Thaathini Development Company Limited v Coast Water Services Board (Environment & Land Case 371 of 2016) [2025] KEELC 4290 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4290 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 371 OF 2016

LL NAIKUNI, J

MAY 30, 2025

BETWEEN

THAATHINI DEVELOPMENT COMPANY LIMITED ..... PLAINTIFF

AND

COAST WATER SERVICES BOARD ..... DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the Further Amended Plaint dated 28th February, 2023 and filed on 1st March, 2023 by Thaathini Development Company Limited, the Plaintiff herein. It is against Mombasa Water & Sewerage Company the Defendant herein.

2. Upon service of the pleading and summons to enter appearance, the Defendants filed their Memorandum of Appearance and a further Amended Statement of Defence dated 19th March, 2024.

3. It is instructive that on 13th December, 2024 upon the request and consensus by the parties, the Honourable Court conducted a site visit ("Locus in Quo") pursuant to the provision of Order 18 Rules, 11 of the Civil Procedure Rules, 2010. A report was prepared and shared among the parties. It is part of this Judgement for ease of reference thereof.

II. Description of the Parties in the suit

4. The Plaintiff was described as a Public Limited Liability company registered in Kenya pursuant to the provisions of the *Companies Act* Cap 486 Laws of Kenya.

5. The 1st Defendant was a registered company within the relevant provisions of the *Companies Act* dealing/providing water and sewerage services. The 2nd Defendant was the Coast Water Services Board.

III. Court directions before the hearing

6. The parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010, the Honourable Court fixed the hearing dated on 21st September, 2023. The matter proceed for hearing on 21st September, 2023 by way of adducing "Viva Voce" evidence with the Plaintiff's witnesses testifying in Court whereby they closed their case and the Defendant's called her witnesses on 17th December, 2024 and closed their case thereafter.

IV. The Plaintiff's case

7. From the filed pleadings, at all material times to this suit, relating to this suit the Plaintiff is the registered owner of the year 2023 plots No known as Mombasa/mainland North/Block4/72, M N/Block4/116, MN/Block4/73, MN/Block4/1, MN/Block4/74, MN/Block4/17, MN/Block4/75, MN/Block4/19, MN/BLOC K 4/76, MN/Block4/21, MN/Block4/25, MN/Block4/26, MN/ Block 4/27, MN/Block4/77, MN/Block4/78, MN/Block4/32, MN/Block 4 /48, MN/Block4/49, MN/Block4/104, MN/Block4/105, MN/Block 113, MN/Block4/110, MN/Block4/112, MN/ Block4/107, MN/Block4/109, MN/Block4/111, MN/Block4/369, MN/Block 4/ 340, MN/ Block4/230, MN/Block4/229, MN/Block4/228, MN/Block 4/224 located at Nguu tatu area within Mombasa.

8. The Plaintiff had earlier filed ELC NO 371 Nof 2016 over parcel No Mombasa Block 4/221 and as he was conducting due diligence discovered further invasion of the above reference land measuring 4.175/Ha which the Defendant has illegally and unlawfully laid their pipe. The Plaintiff relied on the following particulars of trespass: -

    a. Invading the said land

    b. Bringing heavy machinery in the said land.

    c. Using heavy machinery to dredge the Plaintiff's land without consent.

    d. Laying huge pipes in the Plaintiff's land without his consent

9. According to the Plaintiff that continued trespass, dredging and laying of huge pipes without his consent is illegal, ought to be discontinued and the offending pipes removed immediately. The Plaintiff subscribed to the jurisdiction of this Honourable Court. Despite demand and notice of intention to sue being given the defendant has refused/neglected to remove and relocate the offensive huge pipes that they have put in plot No. known as Mombasa/Mainland North/Block4/72, MN/Block4/116, MN/Block4/73, MN/Block4/1, M N /Block4/74, MN/ Block4/17, MN/Block4/75, MN/Block4/19, MN/Block 4/76, MN/Block4/21, MN/Block4/25, MN/Block4/26, MN/Block 4/27, MN/Block4/77, MN/Block4/78, MN/Block4/32, MN/Block 4/48, MN/Block4/49, MN/Block4/104, MN/Block4/105, MN/Block1/ 13, MN/Block4/110, MN/Block4/112, MN/Block4/107, MN/Block4/109, MN/Block4/111, MN/Block4/369, MNV/ Block4/340, MN/Block4/230, MN/Block4/229, MN/Block4/228, MN/Block 4/224.

10. The Plaintiff prayed for Judgment against the Defendant for:-

    a. An order directing the Defendants to remove and relocate the offensive huge pipes that they have put in Mombasa/Mainland North/ Block 4/72, MN/Block4/116, MN/Block 4/73, MN/Block4/1, MN/Block4/74, MN/Block4/17, MN/Block4/75, MN/Block4/19, MN/Block4/76, MN/Block4/21, MN/Block4/25, MN/Block4/26, MN/Block4/27, MN/ Block4/77, MN/Block4/78, MN/Block4/32, MN/Block4/48, MN/Block4/49, MN/

Block4/104, MN/Block4/105, MN/Block4/113, MN/Block4/110, MN/Block4/112, MN/Block4/107, MN/Block4/109, MN/Block4/111, MN/Block4/369, MN/Block4/340, MN/Block4/230, MN/Block4/229, MN/Block4/228 and MN/Block4/224

b. An order directing the Defendant to compensate the Plaintiff at current market rate.

c. Damages for illegal trespass and invasion.

d. Compensation for forceful detainer.

e. Costs of this suit.

11. The Plaintiffs called their witness PW - 1 on 19th June, 2023 at 3.30 pm where he averred that: -

A. Examination in Chief of PW – 1 by Mr. Asena Advocate.

12. PW - 1 testified under oath in Kiswahili language. He identified himself as being Francis Matiru Kamande. He was a citizen of Kenya bearing the details as shown in the national identity card, a copy of which was produced in Court. He was a businessman, shareholder and Director of Thathini Development Limited, the Plaintiff herein. He was referred to his witness statement dated 22nd March, 2022 and list of documents filed on 23rd March, 2022, being six (6) documents in total and produced as Plaintiff Exhibit Numbers 1, 2, 3, 4 and 5 respectively save for document No. 2 being the Sketch Map – which was to be marked for identification as "PMFI – 2". He further referred to a further document filed on 20th September, 2023 – being a Valuation Report to be marked for identification as "PMFI -6".

13. The witness also asked the court to have the list of documents filed on 30th November, 2016 and filed 1st December, 2018 of five (5) documents produced as "Plaintiff Exhibit Numbers 7 to 11". PW - 1 told the court that their complaint was that Coast Water started drilling trenches without the authority and knowledge of the Plaintiff. They also placed huge water pipes. Despite of all these, that the Plaintiff was never compensated. The position taken by the Defendant to the effect that that the trenches were on road reserve was not correct. On the contrary, the land belonged to the Plaintiff – in the year 2015 and 2016. PW - 1 refuted the fact that they compensated people and the company. PW - 1 informed court that his prayer was for the Plaintiff to be compensated for the trespass or they remove their pipes, from the year 2016 as prayed.

B. Cross examination of PW - 1 by M/s. Nyaga Advocate.

14. PW - 1 confirmed that he was a Director to the Plaintiff. However, he affirmed that he had not brought any documents to court to prove that he was a Director of Plaintiff but the papers were filed. The witness further told the court that the land was bought in the year 1998 though he did not have title for the land in Court. That apart from the photographs, the Plaintiff had nothing else to prove its Coast Water which were or dug the trenches onto the suit land. The witness admitted that the photographs did not have dates and that from the same some of the pipes would be encroaching the land. He stated that from the report by the surveyor showed the number of parcels where the encroachments took place.

C. Re - examination of PW - 1 by Mr. Asena Advocate.

15. PW - 1 confirmed that the photographs by the Plaintiff were taken year 2016. They were taken with the assistance of the Land Surveyor. The pipes passed only on part of the land that they took the photographs.

16. The Plaintiff called PW - 2 on 29th July, 2024. He testified as follows:-

A. Examination in Chief of PW - 2 by Mr. Mwaniki Advocate.

17. PW - 2 testified under oath in English language. He identified himself as Hillary/Nyagah Magodu, a citizen of Kenya with all the particulars as indicated in the national identity card, a copy of which was produced in Court. He was a Land Practising Surveyor holding the Institute Surveyor of Kenya (ISK) numbers 4317/G/LS.20. He stated having prepared a due diligence report on the suit properties using the GPO – picking of the existing pipeline on the ground. There was a large extent of encroachment of the pipes by the Defendants into the Plaintiff's land. He found the width was 15 meters and length of 4 Kilometres. The total encroached area was 6.04 HA. The witness referred to the parcels of land and stated that the existing pipeline had entered into several areas as listed below:-MN/IV/72.MN/IV/116.MN/IV/73.MN/IV/1.MN/IV/74.MN/IV/17.MN/IV/475.MN/IV/19.MN/IV/76.MN/IV/91.MN/IV/25.MN/IV/26.MN/IV/27.MN/IV/77.MN/IV/78.MN/IV/32.MN/IV/105.MN/IV/113.MN/IV/110.MN/IV/112.MN/IV/107.MN/IV/109.MN/IV/111.MN/IV/369.MN/IV/340.MN/IV/230.MN/IV/229.MN/IV/228.MN/IV/224.

18. The witness produced the Land Survey report dated 26th April, 2007 as Plaintiff Exhibit Number 3.

B. Cross examination of PW - 2 by Mr. Kibara Advocate.

19. PW - 2 reiterated that he was not a Licensed Surveyor but a Practicing surveyor and his documents were authenticated by a Licensed Surveyor. He further stated that he was an Assistant to a Licensed Surveyor. He further testified that the Institute Surveyor of Kenya (ISK) allowed practicing surveyors to practice as surveyors and to do examinations to get a Licence. In the Intervening period he may practice. He further testified that he could submit documents officially after writing but the same had to bear the stamp of the licensed surveyor. According to the witness a survey of the entire land had been carried out and it was established that the same was under one ownership – Thathini Development Limited – the Plaintiff herein.

20. On being referred to the report, PW - 2 confirmed that the same did not have an official stamp of the licensed surveyor but only had his signature and the letter head of a licensed surveyor. In his testimony PW - 2 told the court that each of the sub-divisions had a Deed Plan and ha certificate of Title Deed. He testified that though the official searches had been conducted over all these parcels of land, these information was not included in his report. That there was a pipeline Way Leave which was created on 20th September, 2014 and the construction commenced. That this information was from a list compiled by the Coast Water Service Board for purposes of settlement and compensation. Hence it was contained in the acquisition process. He noted that the pipeline never confined itself on the Way Leave.

21. The witness admitted of being aware there were MAPS at the Survey of Kenya which indicated how the Way Leave was created. PW – 2 confirmed that the sub - division of the land was done in the year 1986 and the sub-division came first before the Way Leave. He disapproved that the Way Leave was done in year 1961.

C. Re - examination of PW - 2 by Mr. Mwaniki Advocate.

22. PW - 2 reiterated that as a Practicing Surveyor, there was nothing that barred him from appearing in court as a surveyor. He used the mother title to undertake his surveying exercise.

23. The Plaintiff called PW - 3 on 29th July, 2024 who testified as follows:-

A. Examination in Chief of PW - 3 by Mr. Mwaniki Advocate.

24. PW - 3 testified under oath and English language. She identified herself as Josephine Wanjiru Osodo, a Citizen of Kenya bearing all the particulars as shown in the national identity card and a copy produced in Court. That she was a Land Valuer by profession. She did the valuation of the suit land on 21st May, 2021. That the parcels that were valued were: -MN/Thathini/IV/254.MN/Thathini/IV/67.MN/Thathini/IV/338.MN/Thathini/IV/339.MN/Thathini/IV/315.MN/Thathini/IV/313.MN/Thathini/IV/314.MN/Thathini/IV/221.MN/Thathini/IV/546.

25. The witness told the court that there was no valuation done on encroached area. The value of the plots fronting the main road were for a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500, 000.00/=) per acre as per the market rate then.

B. Cross examination of PW - 3 by Mr. Kibara Advocate.

26. PW - 3 reiterated that she did not make the valuation of the encroached land. Her report did not identify the encroached land. As they were inspecting the land, they saw water points but no Way Leave had been talked about in her report. The witness saw some damage and excavation of the land. She gave the description of the land. She had mentioned it in her report. The witness never provided the valuation of this. The witness did not do the damage assessment of the damage and excavation. She was neither aware that it was done in the year 2016. She had done her valuation in the year 2021. She went to the suit property on 15th March, 2021. The witness stated that there were squatters and they were unable to penetrate on the land due to security reasons as the squatters were there. What she did was a general valuation of the land.

27. The Plaintiff marked its case closed through his Counsel Mr. Mwaniki Advocate on 29th July, 2024.

V. The Defendant's case

28. The Defendant responded to the Plaint through a further amended Statement of Defence wherein the descriptive parts of the parties were admitted. It was stated that the coast region water services board established through Gazette Notice No 1328 of 26th February, 2004 no longer exists and in its place was the Coast Water Works Development Agency which was established on 3rd May, 2019 through Gazette Notice No 28 of 26th April, 2019.

29. The Defendant denied invading the Plaintiffs parcel in anyway and put the Plaintiff to strict proof of this allegation. It was averred that the area on which the suit properties lie was earmarked for the laying of water pipes by the relevant authority/ministry in the year 1961.

30. According to the Defendant, the government then identified and provided for pipeline reserves along the suit property as per the maps prepared in the year 1961 from the Director of Surveys. It was stated that the Plaintiff had misapprehended facts and misled the court by claiming that the Defendant water pipes run across the suit properties when in fact it was the Plaintiff's properties that were subdivided along the pipeline reserve which was acquired in the year 1961. The Defendant stated that several maps confirm the existence of the Way Leave and which are:-

    a. FR No 97/27[office copy no 78630].

    b. FR No 97/28[office copy no 78631].

    c. FR No 97/29[office copy 78632].

31. The Defendant stated that had the Plaintiff conducted due diligence at the time of acquiring the suit properties then this information would have been brought to its attention. It was also stated that at no point did the Defendant undertake excavation nor mandate the carrying out of any quarry works on the suit properties that would require heavy machinery or dredging of any kind. The Defendant stated that the particulars of trespass as elaborated under Paragraph 5 of the further re - Amended Plaint were incorrect since no works or rehabilitation has been undertaken in the suit premises.

32. At Paragraph 16 of the defence, it was stated that the water pipes were laid in the year 1980 which is 36 [read thirty-six] years ago. The allegation that there had been recent works or rehabilitation of pipes was an attempt to misdirect the court from the fact that the suit was time barred having been filed 36 years ago. The suit was therefore ill conceived and fatally defective. The government administration acquired the pipeline reserve in the year 1961 and the Plaintiff acquired the property thereafter. That the pipelines were laid without interfering with private interests. The Defendant prayed that the suit be dismissed with costs to the Defendant.

33. On 17th December, 2024, the Defendant called DW - 1 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Kibara Advocate.

34. DW - 1 testified under oath and in English language. He identified himself as being Samwuel Soda Bengi. He was a citizen of Kenya bearing all the particulars as shown on the national identity card and a copy of which was produced in Court. He was an employee of the Defendant as the Bulky Water Supply Manager for Coast Water Works Development Agency. He had worked for he Defendant for 22 years. He was a graduate from the Technical University (TUM), Mombasa with a Bachelor of Science Degree in Electronic and Electrical. DW - 1 recorded a witness statement dated 20th March, 2024 which he relied on as his evidence in chief. According to him the Defendant, being the institution had undergone re-structuring as its typical of the water sector. It had changed name from Coast Region Water Services Board – created through a Gazette Notice numbers 1328 of 26th February, 2004. Currently, it was known as the Coast Water Works Development Agency established in 3rd May 2019 through Gazette Notice No. 28 of 26th April, 2019.

35. DW - 1 had knowledge of the Geographical Location of the tanks at Nguu Tatu. He confirmed being there during the site visit conducted by the Honourable Court. He was aware of the Water Pipes. At no time had the Defendant invaded the Plaintiff's land. Basically for a process for doing water pipeline, there was a Way Leave obtained by the Ministry of Water. There were drawings prepared for this purpose. In this case, the drawings were done in the year 1961. By year 1961, a Way Leave for laying of the water pipes at Nguu Tatu was created. The witness stated that he personally foresaw the laying of the pipeline which were on the road reserve. Paragraph *8* indicated that the pipelines were placed on the Way Leave and the road reserve which measured 13.3.Meters and the Pipeline 60 MM was laid on the said road reserve.

36. According to the witness, it was in the year 1961 that there was the acquisition of the Way Leave. The pipelines were laid down in the years 1970s. It took two to three years and in the 1980s when the project was commissioned i.e. it was ready for utilization. They had never had any quarrying, excavation, mutilation and damaged the Plaintiff's property. The Defendant had not encroached the Plaintiff's suit property as alleged. The Defendant averred that there were several maps that confirmed the existence of the Way Leave created in the year 1961. These were FR. No. 97/27; FR. No. 97/28 and FR No. 97/29. According to DW – 1 had the Plaintiff conducted due diligence before purchasing the land they would have established the existence of the Way Leave. From the year 1980s when they commissioned the project they had not undertaken any major work.

B. Cross Examination of DW - 1 by Mr. Mwaniki Advocate.

37. DW 1 confirmed that he was the manager for Bulky Water Supply. They did not have a Manager in Charge of Environment and Community Management though the said Unit existed. On being referred to the witness statement of Mr. Haji Salim Masaa dated 13th September, 2023, DW - 1 stated that he knew him. He claimed to be the Environment and Community Manager. Both of them were relevant. He stated that in the year 2016. The witness wanted the court to believe in him that what Mr. Masaa stated was correct.

38. On being referred to a set of photographs produced by the Plaintiff, the witness told the court that he knew the Emblem. It was the one by the Coast Water Board (CWSB). He could identify the photographs. They belonged to the C.W.S.B. These pipes could be done by both public and private entities. They could be done elsewhere at Taveta, Mzima Spring Kwale e.t.c. DW - 1 was aware of the project undertaken by World Bank – Coast Water Services works for the construction of the Water pipeline. He was not aware of the construction in the year 2016.

39. DW - 1 stated that he had not produced the Way Leave created/obtained in 1961. He had stated under paragraph 7 of the statement to mean at the time of laying of the water pipes the suit property was owned by the Government until the Plaintiff acquired the land. On being referred to the legal notice – the witness told the court that the provision of Section 24 (4) of the Land Control Board Act Cap 302 – it was evident that the Plaintiff bought the land on 6th June, 1979 i.e. it was when they acquired the land. On being referred to Paragraph 11 of the statement, DW - 1 stated that he was not aware that the MAPs only appeared on the leases. He was employed by the Defendant in the year 2002 and hence when all these works were taking place he was not present. He was not aware that the County Government had undertaken a Survey exercise and that they concluded that.

40. The Defendant called DW - 2 who testified as follows:-

A. Examination in Chief of DW - 2 by Kibara Advocate.

41. DW - 2 was sworn and testified in English language. He identified himself as Edward Marenye Kiguru. He introduced himself as aLicensed Surveyor in Mombasa with 35 years. He was a Government Land Surveyor. In his testimony, he stated having relied on the 3 documents:-

    a. Further List of Documents dated 16th December, 2024.

    b. Documents dated 25th March, 2024.

    c. Further Supplementary dated 11th November, 2024.

42. DW - 2 also referred to the supplementary documents dated 25th March, 2024 which were 3 maps: - FR 97/27.*FR 97/28.*FR 97/29.

43. DW - 2 stated that all the three (3) confirmed the existence of the Way Leave created in the year 1961 during the colonial era. By that time the plot that covered the tank was unsurveyed. The land for the Way Leave was MN/I/2/343/1 and which is the pipeline portion. That it was surrendered and it became Government Land. After the surrender, the balance was MN/I/2/343/R – where it was marled as “R” meant “The Reminder” . The Map - FR No. 97/27 was the most relevant Map. The witness referred to the further Supplementary dated 11th November, 2024 which contained the MN/ Block 4 Sheet No. 1 – for THATHINI. From this map, the Way Leave was indicated. He pointed it out on the Map to the Court. i.e. the narrow step and showed the water tanks area and the road reserve. He

stated that the plots were a sub - division of the Thathini Land, the Survey was done by Mr. Simaleck. It was after the year 2002. It was when the titles for Thathini had been produced/processed.

44. The same backed by RIM MAP. The Way Leave was first established in the year 1961 and the sub-division of Thathini was 2002. He referred to the Satellite Google Map and stated that all the physical features were visible but the water pipes were not visible, from photograph as they are underground and also in the beneath were not visible. It's the Google Map for March, 2024. DW - 2 produced the three (3) maps and the Google Map as Defendant's Exhibits.

B. Cross examination of DW - 2 by Mr. Mwaniki Advocate.

45. DW - 2 confirmed with reference to Thathini MAP after the sub-division, the parcel had been slipped into two by the pipeline. The Wayleave would be registered and hence found in the Green Card, i.e. that information is contained in the RIM. It was not part of the property. It's like a river e.t.c. The survey was done in the year 1961. It was MN/2/343/2. The "R" came after the survey of the pipeline was done in the year 1961. From the title the witness would know when the Plaintiff acquired the land. From the Kenya Gazette Notice it showed that the Plaintiff acquired land in year 1979. There was no "R" on it. The FR. Folio Reference – they could apply to both freehold and Leasehold title. It was the title that would give one the actual information.

C. Re - examination by DW - 2 of Mr. Kibara Advocate: -

46. DW - 2 reiterated that the Notice was for the provisions of the exemptions by the President in the Land Control Board under the Land Control Board Act. It was a proposal sale that is the intention. The process ended after the sub-division of the title deed. The Wayleave may have been registered as an encumbrance in the title.

47. The Defendant marked their case closed on 17th December, 2024 through its counsel on record Mr. Kibara.

VI. Submissions

48. On 17th December, 2024 after the Plaintiff and Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that, parties obliged. Thereafter, the Honourable court reserved a date to deliver its Judgement on 30th May, 2025.

A. The Written Submissions by the Plaintiff

49. The Plaintiff through the Law firm of Messrs. Mwaniki Gitahi & Partners Advocates filed written submissions dated 10th January, 2025. Mr. Mwaniki Advocate commenced his submissions by stating that the Plaintiff had proved his case on a balance of probabilities as required in law. On introduction, the Learned Counsel submitted that sometimes in the year 1979, the Plaintiff acquired the suit premises then known as parcel number 343/II/MN. The then President of the Republic of Kenya pursuant to legal notice No. 115 gave exemption for the controlled transaction. Thereafter, the Plaintiff did sub - divide the said parcel of land to the various sub-plots. In the course of time, they discovered that the land had been encroached by the Defendant who placed their water pipe onto their parcels of land. The Plaintiff averred that the parcels had been affected by the encroachment and trespass by the Defendant herein.

50. According to the Learned Counsel, pursuant to further Amended Plaint, the Plaintiff filed this case against the Defendant seeking: -

a. An order directing the Respondents to remove and relocate the offensive huge pipes that they have put in Mombasa/Mainland North/ Block 4/72, MN/Block4/116, MN/Block 4/73, MN/Block4/1, MN/Block4/74, MN/Block4/17, MN/Block4/75, MN/Block4/19, MN/Block4/76, MN/Block4/21, MN/Block4/25, MN/Block4/26, MN/Block4/27, MN/Block4/77, MN/Block4/78, MN/Block4/32, MN/Block4/48, MN/Block4/49, MN/Block4/104, MN/Block4/105, MN/Block4/113, MN/Block4/110, MN/Block4/112, MN/Block4/107, MN/Block4/109, MN/Block4/111, MN/Block4/369, MN/Block4/340, MN/Block4/230, MN/Block4/229, MN/Block4/228 and MN/Block4/224

b. An order directing the Defendant to compensate the Plaintiff at current market rate

c. Damages for illegal trespass and invasion

d. Compensation for forceful detainer

e. Costs of this suit.

51. On the analysis of the evidence tendered, the Learned Counsel submitted that PW - 1 Kamande Matiru statement dated 28th March 2022 was adopted by the court. On cross-examination, he stated that the Defendant claimed they had compensated the people they met on the ground as they were laying the huge pipes. He went ahead to refer the court to the Defendant's list of documents dated the 13th day of September 2023. The said Defendant's list of documents was filed by the Defendant and forms part of this court's record.

52. PW - 2 Hillary Mangondu Nyagah a Land Surveyor produced his Due diligence Survey Report. The said report dated 26th April, 2017 stated that the pipes occupied a width of 15 meters and a length of 4 Kms on the ground and concluded that the total area occupied by the water pipe way leave was 6.0457 Ha equivalent to 14.939 Acres. The report was in tandem with the maps produced by the Defendant Surveyor and also in tandem with the Mombasa County Surveyor report annexed in our application dated 13th September 2021 seeking to reinstate this suit.

53. PW - 3 Mrs Josephine Osodo produced her valuation report dated 21st May 2012 and was adopted by the court. In her report she stated that the plots with main road frontage value was at a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=) and on cross-examination she stated the valuation was for the whole land owned by the Plaintiff and was not for a specific area.

54. On the defence case. The Learned Counsel submitted that on filing the suit the learned Counsel for the Defendant did write to them on 5th March, 2020 and to borrow his exact words, he addressed them as follows:

> " Enclosed herewith please find the Surveyor's Report in respect to the encroachment. In view of the Surveyor's finding, our client is agreeable to an out-of-court settlement. If you are agreeable to an out-of-court settlement we shall then proceed to the issue of Valuation and Compensation. Kindly confirm by return....."

55. The Learned Counsel averred that as earlier stated, the said letter plus the Surveyors report were part of this court record and was contained in their application dated 13th September, 2021. After the receipt of the said Letter, they went to sleep waiting for compensation. This matter was dismissed for want of prosecution and they had to file an application to reinstate the case though the said application was vigorously opposed by the Defendant.

56. After the case was reinstated, the Defendant changed his narrative. Apparently, the issue of encroachment and compensation disappeared. The Defence filed their list of documents dated 13th September 2023 and from the Witness Statement by Haji Salim Masaa Admitted that in the year 2016 they commenced a Project in a bid to increase the water supply to Mombasa residents. In their List of Documents aforementioned, they claimed to have paid a total sum of Kenya Shillings Fourty Five Million Seven Eighty Seven Thousand Four Eighteen Hundred (Kshs. 45,787,418/=) to Nguu Tatu as compensation for the use of the pipeline on their parcels of land. During the site visit, no single person came out to claim he had been paid out.

57. According to the Learned Counsel this document described a money heist where the Defendant claimed to have compensated ghost people who apparently and allegedly were in their land. After their first witness testified, the Defendant changed their narrative. They came up with a new narrative of the existence of "a Wayleave" created in the year 1961 on the encroached area where they had laid the huge pipes. In 1879,William Shakespeare wrote a classical play known as "The Comedy of Errors". The said play aptly described what the defense had treated them to from the commencement of this suit.

58. The Learned Counsel further submitted that firstly, the Defendants admitted to encroachment and requested for an out-of-court settlement. They were agreeable to compensate the Plaintiff as highlighted in their correspondence. The said correspondence was annexed in their application to reinstate the suit. Secondly, in their comedy of errors they changed their narrative and stated that they never saw them in the Plaintiff's land and thus compensated other people who were "allegedly"" in their land.

59. Thirdly, in their comedy of errors, they further changed their narrative and are now allegedly claiming about the existence of "a wayleave". They further failed to show and/or produce any registered instrument to show how and when they acquired the said way leave.

60. The Learned Counsel argued that there was no existence of the said way leave which only exists in their fertile imagination. A question then arises if it was true they knew of the existence of the alleged wayleave why did they go ahead to allegedly compensate the alleged people whom they purportedly found on their land? The Defendant's Surveyor in a bid to Justify the absurd event went ahead to claim the land bought by the Defendant was 343/II/MN/R. Upon being shown the legal notice of the land showing the land bought by the Plaintiff, in 1979 he was "Speechless". However, on cross-examination, he admitted that the pipes had encroached on the Plaintiff's land.

61. In conclusion, the Learned Counsel on the issue of ownership submitted that the provision of Section 1 of the *Land Registration Act* defines registration as:-

> " Registration means bringing of an interest in land or lease under the provisions ofthe Act and includes making of an entry, note or record in the land register."

62. The provision of Section 24 Part l a of the *Land Registration Act* outlines the interests conferred upon registration as:-

> " The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

63. The importance of a title deed is well captured in Section 26 (1) of *Land Registration Act* which states that:-

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor ofthe land is the absolute and indefeasible owner, subject to theencumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor...."

64. In light of the above paragraphs, the Learned Counsel submitted that the Plaintiff was the owner of the Land since Legal Notice No.115. The title deeds, searches and green cards produced by Plaintiff affirm that the Ownership of the suit properties was that of Plaintiff herein. The defense tendered no title to prove ownership or the creation of a way leave on the said land. On the issue of trespass, it was defined under the provision of Section 3 (1) of *Trespass Act* Cap 294 as follows:-

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence."

65. The acts of getting into the land, digging, dredging and installing the huge water pipes on the Plaintiff's Land without their consent or compensation thereof amounts to acts of trespass which was in breach of Section 3(1) of the *Trespass Act*. The Learned Counsel submitted the Court visited the suit premises. It was not in dispute that the Defendant had encroached on the Plaintiff's land. Their ever – changing and/ over evolving narratives since the filing of this case borders on comic if not on the absurd. No single title was ever shown or presented before the Honourable Court to show there was a wayleave created before the Plaintiff bought the land.

66. The Learned Counsel contention was that – DW – 1, Mr. Samuel Soda Bengi on his comics went ahead to even deny knowing his colleague Haji Salim Masaa who had earlier prepared and filled his statement. He came out as a pathological liar who was highly evasive and brought no value to the Defence case. The Learned Counsel went ahead to quote "ELC Petition No.13 OF 2022 at Mombasa Osman Ahmed Kahia – Versus - Kenya Airports Authority & National Land Commission" where this Honourable Counsel handled a similar matter like the one before this Honourable Court. They prayed that the Court be guided by the same authority.

67. In conclusion, the Learned Counsel opined that there were some of the overwhelming reasons why this case has to succeed. The impunity lies, the alleged compensation of "strangers" on their land was unacceptable in their modern society. If the defense believed in their last narrative, all they needed to do was to produce the title of the alleged Wayleave. The Learned Counsel prayed for judgment for the 6.0457Ha an equivalent of 14.939Acres multiplied by the value of each acre a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs.3,500,000/-) which came to a total sum of Kenya Shillings Fifty Million Two Hundred and Eighty Six Thousand (Kshs.52,286,000/-). They also prayed for damages for trespass and compensation for forcible detainer to the tune of a sum of Kenya Shillings Fifteen Million (Kshs.15,000,000/-) and the costs of this suit.

B. The Written Submissions by the Defendant

68. The Defendant through the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written submissions dated 27th March, 2025. Mr. Kibara Advocate commenced the submission by stating that

by its further re-amended Plaint dated the 24th of May 2023, the Plaintiff in this matter sought from this Honorable Court the above stated reliefs.

69. The Learned Counsel further stated that in paragraph 5 of the said Plaint, the Plaintiff alleged that after conducting further due diligence it discovered the invasion by the Defendant on its land measuring 4.175 Hectares on which it claims the Defendant illegally and unlawfully laid their pipes. In Paragraph *5*, the Plaintiff then sets down the particulars of trespass as follows: -

    a. Invading the said land;

    b. Bringing heavy machinery in the said land;

    c. Using heavy machinery to dredge the plaintiff's land without his consent; and

    d. Laying huge pipes in the plaintiff's land without his consent;

70. On the Defendant's case before the Court, the Learned Counsel submitted by its Further Amended Statement of Defence dated 19th March, 2024 the Defendant averred the government identified and provided for pipeline reserves along the suit property and this fact was corroborated by maps prepared in the year 1961 from the Director of Surveys and it was in fact the Plaintiff's properties that were sub - divided along the pipeline reserve which was acquired in 1961. The Plaintiff herein only acquired the suit property(ies) thereafter. During this period the (then) Coast Region Water Services Boardwas not in existence, as it was only established in the year 2004 about twenty-four(24) years prior to the filing of the suit.

71. The Defendant further stated that there were several maps that confirmed the existence of the Wayleave: -

    a. FR. No. 97/27 (Office Copy No.78630).

    b. FR. No. 97/28 (Office Copy No.78631).

    c. FR. No. 97/29 (Office Copy No.78632)6.

72. The (then) Coast Region Water Services Board stated that after the relevant ministry/authority obtained and secured a pipeline reserve in or about 1961 prior it then laid the water pipes in the year 1980-thirty-six (36) years clear of the date of filing suit. Additionally, the Defendant as per the Learned Counsel's submission stated that when the relevant authority/ministry laid the concerned water pipes it never invaded the suit property(ies) as purported by the Plaintiff because it was the Plaintiff's property(ies) that were acquired and sub - divided along the already existing pipeline reserve which was acquired in the year 1961. The pipes were therefore laid without interfering with private interests and the government of the day was entitled to lay water pipes there.

73. On the analysis of the evidence tendered at the trial. The Learned Counsel asserted that on the Plaintiff's evidence, in a case for trespass, expert evidence, and in particular that of a surveyor became paramount in guiding the court as to the nature and extent of the alleged Trespass. With this in mind, they proceeded to give special weight and relevance to the evidence of the two surveyors who were called before the Honourable Court to testify by the Plaintiff and the Defendant respectively.

74. On the evidence of Mr. Hillary Nyagah Magondu (PW - 2); the Learned Counsel submitted that in his examination in chief, the surveyor produced his report and marked the same as Plaintiff's exhibit 3. It was profound to note that the said report had in it a map of the suit property entitled Due Diligence Survey of water pipe way leave on Thathini Parcel. The map itself contained drawings of the suit properties which are clearly divided by a way leave. During cross-examination, the surveyor confirmed

that there was indeed a water pipe wayleave that runs across (traverses) the suit property. His only contention was that the way leave came after the sub - division. In his evidence, he stated as follows:-

> "I am aware there are maps at the survey of Kenya which indicate how the way leave was created. I don't have the map on my report. As far as I am concerned the subdivision was done in 1986. Hence the subdivision came first before the Way leave.

75. The surveyor having conceded that there was indeed a water pipeline way leave created for the purposes of the water pipes that were laid by the Defendant, which action forms the basis of the action before the court, the question that remained unanswered was what came first, the water pipeline way leave or the sub - divisions? The surveyor rightly conceded that he did not have with him the maps from the survey of Kenya, which should have indicated when the water pipeline Way Leave was created. He, however, insisted that the subdivision, which to him was carried out in the year 1986, came first, although he did not know and could not tell when the water pipeline way leave was created.

76. With regard to the evidence by DW - 2 Edward Marenye Kiguru. The Learned Counsel submitted that DW – 2 was an expert witness called by the defence. He was Land Surveyor of over 50 years standing. The Land Surveyor produced documents in three batches (3 lists of documents), namely: -

    a. (Defence Exhibit 1). Further List of documents dated 16th of December 2024;

    b. (Defence Exhibit 2) Defendants supplementary list of documents dated 25th of March 2024.;

    c. (Defence Exhibit 3) Defendant's further supplementary list of documents dated 11th of November 2024

77. The surveyor referred to 3 maps attached to the Defendants supplementary list of documents dated 25th of March 2024, namely:

    a. FR. No. 97/27 (Office Copy No.78630)

    b. FR.No.97/28 (Office Copy No.78631)

    c. FR.No.97/29 (Office Copy No.78632)

78. The Learned Counsel opined that the Surveyor confirmed that all three maps confirm the existence of a water pipeline way leave that was created in the year 1961 which traverse the Plaintiff's land. The surveyor went on to explain that the then colonial government set apart the way the wayleave and thereby allocated it a title number, the samebeing MN/1/2/343/1. He did explain that whenever one sees the same meant that the land that been surrendered back to the government as public land.

79. The surveyor explained that after the surrender of the above property what remained was Property known as MN/2/343/R. He explained that the letter "R" at the end simply means and signifies that the property described was now "the remainder of the Land" after the excision in this case, the land remaining after the excision of the way leave above. The surveyor then referred the court to the map in the further supplementary list of documents dated 11th of November 2024, which was map sheet number 1 part of (198/3/24) Mombasa mainland North Block 4 (Thathini). He was able to identify this land as the one forming the Plaintiff suit property. The surveyor did also state that a sub - division to that land was undertaken in the year 2002 by a surveyor known as Simmalick. More importantly the surveyor pointed out that this particular map sheet clearly indicated that there was an existing water pipeline way leave.

80. On the rest of the evidence called by the Plaintiff, the Learned Counsel submitted that PW - 3 a Land Valuer named Josephine Wanjiru or Osodo; upon cross examination, she conceded that: -

1. in her report produced before the court as an exhibit, she did not take cognizance of, neither was she made aware of the existence of a water pipe way leave.

2. She did not do any valuation of the alleged damage due to excavation.

3. Should not able to free remove around the land since it was infested with squatters

81. The Learned Counsel submitted that the rest of the evidence called by the defence. DW - 1 Engineer Samuel Soda Bongi, was a Bulk Water Supply Manager of the Defendant. He confirmed that the Defendant had complied in providing for a water pipeline way leave at Nguu Tatu, which traversed the Plaintiff's property. The engineer also confirmed the acquisition of the water pipeline way leave in the year 1961 and the fact that the water pipeline was laid down in the year 1970s.and later works were carried out in the year 198Os. He vehemently denied that the Defendant had mutilated, damaged and or excavated the Plaintiff's property, much less encroached on the same.

82. On the law. The Learned Counsel submitted that the provision of Section 32 of the *Survey Act* established the legal framework governing land surveys and recognized Surveyors as professionals mandated to: -

i. Conduct official land surveys.

ii. Prepare and maintain boundary records.

iii. Resolve land demarcation disputes.

83. The Learned Counsel submitted the Honourable Court in the case of the "County Government of Meru – Versus – Mathiu (Environment and Land Appeal E011 of 2024)" stated that: -

> " An expert witness who hopes to carry weight in a court of law must, before giving his expert opinion: -
>
> i. Establish by evidence that he is specially skilled in his science or not.
>
> ii. Direct the court on the criteria of his science or art so that the Court can test the accuracy of his opinion and also form his own independent opinion by applying these criteria to the facts proven.
>
> iii. Give evidence of the facts on which may be ascertained by him or facts reported to him by another witness.

84. Unlike the Defendant's expert witness, the Plaintiff's expert witness fell short of the threshold required by law as stated in the above case law for the reason that he did not back his evidence with any factual verifiable evidence. It was important to note that, during cross examination, the Plaintiff's expert witness rightly conceded that he did not have with him the maps from the survey of Kenya, which should have indicated when the water pipeline way leave was created.

85. In conclusion, they submitted that from the evidence tendered by the Defendant before this Honourable court it was evident that the way leave and water pipes were placed on the suit properties long before the sub - division of the same. The Defendant's witness being a registered surveyor of over 50 years' experience has indeed adduced conclusive evidence meeting the criteria of an expert witness as required by law.

86. They urged this Court to relied on the case of "H.A Charles Perera – Versus - M.L Motha E004 of 2020) (2024) KEHC 496 (K.L.R.) (25th January 2024)(Judgment)" where it was stated that: -

> " For the court to determine how much weight to attach to an expert report, it has to consider the circumstances of each case, the standing of the expert, the skill and experience of the expert, care, how he approached the question on which he was expressing his opinion and the extent to which the expert used aids to advance his skill."

87. In conclusion and as such, the Defendant prayed that the Plaintiff suit be dismissed with costs and judgement be entered in favour of the Defendant.

VII. Analysis and Determination

88. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

89. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following Four (4) for its determination. These are: -

a. Whether the suit instituted by the Plaintiff herein has any merit whatsoever.

b. Whether the Defendant trespassed unto the suit properties without authority of the Plaintiff

c. Whether the Plaintiff is entitled to the orders sought in the Plaint

d. Who bears the costs of the suit?

Issue No. A): Whether the suit instituted by the Plaintiff herein has any merit whatsoever.

90. Under this sub title, the Honourable court shall be examining whether the Plaintiff has been able to establish its case within the required standards. In so doing it shall be looking at the substratum of the matter and particularly the limitation of actions of this suit.

The Site Visit Report

91. However, before embarking on the analysis herein and as indicated, on 13th December, 2024 the Honourable Court conducted a Site Visit and prepared the following report.

Republic of Kenya

Environment & Land Court At Mombasa

ELC No. 371 0f 2016

A Site Visit Report on a visit held at Nguu Tatu on 13th December 2024

i. Preliminaries.

1. The team arrived at the site at 12.54 pm a place known as Kiembeni near Nguu Tatu within the County of Mombasa. It was around 12.5km from the Mombasa Central Business District (CBD).

2. The session assembled and it started with a word of prayer led by Rachel Muthee and introductions were conducted and the purpose of the visit was explained by the court.

After the purpose was explained, the court was given the history of the water reservoir and its vast importance in Mombasa.

3. It was also agreed by consensus that the surveyors would lead in the observations. The site visit commenced under a cool shade of an acacia tree inside the compound.

4. The court emphasized that the site visit was not with a view of gathering further evidence on the case but to make observations, verify and inspect the suit property so as to assist Court in its decision-making functions and/or process.

ii. The Report

A. The Court

1. Before Hon Justice L.L Naikuni – The ELC Judge.
2. Mr. Ian Okwaro – the Court Assistant.
3. Mr. George Omondi – the Judge's Usher.
4. Mr. John Ngari – the Judge's driver.

B. The Plaintiff

1. Mr. Mwaniki Advocate - present for the Plaintiff.
2. Mr. Kamande Francis-Director of Zazini.
3. Job Gatundu-Director of Zazini
4. M/s Veronica Njeri-Treasurer of Zazini
5. Mr. Hillary Magondu-Surveyor

C. The Defendants

1. Mr. Kenneth Kibara Advocate for the Defendant.
2. Eng. Samuel Soda– Managing Director for Bark Water.
3. Ms. Judith Mjeni Leli-Principal Legal Officer
4. Mr. Edward K. Kiguru – Senior Surveyor.
5. Mr. Derek Otieno –Surveyor.
6. Mr. Rachel Muthee – Surveyor.

D. Security Operatives

1. Inspector Joseph Nyasimi- OCS Kiembeni Police Station.
2. Police Constable Bitange – Kiembeni Police Station.
3. Corporal Solomon Wachira- Kiembeni Police Station
4. Police Constable Longoria – Kiembeni Police Station.
5. Police Constable Joseph Kagia - Kiembeni Police Station.
6. Police Constable Keino – Kiembeni Police Station.

(Hereinafter all referred to as "The Team").

iii. The purpose for the Site Visit

5. The Court explained that the purpose of the site visit and held that it was in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit: -

Power to court to inspect;

> " The court may at any stage of a suit inspect any property or thing concerning which any question may arise"
>
> While Order 40 Rule 10 (1) (a) provided to wit: -
>
> > "The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-
> >
> > a. Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.

iv. The Procedure

6. The surveyors described the instruments for use in the site visit and it was agreed between the surveyors that the following instruments would be in use:

   a. RIM map for MN Block 4 Thathi-Ini prepared in the year 2002 by Mr. Zimmerlin and approved by the Survey of Kenya. Furthermore, the parties agreed that the issue that arise was encroachment.

   b. Digital Tape Measure

   c. G.P.S receiver.

7. The first observation was a huge water tank and the compound had a perimeter wall with a gate at the eastern side of the wall and we were informed by Engineer Soda that it has a capacity of 27,000,000 liters.

8. The team commenced by heading to the point where the map suggested plot 1907 started. It is important to note at this point that the plot started just next to the highway road and over a ditch which ordinarily is located next to the road for purposes of draining any water accumulating on the road surface.

9. Since the area to be visited was small, the movement was by walking from the starting point to the end point while using the maps as a guide.

vi. The observations made by the team

10. The team made the following observations.

   A. The location and size:-The compound had a perimeter wall and he estimated the same to be around seven (7) acres. There were two other tanks with a capacity of 400,000 liters, some servants' quarters and administrative

offices.The Plaintiffs' property is estimated at 2,000 acres according to Mr. Magondu.

B. The Historical SignificanceEngineer Soda explained that the tanks receive water from river Sabaki but is also supported by Mzima water springs in Tsavo West National Park and other coastal water bodies. However, he explained that the water comes from Baricho in Malindi where it is treated first and hence the pipes bringing in the water is what is disputed to be encroaching onto the plaintiffs property.Engineer Soda explained that the piping was done in the year 1961 by the water authority in operation at the material time.

C. The court was taken out of the premises and was taken to the different destinations where piping had been laid and was visible on the plaintiffs' property. Those protrusions are known as breathers.The plaintiffs' property was vast and access was done by driving along the road leading to Mwembelegeza dumpsite.At each stop the court and parties made, Mr. Magondu measured the distance from the pipe protrusion on the surface to the road and it was found to always be less than the legal requirement. The 1st breather was about 3 meters from the road which was fine. The 2nd breather was approximately 13.99 meters from the road which is outside the road reserve. The 3rd breather was 12.43 meters from the road.The arguments by the Plaintiffs was that the water pipes had encroached onto their property and ought to be removed. Instead, the pipelines should be placed along the road; right in the road reserve

Further observations

iv. Conclusion

11. Upon completion of the tour around the site, the Court made the following directions: -

a. That the Honourable Court to prepare and share the Site Visit report accordingly.

b. That the part – heard to proceed with the remaining witness and then close its case for submissions and Judgement delivery.

There being no other business, the session ended with a word of prayer by M/s Judith at 2.00 pm.

The site visit report prepared and dated this 17th Day of December, 2024.

.....

Hon. Mr. Justice L.L. Naikuni,

Environment & Land Court at Mombasa

92. The court will first seek to establish whether this suit is time barred by the *limitation of actions act* as was raised by the Defendant it its defence. In doing so, the court is alive to the fact that this issue might summarily determine the suit in the event that it is established that indeed the suit is time barred.

93. The Defendant stated that the suit has been filed 44 years after the cause of action alluded to by the Plaintiffs of laying pipes on the suit parcels of land. It is therefore averred that the suit is time-barred having been instituted 46 years from the date the cause of action is alleged to have arisen. The issue of limitations goes to the jurisdiction of the court as was held in the case of "Sohanladurgadass Rajput

and another – Versus - Divisions Integrated Development Programmes Co Ltd (2021) eKLR" where the Court held;

> " The question of limitation is a question that goes to the jurisdiction of this Court."

94. Further in the case of "Bosire Ongero – Versus - Royal Media Services [2015] eKLR", the Court stated that; -

> " The question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it."

95. Legally speaking, a cause of action is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. Also, the term refers to the legal theory upon which a Plaintiff brings suit before the Honourable Court seeking certain reliefs.The provision of Section 4 (1) of the *Limitation of Actions Act*, Cap. 22 provides that:-

> " (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
>
> (a) actions founded on contract;
>
> (b) .....
>
> (c) .....
>
> (d) .....
>
> (e) ....."

96. It is the Plaintiff's case that the Defendant has trespassed into the suit property and the erected water pipes, beacons and the water tower are infringing with the Plaintiffs right to use and ownership of property without being considered for compensation as required by Law. The question is when the said pipes were laid on the suit properties. According to the Defendant, the pipes were laid sometime in the year 1980, the Plaintiff on the other hand in its submissions referred the court to the witness statement of Haji Salim Masaa a Defence witness designated as an Environmental and Community Manager for the Defendant who although never testified had admitted in his statement filed before court that sometime in the year 2016 a project to increase water supply to Mombasa was commenced but the affected parties were compensated. According to the Plaintiffs, the Defendant undertook a facelift of their project in the year 2016 and hence necessitated the instant suit. Therefore, the year 2016 is pari materia.

97. The central contention of the Defendant is that the Plaintiff's suit was barred under the provision of Section 4 of the Limitation of Action Act. Then the issue would be was the suit as filed time barred and this issue can only answered with whether the trespass by the Defendant happened on one occasion or if it was continuous. Since the Since the Plaintiff's suit was founded on trespass, the Honourable Court must ask itself whether the statute of limitation affects the Defendant's continuous trespass. The Black Law Dictionary has defined a continuous trespass as;

> " A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".

98. Indeed the Court of Appeal in the case of "Nguruman *Limited – Versus - Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004* reported in 2007 KLR". Citing Clerk and Lindsel on Torts 16th Edition, paragraphs 23-01 held that : -

> " Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

99. In the case of "Isaack Ben Mulwa – Versus - Jonathan Mutunga Mweke [2016] eKLR", the Court of Appeal stated as follows in regard to a continuous trespass: -

> " Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts."

100. The Plaintiff has alleged that the Defendant's pipes are still on the suit land and therefore the Defendant continues to commit fresh acts of trespass for every time the pipes continue being on the suit land. Time therefore begins to run afresh as long as the Defendant's pipes are still on the suit property. I find that the statute of limitation does not apply in the present scenario. It is trite law that continuous injuries to land create separate cause of actions.

Issue No. B: Whether the Defendant trespassed unto the suit properties without authority of the Plaintiff

101. Under this sub - title, the Honourable Court shall critically examine the issue of trespass. However, before delving further into the issue of trespass, the court will first establish whether the Plaintiffs are the absolute and legally registered owners of the suit properties herein with all the indefeasible rights, title and interest vested in them by law thereof. Otherwise, they cannot possibly make a claim for trespass in the event that the suit does not legally belong to them. I have perused the Plaintiffs list of documents dated 23rd March, 2022 which was produced before court by PW - 1. The Plaintiff Exhibit Number is a copy of the Certificate of title deed and a Certificate of postal search for the suit property. From these fundamental information as of 14th March, 2022, it is a clear indication that the suit property is registered in the names of the Thathini Development Company Limited - Plaintiff herein. Therefore, and though it was never a contested issue, I reiterate that the suit properties belong to the Plaintiff. It is incumbent upon the court to protect the Plaintiffs rights to ownership of property the same having been sought by the Plaintiffs herein. The provision of Section 24 of the *Land Registration Act* 2012 No. 3 of 2012 provides as follows:-

> " The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

102. Section 25 (1) of the said Act further provides that: -

> " the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and

appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section."

103. The Plaintiff has proved that the Defendant has invaded the suit properties and undertaken the listed activities on it without the Plaintiffs consent and compensation hence amounting to trespass. It is trite that he who alleges must prove and the proof in civil matters should be on a balance of probability. The provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 provides as follows: -

107.(1) 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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. 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 tact shall lie on any particular person.

104. Similarly, the provision of Sections 109 and 112 of the Act provides as follows:

109. 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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

105. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

"an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

106. The Court in "John Kiragu Kimani – Versus - Rural Electrification Authority [2018] eKLR" also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923 which defines trespass as: -

'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason'.

107. The provision of Section 3 (1) of the *Trespass Act*, defines trespass as follows:-

" Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

108. Any such private property may be acquired any where in the Republic of Kenya. However, should the Government find that there would be need for public use of any private property it would move to compulsorily acquire it. The compulsory acquisition should be undertaken within a legal process and whereby the owner of the land would be compensated adequately, promptly and fairly. This concept

is hinged on the provision of Article 40 (1), (2) and (3) of *the Constitution* of Kenya, 2010 and Sections 108 to 11 of the *Land Act*. No. 6 of 2012. Articles 40 of COK which provides as follows:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law...."

109. To lay great emphasis on this issue, the Honourable Court wishes to rely in the case of:- In the case of "Patrick Musimbi –Versus- National Land Commission & 4 Others" Petition No. 613 of 2014" whereby the Court held "inter alia:-

> "As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both *the Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory"

110. From the evidence adduced by the Defendant, at first it was alleged that the Plaintiffs had been compensated for the use of their land for purposes of fixing the water pipes. They claimed to have

paid a total sum of Kenya Shillings Fourty Five Million Seven Eighty Seven Thousand Four Eighteen Hundred (Kshs. 45,787,418/=) to Nguu Tatu as compensation for the use of the pipeline on their parcels of land. Unfortunately, during the hearing nor the site visit, no single person came out to claim he had been paid out the said sum by the Defendant. No such evidence was adduced before court. Infact, in the pendency of the proceedings, it appeared the Defendant completely abandoned this strategy with that of the land belonged to the Government of Kenya with the registered "Way Leave" registered in the year 1961 hence making the issue of the compensation of the Plaintiff unattainable in law.

111. With regard to trespass, in the case of "Eliud Njoroge Gachiri – Versus - Stephen Kamau Ng'ang'a (2018) eKLR", it was held that:-

> " A continuing trespass is defined in Jowitt's Dictionary of English Law 2nd Edition as follows:-
>
> > 'A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbour's land.'
> >
> > In Black's Law Dictionary 8th Edition, a continuing trespass is defined as:-
> >
> > > 'A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property.'
> > >
> > > Finally, in Clerk & Lindsel on Torts 16th Edition, paragraph 23 - 01, it is stated that:-
> > >
> > > > 'Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."

112. The Plaintiff has annexed a copy of a sketch map showing the extent of the illegal trespass meted by the Defendant. PW - 2 a practising surveyor, testified that he did a due diligence report on the suit properties using the GPO – picking of the existing pipeline on the ground. He found the width was 15 meters and length of 4 Kms. That from this, it was his opinion that the total encroached area was 6.04 HA. He referred to the parcels of land and states that the existing pipeline has entered into several areas which he listed in his report produced before court.

113. In rebutting this testimony, DW - 1 testified that at the time of laying the water pipes the suit property was owned by the Government of Kenya until the same was acquired by the Plaintiffs. Further that the laid pipes were on Wayleaves registered in the year 1961 and a water pipeline reserve measuring approximately 60 millimetres in diameter and a road reserve measuring approximately 13.3 metres. The Defendants relied heavily on the evidence by DW - 2 Edward Marenye Kiguru a Land Surveyor of over 50 years standing. The Land Surveyor produced documents in three batches (3 lists of documents), namely: -

d. (Defence Exhibit 1). Further List of documents dated 16th of December 2024;

e. (Defence Exhibit 2) Defendants supplementary list of documents dated 25th of March 2024.;

f. (Defence Exhibit 3) Defendant's further supplementary list of documents dated 11th of November 2024

114. The surveyor referred to 3 maps attached to the Defendants supplementary list of documents dated 25th of March 2024, namely:

d. FR. No. 97/27 (Office Copy No.78630)

e. FR.No.97/28 (Office Copy No.78631)

f. FR.No.97/29 (Office Copy No.78632)

115. The Surveyor confirmed that all three maps confirmed the existence of a water pipeline way leave that was created in the year 1961 which traverse the Plaintiff's land. The surveyor went on to explain that the then colonial government set apart the way the wayleave and thereby allocated it a title number, the samebeing MN/1/2/343/1. He did explain that whenever one sees the same meant that the land that been surrendered back to the government as public land.

116. The surveyor explained that after the surrender of the above property what remained was Property known as MN/2/343/R. He explained that the letter "R" at the end simply means and signifies that the property described was now "the remainder of the Land" after the excision in this case, the land remaining after the excision of the way leave above. The surveyor then referred the court to the map in the further supplementary list of documents dated 11th of November 2024, which was map sheet number 1 part of (198/3/24) Mombasa mainland North Block 4 (Thathini). He was able to identify this land as the one forming the Plaintiff suit property. The surveyor did also state that a sub - division to that land was undertaken in the year 2002 by a surveyor known as Simmalick. More importantly the surveyor pointed out that this particular map sheet clearly indicated that there was an existing water pipeline way leave. Unfortunately, the Court was never shown the actual registered Way leave – being a legal registrable instrument as an encumbrance.

117. From the authorities herein above and the definition of trespass, the Court finds that the circumstances leading to the Defendant's action laying the pipes on the suit property constitute continuing trespass and the pipes are still on the land and have never been removed.

Issue No. C: Whether the Plaintiff is entitled to the orders sought in the Plaint

118. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaint, herein. Having concluded that the Plaintiff has proved his case; prayer (a) and (b) of the Plaint are hereby granted.

119. On the issue of damages for illegal trespass and invasion, the issue that arises is the measure of it. In the case of "Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR", it was held as follows:-

> " The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999)."

120. In the case of "Duncan Nderitu Ndegwa – Versus - KP & LC Limited & Another (2013) eKLR", P. Nyamweya, J held that:-

> " ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass"

121. From the evidence on record, there is nothing that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the Plaintiff suffered for him to be compensated for the loss. However, in relying on the above authorities, I find the Plaintiff has suffered damages as a result of the Defendants' unlawful acts of trespass and award it a sum of Kenya Shillings Fifty Two Million Two Eighty Six Thousand (Kshs. 52,286,000/-) as regards to prayer (b) as compensation for depraving them of the Plaintiff of their land for more than 40 years and a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) as general damages for trespass which is equivalent to the value of each acre of the suit property.

122. The Plaintiff also prayed for forcible detainer; this is a criminal offence found under the provision of Section 91 of the *Penal Code* which to constitute an offence of forcible detainer, the accused must be in actual possession; must have no claim of right over the land and the possession must be in a manner that is likely to cause a breach of the peace. Nonetheless, this not being a criminal matter therefore I shall decline to award the same.

123. All said and done and in the spirit of dispensing substantive justice whereby the interest of all is factored, the Honourable Court still strongly feels this is one matter whereby "the Private Mediation" as enshrined under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, Sections 59 A, B, C & D of the *Civil Procedure Act*, cap. 21 and Sections 20 (1) and (2) of the Environment & *Land Act*, No. 19 of 2011 may be adequately explored by the parties with a view of attaining an amicable settlement thereof.

Issue No. D). Who bears the costs of the suit

124. 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 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. 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.

125. In "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given

discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

126. In the present case, I reiterate that the Plaintiff has proved his claim against the Defendant there he shall have the costs.

VIII. Conclusion and Disposition

127. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has established his case against the Defendant. Thus, the Court proceeds to make the following specific orders:

SUBPARA a.

That Judgment be and is hereby entered in favour of the Plaint dated 28th February, 2023 and filed on 1st March, 2023 in its entirety with costs.

SUBPARA b.

That an Order be and is hereby issued directing the Respondents to remove and relocate the offensive huge pipes that they have put in Mombasa/Mainland North/ Block 4/72, MN/Block4/116, MN/Block 4/73, MN/Block4/1, MN/Block4/74, MN/Block4/17, MN/Block4/75, MN/Block4/19, MN/Block4/76, MN/Block4/21, MN/Block4/25, MN/Block4/26, MN/Block4/27, MN/Block4/77, MN/Block4/78, MN/Block4/32, MN/Block4/48, MN/Block4/49, MN/Block4/104, MN/Block4/105, MN/Block4/113, MN/Block4/110, MN/Block4/112, MN/Block4/107, MN/Block4/109, MN/Block4/111, MN/Block4/369, MN/Block4/340, MN/Block4/230, MN/Block4/229, MN/Block4/228 and MN/Block4/224.

c. That an Order do and is hereby issued directing the Defendant to compensate the Plaintiff at current market rate which amounts to Kenya Shillings Fifty Two Million, Two Hundred and Eighty Six Thousand (Kshs. 52,286,000/-).

d. That in the alternative, the parties may consider exploring an amicable out of court and/or court annexed mediation and/or negotiation as guided by the principles enshrined under the provision of Article 159 (2) (c); 40 (3) (a) & (b) (i), (ii) and 4 of *the Constitution* of Kenya, 2010; Sections 59A, B, C, and D of the *Civil Procedure Act*, Cap. 21; Sections 3, 13, 20 (1) & (2) of the Environment & *Land Act*, No. 19 of 2019; Sections 108 to 118 of the *Land Act*, No. 6 of 2012.

e. That the Plaintiff be and is hereby awarded Kenya Shillings Twenty Million (Kshs. 20,000,000/-) as general damages for trespass.

f. That there shall be no award of compensation for forceful detainer as the same is a criminal offence which the Court has no jurisdiction to try.

g. That the court awards the costs of litigation of the suit to the Plaintiff.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF MAY 2025.

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of: -

M/s. Firdaus Mbula – the Court Assistant.

Mr. Mohammed holding brief for Mr. Mwaniki Advocate for the Plaintiff.

M/s. Kinuva Advocate holding brief for Mr. Kibara Advocate for the Defendant.