Damsyl Investment Limited v The Director of Physical Planning Ministry of Lands, Planning and Housing & 8 others; Gichuki & 2 others (Interested Parties) (Enviromental and Land Originating Summons E067 of 2021) [2022] KEELC 13321 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13321 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E067 OF 2021

SO OKONG'O, J

SEPTEMBER 22, 2022

BETWEEN

DAMSYL INVESTMENT LIMITED .... PLAINTIFF

AND

THE DIRECTOR OF PHYSICAL PLANNING MINISTRY OF LANDS, PLANNING AND HOUSING .... 1ST DEFENDANT

THE DIRECTOR, URBAN PLANNING COUNTY GOVERNMENT OF NAIROBI .... 2ND DEFENDANT

THE COUNTY SURVEYOR COUNTY GOVERNMENT OF NAIROBI .... 3RD DEFENDANT

COUNTY GOVERNMENT OF NAIROBI .... 4TH DEFENDANT

THE LAND REGISTRAR NAIROBI DISTRICT .... 5TH DEFENDANT

THE DIRECTOR OF SURVEY, KENYA .... 6TH DEFENDANT

THE HON. ATTORNEY GENERAL .... 7TH DEFENDANT

LEONARD GITAU GICHUI .... 8TH DEFENDANT

J.D OBEL, LICENCD SURVEYOR T/A GEOMATIC SERVICES .... 9TH DEFENDANT

AND

JACINTA NJERI GICHUKI .... INTERESTED PARTY

RAYMOND KABUCHO NJIRIRI .... INTERESTED PARTY

SHEILA M RANGE .... INTERESTED PARTY

RULING

Background:

1. The plaintiff is the registered owner of all that parcel of land known as title No Dagoretti/Riruta/6235(hereinafter referred to only as "plotNo 6235") while the 1st and 2nd interested parties are the registered owners of title No Dagoretti/Riruta/6236 (hereinafter referred to only as "plot No 6236"). Plot No 6235 and plot No 6236 are subdivisions of title No Dagoretti/Riruta/ 6080. Title No Dagoretti/Riruta/6080 was a subdivision of title No Dagoretti/Riruta/4776 (hereinafter referred to as "the original parcel"). The original parcel was owned by one, Leornard Gitau Gichuhi, the 8th defendant herein. The original parcel was subdivided first into two portions; title No Dagoretti/Riruta/6080 and title No Dagoretti/Riruta/6081(hereinafter referred to as "plot No 6080" and "plot No 6081" respectively). The 8th defendant retained plot No 6080 in his name and sold plot No 6081 to the 3rd interested party. The 8th defendant subsequently subdivided plot No 6080 into two; plot No 6235 and plot No 6236. The 8th defendant sold plot No 6235 to the plaintiff and plot No 6236 to the 1st and 2nd interested parties.

2. In 2016, a dispute arose between the plaintiff and the 1st and 2nd interested parties over a road of access to plot No 6235. The plaintiff claimed that access to plot No 6235 was through a road on plot No 6236 while the 1st and 2nd interested parties contended that access to the plaintiff's parcel of land, plot No 6235 was through a road on the northern part of the said parcel of land and was not through plot No 6236. The dispute was not resolved and the 1st and 2nd interested parties filed a suit against the plaintiff and the 4th defendant before this court namely; ELC No 345 of 2016(hereinafter referred to only as "the previous suit").

3. In the previous suit, the 1st and 2nd interested parties averred that they were the registered proprietors of plot No 6236 that was adjacent to plot No 6235 owned by the plaintiff. The 1st and 2nd interested parties averred that during the subdivision that gave rise to plot No 6235 and plot No 6236, roads of access to each of the two parcels of land were clearly provided for in the mutation form and subsequently in the amended registry index map(RIM).

4. The 1st and 2nd interested parties averred that the plaintiff had claimed that access to plot No 6235 was through a road on plot No 6236 and had sought assistance of the 4th defendant to create a road through plot No 6236. The 1st and the 2nd interested parties averred that the 4th defendant acting on the influence of the plaintiff was intent on creating a road of access to plot No 6235 through plot No 6236. The 1st and 2nd interested parties sought judgment against the plaintiff and the 4th defendant jointly and severally for;

    a) A declaration that the 1st and 2nd interested parties were the indefeasible owners of plot No 6236 and were entitled to quiet and uninterrupted possession of the same free from any interference whatsoever from the plaintiff and the 4th defendant.

    b) An injunction restraining the plaintiff and the 4th defendant by themselves or their employees, servants and/or agents from entering, trespassing or in any way whatsoever interfering with the plaintiffs' quite possession of plot No 6236.

    c) An injunction restraining the plaintiff and the 4th defendant by themselves or their employees, servants and/or agents from interfering with the beacons and/or boundary features or the mutation/survey records of plot No 6236.

d) Costs of the suit.

5. In its defence in the previous suit, the plaintiff denied that roads of access to plot No 6235 and plot No 6236 were provided for during the subdivision that gave rise to the two parcels of land. The plaintiff averred that his right to a road of access through plot No 6236 was confirmed by the 4th defendant while approving the sub-division of title No Dagoretti/Riruta/6080("plot No 6080") which gave rise to plot No 6235 and plot No 6236.

6. The plaintiff averred that the 1st and 2nd interested parties had illegally appropriated as part of plot No 6236 a 12-meter strip of land that was reserved for a road of access to plot No 6235 and plot No 6236. The plaintiff averred that the 1st and 2nd interested parties had always acknowledged that there was a road of access to plot No 6235 through plot No 6236 and had agreed to have the same restored. The plaintiff averred that the 1st and 2nd interested parties falsified documents to facilitate the closure of a road of access to plot No 6235 thereby undermining the plaintiff's property rights and the 4th defendant's planning authority.

7. In its counterclaim in the previous suit, the plaintiff sought judgment against the 1st and 2nd interested parties for;

a) A declaration that the plaintiff as the indefeasible owner plot No 6235 was entitled to the access envisaged in the approval that was given for the subdivision of the plot No 6080.

b) An order of *mandamus* compelling the 4th defendant to create, restore and provide access to plot No 6235.

c) An injunction restraining the 1st and 2nd interested parties by themselves, their agents, servants and or employees from interfering with the plaintiff's access to plot No 6235.

d) An injunction restraining the 1st and 2nd interested parties by themselves, their agents, servants and or employees from blocking or in any other way interfering with access to plot No 6235.

e) An award of mesne profits for the use of access to plot No 6235.

f) Damages for the destruction of the plaintiff's property situated next to the access road.

g) Costs of the suit.

8. In their defence in the original suit, the 4th defendant denied the 1st and 2nd interested parties' claim in its entirety. The 4th defendant averred that the mutation form and the RIM upon which the 1st and 2nd interested parties had based their claim could be faulty. The 4th defendant admitted that the plaintiff had sought its assistance to create an access road through plot No 6236 to the plaintiff's parcel of land. The 4th defendant averred that it was within its mandate to create such roads and urged the court to dismiss the 1st and 2nd interested parties' suit with costs.

9. The previous suit was heard and the court rendered its judgment on the dispute on December 17, 2020. In the judgment, the court framed the following issues for determination;

1. Whether there is a road of access through the plot No 6236 to plot No 6235.

2. Whether the 1st and 2nd interested parties were entitled to the reliefs sought against the plaintiff and the 4th defendant.

3. Whether the plaintiff was entitled to the reliefs sought against the 1st and 2nd interested parties in the counter-claim.

4. Who should bear the costs of the suit?

10. On the first issue which is the main one relevant to the present suit the court stated as follows in part in the said judgment:

> " ...I am in agreement with the 2nd plaintiff, PW1 and PW2 that no road of access was provided for through the suit property to plot No 6235 and that the said road that was provided for during the subdivision was not meant to serve plot No 6235. It is my finding therefore that there is no road of access through the suit property to plot No 6235.
>
> The 1st defendant contended that the subdivision of the original parcel was approved by the city council of Nairobi on condition that a 12 m road of access was to be created from an existing main road in the southern part of the original parcel to serve both the suit property and plot No 6235. The 1st defendant contended that the subdivision aforesaid should have been in accord with the plan that was approved by the city council of Nairobi and since it did not, the same was fraudulently carried out rendering it null and void. In proof of that illegality, the 1st defendant placed before the court what it claimed to have been the approval that was given by the city council of Nairobi on September 28, 2011 for the subdivision of the original parcel. Surprisingly, the 1st defendant also produced in evidence a letter from the 2nd defendant disowning the purported approval and declaring it a forgery. The said letter from the 2nd defendant rendered the purported approval of no evidential value as concerns the conditions under which the subdivision of the original parcel was approved by the city council of Nairobi if indeed there was such approval. It follows therefore that the only official documentary evidence on the manner in which the owner of the original parcel wanted to subdivide the same and proceeded to do so is the mutation form. Since the purported approval by the city council of Nairobi which purportedly imposed a condition for the creation of a 12 m access road to the suit property and plot No 6235 by the 1st defendant's own evidence was a forgery, there is no basis upon which this court can find that the subdivision of the original parcel was fraudulent and illegal. I wish to point out also that from the evidence before the court, the 1st defendant purchased plot No 6235 after the subdivision had been completed and a separate title issued for the property. I believe that if he had engaged a surveyor at that stage, he would have learnt that there was no road of access to plot No 6235 through the suit property and that during the subdivision of the original parcel, the access road that was left to serve the plot was a 3m road on the northern part of the property... What I can say for now is that there is no evidence before the court of the existence of an access road through the suit property to plot No 6235 or of an intention to create one. There is also no evidence to support the 1st defendants' contention that the subdivision of the original parcel was carried out illegally and fraudulently...".

11. On the plaintiff's counter-claim against the 1st and 2nd interested parties, the court stated as follows in part:

> " The 1st defendant has not established that the subdivision of the original parcel was approved on condition that a 12m road of access would be created to serve among others plot No 6235. Even in the purported approved subdivision plan, there is no mention of a 12m road. The 1st defendant is therefore not entitled to the declaration sought. There also no basis laid in these proceedings for compelling the 2nd defendant to create a road of access through the suit property to plot No 6235. In the event that plot No 6235 is landlocked as claimed by the 1st defendant or that the 3m road that was meant to serve it is inadequate, the 1st

defendant can bring proceedings under section 140 of the *Land Act*, 2012 for an access to be provided for plot No 6235. The 1st defendant's counter-claim herein was not brought for that purpose. The 1st defendant sought a road of access as of right. The court cannot therefore consider the 1st defendants' need for an access road to plot No 6235 under section 140 of the *Land Act*, 2012. For the reasons I have given above, the injunctive reliefs sought by the 1st defendant have no basis and are not for granting. There is also no basis for the mesne profits and damages sought. The damages sought are in the nature of special damages. The same was neither specifically pleaded nor proved."

12. In conclusion, the court entered judgment for the 1st and 2nd interested parties against the plaintiff and the 4th defendant as prayed and dismissed the plaintiff's counter-claim.

The Current Dispute:

13. The present suit was brought by way of originating summons dated February 22, 2021. The originating summons was brought under several provisions of the *Constitution* and various statutes. Principally, the suit was brought under section 140 of the *Land Act* 2012. That section empowers the court to make an order for an access to be granted to a parcel of land that has no access. The plaintiff wants the court to determine the following questions;

    1. Whether the court has jurisdiction to make an access order in respect of plot No 6235 which is landlocked.

    2. Whether the 1st to 7th defendants have mandate or oversight role in respect of a sub-division of land being undertaken within Nairobi city county.

    3. Whether the 1st to 7th defendants have mandate to alter and cancel a sub-division scheme which has not been implemented.

    4. Whether the 6th and 7th defendants have the mandate to alter and/or make such amendments over a cadastral map (RIM) of a registered land without a sub-division scheme being approved in accordance with the relevant law and rules.

    5. Whether the 8th to 9th defendants by implementing the said sub-division scheme had the intention of creating access road to plot No 6235 and if so, could the mutation form and the cadastral map(RIM) relied upon be faulty?

14. The plaintiff has contended that following the judgment in the previous suit in favour of the 1st and 2nd interested parties in which the plaintiff was restrained from trespassing on plot No 6236, the 1st and 2nd interested parties had erected a stone wall fence and a metal gate that have blocked the plaintiff from accessing plot No 6235 thereby rendering plot No 6235 completely landlocked and marooned. The plaintiff has contended that in the previous suit, the court had indicated that the plaintiff's relief in case plot No 6235 is landlocked is to seek redress under section 140 of the *Land Act*.

15. The plaintiff has contended that the sub-division scheme through which plot No 6080 was subdivided to give rise to plot No 6235 and plot No 6236 was faulty in that it failed to provide an access road to plot No 6235. The plaintiff has contended that the provisions of the *Physical Planning Act*, cap 286 Laws of Kenya (now repealed) and the rules thereunder were not followed in the subdivision of the said parcel of land. The plaintiff has contended that the defendants did not properly discharge their constitutional and statutory mandate in approving the said subdivision.

16. The plaintiff has sought the following reliefs in its originating summons;

1. An order granting plot No 6235 which is landlocked a reasonable access.
2. In the alternative, an order compelling the defendants to create a permanent 9- meters access road to plot No 6235 and plot No 6236 from the 18-meters major road adjoining plot No 6081.
3. The court does fix a time limit within which its orders should be complied with.
4. A mandatory injunction restraining and directing the interested parties to forthwith unblock/ remove the stone fence, steel metal gate or any barriers whatsoever that shall interfere with the granted access road to plot No 6235.
5. The deputy county commissioner, Dagoretti sub-county with the assistance of officer commanding Kabete police station and the area chief to facilitate the enforcement of the order.

The plaintiff's application:

17. Together with the originating summons, the plaintiff has filed a notice of motion application of the same date seeking the following orders;

    1. A temporary injunction restraining the 1st, 2nd and 3rd interested parties from barricading, obstructing, blocking, refusing and/or denying the plaintiff by itself through its agents, employees or tenants a temporary access to plot No 6235 through plot No 6236 and for them to unconditionally open the steel metal gate and the stone wall fence pending the hearing and determination of the suit.
    2. An order that the 3rd and 5th defendants accompanied and/or assisted by independent licensed surveyors for the plaintiff and the interested parties do visit plot No 6235, plot No 6236 and plot No 6081 and a survey report be filed within a reasonable time as may be fixed by the court.

18. The application is supported by the affidavit and supplementary affidavit of Nixon W Mburungo sworn on February 22, 2021 and September 2, 2021 respectively in which he highlighted the irregularities in the subdivision of plot No 6080 that left plot No 6235 without an access road. The plaintiff has averred that after the subdivision complained of, plot No 6235 was accessed through plot No 6236 until the 1st and 2nd interested parties changed their minds and claimed that the plaintiff was a trespasser on plot No 6236. The plaintiff has claimed that following the orders made in favour of the 1st and 2nd interested parties in the previous suit, the 1st and 2nd interested parties completely blocked the plaintiff's access to plot No 6235 through plot No 6236 an act which is detrimental to the plaintiff which has no other access to plot No 6235. The plaintiff has contended that it is now accessing plot No 6235 from a neighbouring plot whose owner has allowed him to use the same to access the said plot on a temporary basis. The plaintiff has contended that the 3 meters wide road on the northern part of plot No 6235 is a private path used to access a private cemetery and as such not available to serve plot No 6235 neither is it adequate as a road.
19. The plaintiff has denied that its suit is *res judicata*. The plaintiff has contended that the issues raised in the originating summons were not raised in the previous suit. The plaintiff has urged the court to grant the prayers sought in the application.
20. The 8th defendant filed a replying affidavit sworn on July 1, 2021 in which he supported the plaintiff's originating summons and the notice of motion application. The 8th defendant has conceded that the subdivision of plot No 6080 was irregular and that the same was not carried out in accordance with his instructions.

21. The plaintiff's notice of motion application was opposed by 1st, 5th, 6th and 7th defendants and the 1st and 2nd interested parties. The 1st, 5th, 6th and 7th defendants who are represented by the Attorney General have opposed the application through grounds of opposition dated September 27, 2021. The 1st, 5th, 6th and 7th defendants have contended that the plaintiff's suit is *res judicata* in that the issues raised in the originating summons were raised and conclusively determined in the previous suit, ELC No 345 of 2016. The 1st, 5th, 6th and 7th defendants have averred that the plaintiff's application that is based on the said originating summons is devoid of any merit and amounts to an abuse of the process of the court.

The 1st and 2ndInterested Parties' Application:

21. The 1st and 2nd interested parties opposed the plaintiff's application through a replying affidavit sworn by the 2nd interested party on May 27, 2021 and a notice of motion application of the same date seeking to strike out the originating summons. in the replying affidavit, the 1st and 2nd interested parties (hereinafter referred to only as "the interested parties") have averred that they are the registered proprietors of plot No 6236 while the plaintiff is the registered proprietor of plot No 6235. The interested parties have averred that the plaintiff purchased the suit property from the previous owner, one, Wallace Mwaura Muigai in the same state in which it is. The interested parties have averred that since they acquired plot No 6236, the plaintiff has not given them peace. The interested parties have averred that as a result of the plaintiff's acts of trespass and malicious damage to their properties on plot No 6236, they filed the previous suit against the plaintiffs seeking several reliefs which suit was defended by the plaintiff which also filed a counter-claim against the interested parties. The interested parties have averred that the previous suit was heard and a judgment delivered on December 17, 2021 in favour of the interested parties. The interested parties have contended that the issues that have been raised by the plaintiff in the originating summons were substantially in issue in the previous suit and the same were deliberated upon by the court and a judgment delivered thereon on merits.

22. The interested parties have averred that the originating summons and the notice of motion application based thereon are res judicata. The interested parties have averred that plot No 6235 owned by the plaintiff is not landlocked. The interested parties have averred that the plot is served by a 3 meters wide road to the north of the property. The interested parties have averred that the said 3 meters wide road in adequate for accessing plot No 6235 and that no evidence has been placed before the court to the contrary. The interested parties have averred that the court having made a finding that the interested parties are the absolute and indefeasible proprietors of plot No 6236 and having granted a permanent injunction restraining the plaintiff from trespassing on or interfering with the interested parties' quiet user and enjoyment of plot No 6236 and from interfering with the beacons and/or boundary features and mutation and/or survey records relating to plot No 6236, there is no way in which the court can again be asked to make an order for the creation of a 9-meters access road through plot No 6236. The interested parties have averred that such order will amount to the court sitting on an appeal against its own decision. The interested parties have averred that the court having conclusively determined the issue of ownership of plot No 6236, the court is *functus officio*. The interested parties have averred further that in view of the existing order of injunction restraining the plaintiff from trespassing on plot No 6236 which order has neither been reviewed nor set aside on appeal, the mandatory order sought by the plaintiff to compel the interested parties to remove their stone fence and steel gate to enable the plaintiff to access plot No 6235 through plot No 6235 cannot issue. The interested parties have averred that the plaintiff's suit does not disclose any cause of action against the interested parties.

23. In their application, the interested parties have sought an order that the plaintiff's originating summons dated February 22, 2021 be struck out and the suit dismissed with costs. The interested parties' application that is brought under order 2 rule 15(1)(a) and (d) of the *Civil Procedure Rules* and section

7 of the *Civil Procedure Act* has been brought on the grounds set out on the face thereof and on the affidavit sworn in support thereof by the 2nd interested party on May 27, 2021. The interested parties have contended that in its originating summons, the plaintiff is seeking to re-litigate the issues that were substantially in issue in the previous suit and which the court fully considered and determined. The interested parties have contended that the originating summons is *res judicata* and offends section 7 of the *Civil Procedure Rules*. The interested parties have contended further that the originating summons to the extent that it is seeking to invoke the provisions of section 140 of the *Land Act* 2012 is incompetent and fatally defective in that the same is instituted contrary to the provisions of order 37 of the *Civil Procedure Rules*. The interested parties have averred further that the originating summons is otherwise an abuse of the process of the court.

24. The plaintiff has opposed the 1st and 2nd interested parties' application through a supplementary affidavit sworn by Nixon W. Mburungo on September 2, 2021 the contents of which I have highlighted while considering the plaintiff's case. It is not necessary to reproduce the same here.

25. The plaintiff's application dated February 22, 2021 and the interested parties' application dated May 27, 2021 were heard together by way of written submissions. The plaintiff filed submissions dated September 15, 2021, the 1st, 5th, 6th and 7th defendants filed submissions dated January 21, 2022 and the 1st and 2nd interested parties filed submissions dated December 17, 2021.

The Plaintiff's Submissions:

26. In the submission in support of its application, the plaintiff has argued that a part from the constitutional provisions cited on the face of the application and the originating summons, the plaintiff's suit is anchored on section 140 of the *Land Act* and section 41(1) and (2) of the Physical Planning Act, chapter 286 Laws of Kenya (now repealed) and that the suit is brought to seek an order for reasonable access to plot No 6235 which is landlocked. The plaintiff has submitted that maintaining the closure of the access to plot No 6235 pending the hearing of this suit would be detrimental to the plaintiff as it has no other access to the said parcel of land. The plaintiff has contended that it is necessary for the court to restore the status quo that was prevailing prior to the orders that were issued in the previous suit. The plaintiff has submitted that the suit raises reasonable cause of action against the defendants and the interested parties. The plaintiff has submitted that it has satisfied the conditions for grant of an interlocutory injunction set out in*Giella v Cassman Brown & Co Ltd* [1973] EA 358.

27. In its submission in respect of the interested parties' application, the plaintiff has submitted that the interested parties have unclean hands and as such are not entitled to any relief from the court. The plaintiff has submitted further that a party is entitled to pursue a claim in court however implausible and however improbable his chances of success unless it is demonstrated that the suit is bound to fail or that it is an abuse of the process of the court. The plaintiff has submitted that the court's jurisdiction to strike out a suit should be exercised sparingly and only in exceptional cases since striking out a suit is a draconian act which should only be resorted to in plain cases. The plaintiff has submitted that a pleading is only an abuse of the process of the court where it is frivolous or vexatious none of which has been proved by the interested parties. The plaintiff has submitted that this suit is not res judicata in that the substantive reliefs sought by the plaintiff in the originating summons concern access to plot No 6235 that was not determined in the previous suit. The plaintiff has submitted that the issues whether plot No 6235 is landlocked and whether the 3 meters road that is said to have been meant to serve it is inadequate have never been interrogated by the court and a determination made. The plaintiff has submitted that there is no impediment arising from the previous suit to the granting of the reliefs sought in this suit by the plaintiff. In conclusion, the plaintiff has urged the court to allow its application and to dismiss the interested parties' application with costs.

The 1st, 5Th, 6ThAnd 7ThDefendants' Submissions:

28. In their submission, the 1st, 5th, 6th and 7th defendants have supported the interested parties' application to strike out the plaintiff's suit. They have submitted that the suit is *res judicata* in that the issues raised for determination by the court were raised and determined conclusively in the previous suit. They have submitted that the suit has been brought contrary to section 7 of the *Civil Procedure Act*. The 1st, 5th, 6th and 7th defendants have submitted further that the plaintiff is not entitled to invoke the provisions of section 140 of the *Land Act*, 2012 because plot No 6235 is not landlocked as there is an existing road of access to the property and any attempt to create an access road through plot No 6236 would reduce its size by 50%. The 1st, 5th, 6th and 7th defendants have urged the court to strike out the plaintiff's suit with costs.

The 1stand 2nd Interested Parties' Submissions:

29. In their submission, the interested parties have reiterated much of what is contained in their affidavits in opposition to the application by the plaintiff and in support of their application seeking to strike out the suit. The interested parties have reiterated that the plaintiff's suit and application are *res judicata* as all the issues raised by the plaintiff in the present suit were raised and determined in the previous suit. The interested parties have submitted further that the duty of the court under section 140 of the *Land Act* is not to interrogate the legality of titles to land. The interested parties have submitted that in this case, that issue was considered and determined in the previous suit. The interested parties have submitted that the court did not permit the plaintiff to file a fresh suit and that what the plaintiff has relied on to institute the present suit is an obiter dictum of the court in the previous suit. The interested parties have submitted that the issues raised in the present suit should have been raised in the previous suit. The interested parties have urged the court to allow their application dated May 27, 2021 and to strike out the plaintiff's originating summons and notice of motion application both dated February 22, 2021.

Determination:

30. I have considered the plaintiff's application dated February 22, 2021 together with the affidavits filed in support thereof and in opposition thereto. I have also considered the 1st and 2nd interested parties' application dated May 27, 2021 together with the affidavits filed in support thereof and in opposition thereto. Finally, I have considered the submissions by the advocates for the parties and the numerous authorities that were cited in support thereof. Failure to cite any of the said authorities in this ruling does not mean that they were not useful.

31. Since the interested parties' application is seeking to strike out the suit, I will consider the same first because if it succeeds, it will not be necessary to consider the plaintiff's application for interim reliefs pending the hearing of the suit. The interested parties' application which is brought under order 2 rule 15(1)(a) and (d) of the *Civil Procedure Rules* and section 7 of the *Civil Procedure Act* is based principally on the grounds that the plaintiff's suit does not disclose a reasonable cause of action and that it is an abuse of the process of the court the same being *res judicata.*

32. In the book, *Pleadings, Principles and Practice* by Sir Jack Jacob and Ian Goldrein, the authors have stated that:

> An action is an abuse of the process of the court where it is "pretenceless" or "absolutely groundless" and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted."

33. In *D.T Dobie & Company (K) Ltd v Joseph Mbaria Muchina & another*, civil appeal No 37 of 1978, [1982] KLR 1, Madan J A stated as follows regarding the exercise of the power to strike out pleadings:

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."

34. In *J.P Machira v Wangethi Mwangi*, Court of Appeal, civil appeal No 179 of 1997, Omolo J A, stated as follows:

> I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J A in the case of *D.T Dobie& Company(Kenya) Ltd v Joseph Mbaria Muchina & another*, civil appeal, No 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits........I agree that these powers are drastic and as the court said..........the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it."

35. The interested parties have sought to strike out the plaintiff's suit on the ground that it is *res judicata* as the issues raised in the suit were raised in the previous suit and conclusively determined. The interested parties have contended further that even if the issues were not directly raised in the previous suit, they are of such a nature that the plaintiff should have raised the same in the previous suit.

36. Section 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya provides as follows;

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of their claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such court."

37. Explanation 4 to section 7 of the *Civil Procedure Act* aforesaid provides that:

> Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

38. In *Uhuru Highway Development Ltd v Central Bank of Kenya & others* CA No 36 of 1996, the court stated that:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

39. In *Salama Beach Hotel Limited & 3 others v Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates* [2019] eKLR, the Court of Appeal stated as follows on *res judicata*:

> 32. It follows therefore, in determining whether a suit or application is res-judicata, whichever the case may be, all the elements outlined in section 7 must be satisfied conjunctively. That is:
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
>
> See, *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (supra)."

40. I am not satisfied that the plaintiff's suit is res judicata. I have at the beginning of this ruling set out in detail the claims by both the plaintiff and the interested parties in the previous suit. I am in agreement with the plaintiff that whether or not plot No 6235 is landlocked and whether the 3 meters road to the north of the said plot is inadequate to serve its purposes was not in issue in the previous suit and as such was not determined by the court. In the previous suit the court stated that:

> In the event that plot No 6235 is landlocked as claimed by the 1st defendant or that the 3m road that was meant to serve it is inadequate, the 1st defendant can bring proceedings under section 140 of the *Land Act*, 2012 for an access to be provided to plot No 6235. The 1st defendant's counter-claim herein was not brought for that purpose. The 1st defendant sought a road of access as of right. The court cannot therefore consider the 1st defendant's need for an access road to plot No 6235 under section 140 of the *Land Act*, 2012."

41. To the extent that the plaintiff's suit has been brought under section 140 of the *Land Act* 2012 for an access road to be provided, the suit is not *res judicata*. When considering an application under section 140 of the *Land Act* 2012, the Act itself has given guidance to the court on the issues to consider. It will be up to the trial court to determine if the questions that have been put forward by the plaintiff in the originating summons for determination by the court are in tandem with the provisions of the Act. It will also be for the trial court to determine whether some of those questions or issues were answered or determined in the previous suit. The court cannot at this stage split the questions posed by the plaintiff into those that had been determined in the previous suit and those which were not. For now, what I can say is that the suit before the court is not res judicata. I am also satisfied that the suit raises triable issues. It is my finding therefore that the suit raises a reasonable cause of action. A suit that raises a reasonable cause of action cannot be said to be an abuse of the process of the court. I therefore find no merit in the interested parties' application seeking to strike out the plaintiff's suit.

42. With regard to the plaintiff's application, the plaintiff has sought a temporary mandatory and prohibitory injunction against the interested parties. The plaintiff has also sought an order for a survey

to be conducted by the 3rd and 5th defendants over plot Nos 6235, 6236 and 6080 and for a report to be filed in court.

43. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In *Giella v Cassman Brown & Co Ltd* [1973] E A 358, it was held that an applicant for a temporary injunction must establish a *prima facie* case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

44. For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court applies in applications for interlocutory mandatory injunction were set out in *Locabail International Finance Limited v Agro-Export* (1988) 1 All ER 901, where the court stated that:

45. 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 thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

46. In *Shepherd Homes Ltd v Shandahu* [1971] 1 Ch 304, Meggary J. stated as follows:

> It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation".

47. From the material before me, I am not satisfied that the plaintiff has established that it has a prima facie case with a probability of success against the interested parties and that it stands to suffer irreparable harm if the orders sought are not granted. In the previous suit, the court declared that the 1st and 2nd interested parties were the indefeasible owners of plot No 6236 and that they were entitled to quiet and uninterrupted possession of the same. The court also issued an order restraining the plaintiff from interfering with the 1st and 2nd interested parties' quiet possession of the said plot. The said orders by this court have not been reviewed or set aside. The injunctive relief sought by the plaintiff if granted would be inconsistent with the said orders in the previous suit. The court has power to make an order for a reasonable access to a landlocked parcel of land. The plaintiff has now claimed that plot No 6235 is landlocked and that a road of access should be provided for it through plot No 6236. The court has power to make such order under section 140 of the [Land Act](#) 2012 conditionally or otherwise. The court has to be satisfied that plot No 6235 is landlocked and the reason for that state of affairs among other factors. The court has also to consider whether plot No 6236 is the most ideal for the access sought and whether the 1st and 2nd interested parties who are the owners of plot No 6236 would be entitled to compensation. The plaintiff has not placed sufficient material before me at this stage on the basis of which I can say that a prima facie case has been made out for the creation of a road of access through plot No 6236 to plot No 6235. I am not satisfied therefore that a case has been made out for the injunction sought to restrain the 1st, 2nd and 3rd interested parties from obstructing or denying the

plaintiff access to plot No 6235 through plot No 6236. There is also no basis for compelling the 1st and 2nd interested parties to pull down their stone wall and metal gate to allow the plaintiff to access plot No 6235 through plot No 6236.

48. With regard to an order sought for the 3rd and 5th defendants to carry out a survey on plot No 6235, plot No 6236 and plot No 6081and to file a report in court, no basis has been laid for the prayer. The plaintiff has not explained why such survey is required or how it will assist in the determination of the dispute before the court. The order cannot issue in the circumstances.

Conclusion:

49. In conclusion, I find no merit in the plaintiff's notice of motion dated February 22, 2021 and the 1st and 2nd interested parties' notice of motion application dated May 27, 2021. The two applications are dismissed. Each party shall bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Kamau for the Plaintiff

Mr. Mwambonu for the A.G

Mr. Lumumba h/b for Mr. Saende for the 2nd, 3rd and 4th Defendants

N/A for the 9th Defendant

Mr. Masese for the 1st and 2nd Interested Parties

N/A for the 3rd Interested Party

Ms. C. Nyokabi - Court Assistant