**African Gas and Oil Limited v Kahia Transporters Limited & 6 others; County Government of Mombasa & 2 others (Interested Parties) (Environment & Land Case E012 & E004 of 2023 (Consolidated)) [2024] KEELC 14186 (KLR) (7 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14186 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE E012 & E004 OF 2023 (CONSOLIDATED)**

**LL NAIKUNI, J**

**OCTOBER 7, 2024**

**BETWEEN**

**AFRICAN GAS AND OIL LIMITED ..... PLAINTIFF**

**AND**

**KAHIA TRANSPORTERS LIMITED ..... 1ST DEFENDANT**

**CABINET SECRETARY MINISTRY OF ENVIRONMENT AND FORESTRY ..... 2ND DEFENDANT**

**CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... 3RD DEFENDANT**

**KENYA FOREST SERVICE ..... 4TH DEFENDANT**

**DISTRICT LAND REGISTRAR, MOMBASA ..... 5TH DEFENDANT**

**CHIEF LAND REGISTRAR ..... 6TH DEFENDANT**

**ATTORNEY GENERAL ..... 7TH DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... INTERESTED PARTY**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**MKUPE BEACH MANAGEMENT UNIT (BMU) ..... INTERESTED PARTY**

**RULING**

## I. Introduction

1. This Honourable is tasked with the hearing and determination of two (2) Notice of Motion applications before it. The Plaintiff/Applicant herein, African Gas and Oil Limited moved this Honourable Court for the hearing and determination of their Notice of Motion application dated 31st August, 2023 brought under Sections 1,1A of the Civil Procedure Rules, Order 41 of the Civil Procedure Rules, Sections 34, 56 and 77 and the Third Schedule of the *Forest Conservation and Management Act*, 2016, Articles 62 of *the Constitution* of Kenya, 2010. The 1st Defendant/ Applicant herein also, moved this Honorable Court for the hearing and determination of their Notice of Motion application dated 18th September, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules, 2010, 2013.

2. Upon service of the applications to the Defendants, and the 2nd to 7th Defendants tendered their response to the Notice of Motion application dated 31st August, 2023 via a Replying Affidavit dated 30th October, 2023.

3. It is instructive to note for ease of reference that this matter is directly connected to other matters which have adverse effect to this case. These are "Constitution Petition Numbers 51, 52, 53, 54 and 55 of 2019 – "African Gas & Oil Company Limited & 4 others – Versus – Kahia Transporters Limited (Consolidated)" whereby this Honourable Court delivered its Judgement on 14th November, 2022. Indeed, I take judicial notice that supposedly the matter is pending at the appellate and/or execution stage. The other matters are "Environment & Land Court numbers E004 of 2023 – Miritini Free Ports Limited – Versus – Kahia Transporters Limited & 6 Others – Ex – Parte Country Government of Mombasa 2 Others; "Environment & Land Court numbers E012 of 2023 – Miritini Free Ports Limited – Versus – Kahia Transporters Limited & 6 Others – Ex – Parte Country Government of Mombasa 2 Others; "Environment & Land Court – Constitution Petition numbers E015 of 2023 – Ujamaa Centre & Commission for Human Rights – Versus – Sahal Ahmed Dahir & 7 Others – Ex – Parte Country Government of Mombasa 2 Others.

4. However, these matters have not been consolidated though being handled under one Court for avoidable of any confusion.

## II. The Notice of Motion application dated 31st August, 2023

5. The Plaintiff/Applicant sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue temporary injunction ·restraining the 1st Defendant/Respondent by itself, servants, agents, employees, proxies or any other person acting on its behalf from interfering, blocking, denying, impeding, preventing, obstructing, hampering, fettering or in any other manner whatsoever, restraining or limiting the Applicant's access to the land known as L.R.5169/ VI/MN/ [Title No CR. 70862] which encompasses the Kilindini Bay Mangrove Area, for

purposes of utilizing the land pursuant to the Licenses dated 21st March 2012, 7th October 2019, 25th January 2021 and 8th June 2023.

d. Spent.

e. That pending the hearing and determination of this suit, the Honourable Court be pleased to issue a temporary injunction restraining the 1st Respondent by itself, servants, agents, employees, proxies or any other person acting on its behalf from interfering with the Applicant's use and enjoyment of the land known as 5169/VI/MN/ [Title No CR. 70862] which encompasses the licensed area being a portion of the Kilindini Bay Mangrove Area.

f. That the orders herein above be executed by the Officer in Charge of the Station [OCS] Jomvu Police Station..

g. That the Respondents be condemned to pay the costs of this application.

6. The application by the Plaintiff herein was premised on the grounds, testimonial facts and averments made out under the 18th Paragraphed Supporting Affidavit of Joseph Mwela, the Legal Officer of the Plaintiff/Applicant sworn and dated 31st August, 2023 averred that:

i. On 21st March 2012, the 4th Respondent issued the Applicant with a Special Use License over a portion of Kilindini Bay Mangrove Area, the suit propertyherein for a period of thirty (30)years permitting the Applicant to out activities as specified in the First Schedule of the License inter alia:

> "…….construction, installation, operation, inspection, maintenance, repair and replacement of the Petroleum Products pipeline, construction of the storage tanks, jetty and other gas off-loading structure, and access road grading and maintenance within the Forest area at the locations agreed between the parties. (Annexed and marked as "JM – 1" is a copy of the Special use License)

ii. Special Use License was issued pursuant to a determination by the 4th Respondent that the primary purposes of the activities allowed were in the public interest.

iii. Over the course of period of time, the Applicant requested for an extension of the licensed areas within the forest which requests were granted by the 4th Respondent and Addendums Special Use Licenses were executed on 7th October 2019, 25th January 2021 and 8th June 2023.(Annexed and marked as "JM2 – "a" – "d" were copies of the Addendums Special Use Licenses).

iv. The Applicant has carried out its activities over the portion of the Kilindini Bay Mangrove Area pursuant to the Licenses and has submitted all due payments thereunder to the 4th Respondent.

v. The 4th Respondent represented to the Applicant and other members of the public that the Area under the Special Use License as a part of the Mangrove area, was a public forest area.

vi. The suit property as part of the Coastal Mangrove Swamp Forest Reserve having been so declared vide the *Proclamation No 44 of 1932* as a forest area and as confirmed by the 4th Respondent under Clause 6 of the License that the licensed property is a state forest area and in the Third Schedule of the License.(Annexed and marked as JM 3 a copy of the *Proclamation No 44 of 1932*).

vii. Vide the *Legal Notice No 174 of 1964* it was declared by the then Minister for Natural Resources that central forests situated in Mombasa, Kwale, Lamu and Kilifi Districts are

public forests. From the foregoing the Kilindini Mangrove Bay Area as comprised under Land Reference Number 5169/VI/MN/ [Title No CR.70862] is a mangrove forest reserve. (Annexed and marked as "JM - 3A" was a copy of the *Legal Notice No 174 of 1964*).

viii. The 1st Respondent was issued with a lease over the Kilindini Bay Mangrove Area now referenced as L5169/VI/MN/[Title No CR.70862] to hold the property as a Lessee for a period of ninety nine (99) years. (Annexed and marked as "JM – 4" are a copy of the Certificate of Lease and Recent Certificate of Postal Search)

ix. The suit property is a public forest land whose administration and management is provided under the Forest Management and' Conservation Act 2016. The registration of suit property as a public forest has never been revoked pursuant to the provisions of Section 34 of the Act.

x. Further, 5169/VI/MN/ [Title No CR. 70862] being a public forest land, is not available for alienation and reallocation to the 1st Respondent or to any entity to hold the interest of the same for private purposes without the procedures being followed concerning the deregistration of public forests and the subsequent allocation of public land.

xi. The 1st Respondent without any colour of right, had proceeded to deny the Applicant access and entry on to the suit property for purposes of carrying out its licensed activities on the public forest land.

xii. The 1st Respondent having accepted a lease over a public land, which was available for use by the Applicant and other members of the public cannot purport to deny the Applicant and other Kenyans the use of the suit property.

xiii. The 1st Respondent's denial to grant access to the Applicant jeopardizes the Applicant's commercial interests. The Applicant are a company which has employed many Kenyans on its payroll and relies on the operations on the suit property to generate income. Unless, an injunction was issued and the Applicant is granted the right of access, there are a likelihood that the Applicant would be forced to close its doors to its employees.

xiv. This application met the threshold for grant of a temporary injunction.

xv. The balance of convenience tilted in favour of the Applicant who for a long period of time had been using the public forest land prior to the alienation and reallocation to the 1st Respondent.

xvi. No prejudice shall be occasioned on the part of the Respondents and it is the interest of justice that the application be allowed.

**III. Response by the Defendant to the Notice of Motion application dated 31st August, 2023**

7. The 2nd to 7th Defendant through the County Forest Conservator-Mombasa the 4th Defendant, Benjamin Muindi, opposed the Notice of Motion application dated 31st August, 2023 through a 13th Paragraphed Replying Affidavit sworn on 30th October, 2023 where he deposed that:-

i. Theproperty, LR 5169/VI/MN (Title No CR 70862) is part of the Coastal Mangrove Swamp having been gazetted via the *Proclamation No.44 of 1932* as a forest area. Attached in the affidavit and marked as "BM – 1" annexed hereto.

ii. Further to the above proclamation, it was declared by the then Minister for Natural Resources that Central Forests situated in Mombasa, Kwale, Lamu and Kilifi Districts are public forest vide *Legal Notice No.174 of 1964*. Attached in the affidavit and marked as BM-2.

iii. Since the suit property was a public forest, its management is provided for under the Forest Management and Conservation Act 2016 particularly Section 34 and its status has never been revoked.

iv. On 25th June, 2015, Kenya Forest Service and Miritini Freeport Limited entered into a special use license agreement and submitted all due payments. Attached in the affidavit and marked as "BM – 3".

v. An area of approximately 54.534 Ha was leased to Miritini Freeport Limited for an agreed term of 20 years from the date of issue.

vi. The suit property being a public forest is not available for alienation and re-allocation to any individual to hold interest of the same for private purposes.

vii. There was no record available altering the gazetted mangrove area for tilting or creating a parcel for another use.

viii. The Certificate of Title over the land known as 5169/VI/MN (Title No.CR 70862) issued to the 1t respondent is thus irregular.

ix. The 1st Respondent leasehold holding of the suit property which is a mangrove public forest is in contravention of the *Forest Conservation and Management Act*.

x. In the interest of justice the application dated 31st August, 2023 should be allowed.

**IV. The Notice of Motion application dated 18th September, 2023**

8. The 1st Defendant sought for the following orders:-

a. Spent.

b. Spent.

c. Spent.

d. Spent.

e. That pending the hearing and determination of the suit, there be a stay of execution of the ex parte orders issued on 6th September 2023 by the Honourable Justice L. Naikuni.

f. That pending the hearing and determination of the suit, this Honourable Court be pleased to set aside, vary and/or review the Orders issued on 6th September 2023.

g. That pending the hearing and determination of the suit, this Honourable Court be pleased and/or employees or any other person from interfering with the Defendant/Applicant's quiet eviction, trespass or interference with the Plaintiff/Applicant's quiet and uninterrupted possession of the property known as MN/VI/5169.

h. That this Honourable be pleased to issue any other order or relief that the Court deems just, fair and expedient.

9. The application by the 1st Defendant herein was premised on the grounds, testimonial facts and averments made out under the 23 Paragraphed Supporting Affidavit of Osman Ahmed Kahia sworn and dated 18th September, 2023. The director of the 1st Respondent herein averred that:

a. The Respondent instituted the instant suit vide the Plaint dated 31st August 2023 together with an Application of even date seeking temporary injunctive orders against the Applicant from limiting its ingress and use of Parcel of Land known as MN/VI/5169(Title No.CR. 70862).

b. This Honourable Court issued an Order dated 6th September 2023 restraining the 1st Defendant/Applicant from denying the Plaintiff/Respondent entry and use of the suit property. Annexed in the affidavit and marked OAK-1 is the copy of the ex parte Order dated 6th September 2023).

c. The said order is extremely oppressive to the extent that it permits the Plaintiff/Respondent- as a third party, unfettered use, access and enjoyment of our property.

d. It was further more absurd owing to the fact the said Plaintiff/Respondent has admitted that the Defendant/Applicant has a title over the said property and has produced an official search in that regard. Annexed in the affidavit and marked as "OAK – 2" was a copy of the Applicant's title dated 14th December 2017 and recent official search dated 18th August 2023).

e. Despite this direct admission that the Defendant/Applicant was the lawfully registered proprietor of the subject property, the Plaintiff/Respondent failed to disclose certain material facts which had it so disclosed, would have enable this Honourable court to reach an informed decision.

f. The Plaintiff/Respondent misguided this Honourable Court to issue orders that are in direct conflict with its order in a different suit between the Plaintiff/Respondent and Defendant/ Applicant being "Mombasa Consolidated ELC Constitution Petitions No. 51, 52, 53, 54 & 55 of 2029; African Gas and Oil Co. Limited & 4 Others – Versus - National Land Commission and Kahia Transporters Limited.

g. The Plaintiff/Respondent failed to disclose that vide the Judgement delivered on 14th November 2022 by Hon. Justice Naikuni at page 65 in "Mombasa Consolidated ELC Petitions No.51, 52, 53, 54 & 55 of 2029; African Gas and Oil Co. Limited & 4 Others – Versus - National Land Commission and Kahia Transporters Limited, the Honourable Court concluded that the suit property is found along "the high-water mark area" and thus, it is a private property belonging to the Applicant who is the absolute indefeasible owner with a 99-year leasehold interests spanning from 1st January 1999 which was legally acquired from the 1st Interested Party. Annexed in the affidavit and marked as "OAK – 3" was the copy of the Judgement of Hon. Justice Naikuni dated 14th November 2022).

h. Before arriving to the conclusion that suit property is found above the high-water mark area as captured in the said Judgement, the Court undertook a "Locus in Quo" (Site visit) on 19th September 2022 in presence of the Respondent's Advocate one Mr. Ogendo and its two surveyors Mr. John Musyoka and Mr. Sammy Mukela.

i. The site visit was also attended by the 2nd Interested Party was also represented at the site visit by inter alia, Mr. Solomon Mbuthia and Mr. Brian Ikol-Legal Representatives, Mr. Sospeter Ohanga-Deputy Director of Survey, Mr. Paddy Odera-Land Surveyor, Mr. Mariko Karomoi. The Government Survey Office-Coast Department was also represented by Mr. Sammy Wambua Juma and Mr. Abbas Walid.

j. The Plaintiff/Respondent failed to disclose that this Honourable Court had earlier made a finding that the suit property is located above the high-water mark and thus not subject to the jurisdiction of the 5th Respondent herein.

k. In the wake of this concrete determination by this Honourable Court, the Plaintiff/ Respondent knew that the 5th Respondent had no jurisdiction over the suit property and therefore could not be able to grant the purported Special Use License to it.

l. It was the Applicant's case that the said orders were ultimately acquired through material non - disclosure and deliberate concealment of crucial facts by the Respondents so as to unwittingly cause this Honourable Court to issue the said orders.

m. It was also apparent that the actions of the Respondent to mislead this court was mala fide and the said order was procured in bad faith so as to steal a match from the Applicant and shackle its property rights without any plausible reason and/or justification in law.

n. It was crucial to highlight that upon acquiring the order on 6th September 2023, the 1st Respondent invaded the Applicant's property on diverse dates between 11th -13th September 2023 and attempted to eject the Applicant from its property even though this Court did not intend its orders to be construed as eviction orders. It was needless to buttress that there was chaos that ensued on account of the 1st Respondent's failed attempt. The ensuing chaos warranted the intervention of the relevant security agencies.

o. There was no doubt that the Plaintiff/Respondent would once again attempt to invade the Applicant's property under the guise of enforcing the impugned order. It was therefore necessary that the said orders be set aside so as to avert any prejudice to the Applicant.

p. The impact of the impugned orders was that they infringe on the Applicant's right to peacefully enjoy and occupy its property MN/VI/5169.

q. The Honourable Court had unfettered discretion to set aside ex parte orders where it was reasonably founded that they were obtained with material non-disclosure of facts in order to mislead Court and benefit from its orders. The Plaintiff/Respondent's failure to present accurate facts before Court was to mislead it and therefore Orders acquired through such means should not be allowed to stand.

r. This Application was brought in good faith and in the event that the said ex parte Orders were set aside and/or vary, the Respondent would not be prejudiced in any way whatsoever.

s. Unless the Honourable Court sets aside and/or vary the ex parte order dated 6th September 2023 that was obtained with material non-disclosure of proper facts in this matter, the Applicant's constitutional rights to property protected under the provision Article 40 of *the Constitution* would have been abrogated.

t. It was in the interest of justice that the orders sought herein be granted as prayed.

**V. Submissions**

10. On 15th January, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 31st August, 2023 and another dated 18th September, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 18th January, 2024 a ruling date was reserved on 22nd April, 2024 by Court accordingly. Unfortunately, this could not be realized due to unavoidable circumstances thereof.

**A. The Written Submissions by the Plaintiff/Applicant.**

11. The Plaintiff/Applicant through the Law firm of Messrs. Marende & Nyaundi Associates Advocate filed their submissions dated 19th October, 2023. Mr. Nyaundi Advocate for the Plaintiff commenced stating that the on 31st August, 2023, the Applicant filed a Notice of Motion Application supported by an Affidavit sworn by Joseph Mwela through which the Applicant sought an interim relief in form of an injunction restraining the 1st Respondent from interfering, blocking, denying, impeding, preventing, obstructing, hampering, fettering or in any other manner whatsoever, restraining or limiting the Applicant's access to the land known as L.R.5169/VI/MN/ [Title No CR. 70862] (the Suit Property) which encompasses the Kilindini Bay Mangrove Area, for purposes of utilizing the land pursuant to the Licenses dated 21st March 2012, 7th October 2019, 25th January 2021 and 8th June 2023. Additionally, the Applicant sought an order of temporary injunction restraining the 1st Respondent by itself, servants, agents,employees, proxies or any other person acting on its behalf from interfering with CR.70862] which encompasses the licensed area being a portion of the Kilindini Bay Mangrove Area. The Applicant relies on the grounds adduced in the body of the application, the Supporting Affidavit sworn on 31st August 2023,the Witness Affidavit sworn by Ignatius Seko on 24th August 2023 and the Supplementary Affidavit sworn on 17th October 2023 in urging the Court to allow the application and grant the orders sought.

12. On the background, the Learned Counsel informed Court that on or around 25th May, 2015, the Applicant was granted a Special Use License for a period of twenty (20) years over a portion of Kilindini Bay Mangrove Area located at Mombasa Forest Zone (Hereinafter referred to as the 'Suit Property') by the 4th Respondent, Kenya Forest Service. The objective and purpose of the special license issued to the licensee was for the purposes of permitting the Plaintiff to have wayleave and license to construct a Freeport consisting of three berths, modern container terminal, a motor vehicle terminal and exclusive free trade zone at Kilindini Bay Mangrove Area.The issuance of the Special Use license was premised on the ground that the principal purposes of the undertakings allowed were subject to Public Interest. The Applicant submits that Clause 6 of the said License provided that the suit property is a state forest and therefore it is immaterial to grant the Plaintiff the exclusive possession of the forest area or any part thereof. Similarly, the 4th Respondent represented to the Applicant and members of the public that the area under the license was part of the coastal mangrove forest gazetted by *Proclamation No 44 of 1932*.

13. From early year 2023 to date, the Applicant was denied access and/or entry onto the suit property and the subsequent utilization of the property by the 1st Respondent who has represented to it that it is the registered proprietor of a title over the suit property. The Applicant filed the suit to challenge the legality of the 1st Respondent's title to the suit land on grounds that the property is a mangrove forest area which is not available for alienation and allocation to any private entity, unless the procedures contemplated under the *Forest Conservation and Management Act* 2016 and/or Forest Act Cap 385 have been complied.

14. On the issue for determination, the Learned Counsel submitted that they opined that the following issues arise for determination before this Honourable Court:-

    a. Whether the Application meets the threshold for granting the Interim Injunction orders sought against the Defendants thereof.

    b. Who shall bear the Cost of the Application?

15. On the analysis of the issues, the Learned Counsel submitted that the principles for a grant of temporary injunctions were well set out by the court of Appeal in the famous case of "Giella – Versus

-Cassman Brown (1973) EA 385" where the court has to consider the following questions before granting injunctive relief:-

i. Whether the applicant has established a prima facie case with a high probability of success.

ii. Whether the applicant shall suffer irreparable injury which cannot be compensated by damages.

iii. If the court is in doubt then it can decide the application on a balance of convenience.

16. This position was reiterated in the case of "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others *CA No. 77 of 2012* (2014) eKLR", where the Court of Appeal held that:-

> "in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.

17. On whether the Applicant had established a prima facie case with high probability of success, the Learned Counsel submitted that the Applicant has established a prima facie case to warrant the grant of an order of temporary injunction. While the 1st Respondent holds a certificate of title over the property, the Applicant submits that this title was obtained illegally, un-procedurally and through fraud and/or misrepresentation. In order to determine whether there exists a prima facie case, it is imperative to establish whether the 1st Respondent have a good title to Parcel bestknown as L.R 5169/VI/MN [Title No CR. 70862] which encompasses the Kilindini Bay Mangrove Area (hereinafter referred to as the Suit Property).

18. The suit property was part of the Coastal Mangrove Swamp and having been declared as such via the *Proclamation No 44 of 1932*, is a public forest area. The Applicant herein holds a Special Use License dated 25th June 2015 that runs for a period of twenty (20) years having being granted by the 4th Respondent-a state Corporation, responsible for the administration and management of the forests pursuant to the *Forest Conservation and Management Act* 2016. Section 77(a) of the Act as read with the Third Schedule categorizes mangrove swamps as forest reserves and deems them to be public forests incapable and unavailable for alienation. Vide the *Legal Notice No. 174 of 1964*, it was declared by the then Minister for Natural Resources in consultation with the then National Forest Authority, that Central forests situated in Mombasa, Kwale, Lamu and Kilifi Districts are public forests which comprises Land Reference Number 5169/VI/MN [Title No CR.70862] as mangrove forest reserve.

19. The suit property being a public forest area, it is non-typical that the 1st Respondent herein was issued with a Certificate of Title over L.R 5169/VI/MN [Title No CR.70862] which title encompasses the suit property to hold the same as a lessee for a period of ninety nine (99) years. Once the suit property herein had been declared as a forest land, it was no longer available for allocation to the 1st Defendant unless it had ceased to be a public forest land through the process contemplated under the provision of Section 34 of the *Forest Conservation and Management Act*.From the foregoing, the Learned Counsel submitted that it is apparent that the 1st Respondent herein does not hold good title to the suit property in light of the fact that the subject parcel was a public forest and was never available

for reallocation. Further, there has been no Gazette Notice Published by the 4th Respondent through which the registration of the Suit property as a public forest was de-gazetted.

20. The Applicant is guided by the decision of the Court in the case of "Mrao Limited – Versus - First American Bank Limited & 2 Others,[2003] KLR 125",the Court of Appeal delineated what prima facie case is as follows:-

> " So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

21. From the above decision, it is ostensible that the 1st Respondent's actions of alienating the public forest and the subsequent acquisition of title without due observance of the due process in law is illegal. The Applicant contends that it has a prima facie case which will succeed and shall have the certificate of title issued to the 1st Respondent revoked.

22. They prayed that the Honourable Court to be guided by the decision of the Court in the case of:- "Pati Limited- Versus – Funzi Island Development Limited & 4 Others (Petition 37 of 2019)[2021] KESC 29 (KLR) (16 July 2021) (Judgment)" where the Supreme Court of Kenya stated that:-

> " Besides, the Forests *Act No 7 of 2005* at section 65 and the *Forest Conservation and Management Act* No 34 of 2016 at section 77, provide (d) that notwithstanding the repeal of the preceding Act, 'any land which, immedintely before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act. 'Section 77 of the Forest Conservation Management Act specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any other relevant law shall be deemed to be a public forest under the Act. The Third Schedule identifies mangrove swamp forests as land declared under Notice No 44 of 1932. Although the word 'Proclamation' is not used, we have no doubt that the Notice' referred to, can only be "*Proclamation No 44 of 1932*". The conclusion to which we must therefore arrive, is that the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the *Forest Conservation and Management Act*."

23. The Learned Counsel further placed their reliance on the case of:- "Chongeiywo & 10 others (Suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt. Elgon) – Versus - Attorney General & 4 others; Kenya National Commission on Human Rights (Amicus Curiae) (Environment & Land Petition 1 of 2017)[2022] KEELC 13783 (KLR) (19 October 2022) (Judgment)" where the learned Judges in their wisdom stated that:-

> " when the 2005 Act was repealed, the 2016 Act, which was intended to align forest conservation and management issues with *the Constitution* and other related policies, carried over provisions that had unconstitutional effects. From a reading of the Act, the specific purpose of section 77 was to ensure that any land that tas gazetted or registered as a forest under the 2005 Act and before the enactment of the 2016 Act, would retain that status. The purpose of this provision is Hot unconstitutional."

24. The provision of Section 34 of the Forest Conservation Act and Management Act stipulated that any person may petition the National Assembly or the Senate, for the variation of boundaries of a

public forest or the revocation of the registration of a public forest or a portion of a public forest. The petition hereinabove is expected to demonstrate that the variation of boundaries or revocation of the registration of a public forest or a portion of a public forest does not endanger any rare, threatened or endangered species or adversely affect its value as a water catchment area andprejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.

25. In the case of "Tabot – Versus - Attorney General; Kalimbula Investments Limited (Interested Party) (Environment & Land Case 288 of 2018) [2023] KEELC 16846(KLR) (18 April 2023) (Judgment)" learned Justice A. O. Ombwayo in his wisdom stated that:-

> " The Enderit reserve forest initially was protected by the Forests Act 2005 before its repeal, but now it is protected by the *Forest Conservation and Management Act*, No.34 of 2016 which repealed the forest Act 2005 and has placed very stringent conditions for variation or allocation of forest land. Section 34 (1) of *Forest Conservation and Management Act*, No. 34 of 2016 provides that any person may petition the National Assembly or the Senate, for the variation of boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest."

26. Additionally, the Applicant has availed an expert witness Ignatius Siko who has sworn on oath on the importance of mangrove forests to the environment and the need to protect them. It is apparent then that a prima facie case is not merely frivolous, but one that is easily discernable from the pleadings even before the party is heard. Such a case inherently demonstrates that a right exists which may be infringed if an injunction is not issued. Importantly, the onus of establishing the existence of a prima facie case lies with the applicant. This onus has been aptly met by the Applicants in this instance, given the clear presentation of their case which has a high probability of success.

27. On whether the applicant shall suffer irreparable injury which cannot be compensated by damages, the Learned Counsel submitted that it was trite that merely establishing a prima facie case is inadequate; the applicant must demonstrate that irreparable injury will befall them if the injunction is not granted and that no alternative remedy exists to shield them from the potential consequences of the apprehended injury. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

28. The 1st Respondent having acquired the title to the suit property through unprocedural means, has now denied the Applicant access onto the suit property for the purposes of carrying out its licenced activities on the public forest land. As a result, the Applicant's commercial interests are at jeopardy since it was a company which had employed many Kenyans on its payroll who relied on the activities operated on the suit property to generate income.

29. The Learned Counsel asserted that the Applicant's business and operations have been greatly affected and may result in severe, substantial and irreparable loss, damage and injury, unless the orders sought herein are granted, the Applicant's business will be completely and irretrievably destroyed wherein the Applicant would be forced to close its doors to its employees leading to loss of income. The Applicants had effectively demonstrated the likelihood of irreparable injury in this case-an injury that goes beyond

financial valuation and necessitates the intervention of the court to safeguard their rights, and prevent further harm.

30. On the issue of if the court is in doubt then it can decide the application on a balance of convenience, the Learned Counsel submitted that as regards the issue of balance of convenience, we associate ourselves with the decision in case:- "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai [2018] eKLR", where it was held as follows(supra):

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise front granting it

31. It is indubitably that the balance of convenience tilts in favour of the Applicant who for a long period time has been using the public forest land despite the allegation that the 1st Respondent obtained title in 1999. The 1st Respondent did not seek to evict the Applicant in 2012 while it first obtained the Special Use License. For a period of eleven [11] years, the Applicant used the suit land and deemed the same as mangrove public forest available to all members of the public. It is until the year 2023, when the 1st Respondent denied access to the Applicant and the other members of the public. It is clear that the Applicant's continuous use and access of the suit land under the license was valid and the suit property is a public forest land. The 1st Respondent did not undertake any proceedings against the Applicant through which it sought eviction orders or permanent injunction barring the Applicant from further use and access of the suit land. This goes to demonstrate that the 1st Respondent deemed the land as a public forest and not a private property worthy of protecting for exclusive ownership.

32. Furthermore, as a matter of public interest, the Kilindini Mangrove Forest Area is a key carbon sink, and its allocation to a private entity exposes the whole country to the travails of climate change. The area is reserved for purposes of conservation of nature and biodiversity, offering protection for a special ecosystem of threatened and endangered animal, bird and fish species and is not available for private ownership. It is an area which requires special protection which only the 4th Respondent can offer. Such protection helps to maintain the ecological processes which survive, only, in intensely managed and restricted landscapes and seascapes.

33. In conclusion, the Learned Counsel averred that the present case presents a clear prima facie case with a likelihood of success, as demonstrated by the Respondent's conversion of the public land to private land which is in contravention of Article 62 of *the Constitution*. The harm caused by the Respondent's actions extends beyond mere monetary losses, establishing the presence of irreparable injury. Additionally, the balance of convenience aligns with granting the injunction to safeguard the rights of the Applicants.

34. Therefore, it is the Learned Counsel's submission that the prayer for a temporary injunction should indeed be granted to preserve justice, prevent breaches of peace, and protect the rights of the lawful licensee. They urged this Honorable Court to thoroughly examine the merits of our submissions and allows the application dated 31st August 2023 with costs.

35. On who should bear the cost of application, the Learned Counsel prayed that the Respondents be condemned to pay the costs of this Application as the general rule outlined in Section 27 of the *Civil Procedure Act* that costs follow events.

**B. The Written Submission of the 2nd to 7th Defendants.**

36. The 2nd to 7th Defendants through the Attorney General's office filed their written submission dated 3rd November, 2023. The Learned Counsel submitted that they hereby submitted as follows in support of the Plaintiff's Notice of Motion application dated 31st August, 2023 which was filed under certificate of urgency.The law on granting it on granting interlocutory injunction is set out under the provision Order 40 (1) (a) of the Civil Procedure Rules 2010 2010 which provides:

    1. Where in any suit it is p1.Where in any suit it is proved by affidavit or otherwise-

        a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

        b) That the Defendant threatens or intends to remove or dispose of his property in the circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

    the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

37. Accordingly, the circumstances for consideration before granting a temporary injunction dispute is in the danger of being wasted, damaged or alienated by any party to the suit remove or dispose the property, the court in such situation enjoined to grant a temporary injunction to restrain such acts.The conditions for consideration further in granting an injunction is now settled in the case of "Giella – Versus - Cassman Brown & Company Limited (1973) EA 358" where the court expressed itself on the condition that a party must satisfy for the grant of an interlocutory injunction:

    i) First the applicant must show a prima facie case with a probability of success.

    ii) Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages.

    iii) Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.

38. On whether in the instant case there is a prima facie case to be tried, the Learned Counsel submitted that

    a. There is a property in dispute

    b. That there is a likelihood that the said property is in danger of being wasted, damaged or alienated by any party to the suit

39. The condition has already been established. The Replying Affidavit by the 2nd to 7th Defendants clearly demonstrates that the ownership of the suit property is disputed. While the application presently in court indicates the manner in which the 1st Defendant acquired the suit property is questionable, the 1st Defendant persists in their position in how they came about the suit property. A dispute has emerged. The court has no option but to investigate each party's claim to the property and determine the dispute

on its merits. The application by the plaintiff has high chances of success as has been demonstrated in the body of the application itself and the affidavit in support that the process of how the 1st defendant came about the suit property is questionable. The had annexed documents in their replying affidavit showing that the suit property being a public forest is not for private purposes. The 1st Defendant has a Certificate of title in his name which is a sought are not granted.

40. On whether the Applicant will suffer irreparable harm if the injunction is not granted, the Learned Counsel opined that as explained in the Replying Affidavit, they had demonstrated that the Plaintiff. a privately owned company entered into a special use license agreement with Kenya Forest Service, the 4th Respondent which permitted the licensee to undertake various activities such as to construct, install, operate, inspect, maintain, repair and replacement of petroleum products pipeline. As such the licensee has employed many Kenyans on its payroll who rely on the activities operated on the suit property to generate income. Further to it the Learned Counsel submitted that *the Constitution* at Article 40 (1) protects the rights to property of all persons. The Plaintiffs rights under the said Article stand to be violated if a temporary injunction is not granted pending the determination of this matter on its merits.

41. On whether on a balance of convenience the Applicant would suffer the greater harm if an order of injunction is not granted pending the determination of the suit on its merits, the Learned Counsel submitted that the balance of convenience in this case is in favor of the Plaintiff/ Applicant's. It was the Plaintiff who is currently licensed to conduct their income generating activities on the suit property. The 1st Defendant's has so far not demonstrated to the court that they are equally likely to suffer harm if not allowed to take possession of the alleged suit property. For those grounds, it was the Learned Counsel's submission that the Plaintiff/Applicant's application dated 31st August should be allowed and a temporary injunction be granted pending hearing and determination of the suit.

**VI. Analysis & Determination.**

42. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

43. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-

    a. Whether the Notice of Motion dated 31st August, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010?

    b. Whether this Honourable Court will be pleased to review orders issued on 6th September, 2023 in accordance and as prayed for in the Notice of Motion application dated 18th September, 2023?

    c. Who will bear the Costs of Notice of Motion applications dated 31st August, 2023 and 18th September, 2023.

**Issue No. a). Whether the Notice of Motion dated 31st August, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010?**

44. Under this Sub – heading, the Honourable Court will deliberate on the main substratum founded in the application by the Plaintiff/Applicant. This is whether or not to grant both interim and mandatory injunctive orders against the Defendants/Respondents herein. The said application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

45. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Ltd (Supra)", where it was stated:-

> " First an applicant must show a prima facie case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

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

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

47. In dealing with the first condition of "Prima facie case", the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd (Supra). The Plaintiff/ Applicant averred that on 21st March 2012, the 4th Respondent issued the Applicant with a Special Use License over a portion of Kilindini Bay Mangrove Area, the suit property herein for a period of thirty (30)years permitting the Applicant to carry out activities as specified in the First Schedule of the License. Special Use License was issued pursuant to a determination by the 4th Respondent that the primary purposes of the activities allowed were in the public interest Over the course of period of time, the Applicant requested for an extension of the licensed areas within the forest which requests were

granted by the 4th Respondent and Addendums Special Use Licenses were executed on 7th October 2019, 25th January 2021 and 8th June 2023. (Annexed and marked as "JM2 a -d" are copies of the Addendums Special Use Licenses).

48. The Applicant has carried out its activities over the portion of the Kilindini Bay Mangrove Area pursuant to the Licenses and has submitted all due payments thereunder to the 4th Respondent. The 4th Respondent represented to the Applicant and other members of the public that the Area under the Special Use License as a part of the Mangrove area, was a public forest area. The suit property as part of the Coastal Mangrove Swamp Forest Reserve having been so declared vide the *Proclamation No 44 of 1932* as a forest area and as confirmed by the 4th Respondent under Clause 6 of the License that the licensed property is a state forest area and in the Third Schedule of the License. (Annexed and marked as "JM – 3" is a copy of the *Proclamation No 44 of 1932*).

49. Vide the *Legal Notice No 174 of 1964* it was declared by the then Minister for Natural Resources that central forests situated in Mombasa, Kwale, Lamu and Kilifi Districts are public forests. From the foregoing the Kilindini Mangrove Bay Area as comprised under Land Reference Number 5169/VI/MN/ [Title No CR.70862] is a mangrove forest reserve. (Annexed and marked as "JM - 3A" is a copy of the *Legal Notice No 174 of 1964*). The 1st Respondent was issued with a lease over the Kilindini Bay Mangrove Area now referenced as L5169/VI/MN/[Title No CR.70862] to hold the property as a Lessee for a period of ninety nine (99) years. (Annexed and marked as "JM – 4" is a copy of the Certificate of Lease and Recent Certificate of Postal Search). The suit property is a public forest land whose administration and management is provided under the Forest Management and Conservation Act 2016. The registration of suit property as a public forest has never been revoked pursuant to the provisions of Section 34 of the Act.

50. Further, 5169/VI/MN/ [Title No CR. 70862] being a public forest land, is not available for alienation and reallocation to the 1st Respondent or to any entity to hold the interest of the same for private purposes without the procedures being followed concerning the deregistration of public forests and the subsequent allocation of public land. The 1st Respondent without any colour of right, has proceeded to deny the Applicant access and entry on to the suit property for purposes of carrying out its licensed activities on the public forest land.

51. The 2nd to 7th Defendants on the other hand argued that the property, LR 5169/VI/MN (Title No CR 70862) is part of the Coastal Mangrove Swamp having been gazetted via the *Proclamation No.44 of 1932* as a forest area. Attached in the affidavit and marked as "BM – 1". Further to the above proclamation, it was declared by the then Minister for Natural Resources that Central Forests situated in Mombasa, Kwale, Lamu and Kilifi Districts are public forest vide *Legal Notice No.174 of 1964*. Attached in the affidavit and marked as "BM – 2".

52. Since the suit property is a public forest, its management is provided for under the Forest Management and Conservation Act 2016 particularly Section 34 and its status has never been revoked. On 25th June, 2015, Kenya Forest Service and Miritini Freeport Limited entered into a special use license agreement and submitted all due payments. Attached in the affidavit and marked as "BM – 3".

53. An area of approximately 54.534 Ha was leased to Miritini Freeport Limited for an agreed term of 20 years from the date of issue. The suit property being a public forest is not available for alienation and re-allocation to any individual to hold interest of the same for private purposes. There was no record available altering the gazetted mangrove area for tilting or creating a parcel for another use. The Certificate of Title over the land known as 5169/VI/MN (Title No. CR 70862) issued to the 1st Respondent is thus irregular. The 1st Respondent leasehold holding of the suit property which is a mangrove public forest is in contravention of the *Forest Conservation and Management Act*. While at

this point of whether the Plaintiff has "Prima facie" case. The Honourable Court has taken cognizance that the Plaintiff is simply urging to be granted access into the Defendant's land to inspect, repair and maintenance of their gas pipes which passes on the suit land. This being a natural resources the Honourable Court is privy to and rely on the provision of Sections of 139 and 140 of the *Land Act*, No. 6 of 2012 on Right of way and access order under such circumstances.

Rights of Way

139. Entry on neighbouring land where easement is refused

(1) An owner of any dominant land) may apply to a court on the prescribed form for an order, referred to as an entry order authorising his or her entry on or over any servient land for the purpose of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the dominant land or doing any other necessary or desirable thing on that land.

(2) The applicant shall give not less than fourteen days notice in writing to-

(a) the owner of the servient land; and

(b) the county government having jurisdiction in the area where the dominant and servient land are located, of the intention to apply for an entry order under this section.

(3) On an application under subsection (1), the court after hearing the applicant and the persons to whom notice was given under subsection (2), may make an entry order authorising the applicant to do all or any of the following-

(a) to enter on or over the servient land, either personally or through the applicant's employees, agents or contractors, for any purpose specified in the entry order;

(b) to use for that purpose on or over the servient land any vehicles and other means of transport and any plant machinery, cranes or other equipment as are specified in the entry order;

(c) to store on the servient land such materials as may be required for the purposes of the work and in any quantities that are specified in the entry order.

(4) In determining whether to grant an entry order under subsection (3), tha court shall have regard to-

a) the nature and conduct of the negotiations if any, between the owners of the dominant and servient land with respect to any attempt by the owner of the dominant land to obtain an easement for the purpose for which the entry order is applied for from the owner of the servient land;

(b) the urgency, importance and desirability of the work for which the entry order is being applied for;

(c) the scope of the work and the length of the time for which the entry order is being applied for;

(d) whether the applicant has applied for or obtained all permissions,license and consents required from all relevant public authorities to execute the works;

(e) any other matters that shall appear to the court to be relevant.

(5) An order made under subsection (3) may be made on any condition including-

(a) the period of time during which the entry on or over the servient land is authorized;

(b) the hours of the day during which the work may be done;

(c) the preservation of the safety of persons or property on the servient land;

(d) the preservation, so far as is consistent with the work to be executed,of the natural features and condition of the servient land;

(e) the restoration of the servient land to its former state at the conclusion of the work;

(f) the maintenance of adequate access to the servient land;

(g) the provision of security or indemnity to secure-

(i) the performance of any conditions of the entry order; or

(ii) the making good of any damage caused by entry on or over the servient land, or work on or over the land; or

(iii) the reimbursement of the owner of the servient land for any costs, expenses or loss arising from the entry; and

(h) any other relevant matter.

(6) If, as a result of fire, civil commotion or natural disaster, a structure on the dominant land has become a threat to public safety or public health, and there is an urgent need to effect repairs to or demolish that structure and such action may only be executed by entry on or over the servient land, the owner of the dominant land may enter the servient land and effect the repairs or demolition, after giving at least twenty-four hours' notice in writing to the owner of the servient land, but the entry and execution of works shall not prevent the owner of the servient land from applying to the court for an order requiring the owner of the dominant land to make good any damage caused by the entry and works and to reimburse the owner of the servient land for any costs, expenses or loss arising from the entry and works.

(7) In this section-

(a) an owner of land includes an owner under a lease, a lessor and lessee; and

(b) neighbouring land means any land in respect of which an order is sought under this section, whether or not it adjoins the land occupied by the applicant for an entry order.

140.Access order

(1) An owner of landlocked land may apply in the prescribed form to a court for an access order, granting reasonable access to that land.

(2) A copy of the application shall be served on-

(a) the owners of each piece of land adjoining the landlocked land;

(b) any person claiming an interest in any such piece of land of whom the applicant has actual notice;

(c) the county government having jurisdiction in the area where the landlocked land is located;

(d) any other person occupying or having an interest in land which in the opinion of the court may be affected by the granting of the application.

(3) The court, after hearing the applicant and any person served with an application under subsection (2) may make an access order in respect of any other piece of land, the owner of which was served with a copy of the application under subsection (2), for the benefit of the landlocked land.

(4) In considering whether to grant an access order, the court shall consider-

(a) the nature and quality of the access, if any, to the landlocked land when the applicant first occupied the land;

(b) the circumstances in which the land became landlocked;

(c) the nature and conduct of the negotiations, if any, between the owners of the landlocked land and any adjoining or other land with respect to any attempt by the owner of the landlocked land to obtain an easement from one or more owners of the adjoining or other land;

(d) the hardship that may be caused to the applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person the making of the order;

(e) the purposes for which access is or may be required; and

(f) any other matter that appears to the court to be relevant.

(5) An access order may be made subject to any conditions including-

(a) the period for which the access order is to be made;

(b) the payment of reasonable compensation by the applicant to any other person;

(c) the allocation of the costs of any work necessary to give effect to the order between the applicant and any other person;

(d) the fencing of any land and the upkeep and maintenance of any such fence;

(e) the upkeep and maintenance of any land over which the access order has been granted;

(1). the execution of any instrument or the completion of any prescribed form or the doing of any other thing necessary to give effect to the order;

(g). any conditions set out in subsection (4) which in the opinion of the court are applicable to an access order; and

(h) any other relevant matter.

(6) An access order made under this section shall be deemed to have all the characteristics and incidents of an easement and the land over which it has been

granted shall be deemed to be the servient land and landlocked land shall be deemed to be the dominant land in respect of that easement.

54. In the case of "Mbuthia – Versus - Jimba credit Corporation Limited 988 KLR 1", the Court held that:-

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases."

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

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

56. In the present case, there are two conflicting interests by the Plaintiffs/Applicant and the Defendants/ Respondents. I have gone through the annexures by the Plaintiff/Applicant and I am of the opinion that regarding this first condition, the Plaintiff/Applicant has established that it has a prima facie case with a probability of success.

57. With regard to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that:-

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

58. On the issue whether the Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages. Principally, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. In the instant case, the Plaintiff/ Applicant has to demonstrated that irreparable injury will be occasioned to him if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" provides an explanation for what is meant by irreparable injury and it states;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

59. Quite clearly, in the instant case, it is the argument of the Plaintiff/ Applicant, the 1st Respondent's denial to grant access to the Applicant jeopardizes the Applicant's commercial interests. The Applicant is a company which has employed many Kenyans on its payroll and relies on the operations on the suit

property to generate income. Unless, an injunction is issued and the Applicant is granted the right of access, there is a likelihood that the Applicant would be forced to close its doors to its employees. In considering an application for interlocutory orders, the court is called upon to take into consideration such issues as inter alia whether an undertaking for damages has been issued. It is the Plaintiff/ Applicant's submission that none had been issued, as such, in the absence of interlocutory orders, the Applicant, stands to suffer irreparable injury not capable of redemption by way of an award of damages. Therefore, the Plaintiff/Applicant has not satisfied the second condition as laid down in "Giella's case".

60. Thirdly, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

61. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited & 2 others (Supra)", the court dealing with the issue of balance of convenience expressed itself thus:-

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

62. In this instant case, according to the Plaintiff, it is indubitably that the balance of convenience tilts in favour of the Applicant who for a long period time has been using the public forest land despite the allegation that the 1st Respondent obtained title in 1999. The 1st Respondent did not seek to evict the Applicant in 2012 while it first obtained the Special Use License. For a period of eleven [11] years, the Applicant used the suit land and deemed the same as mangrove public forest available to all members of the public. It is until the year 2023, when the 1st Respondent denied access to the Applicant and the other members of the public. It is clear that the Applicant's continuous use and access of the suit land under the license was valid and the suit property is a public forest land. The 1st Respondent did not undertake any proceedings against the Applicant through which it sought eviction orders or permanent injunction barring the Applicant from further use and access of the suit land. This goes

to demonstrate that the 1st Respondent deemed the land as a public forest and not a private property worthy of protecting for exclusive ownership.

63. According to the Plaintiff in their submissions, as a matter of public interest, the Kilindini Mangrove Forest Area is a key carbon sink, and its allocation to a private entity exposes the whole country to the travails of climate change. The area is reserved for purposes of conservation of nature and biodiversity, offering protection for a special ecosystem of threatened and endangered animal, bird and fish species and is not available for private ownership. It is an area which requires special protection which only the 4th Respondent can offer. Such protection helps to maintain the ecological processes which survive, only, in intensely managed and restricted landscapes and seascapes.

64. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated:-

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

65. According to the Plaintiff/Applicant there isa high likelihood that in the absence of the injunctive orders, the Defendants/Respondents may proceed to further alienate the suit properties thereby making the Plaintiff/Applicant's claim over the suit properties a mere academic exercise. Thus, I am convinced that the balance of convenience lies with the Plaintiff/Applicant in this case as he is the legal and beneficial proprietor of the suit property.

66. Be that as it may, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the ownership of the suit property by the Plaintiff/Applicant.

67. In saying so, I wish to refer to the case of:- "Robert Mugo Wa Karanja – Versus - Ecobank (Kenya ) Limited & Another [2019) eKLR" where the court in deciding on an injunction application stated;

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

68. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. It follows that the Plaintiff has a prima facie evidence and legal inclination to the suit property. In view of the foregoing, I find that the suit property is at risk of being wasted.

69. Indeed, based on "the Doctrine of Stare Decisis" and as indicated above, on 24th July, 2024, my brother Justice S. M. Kibunja while delivery a decision over whether to grant injunctive orders over the same subject matter in "ELC Constitution Petition Number E015 of 2023 – Ujamaa Centre & Commission For Human Rights & Justice – Versus – Director of Survey of Kenya & Others" ruled as follows:

> " That injunction order in terms of prayer (3) of the Petitoner's Notice of Motion application dated 4th December, 2023 is hereby granted;

That the Court in its own motion however directs that this Petition be placed before the Court dealing with ELC Numbers E004 of 2023 and E012 of 2023 for further direction and hearing....."

70. Therefore, this Honourable Court is bound by these orders and thus equally proceeds to allow the orders sought fron the application by the Plaintiff/Applicant herein.

**Issue No. b). Whether this Honourable Court will be pleased to review orders issued on 6th September, 2023 in accordance and as prayed for in the Notice of Motion application dated 18th September, 2023?**

71. Under this this sub heading, the main substratum is on the review, setting aside and/or varying of Court's orders. These reliefs are governed under the provision of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the Civil Procedure Rules, 2010. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

72. Further, the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

73. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] e KLR" it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

74. In the case of:- "Pancras T. Swai – Versus - Kenya Breweries Limited [2014] eKLR" the Court of Appeal held: -

> " Order 44 Rule 1 (now Order 45 Rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason....."

75. "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

76. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608". had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

77. In the case of:- "Tokesi Mambili and others – Versus - Simion Litsanga" the Court held as follows: -

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

78. In case of:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

79. In the instant case, the Applicant argues that the Plaintiff/Respondent misguided this Honourable Court to issue orders that are in direct conflict with its order in a different suit between the Plaintiff/ Respondent and Defendant/Applicant being Mombasa Consolidated ELC Petitions No. 51, 52, 53, 54 & 55 of 2029; African Gas and Oil Co. Limited & 4 Others – Versus - National Land Commission and Kahia Transporters Limited. The Plaintiff/ Respondent failed to disclose that this Honourable Court had earlier made a finding that the suit property is located above the high-water mark and thus not subject to the jurisdiction of the 5th Respondent herein. In the wake of this concrete determination by this Honourable Court, the Plaintiff/Respondent knew that the 5th Respondent had no jurisdiction over the suit property and therefore could not be able to grant the purported Special Use License to it. It is the Applicant's case that the said orders were ultimately acquired through material non - disclosure and deliberate concealment of crucial facts by the Respondents so as to unwittingly cause this Honourable Court to issue the said orders. It is also apparent that the actions of the Respondent

to mislead this court is mala fide and the said order was procured in bad faith so as to steal a match from the Applicant and shackle its property rights without any plausible reason and/or justification in law.

80. Unless the Honourable Court sets aside and/or vary the ex parte order dated 6th September 2023 that was obtained with material non-disclosure of proper facts in this matter, the Applicant's constitutional rights to property protected under Article 40 of *the Constitution* would have been abrogated.

81. The question therefore is whether the said discovery of the new and important evidence could not have been made after the exercise of due diligence and whether the said evidence could not be produced by him at the time when the court made its orders. Notwithstanding the above observation, I find that even if this court was to determine that the evidence discovered by the Applicant was new and important evidence which was not within his knowledge and which could not have been found after the exercise of due diligence, so that it or could be produced by the Applicant before the order was delivered, it would not be possible to set aside or review the order. The "new evidence" would therefore not change the finding of this Court. I find that the Notice of Motion application dated 18th September, 2023 lacks merit and is hereby dismissed.

**Issue No. c). Who will bear the Costs of Notice of Motion application dated 31st August, 2023 and Notice of Motion application dated 18th September, 2023.**

82. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

83. In this case, this Honourable Court for found both applications will be in the cause.

**VII. Conclusion & Disposition**

84. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest from the framed issues herein. Based on the Preponderance of Probability and the balance of convenience, this court arrives at the following decision and makes the following orders:-

    a. That the Notice of Motion application by the Plaintiff dated 31st August, 2023 be and is found to have merit thus allowed in its entirety save for prayer (f) which is not necessary at this point.

    b. That the Notice of Motion application dated 18th September, 2023 be and is hereby found to lack merit and dismissed in its entirety.

    c. That pending the hearing and determination of this suit, the Honourable Court be and is hereby pleased to issue a temporary injunction restraining the 1st Respondent by itself, servants, agents, employees, proxies or any other person acting on its behalf from interfering with the Applicant's use and enjoyment of the land known as 5169/VI/MN/ [Title No CR. 70862] which encompasses the licensed area being a portion of the Kilindini Bay Mangrove Area.

    d. That for expediency sake the matters there be hearing of the following maters:- "Environment & Land Court numbers E004 of 2023 – Miritini Free Ports Limited – Versus – Kahia Transporters Limited & 6 Others – Ex – Parte Country Government of Mombasa 2 Others; "Environment & Land Court numbers E012 of 2023 – Miritini Free Ports Limited – Versus – Kahia Transporters Limited & 6 Others – Ex – Parte Country Government of Mombasa 2

Others; (Consolidated); "Environment & Land Court – Constitution Petition numbers E015 of 2023 – Ujamaa Centre & Commission for Human Rights – Versus – Sahal Ahmed Dahir & 7 Others – Ex – Parte Country Government of Mombasa 2 Others on 4th & 5th December, 2024.

e. That the Honourable Court reserves the delivery of Judgement to be on 17th February, 2025 all facts remaining constant.

f. That the costs of the Notice of Motion application dated 31st August, 2023 and 18th September, 2023 shall be in the cause.

It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF OCTOBER 2024.**

**HON. MR. JUSTICE L. L. NAIKUNI,**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Dr. Nyaundi for the Plaintiff/Applicant.

Mr. Towett Advocate for the 1st Defendant/Respondent.

Mr. Mwandeje Advocate for the 2nd to 7th Defendants/Respondents.