



**Said & 3 others v Kenya Rural Roads Authority (Environment & Land
Case 198 of 2020) [2024] KEELC 4662 (KLR) (4 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2020**

LL NAIKUNI, J

JUNE 4, 2024

BETWEEN

**JAMAL AGIL SAID 1ST PLAINTIFF
NOORU MUHSIN SALEH 2ND PLAINTIFF
ABDULRAHMAN ABDALLA AGIL 3RD PLAINTIFF
AMIRA ABDULLA SIHAG 4TH PLAINTIFF**

AND

KENYA RURAL ROADS AUTHORITY DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit instituted by way of a Plaint dated 3rd November, 2020 by Jamal Agil Said, Nooru Muhsin Saleh, Abdularahman Abdalla Agil and Amira Abdulla Sihag, the Plaintiffs herein against Kenya Rural Roads Authority, the Defendant herein.
2. Upon service of the pleading and Summons to Enter Appearance, the Defendant filed Memorandum of Appearance dated 18th November, 2020 and a Statement of Defence dated 16th December, 2021 filed on 21st December, 2021. Subsequently, after undergoing the Pre – trial conference under the provision of Order 11 of the Civil Procedure Rules, 2010, the matter was slated down for full trial upto its logical conclusion germinating to this Judgement hereon.

II. Description of the Parties in the suit

3. The Plaintiffs were described in the Plaint as adults of sound mind living and working for gain within Mombasa County; their address of service for purposes of the suit herein shall be C/o Oloo & Chatur



Advocates, OC house, Dedan Kimathi Street opposite Pandya Memorial hospital, P. O. box 99662 - 8010, Mombasa.

4. The Defendant in the Plaintiff was described as an entity established under the provisions of Section 6 of the *Kenya Roads Act*, 2007 as a body corporate with perpetual Succession and common seal, capable of suing and being sued in its corporate name.

III. Court directions before the hearing

5. Nonetheless, on 22nd November, 2022, the Honourable Court fixed the hearing dated on 26th April, 2023 with all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, the suit was fixed for full trial on the 26th April, 2023 with the Court proceeding for the same that afternoon at 2.30 pm.
6. As indicated above, this matter proceeded on for hearing by way of adducing “Viva Voce” evidence with the Plaintiff’s witness (PW – 1) testifying in Court on 26th April, 2023. After which the Plaintiffs closed their case. The Defendant called its witnesses on diverse dated thereafter.

IV. The Plaintiffs’ case

7. From the filed pleadings, at all material times to the suit herein, the 1st, 2nd, 3rd and 4th Plaintiffs, were the absolute joint registered owners of Land Parcels, to wit, MOMBASA/BLOCK XII/244 MI and MOMBASA BLOCK XII/243 MI each measuring approximately 0.0166Hectares effective from the 5th June 1997 (hereinafter “The Suit Property”). The statutory functions of the Defendant are clearly spelled out under the law to include the responsibility for the management, development, rehabilitation and maintenance of rural roads under its control.
8. It was further noteworthy that, the suit property herein constitutes alienated private land that did not fall under the control of the Defendant authority that the latter could only acquire and/or seek to interfere with the suit property only upon getting permission from the Plaintiffs and/or through a lawful process of acquisition as set down under the applicable laws. Contrary to the set down laws and procedures precedent to acquisition of private land by the Defendant, in or about the month of October 2019, the Defendant herein, without any colour of right, legal justification and/or permission from the Plaintiffs, trespassed onto the suit property and constructed thereon a road made of cabro paving blocks covering almost thirds of the entire suit property.
9. The suit property did not comprise a public utility by virtue of the fact that it is a sub-division hived off Land Parcel No. MN/X11/13 as proved by the commissioner of Lands Ref. 74073/9 dated the 12th September 1991, the site was surveyed and authenticated on 12th June 1992 and respective title deed issued on 5th June 1997. In addition to the foregoing and to the best of the Plaintiffs knowledge, no notices for the compulsory acquisition of the suit property have been issued by either the Defendant or through the National Land Commission, as it was the practice, to warrant the taking over and carrying on developments thereon.
10. Upon becoming aware of the Defendant’s trespass and encroachment on the suit property, the Plaintiffs, through their then advocate, wrote to the Defendant on the 30th October, 2019 protesting over the same and demanded for both cessation of the building works and the removal of the paved cabro blocks already laid thereon; but which letter had failed to elicit any response to date. In the meantime, the Plaintiffs had come into possession of a letter dated the 2nd December, 2019 and in which the Defendant advised the County Government of Mombasa that the impugned paving works indeed passed through the suit property and that, consequently, they propose to relocate the paving



blocks to another access road, but which was yet to be done to date; the Plaintiff would seek to rely on the letter aforesaid for its full import and purport.

11. As it stood, the building works on the suit property had prevented and continue to prevent the Plaintiffs, from developing the same, and they were consequently suffering economic loss and damage as a result. The Plaintiffs' suit against the Defendant herein was for orders stopping their continued trespass on the suit property, and for the removal of the paved cabro works, at the Defendant's own cost. Demand and notice of intention to sue has been issued to the Defendant as aforesaid without eliciting any response and thus the instant suit. There was no other suit or dispute concerning the subject matter herein as between the parties hereto in any other Court and/or legal forum. The cause of action arose within the jurisdiction of this Honourable Court.
12. The 1st, 2nd, 3rd and 4th Plaintiffs herein prayed that Judgement be entered against the Defendant in terms of:-
 - a. A declaration that the Defendant's acts of omission and commission aforesaid hereinabove are tantamount to illegal trespass and encroachment on private property and have infringed the Plaintiffs' right to own property as enshrined under *the constitution* of Kenya 2010.
 - b. A permanent injunction to issue, barring the Defendant either by herself, her servants, employees, authorized agents and/or any other person(s) acting under her directions from trespassing on, encroaching onto, carrying out developments and/or in any other way interfering with the Plaintiffs' suit property to wit, Mombasa/BlockXII/243 MI and Mombasa/BlockX11/244 MI respectively.
 - c. A permanent mandatory injunction order be issued directing the Defendant to remove, at their own cost, the cabro paving blocks since illegally laid on the Plaintiff's suit property, to wit, Mombasa/BlockXI1/243 MI and Mombasa/BlockXII/244 MI respectively.
 - d. Costs of and incidental to this suit.
 - e. Any other or further appropriate remedy at the discretion of the Honourable Court.

13. The Plaintiffs called their witness being PW - 1 on 26th April, 2023 where he averred as follows:-

A. Examination in Chief of PW - 1 by Mr. Oloo Advocate.

14. PW - 1 was sworn and testified in the English language. He identified himself as being Mr. Jamal Agil Said. He informed the court that he was born in 26th September, 1966. He was the 1st Plaintiff herein. The 2nd Plaintiff was his sister in law. The 3rd and 4th Plaintiff were the 2nd Plaintiff's children. He obtained and filed the authority to act on their behalf. He filed a witness statement dated 3rd November, 2020 which he adopted as his evidence in chief. He filed a list of nine (9) documents - numbers 1, 2, 3, 4, 5, 6, 8 and 9 – Marked as Plaintiff Exhibits 1 to 8. Document No. 7 which was a Survey Report dated 14th January, 2020 was marked for identification - PLMFI - 1 to be produced by the maker.
15. The witness stated that he had the original titles for Mombasa/Block XII/242 and Mombasa/Block XII/244 both measuring 0.0166 HA in the names of Jamal Agil Said ½ Shares, Nooru Muhsin Saleh, Abdulrahman Abdalla Agil and Amira Abdalla Sihag ½ Shares Entry No. 8 and 9 in both of them



(Original produced in court). The property belongs to the Plaintiff. There was an official search – Plaintiff Exhibits No. 3 and 5.

16. According to PW - 1, the rates for the suit land had been paid to the Municipal Council – Plaintiff Exhibit – 6. In October 2019, while he was driving along Ronald Ngala road where these plots are situated, he found a Contractors working on Cabro works. According to the Bill board, he saw it was Kenya Rural Authority (KURA) undertaking the construction. He went to his then Advocates – Messrs. Swaleh and Company Advocates and instructed them to take legal action. They issued a demand letter dated 30th October, 2019 marked as Plaintiff Exhibit No. 8. The letter was received in October 2019. He asked the to remove the cabro works. The Engineer in charge told him he had written to County Government of Mombasa to produce security – letter dated 2nd December, 2019 addressed to the Chief Officer – KURA wrote asking the County Government to assist them relocate the plot to access road. The letter was copied to M.P. Mvita. They had not given any reason why they could not comply. He had not taken possession. The plots were vacant but there are 2/3 of it covered by Cabro works – it was an open space.
17. PW - 1 reiterated that nobody had ever shown him any other title to the land. When he acquired the title he intended to build. That at the moment there was no development. The cabro works had to be removed. He prayed for the removal of the Cabro by KURA. They should incur the costs, legal fees and filing the suit. He was not aware of the meeting they were talking about. He had never been approached by anyone or consulted by anyone. He had never been approached by the chairman of MVITA or the MP- MVITA.
18. He requested for a report to be done by the Land Surveyor. He was the one who commissioned for the surveying exercise and a report be prepared. The report held that, the suit land was not a public property but private property.

B. Cross examination of PW - 1 by Mr. Rapando Advocate.

19. The witness told the court that the two properties neighbored the Ronald Ngara road. There was one Lumumba road near the area. His plot was about 20 meters from Ronald Ngara road and 5 metres away from the Lumumba Road. The Cabro works – is 2/3 on his property. They occupy his property. The new building was not on his Plot. Apart from his property there were many residential houses there. It was a residential area. There were Swahili houses. The space where the cabro works were placed was an open space where on could take a walk. His problem was that they had placed Cabro works on his property.
20. He was referred to Document No. 9 dated 2nd December, 2019 by KURA – Paragraph 2 which stated that “Kindly offer us an officer from your office to verify the same and consequently facilitate the relocation of paving block”. PW – 1 was further referred to the Drawing/ Sketch Map – showing the Cabro works and the space occupied by the Cabro works i.e. “Topo Cadastral and Boundary Survey” for Plots Nos. MI/Block XII/243 and MI/Block XII/244 Mombasa County. Not just on white area. He refuted having been involved in them.

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

21. With reference to the letter of 2nd December, 2019 by KURA. From its heading, it was on the removal of the Cabro Paving on Plots 244 and 233. By their own admission they agreed that they had invaded and they would have wished to relocate the paving blocks – from map – the plots were not just on the white area only but the whole squared area. His plot did not overlap any other plot.



22. PW - 1 told the Court that he only came to know about the Cabro works when he drove along Ronald Ngala. KURA had never contacted him on it. That was all.
23. Through their counsel Mr. Oloo, the Plaintiffs marked their case closed.

V. The Defendant's case

24. The Defendant entered appearance and filed her statement of defence dated 16th December, 2021 where the Defendant averred that it is a stranger to the contents of Paragraph 3 of the Plaint that all material time to the institution of this suit, the Plaintiffs were the registered owners of Land Parcels Mombasa/ BlockXII/ 244 MI and Mombasa Block XII/243 MI each measuring approximately 0.0166 hectares effective from 5th June, 1997. The Defendant admitted to the contents of Paragraph 4 of the Plaint so far as it relates to the statutory functions of management, development, rehabilitation and maintenance of rural roads by the Defendant.
25. The Defendant averred that it was a stranger to the averments made out under Paragraph 5 of the Plaint that the suit property was alienated private land that does not fall under its control and that the suit property can only be acquired through permission from the Plaintiffs or through the lawful process of acquisition. The Defendant denied the contents of Paragraph 6 of the Plaint that in or about October 2019 it acted contrary to the laws of acquisition of private land in respect to the suit property, trespassed into the suit property and constructed a road made of cabro paving blocks covering almost two – thirds of the suit property.
26. The Defendant was a stranger to the contents of Paragraph 7 of the Plaint in respect of the suit property not being a public utility due to the sub – division from Land Parcel No. MN/XIII/13. The Defendant denied the contents of Paragraph 8 of the Plaint to the need for notices for compulsory acquisition by the National Land Commission or the Defendant to warrant taking over of the suit property. The Letter allegedly confirming that the paving works passes through the suit property and the request proposal to relocate the paving blocks to another access road. The Defendant denied the contents of Paragraph 11 of the Plaint that the building works on the said property prevents the Plaintiffs from developing consequently causing economic loss and damage. The works carried out consisted of improvements on an already existing road as prioritized by relevant stakeholders. The Plaintiffs were not entitled to the order sought to stop trespass by the Defendant and removal of the paved cabro works at the Defendant's cost. There was no demand and notice to sue served to them.
27. The Defendant averred that this suit was bad in law, discloses no reasonable causes of action against the Defendant, was an abuse of the court process and should be struck out and or dismissed with costs.
28. On 19th October, 2023, the Defendant called two of its witnesses DW - 1 and DW 2 who testified as follows:

A. Examination in chief of DW - 1 by Mr. Rapando Advocate.

29. DW – 1 testified under oath in the English language. She identified herself as being M/s. Deborah Wilkista Nehemia. She told the court that she worked for Kenya Rural Roads Authority as a Constituency Roads Officer (CRO) for Mvita Constituency. She filed and recorded a witness statement dated 16th December, 2021. She informed Court that she knew the Constituency Road Committee was mandated to prioritize road works within the constituency. She knew of the meeting held on 5th June, 2018 the Constituency Road Committee resolved to improve certain existing roads. Amongst the roads to be improved was Ziwani Access Road.



B. Cross examination of DW - 1 by Oloo Advocates.

30. DW - 1 informed the court that she had been working at the Defendant's employment since the year 2016 as a CRO. She did not have a hard copy of letter of employment but it was in soft copy. She knew Engineer Alex Machira who was employed in the year 2018. Later on he became her boss. Her role as a CRO was to undertake supervision of the work. They did not keep records of the ownership of the property where the roads were being constructed.
31. When referred to the contents of Paragraph 4 of her statement, she confirmed never having been present at the meeting held on 5th June, 2018. Hence she could not comment on what transpired during the meeting. She knew the Plaintiff – Mr. Jamal Agil Said. He had gone to complain of the road having been constructed on his land. DW – 1 was aware of the letter date 2nd December, 2019 by KURA by Eng. Alex Machira to the Chief Officer Transport Infrastructure and Public Works County Government of Mombasa. While referring to her statement she held that it was based on the meeting which she never attended on 5th June, 2018. She was adding value having been a supervisor.

C. Re - examination of DW - 1 by Mr. Rapando Advocate.

32. The witness confirmed not having attended the meeting of 5th June, 2019. Her input came in as the minutes were given to her boss – Engineer Alex Machira i.e. Mvita Road. When referred to the 2nd Paragraph of the letter dated 2nd December, 2019, DW – 1 stated that her boss had wanted to know whether the road was within the County Government or not.

B. Examination of DW - 2 by Mr. Rapando Advocate.

33. DW - 2 testified on oath in the Kiswahili language. He identified himself as Mr. Omar Sharriff. He told the court that he was the Chairman of CDF and Constituency Rural Roads – Mvita Constituency Roads Committee. He recorded a statement on 16th December, 2021. On 5th June, 2018 a meeting by the Mvita Constituency Roads Committee was held on the needs of the residents of the area. It was resolved to improve the existing road i.e. Ziwani Access Road. The decision to improve the already existing road was based on the road being a critical link for movement of people within the area. They saw it proper to put up cabro works. There was money for the project. They considered where there was a population and houses – the Ziwani Access road was in existence but it was in Marram. They resolved to put Cabro works. The statement and the minutes to be endorsed as evidence by the Defendant.

A. Cross examination DW – 2 by Mr. Oloo Advocate.

34. DW - 2 stated that he had nothing to identify himself with. He was a political appointee. He was the chairperson of Mvita Constituency Roads Committee. Anybody could be appointed Chairman. They never considered the experience of a person. The secretary was from KENHA. All the roads they would construct would be informal roads. They never dealt with the main road. These were also political consideration. It was the KENHA people to decide where the road would be constructed. He knew Jamal Agil Said.
35. With reference to the letter dated 2nd December, 2019. He did not remember of the issues of Plots Nos. 243 and 244 being discussed. He did not know the owners of these plots. It was the technical team.

B. Re - examination of DW - 2 by Mr. Rapando Advocate.

36. He did not recall the letter dated 2nd December, 2019 was placed before them for discussion.



37. On 19th October, 2023 the Learned Counsel for the Defendant, Mr. Rapando marked the close of their case.

VI. Submissions

38. On 9th October, 2023 after the 1st, 2nd, 3rd and 4th Plaintiffs and Defendant marked the closure of this case, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Parties complied accordingly. On 14th February, 2024, the Honourable court reserved a date to deliver its Judgement on 22nd May, 2024. But due to unavoidable circumstances beyond the Court's control it was eventually delivered on 4th June, 2024.

A. The Written Submission by Plaintiffs

39. The Learned Counsel for the Plaintiffs the Law firm of Messrs. Oloo, Chatur & Company Advocates filed their written submissions dated 27th October, 2023. Mr. Oloo Advocate commenced his submissions by stating by providing a brief background of the matter. He stated that the Plaintiffs lodged the instant suit vide a Plaint dated the 3rd November 2020 seeking the orders set out above.

a. on the court's jurisdiction;

40. In bringing the instant suit, the Plaintiffs had invoked both the provisions of *the Constitution* of Kenya, 2010, the *Environment and Land Court Act*, 2011, as well as the *Land Registration Act*, 2012. According to the Counsel the provision of Article 162(2)(b) of *the Constitution* of Kenya, 2010 stipulates, inter alia, that parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

41. On the other hand, the provisions of Section 13(1) of the *Environment and Land Court Act* hold that, the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other written law relating to environment and land. In addition to the foregoing, this Honourable Court is clothed with jurisdiction to entertain and determine the dispute herein by dint of the provisions of Section 101 of the *Land Registration Act*, 2012, which stipulates that, the Environment and Land Court established by the *Environment and Land Court Act*, 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

42. It was thus his considered submissions that the Plaintiffs' case before court invariably concerned a dispute relating to their use, occupation and title to the suit property and thus this court is properly seized of the matter. He referred the court to the decision in the case "Co - operative bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others Mombasa civil appeal no. 83 of 2016 where the issue of this court's jurisdiction was exhaustively ventilated and determined by the Court of Appeal.

b. Plaintiffs' case and evidence;

43. The 1st Plaintiff herein testified on behalf of the other Plaintiffs with his witness statement dated the 3rd November 2020 and filed in court on the same day being adopted as his evidence in chief; in addition, the Plaintiffs' list of documents dated the 3rd November 2020 and filed in court on the same date was also produced in evidence as exhibit nos. 1-9. The Plaintiffs herein content that they are the registered owners of the suit property comprising of Plot No. Mombasa/Block XII/243 & 244 MI respectively, and have produced in evidence their respective Certificate of title deeds and Certificates of search thereof evidencing the same; see Plaintiff. Exhibits nos. 2 - 5.



44. As the registered owners thereof, the Plaintiffs had been paying the due land rates to the County Government of Mombasa as evidenced by Plaintiff Exhibit - 6 being the payment receipt dated the 18th January 2018 and the details thereof. That in or about the month of October 2019, the Defendant herein, without any colour of right and/or legal justification and/or permission from the Plaintiffs trespassed onto the suit property and has constructed a road of cabro paving blocks covering almost two thirds of the entire suit property; we refer the court to Plaintiff Exhibit - 7 being the survey report by Sky Geo Expert Company Ltd dated 14th January 2020 which shows the extend of the encroachment. Upon becoming aware of the trespass and encroachment, the Plaintiffs' Advocate wrote to the Defendant a letter dated the 20th October 2019 protesting their actions and demanded the immediate cessation of the building works and the removal of the already laid cabro blocks but the letter elicited no response; a copy of the said letter was Plaintiff Exhibit Number - 8.
45. Later, in the course of following up the matter with a view of ascertaining the true position, the 1st Plaintiff learnt that on the 2nd December 2019, the Defendant wrote to the Mombasa County Government confirming that indeed, the impugned construction works pass through the suit property and proposed to remove the same as soon as possible, but to date, no effort had been made to that end; the said letter was produced as Plaintiff Exhibit - 9. The building works erected on the suit property by the Defendant had totally altered its complexion to the extent that the Plaintiffs had been unable to develop the land with resultant economic loss and damage being suffered by the Plaintiffs.
46. In view of the Defendant's express acknowledgment of trespass and encroachment on the suit property vide letter dated 2nd December 2019 and produced in court as Plaintiff Exhibit – 9. It was the Plaintiffs' submissions that they have proved their case to the standard required under the law and thus the orders sought in the Plaint ought to be granted in the circumstances.

c. Defendant's case and evidence;

47. The Defendant called 2 witnesses, DW - 1 M/s. Deborah Wilkister Nehemiah and DW – 2, Mr. Omar Shariff; and we submit that the evidence of the two witnesses was not of any use to the court in challenging the Plaintiffs' title to the suit property. DW - 1, an employee of the Defendant herein working as a constituency roads officer, Mvita Constituency stated that her work involved supervision of construction works on roads but acknowledged that they do not keep ownership records and further that, she was not in a position to know the ownership of the suit property. More importantly, DW - 1 confirmed the letter dated 2nd December 2019 (Plaintiff Exhibit No.9) that confirmed the encroachment on the suit property was indeed authored by her then boss Eng. Alex M. Machira.
48. DW - 2, Mr. Shariff, on his part testified that he was at the time when the cause of action herein arose the chairperson of Mvita constituency roads committee, and that meetings were held whence based on the needs of the residents of the area the committee resolved to improve the Ziwani access road. The witness statement and his list of documents comprising of extracts of the meeting of the Mvita constituency roads committee held on 5th June 2018 were produced in evidence. Interestingly, the aforesaid minutes of the committee meeting do not indicate that the cabro road works that were being undertaken by the Defendant were part of the agenda, and it is thus puzzling even why the Defendant sought to introduce the same in evidence, and the same was of no use whatsoever in assisting the court to determine the ownership dispute herein and it suffices to say that, this witness evidence was of no probative value whatsoever and the same ought to be totally disregarded. Therefore, the Learned Counsel asserted that DW - 1 that it was Within the knowledge of the Defendant that the impugned Road works encroach onto the suit property herein, all the other evidence adduced by the Respondent's Witnesses aforesaid



never rebutted the Plaintiffs' claim that they hold valid titles to the suit property and that the same never comprised of a road reserve as alleged, by the Defendant in her defence herein.

d. analysis of the evidence and the applicable law;

49. The Learned Counsel stated that the provisions of Article 14 of *the Constitution* provides for the protection of right to property, and stipulates that, subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property, of any description and in any part of Kenya. Indeed, the court in the case of “Evans Kafusi Mcharo v Permanent Secretary, Ministry of Roads, Public Works and Housing & another [2013] eKLR reaffirmed this position by holding that constitutional protection to property is only available to a registered owner as opposed to a mere allottee, and in the case herein, the Plaintiffs being the registered owners of the suit property ought to be accorded protection by this court. The Learned Counsel referred Court to the provision of Sections 24, 25, 26 and 28 of the *Land Registration Act*, 2019 in support of their case.
50. Further to the foregoing, the legal mantra that posited that he who alleges must prove holds true in this case, and in the case of “Daniel Toroitich Arap Moi – Versus - Mwangi Stephen Muriithi & another [2014] eKLR the court reiterated this position as ventilated in sections 3, 107, 108 and 109 of the *Evidence Act*, but in the instant case, the Defendant is alleging, without proffering any proof that the suit property comprises of a public road and it has failed to discharge her burden of Proof. In addition to the above, it was trite law, and as was held in “CMC Aviation Limited v Crusair Ltd (no. 1) [1976-80] 1 KLR 835, that pleadings in a suit do not constitute evidence, and in this case, whereas the Defendant has pleaded to the effect that the suit property comprises of a public/road land, no evidence has equally been adduced to back up the pleading.
51. The Learned Counsel stated that it needed no gainsaying that matters touching on land are very emotive in this country, as was rightly held by the court in the case of “Margaret Njeri Muiruri (Being the Administrator of the Estate of Joseph Muiruri (Deceased)) v Bank of Baroda (Kenya) Ltd [2001] eKLR 183, and it behoves upon this court to take judicial notice thereof and protect the interests of the Plaintiffs who are the genuine title holders as regards the suit property herein as the matter of sanctity of a title is in the public interest and transcends the rights of the Plaintiffs herein.

e. on merits of the orders sought;

52. According to the Learned Counsel, the substantive prayers sought by the Plaintiffs herein were for a declaratory order as well as for both permanent and mandatory injunctions, with the same being equitable in nature and issued at the discretion of the court, and we humbly submit that the Plaintiffs had demonstrated that they were deserving of the orders sought in the circumstances of this case.
- i. The law on declaratory orders;
53. It was trite law that the High Court, and indeed the Environment and Land Court as a court with the status of a High court as envisaged under *the Constitution* of Kenya, 2010, is clothed with the requisite jurisdiction to issue declaratory orders, with or without consequential reliefs. The Court of Appeal in the case of: “Attorney *General v Bala (Civil Appeal 223 of 2017)* [2023] KECA 117 (Klr) observed that, a declaratory judgement was very limited in its powers, and all it could do was clarify legal relationship or state of affairs by stating the court's opinion on it; in other words, it states the court's authoritative opinion regarding the exact nature of legal matter without requiring the parties to do anything.
54. The court further went on to hold that, it was important to bear in mind the pertinent legal requirements precedent for the satisfaction of the court before it could grant a declaratory relief, to wit, that;



- a) The court had to have jurisdiction and power to award the remedy.
 - b) The matter had to be justiciable in court.
 - c) As a declaration was a discretionary remedy, it had to be justified in the circumstances of the case.
 - d) The Plaintiff had to have locus standi to bring the suit and there had to be a real controversy for the court to resolve.
 - e) Any person whose interests might be affected by the declaration should be before court.
 - f) There had to be some ambiguity about the issue in respect of which the declaration was asked for so that the court's determination would have the effect of laying such doubts to rest; and we humbly submit that the Plaintiffs' case herein has met the above threshold for granting of a declaratory order and the same ought to issue in the circumstances.
- ii. The law on mandatory injunctions;
56. Injunctive orders barring the acts of commissions and/or omission could lawfully be granted by the court either at interlocutory stage or at the final determination of the suit depending on the obtaining circumstances. In the case of "Mohamed Ahmed Noor & 3 Others v Bora Developers Limited & 2 others [2012] eKLR, at page 6 of the decision, the court had the following to say as regards the issue:-
- "A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided of once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march 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 than was required for a prohibitory injunction." "In Suleiman v Amboseli Resort Limited (supra)" it was held on the authority of Belle Maison Ltd v Yaya Towers Limited Civil Case No. 2225 of 1992 that a mandatory injunction ought and must be invoked to aid law and that it offends public policy to flagrantly disobey the law, if it can be shown that such is the case"
57. In addition to the foregoing, and as was held by the Court of Appeal in the case of: "Mucuha v Ripples Limited [1990-1994] E.A 388, as far as it is possible, a party ought not to be allowed to retain a position of advantage that it obtained through a planned and unlawful act. Thus, it was his humble but considered submissions that, in the instant case, the Defendant, through a planned and blatantly unlawful act had trespassed and encroached onto the Plaintiffs' property whence it had constructed a cabro paved road and has deprived the Plaintiffs of its user, and in the premises, a mandatory injunction ought to and must issue to aid law and to prevent the Defendant from retaining its position of advantage that it illegally obtained, by issuance of an order requiring them;



- a) Permanently desist from either trespassing on, encroaching onto, carrying out developments on, and/ or in any other way interfering with the Plaintiffs' suit property, to wit, Mombasa/Block XII/243 MI and 244 MI respectively.
- b) Remove, at their own cost, the cabro paving blocks that have since been illegally laid on the Plaintiffs' suit property aforesaid.

B. The Written Submissions by the Defendant

58. The Defendant through the Law firm of Messrs. J.M. Rapando filed their written submissions dated 24th January, 2024. Mr. Rapando Advocate submitted that the Plaintiffs sued the Defendant for allegedly trespassing into Title Numbers Mombasa/Block XII/243 MI and Mombasa/Block XII/244 MI and constructing a cabro road on almost two thirds of the property. This was allegedly done on or around October 2019. The Defendant's case was that it denied the suit in totality based on their Statement of Defense dated 16th December, 2021, the Witness Statements of Ms. Deborah Nehemiah and Mr. Omar Sharriff and evidence adduced in court. The Defendant's case was premised on the following:
 - a. The Defendant never trespassed into the Plaintiff's properties. It only upgraded an existing road (Ziwani Access Road) to cabro standards.
 - b. The Plaintiffs had failed to demonstrate that they are entitled to the grant of the prayers sought.
58. The Learned Counsel relied on the following two (2) issues for its determination. Firstly, whether or not there existed a road known as Ziwani Access Road. The Learned Counsel responded in affirmative. He opined that there existed a road known as Ziwani Access Road. As per the Defendant's DW – 1 and DW – 2 witness statements of Ms. Deborah Nehemiah and Mr. Omar Sharriff, the road had always existed and its improvement to cabro standards was prioritized by Mvita Constituency Roads Committee, a committee created by law, on or about 5th June, 2018. The Defendant also produced before court, minutes of the meeting of the Mvita Constituency Roads Committee that prioritized the upgrading of Ziwani Access road to cabro standards. Constituency Roads Committees in Kenya were established under the provision of Section 17 (1) of the [Kenya Roads Board Act](#), 1999 (As amended by the Finance Act 2009). Their role as per Section 17(4) of the Act were to prioritize roads in their Constituency for construction.
59. Secondly, on whether the Plaintiffs entitled to grant of the prayers sought and whether the Plaintiffs were entitled to a declaration that the Defendant's acts were tantamount to illegal trespass and encroachment on private property and have infringed the Plaintiffs' right to own property under [the Constitution](#). The Learned Counsel submitted that the Plaintiffs were not entitled to this prayer as the alleged act of trespass had not been proven. His contention was that as per the provision of Section 107 of the [Evidence Act](#), Cap. 80 whoever desired 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. The Plaintiffs never availed any evidence to the effect that the Defendant trespassed into the suit properties. The Plaintiffs relied on a letter (Plaintiff exhibit No. 9) which only sought a verification of the existence of the suit properties and not acknowledgment of the acts of trespass.
60. According to the Learned Counsel, the Plaintiffs further did not produce any survey report to demonstrate any trespass whatsoever or at all. The Plaintiffs never demonstrated the allegation of trespass and encroachment and the infringement of their right to own property under [the Constitution](#) as required under provision of Section 107 of the [Evidence Act](#), Cap. 80.



61. On whether the Plaintiffs were entitled to a permanent injunction barring the Defendant from trespassing, encroaching or carrying developments on the Plaintiffs' properties. The Learned Counsel's contention was that the Plaintiffs were not entitled to the order of permanent injunction sought. The Plaintiffs allege that the Defendant trespassed into Title Numbers Mombasa/Block XII/243 MI and Mombasa/Block XII/244 MI and constructed a cabro road thereon. It was stated in the case of "Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib 2018] eKLR", that for a permanent injunction to be granted, evidence has to be tendered in support of the claim as a permanent injunction fully determines the rights of the parties. As demonstrated in paragraphs 9 and 10 the Defendant submits that the Plaintiffs never proved their claim against the Defendant to warrant grant of the order of permanent injunction.
62. The Learned Counsel further on whether the Plaintiffs were entitled to the prayer of an order of a permanent mandatory injunction, submitted that the Plaintiffs have not met the threshold for grant of the order of the permanent mandatory injunction sought. The permanent mandatory injunction as sought by the Plaintiffs sought removal/destruction of the access road. The Plaintiffs never demonstrated any special circumstances to warrant removal of the access road as stated in the case of: "Malier Unissa Karim v Edward Oluoch Odumbe [2015] eKLR".
63. Issuing of the permanent mandatory injunction in this case would see the destruction of Ziwani Access road, which was improved to cabro standards with the utilization of public funds. The Plaintiffs had failed to demonstrate how the access road had encroached into their properties so as to warrant its removal/destruction. On the other hand, the Defendant had demonstrated how the decision to improve the road was reached. The Defendant had also demonstrated that Ziwani Access Road was an already existing road and not a creation of the Defendant. Its destruction would result in a loss of public funds therefore to issue a permanent mandatory injunction for the destruction of the road, whereas it had been demonstrated that it was already existing road and not the construction of a new road.
64. Therefore, the Learned Counsel submitted that the Plaintiffs had not demonstrated any special circumstances for the grant of the order of permanent mandatory injunction. Thus, they were not entitled to the grant of the order sought.
65. In conclusion, the Learned Counsel urged to find that the Plaintiffs had not proved their case. Hence, the same ought to be dismissed with costs.

VII. Analysis and Determination

58. I have keenly assessed the filed pleadings by all the 1st, 2nd, 3rd and 4th Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
59. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
 - a. Whether the 1st, 2nd, 3rd and 4th Plaintiffs has proven that they have legal right to the suit property
 - b. Whether the Defendant has trespassed on the suit property
 - c. Whether the plaintiff has proved that it is entitled to orders of permanent and mandatory injunction against the Defendant as prayed in the plaint
 - d. Who bears the costs of the suit?



Issue No. a). Whether the 1st, 2nd, 3rd and 4th Plaintiffs have proven that they have legal right to the suit property

58. Under this sub – title, the Honourable Court decipheres that the main substratum in this matter is based on the claim of legal ownership to the suit property. Flowing from that, whether there were any acts of encroachment and/or trespass and the consequential damages thereof. It is trite law that for a person to prove legal ownership of land they must bear a prima facie conclusive evidence in form of documentation for instance a Certificate of Title. The proprietor and/or absolute owner ought to have it registered in his/her name. have a title for one to have acquired indefeasible title, interest and title on the land as vested in law. Ideally, the legal effect and efficacy of registration of the documentation is provided for under the provision of Section 24 of the [Land Registration Act](#), No. 3 of 2012 which 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.”

58. 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.”

58. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the [Land Registration Act](#) which provides; -

“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 of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a. on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

58. It will be seen from the provision of Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the [Land Registration Act](#) gives the registered proprietor absolute rights over the registered land, Section 26 gives sanctity to title and makes provisions of when such title can be cancelled or revoked.



59. To cap it up, it is evident that the right to own and acquire property in Kenya is premised under Article 40 of *the Constitution* of Kenya, 2010. The said Article 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....”

58. The Plaintiffs have produced a title deed issued in the name of the Plaintiffs dated 5th October, 2020 on Plot No. MSA/Block XII serial number 3119315 to wit, Mombasa/Block XII/244 MI and Mombasa Block XII/243 MI each measuring approximately 0.0166Hectares which the court is satisfied that it is sufficient prove of their ownership of land. To this moment, the said title has not been challenged by any one, including the Defendant herein. Therefore, it then remains that it is a valid document. In conclusion, the Court finds that the Plaintiff is the bona fide owner of this suit property.

59. The Defendant in their defence only hopped on the fact that a road existed onto the suit land. Arising from this fact and following the resolution of a meeting held by the Mvita Constituency road Committee, to upgrade the road they undertook place cabro works on it. There is no empirical evidence produced indicating the efforts made to compulsorily acquire the land for public use as it is provided for under the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010 and Sections 101 to 119 of the *Land Act*, No. 6 of 2012. Clearly, all the activities undertaken tantamount to having acquired the land irregularly and illegally in total contravention of the provision of Article 40 (6) of *the Constitution* which states thus:

“the rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

58. For these reasons, therefore, the Honourable Court discern that the Defendant acquired the land by the Plaintiffs for what was ostensibly a proper public use but without adhering to the land down procedure. The construction of the cabro works road stands on sand as it was being undertaken on



land that was unlawfully and illegally acquired on the pretext that the road after all always existed. Two wrongs never make a right. The Defendant ought to have corrected this before embarking on the construction works. The Plaintiffs' case must succeed.

IssueNo. b). Whether the Defendant has trespassed on the suit property

58. Under this sub title, having demonstrated that the Plaintiffs were the absolute and legal proprietors of the suit land, the Honourable Court will examine whether the Defendant has trespassed into the Plaintiffs property. The Plaintiffs case was that in or about the month of October 2019, the Defendant herein, without any colour of right, legal justification and/or permission from the Plaintiffs, trespassed onto the suit property and constructed thereon a road made of cabro paving blocks covering almost thirds of the entire suit property. The suit property does not comprise a public utility by virtue of the fact that it is a sub-division hived off Land Parcel No. MN/X11/13 as proved by the commissioner of Lands Ref. 74073/9 dated the 12th September 1991, the site was surveyed and authenticated on 12th June 1992 and respective title deeds issued on 5th June 1997. In addition to the foregoing and to the best of the Plaintiffs knowledge, no notices for the compulsory acquisition of the suit property have been issued by either the Defendant or through the National Land Commission, as it is the practice, to warrant the taking over and carrying on developments thereon.
59. Upon becoming aware of the Defendant's trespass and encroachment on the suit property, the Plaintiffs, through their then advocate, wrote to the Defendant on the 30th October, 2019 protesting over the same and demanded for both cessation of the building works and the removal of the paved cabro blocks already laid thereon; but which letter has failed to elicit any response to date. In the meantime, the Plaintiffs have come into possession of a letter dated the 2nd December, 2019 and in which the Defendant advised the County Government of Mombasa that the impugned paving works indeed passed through the suit property and that, consequently, they propose to relocate the paving blocks to another access road, but which is yet to be done to date; the Plaintiff shall seek to rely on the letter aforesaid for its full import and purport.
60. The provision of Section 3 (1) of the Trespass Act, Cap 294 provides that:-
- “ 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.”
58. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. I have examined the said letter (Plaintiff Exhibit 9) and indeed PW - 1 told the court that he saw a bill board indicating that Kenya Rural Authority (KURA) undertaking the construction of the cabro on part of his property. The witness went to his Counsel then Swaleh and Company Advocates and they did a demand letter dated 30th October, 2019 marked as Exhibit 8. The letter was received in October 2019 he asked them to remove the cabro works. The Engineer in charge told him he had written to County Government of Mombasa to produce security – letter dated 2nd December, 2019 addressed to the Chief Officer – KURA wrote asking the County Government to assist them relocate the plot to access road the letter is copied to M.P. Mvita. They had not given any reason why they could not comply. He had not taken possession. The plots were vacant but 2/3 of it were covered by Cabro works. When referred to Document No. 9 dated 2nd December, 2019 by KURA – paragraph 2 stated that “Kindly offer us an officer from your office to verify the same and consequently facilitate the relocation of paving block”. With reference to the Drawing/ Sketch Map – showing the Cabro works and the space occupied by the Cabro works i.e. “Topo Cadastral and Boundary Survey” for Plots Nos. MI/Block XII/243 and MI/Block XII/244 Mombasa County. Not just on white area.



59. According to PW - 1 with reference to the letter of 2nd December, 2019 by KURA – heading was removal of the Cabro Paving on Plots 244 and 233. By their own admission they agreed that they had invaded and they would have wished to relocate the paving blocks – from map – the plots were not just on the white area only but the whole squared area. His plot did not overlap to any other plot.
60. The Defendant on the other hand argued that it was a stranger to the contents of paragraph 7 of the Plaintiff in respect of the suit property not being a public utility due to the sub – division from Land Parcel No. MN/XIII/13. The Defendant denied the contents of paragraph 8 of the Plaintiff to the need for notices for compulsory acquisition by the National Land Commission or the Defendant to warrant taking over of the suit property. The Letter allegedly confirming that the paving works passes through the suit property and the request proposal to relocate the paving blocks to another access road. The Defendant denied the contents of paragraph 11 of the Plaintiff that the building works on the said property prevents the Plaintiffs from developing consequently causing economic loss and damage. The works carried out consisted of improvements on an already existing road as prioritized by relevant stakeholders. The Plaintiffs are not entitled to the order sought to stop trespass by the Defendant and removal of the paved cabro works at the Defendant’s cost. There was no demand and notice to sue served to them.
61. DW - 1 confirmed that indeed the Plaintiff – Mr. Jamal Agil Said; was known to her, he had gone to their offices to complain that a road had been constructed on his land. He was aware of the letter date 2nd December, 2019 by KURA by Eng. Alex Machira to the Chief Officer Transport Infrastructure and Public Works County Government of Mombasa. She confirmed that Engineer Alex Machira was her boss. When referred to the 2nd Paragraph of the letter dated 2nd December, 2019. He wanted to know whether the road was within the County Government or not.
62. DW - 2 did not shade any light on the status of the suit property as he said that he was in a technical team. With reference to the letter dated 2nd December, 2019. He did not remember of the issues of Plots Nos. 243 and 244 was discussed, he did not know the owners of these plots.
63. DW - 2 stated that he had nothing to identify himself. He was a political appointee. He was the chairperson of Mvita Constituency Roads Committee. Anybody can be appointed Chairman. They never considered the experience of a person. The secretary KENHA. All the roads they would construct were areas informal roads. They never dealt with the main road. These were also political consideration. It was the KENHA people to decide where the road would be constructed. He knew Jamal Agil Said.
64. The court is unable to agree with the Defendant’s contention that they did not trespass onto the Plaintiffs’ land as the same has been confirmed by DW 1 who had inner depth of the contention of the said claim. The material on record further shows that the Defendant decided to use the suit property to construct cabro which has been confirmed by the Defendant’s first witness. In this premises, the Court finds and holds that the Defendant’s entry into the suit property was not with the consent of the Plaintiffs as there was no form of communication to alert the Plaintiffs of the said construction. Hence the allegation of trespass has been proved on a balance of probabilities.

Issue No. c). Whether the Plaintiffs has proved that it is entitled to orders of permanent and mandatory injunction against the Defendant as prayed in the plaint

58. Under this Sub heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaintiff, herein. On whether the Plaintiffs are entitled to be granted the Permanent and mandatory injunction sought in the plaint, there is no doubt that the Defendant did enter upon the suit property and its actions interfered with the Plaintiffs use and occupation of the suit property. The Plaintiffs seek a permanent injunction, barring the Defendant either by herself, her servants, employees, authorized



agents and/or any other person (s) acting under her directions from trespassing on, encroaching onto, carrying out developments and/or in any other way interfering with the Plaintiffs' suit property to wit, Mombasa/BlockXII/243 MI and Mombasa/BlockX11/244 MI respectively and a permanent mandatory injunction directing the Defendant to remove, at their own cost, the cabro paving blocks since illegally laid on the Plaintiff's suit property, to wit, Mombasa/BlockX11/243 MI and Mombasa/BlockXII/244 MI respectively.

59. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.
60. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case. Certainly, that would not be equity, fair and just at all to the other party.
61. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "Giella v Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes v Sandham [1970] 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-
- “Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.
58. With all due respect and arising from the surrounding facts and inferences, the Honourable Court has already opined and determined in the previous issue that the Defendant has indeed trespassed the suit property and therefore the prayers are granted as prayed.

IssueNo. d). Who bears the costs of the suit

58. 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 v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers v 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 v 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.



59. In the case of: “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products v Alexander Films (SA) (PTY) Limited 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 v Gibbon & Co., 1913 ADD 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.”

58. In the present case, the Plaintiffs have been able to establish their case as pleaded from the filed pleadings therefore, I proceed to award them the costs of this suit.

VIII. Conclusion and Disposition

58. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have established their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

- a. That Judgment be and is hereby entered in favour of the 1st, 2nd, 3rd and 4th Plaintiffs as pleaded in the Plaint dated 3rd November, 2020.
- b. That a declaration be and is hereby issued that the Defendant’s acts of omission and commission aforesaid hereinabove are tantamount to illegal trespass and encroachment on private property and have infringed the 1st, 2nd, 3rd and 4th Plaintiffs’ right to own property as enshrined under *the Constitution* of Kenya, 2010.
- c. That a permanent injunction be and is hereby issued, barring the Defendant either by herself, her servants, employees, authorized agents and/or any other person (s) acting under her directions from trespassing on, encroaching onto, carrying out developments and/or in any other way interfering with the 1st, 2nd, 3rd and 4th Plaintiffs’ suit property to wit, Mombasa/Block XII/243 MI and Mombasa/Block X11/244 MI respectively.
- d. That a permanent mandatory injunction be and is hereby issued directing the Defendant to remove, at their own cost, the cabro paving blocks since they are illegally laid on the Plaintiff’s suit property, to wit, Mombasa/Block XI1/243 MI and Mombasa/Block XII/244 MI respectively.
- e. That the costs of this suit vide the Plaint dated 3rd November, 2020 are awarded to the 1st, 2nd, 3rd and 4th Plaintiffs to be borne by the Defendant.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF JUNE 2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of:-



a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. Chesaro Advocate holding brief for Mr. Rapando Advocate for the Plaintiffs.

c. Mr. Oloo Advocate for the Defendant.

