



**Sutton Holdings Limited v Said & 2 others (Civil Suit E008 of 2024)
[2024] KEELC 13647 (KLR) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT E008 OF 2024
LL NAIKUNI, J
DECEMBER 2, 2024**

BETWEEN

SUTTON HOLDINGS LIMITED PLAINTIFF

AND

ABDULAHI OMAR SAID 1ST DEFENDANT

SADIQ OMAR 2ND DEFENDANT

COUNTY GOVERNMENT OF MOMBASA 3RD DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 30th May, 2024. The Court was moved under Certificate of urgency by Sutton Holdings Limited, the Plaintiff/Applicant. The application was brought under the provisions of Sections 1A, 1B, & Section 3A of the *Civil Procedure Act*, Section 49,58 and 59 of the *Kenya Roads Act*, Cap. 21 Article 69 (d) & (g), 70 of the 2010 Constitution, Section 4 & 5(1) of Administrative Act and all other enabling Provisions of the Law.
2. Upon service of the same, the 1st and 2nd Defendants/ Respondents filed their response through a Replying Affidavit sworn on 12th September, 2024 accordingly. The 3rd Defendant responded to the Application through grounds of opposition dated 18th September, 2024.

II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.



- b. That a temporary injunction be issued restraining the Defendants by themselves, their servants and/or agents from continuing with the developments or in any way dealing with the public access road located on all that parcel of land being MN/1502/I pending the hearing and determination of this Application.
 - c. That a permanent injunction be issued restraining the Defendants by themselves, their servants and/or agents from continuing with the developments or in any way dealing with the public access road located on all that parcel of land being MN/1502/I.
 - d. That a declaration do issue that the 3rd Defendant's construction of the public toilets on the public access road offends the provisions of Article 47 of the *Constitution* of Kenya, 2010 and the *Fair Administrative Action Act*, 2015 for lack of public participation in respect of construction on the public access road.
 - e. That an order of Costs of the suit together with interest thereon at such rate and for such period of time this Honourable Court may deem fit do issue.
4. The application by the Applicant is premised on the grounds, testimonial facts and the averment made by the 31 Paragraphed annexed affidavit of AMAN KURJI a director of the Plaintiff herein with ten (10) annexures marked as “AK - 1 – 10”. The Deponent averred that:
- a. The Plaintiff was the registered Proprietor of all that parcel of land being MN/I/21152 in Mombasa County which borders the parcel of land being MN/1502/I. Annexed and marked as “AK - 1” a copy of the Certificate of Title in favour of the Plaintiff in respect of MN/I/21152.
 - b. The 2nd and 3rd Defendants were the occupiers or developers of the parcel of land being MN/1502/I and which was a public access road.
 - c. The parcel of land being MN/1502/I was a public access road which position has been established by the County Government of Mombasa.
 - d. On or about 31st March 2017, the Plaintiff instituted Court proceedings in “Mombasa ELC NO.75 OF 2020, Sutton Holdings Limited – Versus - Abdulahi Omar Said” with the aim of restraining the Defendant from constructing on the public access road. Annexed and marked as “AK - 2” copies of the Amended Plaint and the Statement of Defence and Counter - Claim.
 - e. The said proceedings commenced by way of the Plaint dated 8th March 2017 and amended on 13th April 2017 were terminated by consent vide the withdrawal of the suit and the Counter - Claim on 3rd March 2023.
 - f. The withdrawal was pursuant to the determination of a suit in Mombasa ELC Petition No. 37 of 2020 involving the Parties herein wherein the Plaintiff herein was an Interested Party and which Petition had a direct impact to the proceedings in Mombasa ELC NO. 75 OF 2020. Annexed and marked as “AK - 3” a copy of the Ruling in Petition No. 37 of 2020.
 - g. During the hearing and determination of the said Petition, the 1st Defendant herein admitted that he had commenced construction on the public access road and that the said buildings which were of a permanent nature had been demolished.
 - h. The Honourable Court in “Mombasa Chief Magistrates Criminal Court case Number 5997 of 2016” found the 1st Defendant guilty for developing an illegal structure on a service lane used by the general public vide its Judgement dated 28th June 2016 and which Judgement had



not been set aside. Annexed and marked as “AK 4” a copy of the Judgement dated 28th June 2016 delivered in Mombasa Criminal Case No. 5997 of 2016.

- i. The Witnesses for the prosecution in Mombasa Chief Magistrates Criminal Court Case Number 5997 of 2016 were officers of the 2nd Defendant.
 - j. The 3rd Defendant also confirmed that the parcel of land being MN/1502/I was a public access road hence no construction ought to take place on the said public access road as it will infringe on the general public’s right to use the said public road. Annexed and marked as “AK - 5” a copy of the letter dated 11th August 2016 while “AK - 6” a copy of the Surveyors report dated 7th May 2019.
 - k. The Plaintiff had noted that the Defendants had commenced the construction of the demolished structures on the public access road. Annexed and marked as “AK - 7” copies of pictures taken on 28th May 2024 in respect of the construction on the public access road.
 - l. The said construction of the buildings which are permanent in nature is unlawful having been declared as such by the 3rd Defendant vide the letter dated 11th August 2016 wherein the 3rd Defendant ordered the 1st Defendant to demolish the structures within 21 days.
 - m. Further, that on or about 12th January 2017, the 2nd Defendant reiterated the aforesaid position vide its letter dated 12th January 2017 addressed to the County Magistrates Court. Annexed and marked as “AK - 8” a copy of the letter dated 12th January 2017 addressed to the Honourable Trial Court.
 - n. The 3rd Defendant through its various Departments further reiterated the position that the construction by the 1st Defendant was illegal as it contravened the Physical Planning Act and that the said construction impeded movement of people as it was being carried out on an access road. Annexed and marked as “AK - 9” various correspondence and notices by the 3rd Defendant confirming that the subject parcel of land was a public access road.
 - o. The 3rd Defendant has since issued enforcement notices against the 2nd Defendant in respect of the illegal constructions being undertaken by the 2nd Defendant on the public access road. Annexed and marked as “AK - 10” a copy of the enforcement notice dated 29th May 2024.
 - p. Despite the enforcement notices having been issued, the 2nd Defendant is still continuing with the constructions on the public access road to the prejudice of the general public who have are being denied use of the said public access road.
 - q. The Honourable Court was invited to find that therefore that public interest supersedes a private individuals’ sense of entitlement.
 - r. The said parcel of land being a public road reserve, the provision of Article 40 (6) of the [Constitution](#) exempts the same from the protection accorded to private property under Article 40 of the [Constitution](#) and the same was not available for development by the Defendants.
 - s. The Defendants’ acts offended the provisions of Section 49 of the [Kenya Roads Act](#).
 - t. Further, the Defendants acts of constructing on the public access road amount to an offence under the provisions of Sections 58 and 59 of the [Kenya Roads Act](#).
5. The Plaintiff’s case against the 3rd Defendant



- a. The Plaintiff had also noted that the 3rd Defendant had also commenced construction of public toilets on the public access road.
- b. The construction of the public toilets on the access road did not align to the intended use of the parcel of land which ought to be used as a public road and ought not to harbour any buildings which position has previously been defended by the 3rd Defendant.
- c. The construction of the public toilets by the 3rd Defendant was conducted without the public participation despite the same culminating in the use of the public access road to the detriment of the Plaintiff and the general public who use the public access road.
- d. The 3rd Defendant is under an obligation to maintain the public roads and alleys.
- e. The construction of the ablution blocks by the 3rd Defendant defeats the very purposes being protected by the 3rd Defendant being the use of the said parcel of land as a public access road.
- f. Unless the Defendant were restrained from carrying on the said construction, the public will be deprived off the use of the public access road.
- g. It was in the interest of justice that the instant Application be granted as prayed.
- h. This application will not occasion any prejudice to the Defendants herein who are in breach and are knowingly undertaking illegal construction on a public access road.
- i. The affidavit was sworn in support of the application herein.

III. The Response by the 1st and 2nd Defendant.

6. The 1st and 2nd Defendant responded to the Notice of Motion application dated 30th May, 2024 through a 28 paragraphed replying affidavit sworn by ABDULAHI OMAR SAID, the 1st Defendant/ Respondent on 12th September, 2024 with eleven (11) annexures marked as “AOS - 1 to 11” where he averred that:-
 - a. He was the occupier of the of that parcel of land known as MN/1502/1/R.
 - b. The subject property was designated as a disused access road and/or road reserve sandwiched between plot number 1501/1/MN and the Plaintiffs Plot no. 21152/1/MN as held in Mombasa ELCPET 37/2020.
 - c. In the year 2017 the Plaintiff herein instituted “Civil Suit No. 75 of 2017 Sutton Holdings limited – Versus - Abdulahi Omar Said” in Mombasa Environment and Land Court the against the 1st Respondent herein for trespass to the road reserve and which was withdrawn by consent of both parties. (Annexed in the affidavit and marked as “AOS – 1” a copy of the ruling dated 7th March 2023).
 - d. There was no trespass to the Applicant’s parcel of land MN/1/21152 which borders the parcel of land known as MN/1502/1/R.
 - e. Plot number 21152 consolidated all the small plots within Sulton and MN/1502/1/R was a remainder of the big plot on which he had constructed the structures. (Annexed in the affidavit and marked as “AOS – 2” a copy of the Land Survey report).
 - f. On 12th July, 2019, he made an application to the County Government of Mombasa for development permission on plot no MN/1502/1/R and the same was approved on 31st



January, 2020 and he paid a total of Kenya Shillings Five hundred and fifty-nine thousand five hundred and fifty only (Kshs. 559,550/-). (Annexed in the affidavit and marked as “AOS -3” was a copy of the Notification of Approval from the County Government of Mombasa dated 31st January 2020 and cheque for payment of the requisite fees).

- g. In December 2023, he applied to the County Government of Mombasa Department of Lands, Planning & Housing for a Temporary Occupation Licence (T.O.L) on plot number MN/1502/R and which was granted on 14th December 2023 and he paid the requisite fees. (Annexed hereto and marked as “AOS – 4” a copy of the Temporary Occupation Licences dated 14th December 2023).
- h. There were previous demolitions of his structures by the 3rd respondent on the same piece of land and he filed “Constitutional Petition at the Environment and Land Court at Mombasa ELCPET 37/2020 Abdullahi Omari Said – Versus - Mombasa County Government and Sutton Investments (Interested party)” where the Court found the 3rd respondent in breach of the law and directed that he should be compensated a total of Kshs.11,259,550/- for the demolitions and which compensation has never been done to date. In the same ELCPET 37/2020 at paragraph 39 the Honourable Court noted that in the Criminal case MCCC NO. M 5997 of 2016 against the 1st respondent herein the Chief Magistrate at directed that he fully comply and seek requisite approvals and as a consequence of the said judgements, he made new applications to the relevant authorities to fully comply with the law. (Annexed in the affidavit and marked as “AOS – 5” was a copy of the judgement dated 28th September 2022 and decree dated 8th December, 2023).
- i. On 19th December 2023, he made a fresh application to the National Land Commission requesting for allocation of the piece of land Known as plot no 1502/Section 1/Mainland North/R Mombasa (1502/1/MN/R) measuring 45ft by 72ft. (Annexed hereto and marked as “AOS – 6” was a copy of the application to the National Land Commission).
- j. Vide the letter dated 21st June 2024, the National Land Commission recommended to the County Executive Committee Member Lands, Housing and Urban planning to request for allocation of plot no 1502/1/MN/R on his behalf. (Annexed in the affidavit and marked as “AOS – 7” was a copy of letter from the National Land Commission dated 23rd June 2024).
- k. He further had obtained a license and/or construction approval from the National Construction Authority and an Environmental Impact Assessment report.(Annexed in the affidavit and marked AOS - 8 are copies of the approval form the National Construction Authority and approval from NEMA.).
- l. On 6th June, 2024, he paid a total of Kenya Shillings One hundred and sixty-seven thousand and one hundred only (Kshs. 167,100/-) for renewal of the Temporary Occupation Licences. (Annexed in the affidavit and marked as “AOS – 9” was a copy of cheque dated 6th June 2024).
- m. Another Temporary Occupation Licence had been granted to someone else over the subject property as noted in the ELCPET 37/2020 and expired and he had also applied for the same in conformity with the law.
- n. He followed the due process and he had not acquired the subject property in contravention of Article 40 and 40(6) of the Constitution.



- o. He had sought the requisite authority and permissions from the County Government of Mombasa and the National Land Commission thus my actions are well within the law and no offence arises under Sections 49, 58 and 59 of the *Kenya Roads Act*.
- p. The said constructions on that plot have neither impeded movement of people/obstructed nor blocked any public access to the neighboring plots. (Annexed in the affidavit and marked as “AOS -10” were a set of photographs of the constructed structures).
- q. At paragraph 34 of judgement in ELCPET 37 of 2020 the surveyors report filed therein concerning the same subject matter indicated that the constructions neither hindered the access of the public nor to the neighboring plots. (Annexed in the affidavit and marked as “AOS – 11” was a copy of the survey report).
- r. In ELCPET 37 OF 2020 the Honourable Court further held that there was no trespass.
- s. The Plaintiff was an interested person in the same subject property with a hidden agenda having been a party in multiple suits against the 1st Respondent in Mombasa civil suit no 75 of 2017 and as an interested party in ELCPET 37 of 2020.
- t. The multiple suits have caused anguish and unfairly burdened him to defend the suit.
- u. The Plaintiff’s case was an abuse of Court process considering the intention and purpose to harass him and was an invitation of the Court to determine similar issues between same parties that had been determined before.
- v. The Plaintiffs suit did not disclose a reasonable cause of action against the 1st and 2nd Respondents and the same was misconceived both in law and in fact and is a candidate for dismissal.
- w. Further, the Plaintiff had not made out a case for the grant of the temporary injunction sought.
- x. The Plaintiffs’ case against the 1st and 2nd Defendant be dismissed with costs.

IV. The response by the 3rd Defendant/ Respondent

- 7. The 3rd Defendant/ Respondent opposed the application through 4 paragraphed grounds of opposition dated 18th September, 2024 on the following grounds:-
 - a. The Applicant has not proven a prima facie case against the 3rd Defendant.
 - b. The Plaintiff has not provided evidence to support the claims made against the 3rd Defendant.
 - c. The Application did not meet the conditions requisite for granting of orders of injunction.
 - d. The Application was brought before Court in bad faith, it reeks of malice and should be dismissed with costs

V. Submissions

- 8. On 8th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th May, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not as yet accessed the written submissions from any of the parties herein. However, the Honourable Court proceeded to reserve a ruling date on 2nd December, 2024 on its own merit accordingly.



VI. Analysis and Determination

9. I have carefully read and considered the pleadings herein and the relevant provisions of the Constitution of Kenya, 2010 and statutes. In order to arrive at an informed, reasonable and fair decision, the Honorable Court has three (3) framed the following issues for determination.
- a. Whether the Notice of Motion dated 30th May, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - b. Whether the Plaintiff has made out a case for the grant of a permanent injunction and orders that are final in nature.
 - c. Who will bear the Costs of Notice of Motion application 30th May, 2024.

Issue No. a). Whether the Notice of Motion dated 30th May, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

10. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
11. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated:-

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

12. 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".

13. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case of:- MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125,

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

14. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application avers that the Plaintiff was the registered Proprietor of all that parcel of land being MN/I/21152 in Mombasa County which borders the parcel of land being MN/1502/I. The 2nd and 3rd Defendants were the occupiers or developers of the parcel of land being MN/1502/I and which was a public access road. The parcel of land being MN/1502/I was a public access road which position has been established by the County Government of Mombasa. On or about 31st March 2017, the Plaintiff instituted Court proceedings in “Mombasa ELC NO.75 OF 2020, Sutton Holdings Limited – Versus - Abdulahi Omar Said” with the aim of restraining the Defendant from constructing on the public access road.
15. The said proceedings commenced by way of the Plaint dated 8th March 2017 and amended on 13th April 2017 were terminated by consent vide the withdrawal of the suit and the Counterclaim on 3rd March 2023. The withdrawal was pursuant to the determination of a suit in Mombasa ELC Petition No. 37 of 2020 involving the Parties herein wherein the Plaintiff herein was an Interested Party and which Petition had a direct impact to the proceedings in Mombasa ELC NO. 75 OF 2020. During the hearing and determination of the said Petition, the 1st Defendant herein admitted that he had commenced construction on the public access road and that the said buildings which were of a permanent nature had been demolished.
16. The Honourable Court in “Mombasa Chief Magistrates Criminal Court case Number 5997 of 2016” found the 1st Defendant guilty for developing an illegal structure on a service lane used by the general public vide its Judgement dated 28th June 2016 and which Judgement had not been set aside. The Witnesses for the prosecution in Mombasa Chief Magistrates Criminal Court Case Number 5997 of 2016 were officers of the 2nd Defendant. The Plaintiff had noted that the Defendants had commenced the construction of the demolished structures on the public access road. The said construction of the buildings which are permanent in nature is unlawful having been declared as such by the 3rd Defendant vide the letter dated 11th August 2016 wherein the 3rd Defendant ordered the 1st Defendant to demolish the structures within 21 days.



17. The 1st and 2nd Defendant responded to the Notice of Motion application arguing that the 1st Defendant was the occupier of the of that parcel of land known as MN/1502/1/R. The subject property was designated as a disused access road and/or road reserve sandwiched between plot number 1501/1/MN and the plaintiffs plot no. 21152/1/MN as held in Mombasa ELCPET 37/2020. In 2017 the plaintiff herein instituted “Civil Suit No. 75 of 2017 Sutton Holdings limited – Versus - Abdulahi Omar Said” in Mombasa Environment and Land Court the against the 1st Respondent herein for trespass to the road reserve and which was withdrawn by consent of both parties. There was no trespass to the Applicant’s parcel of land MN/1/21152 which borders the parcel of land known as MN/1502/1/R. Plot number 21152 consolidated all the small plots within Sul-ton and MN/1502/1/R was a remainder of the big plot on which he had constructed the structures.
18. The 3rd Defendant on the other hand contended that the Applicant had not proven a prima facie case against the 3rd Defendant. The Plaintiff had also not provided evidence to support the claims made against the 3rd Defendant. The Application did not meet the conditions requisite for granting of orders of injunction. The Application was brought before Court in bad faith, it reeks of malice and should be dismissed with costs.
19. In the case of “Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1”, the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party’s cases.”
20. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd” 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.”
21. In the present case, regarding this first condition though, the Plaintiff/ Applicant has not demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.
22. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiff/ Applicant might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “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.”



23. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicant's property is at risk if the Court does not intervene. The Plaintiff/ Applicant has not to demonstrate that irreparable injury will be occasioned to them 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.”

24. Quite clearly, the Applicant can be able to be compensated through damages as it has shown the court that in as much its rights to the legal proprietor of MN/I/21152 the same borders the suit property and not its property. The Applicant has not therefore satisfied the second condition as laid down in "Giella's case".

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

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

26. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR", the court dealing with the issue of balance of convenience expressed itself thus:-

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



27. The balance of convenience does not in the favour of the Applicant. 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.”

28. Be that as it may though bearing this in mind, I have always been of the opinion that that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicant and it will be in the interest of both the Applicant and the Respondents that the suit property is preserved until the hearing and determination of the suit.

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

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

30. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/ Applicant. In view of the foregoing, I strongly find that the Plaintiff/ Applicant in as much as has not met the criteria for grant of orders of temporary injunction; the court shall issue an injunctive order for the status quo to remain pending the hearing and determination of the suit.

Issue No. b. Whether the Plaintiff has made out a case for the grant of a permanent injunction and orders that are final in nature.

31. Under this sub title we shall examine the grant of permanent orders at an interim stage. In the case of “Bandari Investments & Co. Ltd – Versus - Martin Chiponda & 139 others[2022] eKLR” this Court has opined itself on the issuance of Permanent injunctions as follow:-

36. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the “Locus Classicus” case of “Giella – Versus - Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was “Shepard Homes – Versus – 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”.

38. Whether the 1st and 18th Defendants are entitled to be granted the Permanent Injunction restraining the Plaintiff on the suit property. 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.

39. 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 lest the suit is finalized at the interlocutory stage and there is nothing left to be heard and determined at the chagrin of the opposing party. Certainly, that would not be equity, fair and just at all to the other party.
32. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR" as follows:-
- “The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Limited -Versus- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
- “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, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a march on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.
33. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Limited –Versus - Nairobi City Council and 20 others [CA 111/2002](#)” held that:-
- “This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.



34. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of “Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906”, the court held thus:-

“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 ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

35. The reason for this rule on granting of Mandatory Injunction is plain. Megarry J put it succinctly in a subsequent passage in the case of “Shepard Homes Case (Supra)” as follows:-

“.....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

36. From the facts herein, the Plaintiff has no “prima facie” evidence and legal inclination to the Suit property. What is disputed by the Plaintiff is a land bordering its own and not its land. For these reasons therefore this Court finds that the Plaintiff has not demonstrated its case and has not met the fundamental threshold on being granted a Permanent injunction or declaratory orders as laid down in law pending the hearing and determination of the suit. And in any case this Court wishes to warn any party that does not hind to the interim orders as their actions may fatally affect them at the conclusion of the suit. For this reason prayers number 3 and 4 of the application are found to lack merit and hence must fail.

Issue No. c). Who will bear the Costs of Notice of motion application dated 30th May, 2024

37. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs in the cause.

VII. Conclusion & Disposition

38. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to the Preponderance of Probabilities and the balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-



- a. THAT the Notice of Motion application dated 30th May, 2024 be and is hereby found to partially have merit and is hereby partially allowed as per the Court’s discretion for the sole purpose of the preservation of the suit property.
- b. THAT the Honorable court be and is hereby pleased to issue an order restraining the Defendants/ Respondents by themselves, their servants and/or agents from continuing with the developments or in any way dealing with the public access road located on all that parcel of land being MN/1502/I pending the hearing and determination of this the main suit.
- c. That for expediency sake, the matter to be heard on 24th March, 2025. There shall be a mention on 20th January, 2025 for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- d. That subject to the availability of time, the Honourable Court shall conduct a Site visit (“Locus in Quo”) on 31st January, 2025. Parties to make prior security arrangement through the office of the Coast County Commandant and the OCS Kiembeni and/or Bamburi Police Station.
- e. That the cost of this application will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 2ND DAY OF DECEMBER 2024.

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

Ruling delivered in the presence of:

- a). M/s. Firdaus Mbula, the Court Assistant.
- b).Mr. Gathu Advocates for the Plaintiff/ Applicant.
- c).Mr. Lumatete Advocate for the 1st and 2nd Defendants/ Respondents
- d). M/s. Kizingo Advocate for the 3rd Defendant

HON. LL NAIKUINI (JUDGE)

