjects of this suit. A bundle of Certificates of Lease of the Plaintiff's suit property was annexed and marked "M-3".

16. The Plaintiff had demonstrated the infringement of its right to property sufficiently to warrant an explanation or rebuttal from the Defendant in the following ways:-
 - a. The Defendant admittedly entered into the Plaintiff's property, cleared vegetation, cut down trees, and commenced construction of both permanent and semi-permanent structures without the plaintiff's knowledge, consent or authority. A bundle of photographs of the Defendant's developments on the Plaintiff's suit property and a Certificate of Electronic Evidence respectively were annexed and marked as "M - 4 (a) and (b)".
 - b. The Defendant further commenced and continues to run a restaurant business on the suit property in the name of 'La Gusta Restaurant' without the consent or authority of the plaintiff. A copy of the Defendant's Business Registration was annexed and marked as "M - 5".
 - c. The Defendant has admitted that he was on the Plaintiff's property by virtue of permission granted to him by some unknown persons and has vowed not to vacate.
17. The Learned Counsel submitted that on the matters aforesaid the Plaintiff had met the first test of Prima facie case with a high probability of success.
18. On whether the Plaintiff will suffer irreparable injury that could not be adequately compensated by an award of damages, the Learned Counsel submitted that there was a genuine need to grant the prayers sought as allowing the Defendant to continue utilizing without permission and degrading the Plaintiff's parcel, constructing both permanent and semi-permanent structures would amount to a poor and insufficient system of justice. What if the Defendant in his palpable arrogance decides let out? Has the Defendant demonstrated his abilities to compensate the Plaintiff in case he is required to pay the cost of restoration? In the case of:- "Bellamy – Versus – Sabine", and cited in "Patricia Musungu Shaaban – Versus - Mohamed Shaaban & 4 others [2018] eKLR" the Court when dealing with a similar circumstance had this to say:-

"It would be a poor and insufficient system of justice, unethical to contemplate, if a successful Plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh ... The court must therefore protect the status quo."
19. According to the Learned Counsel the suit property stood at further risk of being damaged and/or wasted by the Defendants if the injunction is not granted before the hearing and determination of this suit. In a claim for trespass, where ownership of Land is not in issue and the Defendant has admitted that he did not seek permission from the rightful owner before trespassing, the more just thing to do is not even to deliberate on the issue of whether or not the trespasser was in a position to compensate but rather whether or not judgment can be entered on admission.
20. Further occupation of the suit property, cutting down of the mature trees of over 80 years and construction on the suit property would occasion irreparable injury to the Plaintiff, which cannot be measured, let alone be compensated, through any amount of monetary damages. It would be unfortunate that, in a dispensation where the registration of a person as the proprietor of a lease upon whom all implied and express rights vests, was forced to cede his rights, privileges and control over his



land to the Defendant as a result of the trespass. There was no amount of money that can compensate such a Plaintiff.

21. A similar position was held by the Appellate Court in the case of:- “Goodson – Versus - Richardson (1874) L. R.9Ch.App. 221” as follows: -

“Every owner of property has an absolute dominion over it, which gives him the right to say what shall be done with it, and who may and who may not go upon it. It is the destruction of this right, termed the right of veto, which constitutes the irreparable injury.”

22. On where the balance of convenience lies, the Learned Counsel submitted that in case this Honorable Court is still in doubt, the balance of convenience lies on the part of the Plaintiff because:

i. The balance of convenience tilts towards granting an injunction and preserving the suit property

23. In this premise, the Plaintiff had properly brought itself within the settled conditions for award of a temporary injunction, and is thus deserving of the orders. In conclusion, the Learned Counsel urged the Court to find that the Plaintiff's Application was meritorious and grant the injunction against the Defendant.

24. On the Defendant's application dated 13th November, 2024 the Learned Counsel submitted that the Defendant filed their notice of motion application dated 13th November, 2024 brought under certificate of urgency seeking the following orders:-

i. The Respondent's Suit ELC No. E 065 of 2024 dated 15th October 2024 be dismissed.

ii. The cost of this Application be borne by the Respondent

25. The Learned Counsel contended that the following issues arise for this Honourable Court to determine was whether the Defendant's application met the threshold for striking out of pleadings as set out in Order 2, Rule 15 of the Civil Procedure Rules, 2010 for want of disclosing a reasonable cause of action.

26. The Learned Counsel argued that the principle of striking out pleading was under the provision of Order 2 rule 15 of the Civil Procedure Rules, 2010 had established clear principles which guide the court in the exercise of that power in the following terms:

“ 15.

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- a) it discloses no reasonable cause of action or defence in law; or
- b) it is scandalous, frivolous or vexatious; or
- c) it may prejudice, embarrass or delay the fair trial of the action; or
- d) it is otherwise an abuse of the process of the court....and may order the suit to be stayed or



dismissed or judgment to be entered accordingly, as the case may be.”

27. On whether the Defendant’s application meets the threshold for striking out of pleadings as under Order 2, Rule 15 of the Civil Procedure Rules for want of disclosing a reasonable cause of action, the Learned Counsel relied on the case of “D.T. Dobie & Company Kenya Limited – Versus - Joseph Mbaria Muchina & Another [1980] eKLR”, Madan JA, pronounced himself on the issue of striking out of pleadings as follows: -

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

28. Further, in the case of:- “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the court expressed itself thus: -

“A Plaintiff/Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved’.

29. The Learned Counsel asserted that the Defendant had failed to adequately prove to this Honourable Court that the Plaintiff’s suit was void of a reasonable cause of action. Gainsaid that striking out of pleadings was a drastic remedy that should only be resorted to where a pleading was a complete sham. The Court of Appeal in “Blue Shield Insurance Company Ltd – Versus - Joseph Mboya Oguttu [2009] eKLR” restated these principle as follows: -

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd – Versus - Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1)(a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”



The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

30. The Learned Counsel argued that in view of the foregoing, they humbly echoed the sentiments of Madan J and humbly submit that, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading was shown to be clearly untenable. In conclusion, the Learned Counsel submitted that the Defendant herein had failed to sufficiently met the threshold for striking out of pleading as set out in Order 2 Rule 15 and urged this Court to find that the Application lacked merit and be dismissed with costs to the Plaintiff.

VI. Analysis and Determination

31. I have carefully read and considered the pleadings herein, the numerous citation of cases and the submissions; the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. In order to arrive at an informed, equitable and reasonable decision, the Honorable Court has framed three (3) issues for its determination.
- a. Whether the Defendant/ Respondent has made out a case under Order 2 Rule 15 of the Civil Procedure Rules, 2010 as pleaded in the Notice of Motion application dated 13th November, 2024.
 - b. Whether the Notice of Motion dated 15th October, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - c. Who will bear the Costs of Notices of Motion applications dated 15th October, 2024 and 13th November, 2024.

ISSUE a). Whether the Defendant/ Respondent has made out a case under Order 2 Rule 15 of the Civil Procedure Rules, 2010 as pleaded in the Notice of Motion application dated 13th November, 2024.

32. Under this sub – title the Honourable Court shall examine the merits of the Notice of Motion application dated 13th November, 2024 by the Defendant seeking to dismiss the Plaintiff’s suit. I have considered the application, the supporting grounds and those in opposition. I have also considered submissions by parties and the decisions relied on. The applicants have moved this court under Order 2 Rule 15 of the Civil Procedure Rules, 2010 to strike out the Plaintiff’s suit. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexations; for being prejudicial or embarrassing or for being an abuse of the court process.
33. The Defendant/Applicant’s argument is that the Plaintiff/ Respondent filed suit ELC No. E065 dated 15th October 2024 under Certificate of Urgency (‘the main suit’) citing the Applicant herein as the Respondent/Defendant. Initially before the Respondent filed the main suit, it demanded that the Applicant vacate the land where Applicant’s business was situated (subject property) through their letter dated 2nd October 2024 on the ground that the Applicant was not the owner of the subject property.
34. The Applicant, through his Advocate responded to the Respondent’s Demand Letter via his Response Letter dated 3rd October 2024 where he extensively elaborated that he was not the owner of the subject property and that he entered into a valid Tenancy Agreement with the real owners of the subject



property who authorized him to carry out his business therein. The Applicant entered into a Tenancy Agreement with Hatibu Mjaka Mtego, Hassan Rashid Mzinga, Rama Omari Chimwaga and Rama Ngoro Ngowa who were the representatives of the clans of Achiwa Kulo, Achina Saburi, Achina Ryaza who were the reversionary owners of the subject property under trusteeship of Kwale County Government, managed by the National Land Commission where the Applicant's business named LA GUSTA RESTAURANT is situated.

35. The Applicant contended that the Respondent's main suit does not reveal any cause of action against the Applicant. The Applicant was a mere tenant by dint of a binding Tenancy Agreement with the Representatives of the owners of the land who authorized him to conduct his business in the subject property.
36. The Plaintiff/Respondent on the other hand argued that Grove Development Limited is the registered owner of the suit property having bought leasehold interest in the suit property (Originally Kwale/Diani Block/20) on 28th October, 1995 from the initial owner Mrs. Elizabeth Arbuthnot Grant. Annexed and marked as "M-2" is a copy of the agreement for sale dated 28th October, 1994. The Defendant admittedly entered into the suit property, cleared vegetation, trees and commenced construction of both permanent and semi-permanent structures without the Plaintiff's knowledge, consent or authority. Annexed and marked as "M-3 (a) and (b)" is a bundle of photographs of the Defendant's developments on the Plaintiff's suit property and a Certificate of Electronic Evidence respectively.
37. The Plaintiff's cause of action against the Defendant was the issue of trespass and not whatsoever ownership as the Defendant in his Application attempts to suggest. In any case the Deponent was aware that the issue of ownership of the suit parcel was sealed in the year 2015 and further cemented by this very Court in "Grove Development Limited – Versus - County Government of Kwale & 2 Others ELCPET/E008/2023" on 21st May, 2024. Further, he was aware that this is not the first time Courts have been invited to deal with the alleged owners as in 2016 Hon. Emukule J. as he then was, considered and determined fully their alleged interest in the Plaintiff's property. Any attempt to drag this Court into the issues of ownership would be res judicata. Annexed and marked as "M-7 (a),(b)and (c)" were copies of Judgment dated 21st May, 2024, Rulings dated 30th July, 2015 and 24th November, 2016 respectively.
38. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In saying so, I seek solace from the case of:- "Postal Corporation of Kenya – Versus - I .T Inamdar & 2 Others [2004] 1 KLR 359", the court stated that:-
- “ the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”
39. Furthermore, the case of:- "The Co - operative Merchant Bank Ltd. – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)" the Court of Appeal stated: -
- “Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”



40. Additionally, I wish to borrow wisdom from the case of “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” where the same court expressed itself thus: -

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

41. And in the case of:- “Uchumi Supermarkets Limited & another – Versus - Sidhi Investments Limited [2019] eKLR”, the Court of Appeal emphasized that:-

“The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules (now repealed), and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist.”

42. The long line of decisions above demonstrates one thing; that the court should always allow a party the latitude to have his case heard and decided on merit unless it is so hopeless that even an amendment cannot rescue it. A perusal of the Respondent’s Plea and the relief it seeks cannot lead to a conclusion that it is hopeless, frivolous or vexatious. It seeks specific reliefs which are capable of being granted depending on the evidence to be placed before the court. It raises triable issues.

43. The fact that the applicant has challenged the soundness of the suit, that is not on its own a ground for striking out the suit as not raising a reasonable cause of action. The reasons given by the applicant for seeking to strike out the suit are not compelling to drive the Respondent from the seat of justice and deny him an opportunity to be heard on the merits. The sum total of this is that the Notice of Motion application dated 13th November, 2024 fails.

Issue No. b). Whether the Notice of Motion dated 15th October, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

44. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of 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.

45. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (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.”

46. 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 (Supra)”: -,

“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”.

47. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case “MRAO Limited – Versus - First American Bank of Kenya Limited (Supra)” of: -,

“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”

48. As the Court previously observed in this ruling, the Plaintiff/Applicant is the registered owner of Kwale/Diani Beach Blocks/1299,1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1331, 1332, 1333 and 1334 (hereinafter referred to as the ‘suit property’ which were originally Kwale/Diani Beach Block/20) having bought leasehold interest in the suit property in 1994.



49. The Plaintiff/Applicant bought leasehold interest in the suit property (Originally Kwale/Diani Block/20) on 28th October, 1995 from the initial owner Mrs. Elizabeth Arbuthnot Grant. The Plaintiff's/Applicant's lease in the suit property was subsequently extended in 2019 for an additional term of 50 years and subdivision of Kwale/Diani Beach Block/20 eventually effected in to thirty-five(35) plots namely Kwale/Diani Beach/Blocks/1299, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1331, 1332, 1333 and 1334 which are now the subjects of this suit.
50. The Plaintiff just learnt that the Defendant trespassed on the suit property, cleared vegetation, trees and commenced construction of both permanent and semi-permanent structures. Annexed and marked as “M-4 (a) and (b)” were a bundle of photographs of the Defendant's developments on the Plaintiff's suit property and a Certificate of Electronic Evidence respectively. 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 party's cases.”
51. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” 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.”
52. In the present case, it is clear that the Plaintiff/Applicant had further discovered that the Defendant/ Respondent is running a restaurant business on its suit property in the name of La Gusta Restaurant. The Plaintiff had never permitted the Defendant to enter, cut trees, clear vegetation and undertake construction in its suit property and that the said entrance, cutting trees, clearing vegetation and construction was without the Plaintiff's knowledge, consent or authority. The Defendant has further invited his customers to further trespass on the suit property without the consent and approval of the Plaintiff. Regarding this first condition, the Plaintiff/ Applicant has demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.
53. The court has further considered the annexures on record against the second principle for the grant of an injunction, that is, whether the Plaintiff/ Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “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.”

54. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants 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. The Plaintiff contended that if the Defendant was not enjoined, the Plaintiff stands to suffer irreparably in the following ways:-

- i. The Plaintiff stood the risk of facing contempt proceedings in Kwale ELC Case No. E254 OF 2022 (OS) in which this Court directed parties to maintain status quo.
- ii. Continuous cutting of mature trees of over 80 years old and clearing vegetation for the Defendant’s construction of gazebos and other structures threatens the Plaintiff’s preferred use of its property.
- iii. The Defendant has engaged contractors who were undertaking construction on the suit property. This if not stopped had the possibility of limiting the Plaintiff’s right of use of its property in case the Defendant and his contractors get entangled in a dispute or even a suit.
- iv. The Defendant’s arbitrary nature of trespass and even undertaking construction on the Plaintiff’s parcel posits a greater risk in case he tries to let the portion to other unsuspecting members of the public.

55. The Plaintiff/ Applicant 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.”

56. Quite clearly, the Applicant would not be able to be compensated through damages being that this was their home. The Applicant has therefore satisfied the second condition as laid down in “Giella’s case”.

57. Thirdly, the Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” 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”.

58. 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.”

59. The balance of convenience tilts in the favour of the Applicant as the Defendant would not suffer any prejudice whatsoever if the Orders sought in this Application were granted as he did not have any legal justification to be on the suit property before the suit herein is heard and determined on merit. 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.”

60. Thus, in this case, the balance of convenience lies with the Plaintiff/ Applicant. 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 claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

61. 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 grant a temporary injunction to restrain such acts...”

62. I am convinced that if orders of temporary injunction are not granted in this suit, the property 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 strongly find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction.



Issue No. c). Who will bear the Costs of Notices of Motion applications dated 15th October, 2024 and 13th November, 2024.

63. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise.
64. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:
- “ 58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.
- The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”
65. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the Defendant pay costs for both the applications.

VII. Conclusion and Disposition

66. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards the principles pf Preponderance of Probabilities and the balance of convenience. Clearly, the Plaintiff/Applicant has a case against the Defendant/ Respondent.
67. Having said that much, 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 15th October, 2024 be and is hereby found to have merit and is allowed.
 - b. That the Notice of Motion application dated 13th November, 2024 be and is hereby found to lack merit, hence dismissed entirely.
 - c. That an order of Temporary injunction do issue restraining the Defendant/Respondent by himself his agents, servants employees and or anybody claiming through or jointly with him



from damaging, alienating, charging, mortgaging, or degrading the vegetation and or in any way interfering with the Plaintiff's possession and proprietary rights over plots known as Kwale/Diani Beach Blocks/ 1299,1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333 and 1334 which were originally Kwale/ Diani Beach Block/20) pending hearing and determination of this suit.

- d. That mention for 28th July, 2025 for Pre – trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and a hearing date on 30th October, 2025.
- e. That an order do and is hereby issued directing officer Commanding Station Diani Police Station to enforce the orders of this Court.
- f. That the Plaintiff/Applicant shall have the costs of the Notices of Motion applications dated 15th October, 2024 and 13th November, 2024 to be paid by the Defendant/Respondent.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT KWALE THIS 8TH DAY OF APRIL 2025.

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HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT KWALE

Ruling delivered in the presence of:

- i. Mr. Daniel Disii, the Court Assistant.
- ii. Mr. Kago Advocate for the Plaintiff/Applicant.
- iii. Mr. Kowade Advocate for the Defendant/Respondent.

