Wabere & 4 others v Aqua Houses Ltd t/a Pearl City Apartments & 2 others (Environment & Land Case E014 of 2024) [2025] KEELC 3145 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3145 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E014 OF 2024

LL NAIKUNI, J

APRIL 4, 2025

BETWEEN

MARGARET WACHUKA WABERE ..... 1ST PLAINTIFF

JAMES GAKUO KING'ORI ..... 2ND PLAINTIFF

EVANS ODUOR OGUGA ..... 3RD PLAINTIFF

BENEDICT ONYANGO MILONGO ..... 4TH PLAINTIFF

ROSE MILONGO ..... 5TH PLAINTIFF

AND

AQUA HOUSES LTD T/A PEARL CITY APARTMENTS ..... 1ST DEFENDANT

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND DEFENDANT

THE DEPARTMENT OF LAND, HOUSING AND PHYSICAL PLANNING, COUNTY GOVERNMENT OF MOMBASA ..... 3RD DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Motion application dated 1st November, 2024 by the Margaret Wachuka Wabere, James Gakuo King'ori, Evans Oduor Oguga, Benedict Onyango Milongo and Rose Milongo, the Plaintiffs/ Applicants herein under the provisions of Order 40 and 51 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the *Civil Procedure Act* 21 Laws of Kenya and all other enabling Laws of the Land.

2. Upon service of the Application to the Defendants/Respondents, filed their responses accordingly opposing the application. The Honourable Court shall be dealing with them at a later stage of this Ruling thereof.

II. The Plaintiffs/ Applicants' case

3. The Applicants sought for the following orders: -

   a. Spent.

   b. That a temporary injunction be issued restraining the 1st Defendant by itself, its servants and/or agents from continuing with the developments on all that parcel of land known Plot Number 5256/I/MN, Nyali, along Customs Area, Nyali, Mombasa County in respect of which it has obtained approvals to construct what it refers to as seven storey residential building which developments are being undertaken pursuant to the 2nd Defendant's decision granting Licence No. EIA/PSL/35093 and the 3rd Defendant's permit No. P/2024/00460 to the 1st Defendant pending the hearing and determination of this Application.

   c. That a permanent injunction be issued restraining the 1st Defendant by itself, its servants and/or agents from continuing with the developments on all that parcel of land known Plot Number 5256/I/MN, Nyali, along Customs Area, Nyali, Mombasa County in respect of which it has obtained approvals to construct what it refers to as seven storey residential building which developments are being undertaken pursuant to the 2nd Defendant's decision granting Licence No. EIA/PSL/35093 and the 3rd Defendant's permit No. P/2024/00460 to the 1st Defendant.

   d. That a declaration do issue that the 2nd Defendant's Environmental Impact Assessment Licence violates the provisions of Regulation 17, 21 and 22 of the Environmental (Impact Assessment and Audit) Regulations, 2003 and the provisions of Article 47 of *the Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015.

   e. That a declaration do issue that the 3rd Defendant's decision to issue Form PPA 2- Notification of Approval of Development Permission to the 1st Defendant for Change of User and construction of multiple dwelling units violates the 3rd Defendant's Zoning Guide for Mombasa County and the provisions of Article 47 of *the Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015.

   f. That the EIA licence No EIA/PSL/35093 issued by the 2nd Defendant and the 3rd Defendant's Approval No. P/2024/00460 be cancelled and revoked.

   g. That an order of general damages be issued against the 1st - 3rd Defendants jointly and severally for violating the Plaintiffs' constitutional right to fair administrative action as guaranteed under Article 47 of *the Constitution* of Kenya 2020.

   h. That an order of Costs of the suit together with interest thereon at such rate and for such period of time this Honourable Court may deem fit do issue.

   i. Any other such relief as this Honourable court may deem appropriate.

4. The application was premised on the grounds, testimonial facts and the averments supported by the 27 Paragraphed annexed affidavit of Margaret Wachuka Wabere And James Gakuo King'ori the 1st and 2nd Plaintiffs/Applicants herein. The Applicants averred that:

a. The 1st Defendant was described as a limited liability Company duly registered under the provisions of the *Companies Act* within the Republic of Kenya and the registered and/or beneficial owner of subject parcel of land being Plot Number 5256/I/MN.

b. The 1st and 2nd Plaintiffs/Applicant were the beneficial and legal owner of all that parcel of land situated in Mombasa County and being CR. NO. 25701 where they have occupied their residential house.

c. The 3rd, 4th and 5th Plaintiffs/Applicants were beneficial owners of parcels of land within the same area as that of the 1st Defendant/Respondent and had constructed their respective residential houses thereon.

d. The 1st and 2nd Plaintiffs/Applicants' parcel of land borders the 1st Defendant/Respondent's subject parcel of land being Plot Number 5256/1/MN.

e. In the month of September 2024, the Plaintiffs/Applicants noted some construction that was going on the 1st Defendant/Respondent's parcel of land.

f. They however noted that the excavation on the parcel of land was so deep and vast and was not synonymous to the construction of a one family dwelling house.

g. The Plaintiffs/Applicants were further alarmed by the lack of a sign board on the 1st Defendant/Respondent's parcel of land detailing the type of construction that was being undertaken on the 1st Defendant/Respondent's Parcel of land.Annexed and Marked as "MWW - 3" was a Photostat copy ofthe picture ofthe sign board erected on the 1st Defendant's/Respondent's property.)

h. This prompted the 1st and 2nd Plaintiffs/Applicants to follow up with the 2nd and 3rd Defendants/Respondents who had purportedly issued approvals as outlined in the sign board that only listed the project name as Pearl City and parties involved in the projected who included but were not limited to the contractor as the 1st Defendant and the 2nd and 3rd Defendants/ Respondents' approval.

i. This caused the Plaintiffs/Applicant to visit the 2nd and 3rd Defendants /Respondents' Offices where to their shock they learnt that the 1st Defendant/Respondent had procured a Change of User and the project namely Pearl City comprised of 2 blocks of a 7-storey building being a Ground floor and 1st to 6th floors.

j. The Plaintiffs/Applicants were also issued with a copy of an Environmental Impact Assessment Project Report dated 6th August 2024.Annexed and Marked as "MWW - 4" was a copy of the Environmental Impact Assessment Project Report dated 6th August 2024.

k. Upon further enquiry on how the Project was assessed without their knowledge and/or consultation being carried out, they were issued with Pubic Consultation Forms which the Plaintiffs/Applicants filled on different dates in the month of September 2024.

l. Owing to the approval of the Project without taking into account their views, the Plaintiffs/Applicants issued a Demand Letter dated 30th September 2024 addressed to the 3rd Defendant and also submitted the hard copies of the duly filled Public Consultation Forms to the 2nd Defendant.Annexed and Marked as "MWW - 6" a copy of the Letter dated 30th September 2024.

m. Despite their efforts to have the 2nd and 3rd Defendants/Respondents enforce their mandate with respect to ensuring full compliance on the part of the 1st Defendant/Respondent, they had failed or neglected to undertake any enforcement therefore prompting the instant proceedings.

n. The Plaintiffs/Applicants grievances included but not limited to the fact that the 1st Defendant/Respondent's project contradicted the Zoning requirements which provide that the area which was a low density area should only had a storey construction comprising of a Ground Floor and a 1st Floor were the acreage was approximately 3 Ha as opposed to the 1st Defendant's parcel of land which measures approximately 0.02150 Ha. Annexed and Marked as "MWW - 7" was a copy of an extract of the Zoning Regulations.

o. The Plaintiffs/Applicants grievance was that the location of their parcels of land and that of the 1st Defendant/Respondent was in Nyali, Customs Area which environment harbours residential one family units as opposed to residential apartments such as the one intended to be constructed by the 1st Defendant/Respondent. Annexed and Marked as "MWW - 8" were copies of pictures in respect of the construction by the 1st Defendant/Respondent.

p. The Plaintiffs/Applicants further informed the 2nd and 3rd Defendants/Respondents that the nature of the project by the 1st Defendant/Respondent would lead to congestion, cause their properties to depreciate in value and a pose a threat to the security and serenity of the neighbourhood owing to the increased traffic.

q. The said sign board erected on the parcel of land only disclosed the project name and parties involved in the construction plus the alleged approvals and failed to disclose the magnitude and/or particulars of the said Project.

r. The subject Change of User was not validly obtained as there was obtained without the Plaintiffs/Applicants' involvement and the Plaintiffs/Applicants believe there was material non - disclosure by the 1st Defendant/Respondent on the intended project and the same should be revoked and/or cancelled.

s. The Plaintiffs/Applicants relied on the following particulars of unlawfulness with the respect to the Change of User:-

    a. That the 1st Defendant/Respondent never caused a notice to be erected on the suit property with respect to the intended Change of User.

    b. That there was insufficient scoping process that lacked proper Public Participation;

    c. That the Plaintiffs/Applicants were never consulted prior to the Change of User being issued despite having their permanent residence adjacent to the 1st Defendant/ Respondent's parcel of land;

    d. That the approval was with respect to a parcel of land with an acreage contradicting the 3rd Defendant/Respondent's by - laws;

    e. That the Change of User was premised on a flawed EIA Report plagued with misrepresentations inconsistencies and omissions;

    f. That the Report giving rise to the approval of the Change of User failed to disclose the negative effect it would have on the security of the area.

g. That the Defendants/Respondents failed to consider that the development was of a character not in keeping with developments in the area and will set a bad precedent and encourage similar developments thereby altering the appearance of the area.

h. That the Defendants/Respondents failed to consider that the development would cause irreparable harm to the environment as it would overwhelm the physical infrastructure of the area which was made of single dwelling houses and not storey buildings.

i. That the Defendants/Respondents failed to consider that the population increase that would be brought about by the development would have adverse effects on clean water supply and security in the estate.

j. That the Defendants/Respondents failed to consider that the ongoing operations with respect to construction and the increased population would create insecurity as the workers were likely to commit petty thefts from neighboring houses.

k. That the Defendants/Respondents failed to consider that there would be pollution arising from waste disposal challenges owing to the increased population occasioned by the project.

t. As a result of the approval of the subject Change of User and the Approvals by the 2nd and 3rd Defendants/Respondents, the Plaintiffs/Applicants would stand to suffer loss and prejudice.

u. The Applicants relied on the particulars of loss and prejudice on the part of the Plaintiffs/Applicants:-

a. The residential houses for purposes of rental facilities will increase traffic in a low-density high-class residential area.

b. The adverse effects of the development being undertaken on the subject property will lead to depreciation of values of the Plaintiffs' property.

c. The 1st Defendant/Respondent's development would generate noise and constitute nuisance to the Plaintiffs/Applicants and other residents due to the increased population, thereby interfering with the quiet enjoyment of the Plaintiffs'/Applicants property.

d. The Plaintiffs/Applicants would be permanently deprived of the privacy and quiet enjoyment of their properties.

e. The nature of the 1st Defendant/Respondent interference, to wit, construction of the storey building will permanently affect the use, possession and occupation of the Plaintiffs/Applicants' properties thus occasioning permanent loss and damage

v. Unless the Orders sought were granted at the interim stage, the 1st Defendant/Respondent would proceed with the construction during the pendency of the matter to the prejudice of the Plaintiffs/Applicants.

w. The Plaintiffs/Applicants' Application was merited and ought to be granted to the interim stage as it was evident that the 1st Defendant/Respondent's project contravened the mandatory provisions of the 2nd Defendant/Respondent's governing by laws with respect to the Acreage requiredfor purposes of the construction.

x. The project emanating from the frown process upon which the Change of User was obtained offended the provisions of the Physical Planning Act.

y. The Plaintiffs/Applicants had further satisfied that by virtual of not having been consulted during the process of procuring the Change of User and during the Environmental Impact Assessment process were denied a right to safeguard their constitutional right with respect to quietly enjoying their respective properties.

z. By dint of not being consulted during the preparation of the Environmental Impact Assessment Report, the Plaintiffs/Applicants were not subjected to a fair administrative action hence their constitutional rights had been adversely affected.

aa. It was in the interests of justice that the application be granted as prayed.

III. Submissions

5. On 11th December, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 1st November, 2024 be disposed of by way of written submissions and all the parties complied. Subsequently, only the Plaintiffs/Applicants and the 1st Defendant/ Respondent obliged.

6. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not been in a position to access the written Submission, neither physically filed nor from the Judiciary CTS by the other parties. Pursuant that, it reserved and delivered a ruling on 21st March, 2025 on its own merit accordingly.

A. The Written Submissions by the Plaintiffs/Applicants.

7. The Plaintiffs/Applicants through the Law firm of Messrs. Muthee Partners LLP Advocates filed their written Submissions dated 26th March, 2025. Mr. Gathu Advocate commenced by stating that they had filed their submissions earlier on. Thus, this was a further submissions being a follow up response to the Defendants' Submissions. He stated that contrary to the submissions by the Defendants, he averred that the Honourable Court was seized of jurisdiction to grant the Orders being sought and even so injunctive Orders at this interim. That the Courts had on several occasions held that they had the power to grant mandatory injunctions at a preliminary stage as was stated in the case of "Maher Unissa Karim – Versus - Edward Oluoch Odumbe [2015]" where Justice R.A Aburili provided the threshold for grant of a mandatory injunction at a preliminary stage and stated thus:-

> " The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of Kenya Breweries Ltd vs Washington Okeyo (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury's Laws of England 4th Edition paragraph 948 that:-
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> "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However , if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

In the English case of Locabail International Finance Ltd – Versus - Agro Export & Another (1986), ALI ER 901 which the Court of Appeal in Kenya has followed with approval in may decisions, the court held that: -

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction."

8. The Counsel held that, apart from the Criteria for granting a temporary injunction, to obtain a permanent injunction at a preliminary stage requires special circumstances some of which have been outlined in the above authority as follows:-

   i. Under special circumstances, if the Case is clear and the Court feels it can be decided at once

   ii. where the injunction was directed at a simple and summary act which could easily be remedied.

   iii. where the defendant had attempted to steal a match on the plaintiff.

   iv. the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted.

9. He submitted that the facts of this case were clear being that the 1st Defendant/Applicant's construction on 7 floors on the subject parcel of land which was directly adjacent to the 1st and 2nd Plaintiffs/Applicants' residence offending the Mombasa County By-laws which fact had not been disputed. The said by-laws which had been annexed by the Plaintiffs/Applicants in the application and as annexured as "MWW – 7" provided that the 1st Defendant/Applicant's parcel of land given its acreage of less than 3 HA. and location being a low density area ought to only harbor a building with a maximum of 2 floors where it was a multi-story building. However, he held that the instant construction of 2 blocks consisting of 7 floors each on the parcel of land measuring approximately 0.2150 Acres was therefore unlawful and not in keeping with the other Apartments or constructions within the area.

10. The Learned Counsel further submitted that this was a clear case of unlawful erection of buildings warranting the grant of a permanent injunction as against the 1st Defendant/Applicant without need for a full hearing as was stated in the Case of "Maher Unissa Karim (Supra)" where the Court held:-

    ..... The above decision was cited with approval by the Court of Appeal in the case of Sharriff Abdi Hassan vs Nadhif Jama Adan *CA 121/2005*(2006) e KLR by further observing that: -

    "The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the courts in such cases as those of alleged trespass to property."

11. He stated that the 1st Defendant/Respondent neither denied nor objected to these facts. Further, there was no evidence to the effect that the 1st and 2nd Plaintiffs/Applicants who were the immediate neighbors of the 1st Defendant/Respondent having been consulted prior to the approval being given. There was no public consultation held involving the 1st and 2nd Plaintiffs nor any such Questionnaire forms having been filed by the Defendants/Respondents. None of the other neighbors raised consented to the subject construction and they all agreed that there are Zoning regulations which ought to be adhered to. Hence, the 1st Defendant/Respondent's submission that consent was given was erroneous and aimed at misleading the Honourable Court. The absence of the afore - stated evidence made it a clear case for grant of permanent injunctions at this preliminary stage.

12. However, in the event the Court was not inclined to grant the permanent injunction, the Court ought to grant temporary injunctive Orders so as to preserve the subject matter of the suit and to prevent any prejudice being visited against the Plaintiffs/Applicants. He reiterated that the law on injunctions was clearly settled in the case of "Giella – Versus - Cassman Brown and Co. Ltd {1973} {EA358}.

13. The Learned Counsel argued that the Plaintiff/Applicant had a Prima facie case with a high chance of succeeding in that the subject matter of the suit was the construction of 7 floors on the parcel of land adjacent to the 1st and 2nd Plaintiffs/Applicants' parcel of land. Thus, failing to grant any injunctive orders would mean the 1st Defendant/Applicant continuing with the construction to the prejudice of the Plaintiffs/Applicants. The 1st Defendant/Respondent's construction of 7 floors on the suit property violated both the County by laws and the Plaintiffs/Applicants' rights in enjoying their occupation of their residential property and the nature of the controlled constructions within that area. Besides, the unlawful and unwarranted actions by the Defendants/Respondents violated the rights and fundamental freedoms of the Plaintiffs specifically the right to property as enshrined under Article 40 of *the Constitution*. The Learned Counsel provided Court with the meaning of a prima facie case as was determined in the case of "MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 Others [2003] eKLR".

14. The Learned Counsel averred that the 1st & 2nd Plaintiffs/Applicants stood to suffer irreparable damage with no remedy of compensation by the acts of the Defendants/Respondents. The net effect of the 1st Defendant/Respondent's construction was that it would defeat the Plaintiffs' rights under the instant suit and such prejudice cannot be compensated by way of monetary damages. To buttress on this point he cited Justice John Mativo in determining the meaning of irreparable damage held as follows in the case of "Paul Gitonga Wanjau – Versus - Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR that:-

> " The following paragraph in Halsbury's Laws of England[14] is instructive. It reads:-
>
> "It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

> In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[15] But what exactly is "irreparable harm"?. Robert Sharpe, in "Injunctions and Specific Performance,"[16] states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

15. Thus, the Learned Counsel stressed that from the given the circumstances of this case, the Plaintiffs/Applicants would suffer damages that could not be compensated by way of damages as their privacy could not be compromised by way of damages.

16. Lastly, the Learned Counsel asserted that it was evident that the Plaintiffs/Applicants stood to suffer losses as a result of the 1st Defendant/Respondent's construction of the 2 blocks containing 7 floor each. Thus the balance of convenience tilted in favour of granting the injunctive orders as sought. The requirements provided that if the court was in doubt, it ought to consider the application on a balance of convenience. This was defined by the Court in the case of:

> " Zephania Khisa Saul – Versus - School Committee St. Anne's Secondary School [2019] eKLR" Where Justice Mwangi Njoroge stated as follows:-
>
> "Without any evidence from the defence that it bought the land or otherwise legally took possession thereof its presence thereon amounts to trespass on the plaintiff's property as this court has found that the plaintiff is the registered owner of the suit land and is entitled to possession of the land. The Plaintiff's right to property guaranteed by Article 40 of *the Constitution* have therefore been violated. Article 40 of *the Constitution* provides for the protection of the right to acquire and own property and forbids parliament and state from arbitrarily depriving a person of his property. I do not find any justification given for the defendant's occupation of the Plaintiff's land. I therefore find that the plaintiff has established his claim on a balance of probabilities and I enter judgment in his favour against the Defendant and grant prayers No. (a), (b) and (c) in the plaint dated 21/6/2017."

17. In conclusion, the Learned Counsel urged the Honourable Court to allow their application as prayed.

B. The Written Submissions by 1st Defendant/Respondent

18. The 1st Defendant/Respondent while opposing the application, through the Law firm of Messrs. Soni & Associates Advocates LLP filed their written submission dated 20th February, 2025. Mr. Makori Advocate commenced his submission by stating that on 1st November 2024 the current Plaintiffs filed this suit through a Plaint before this Honorable court under Certificate of Urgency. The Counsel informed Court that the Plaintiffs/Applicants stated that the 1st Defendant/Respondent was building 2 blocks of a 7-storey apartment adjacent to their properties thus the urgency. According to the Applicants the alleged construction was not in conformity with the neighborhood which was composed of a one family dwelling house nor all the legal requirements. That this was being done prior to obtaining both a Change of User and approvals from the relevant authorities before commencement of construction. The Learned Counsel wondered loudly having given due regard to the law and obtaining all possible permits required, what then was the premise of their complaint and suit.

19. The Learned Counsel averred that, on the contrary, the Plaintiffs had further confirmed that the Defendants/Respondents were issued with an EIA report which they had gone on to attach as part of their evidence in court for compliance as "MWW – 4". The Counsel stated that the Plaintiffs averred that on enquiring why the project was assessed without considering their views they were given public

consultation forms duly filed by the applicant proving public participation was done. These forms were again produced by them as annexures "MWW – 5" in their bundle of documents.

20. According to the Learned Counsel, all the above begged the question, why had they brought this suit if they were fully aware and knew of the Applicant's compliance with all possible legal requirements? This showed the malice on the Plaintiffs/Applicants side and proved their views were sought contrary to their claims of no public participation. What was clear from this was that the above statement was made maliciously by the Plaintiffs/Applicants who had failed to disclose material facts to the court for instance the existence of similar developments in the same area. The existence of such similar developments in the area had in the Learned Counsel's view not been disclosed by the Plaintiffs/Applicants in an attempt to hoodwink the court to issue the sought conservatory orders.

21. To support his point, the Learned Counsel referred Court to the case of "Shah – Versus - Mbogo and Another [1967] EA 116", the Court of Appeal of East Africa held as follows:-

> " This discretion (to set aside ex - parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

22. The Learned Counsel asserted that the test for grant of conservatory orders in public law dispute was set by the supreme Court in the case of "Gatirau Peter Munya – vs- Dickson Mwenda Kithinji and 2 others (2014) eKLR as follows: -

> ''Conservatory orders bear a more decided public law connotation for these orders are to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest, conservatory orders, therefore, are not unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring during the pendency of a case or high probability of success in the supplicant's case for orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cause.''

23. Thus, the Learned Counsel argued that Plaintiffs/Applicants had also failed to show any proof that the locality was a low-density area as claimed. The annexures produced by them in their affidavit annexed as "MWW – 7" never in any way show or name their locality. They just reproduced a table therein entitled "low density residential" and the same shows no connection or correlation with their area. This being the back bone of their case, they ought to have clearly shown it to be the case. It was not enough to simply state that there was no public participation, consultation or the area was a low residential area and leave it at that. The onus was upon them to prove their assertions as stated. On this point he sought solace from the provision of Section 107 of the *Evidence Act*, Cap. 80 which provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

24. In addition, it is trite law that he who alleges the existence of certain facts must prove its existence. Accordingly, the provision of Section 109 of the *Evidence Act*, Cap. 80 provides:-

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

25. In essence, the cardinal rule provides that he who alleges must/shall prove. If a party was in possession of cogent and/or tangible evidence, it's upon the party to produce/present the evidence. Failure to do so and consequently getting interim orders for non-disclosure would indeed be a subversion of the law and akin on stealing a match. In absence of concrete grounds for supposing that due process was not followed, the interim orders issued herein should therefore be vacated by this Honorable court.

26. It was the contention by the Counsel that the stay orders sought were overtaken by events as construction was already ongoing on the suit property by the time of filing the suit.

27. Alternatively, that in any event, the applicant's suit being based on rights violations, the remedy available to them was damages and not stoppage of the ongoing construction works. The Court of Appeal in the case of "Muthee – Versus - Mohamed & 7 others; Law Society of Kenya & 2 others (Interested Parties) (Civil Application E063 of 2024) [2024] KECA 950 (KLR)" vide its Ruling denying conservatory orders stated as such:-

> " ...it is of significance that the Applicant filed a Constitutional Petition seeking to enforce his rights over the suit property, and simultaneously with the Petition, he sought orders to restrain the ongoing construction works on the suit property. As pointed out by some of the Respondents, and we agree, the rights violations sought to be pursued by the Applicant in the Petition would, at this juncture, more appropriately be compensated in damages, rather than by halting the construction works on the suit property."

28. It was the submission by the Counsel that the Plaintiffs/Applicants herein had also misinformed the court and exaggerated facts to sensationalize issues. As a result of the impugned conservatory orders, the 1st Defendant/Respondent was suffering immense losses from the destruction of materials that had been put at the site and left to the elements of the weather. Additionally, the 1st Defendant/Respondent was also incurring expenses by paying his contractor charges for the machinery is on the site. The Plaintiffs/Applicants had also failed to show any proof rights violations or that the locality was a low-density area as claimed. Thus, this application was malicious frivolous and an abuse of court that should be dismissed with costs to the 1st Defendant/Respondent herein.

IV. Analysis and Determination

29. I have carefully read and considered the pleadings herein by the Plaintiffs/Applicants and the 1st Defendant/Respondent herein, the written submissions, the cited myriad authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

30. In order to arrive at an informed, reasonable and equitable decision, the Honorable Court has framed the following three (3) issues for its determination.

    a. Whether the Notice of Motion dated 1st November, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Whether the parties herein are entitled to the reliefs sought?

c. Who will bear the Costs of Notice of Motion application 1st November, 2024.

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

31. Under this sub – title, the main issue here is whether the Plaintiffs/Applicants are entitled to be granted the relief of an interlocutory injunction unto the suit property. 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.

32. 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."

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

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

> The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

34. 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 & 2 others (2003) KLR 125" 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"

35. As the Court previously observed in this ruling, the 1st Defendant/Respondent was described as a limited liability Company duly registered under the provisions of the *Companies Act* within the Republic of Kenya and the registered and/or beneficial owner of subject parcel of land being Plot Number 5256/I/MN. The 1st and 2nd Plaintiffs/Applicants were the beneficial and legal owner of all that parcel of land situated in Mombasa County and being CR. NO. 25701 where they have occupied their residential house. The 3rd, 4th and 5th Plaintiffs/Applicants are beneficial owners of parcels of land within the same area as that of the 1st Defendant/Respondent and have constructed their respective residential houses thereon.

36. The 1st and 2nd Plaintiffs'/Applicants parcel of land borders the 1st Defendant/Respondent's subject parcel of land being Plot Number 5256/1/MN. In the month of September 2024, the Plaintiffs noted some construction that was going on the 1st Defendant's parcel of land. They however noted that the excavation on the parcel of land was so deep and vast and was not synonymous to the construction of a one family dwelling house.

37. 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."

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

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

39. In the present case, the Defendants/ Respondents by their action, have threatened to continue with the continued threats to evict the Plaintiffs out of the suit property. Regarding this first condition though, the Plaintiffs/Applicants have demonstrated a prima facie case with a probability of successat the trial as enunciated in the case of "Giella - Versus - Cassman Brown & Co. Limited (Supra)".

40. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/Applicants 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 the case of:- "Nguruman Limited (Supra)", held that:-

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

41. On the issue whether the Plaintiffs/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 Applicants' grievances include but were not limited to the fact that the 1st Defendant/Respondent's project contradicts the Zoning requirements which provide that the area which is a low-density area should only have a storey construction comprising of a Ground Floor and a 1st Floor were the acreage is approximately 3 Ha as opposed to the 1st Defendant/Respondent's parcel of land which measures approximately 0.02150 Ha. Annexed and Marked as "MWW - 7" was a copy of an extract of the Zoning Regulations.

42. The Plaintiffs/Applicants grievance was that the location of their parcels of land and that of the 1st Defendant is in Nyali, Customs Area which environment harbours residential one family units as opposed to residential apartments such as the one intended to be constructed by the 1st Defendant/Respondent. Annexed and Marked as "MWW - 8" copies of pictures in respect of the construction by the 1st Defendant/Respondent. 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."

43. Quite clearly, the 1st Defendant/Respondent has admitted that the construction is already on going on the site. In the given circumstances, the Plaintiffs/Applicants would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Defendants/Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicants have therefore satisfied the second condition as laid down in "Giella's case".

44. Thirdly, the Applicants have 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".

45. 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."

46. The balance of convenience tilts in the favour of the Applicants. 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."

47. 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.

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

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

49. 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 Plaintiffs/Applicants. In view of the foregoing, I strongly find that the Plaintiffs/Applicants have met the criteria for grant of orders of temporary injunction.

50. It is clear that the Motion is seeking the twin prayers of a temporary injunction and a permanent injunction. Concerning the permanent injunction sought under order (iii), it is not in dispute that the suit is yet to be heard on merit and it is apparent that this is not clear-cut case even without going into its merits. For the foregoing reasons, I find that it would be premature for me to grant a permanent injunction at this stage. I am persuaded the holding of this court in the case of "Kenya Power & Lighting Co. Limited – Versus - Sheriff Molana Habib [2018] eKLR" where it was held inter alia as follows:-

> "...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."

51. In respect to order (ii) for a temporary injunction, upon my consideration, I note that the same is essentially a prayer for a mandatory order of injunction.When it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in "Lucy Wangui Gachara – Versus - Minudi Okemba Lore [2015] eKLR" when it rendered itself thus: -

> "...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.
>
> Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In Bharat Petroleum Corp Ltd V. Haro Chand Sachdeva, Air 2003, Gupta, J. of the Delhi High Court observed as follows:
>
> "While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things."

52. From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory order of injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage.In my humble view, the present case does not fall within the category of clear-cut cases that can form a basis to grant a mandatory injunction.

53. Prayers numbers (c) to (h) are substantive prayers which cannot be granted at this stage until the parties submit to a full hearing and the Court has recorded evidence from all the parties to make a final determination.

Issue b). Who will bear the Costs of Notice of Motion application 1st November, 2024.

54. 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.

55. 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."

56. 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 costs in the cause.

V. Conclusion and Disposition

57. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the 1st and 2nd Plaintiffs/Applicants have a case against the Defendants/ Respondents.

58. 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 1st November, 2024 be and is hereby found to have merit thus allowed.

b. That an order of Temporary injunction do issue restraining the 1st Defendant/Respondent by itself, its servants and/or agents from continuing with the developments on all that parcel of land known Plot Number 5256/I/MN, Nyali, along Customs Area, Nyali, Mombasa County in respect of which it has obtained approvals to construct what it refers to as seven storey residential building which developments are being undertaken pursuant to the 2nd Defendant's decision granting Licence No. EIA/PSL/35093 and the 3rd Defendant's permit No. P/2024/00460 to the 1st Defendant pending the hearing and determination of this suit.

c. That for expediency sake, there shall be a mention on 29th April, 2025 before Hon. Mr. Justice J. Olola for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and further direction.

d. That the cost of the Notice of Motion application dated 1st November, 2024 shall be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF APRIL 2025.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT

AT MOMBASA

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Gathu Advocate for the Plaintiffs/Applicants.

Mr. Makori Advocate for the Defendants/Respondents