



**Othman v PN Mashru Limited (Environment & Land Case
129 of 2022) [2023] KEELC 21453 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 129 OF 2022
LL NAIKUNI, J
NOVEMBER 1, 2023**

BETWEEN

ALAMIN HASSAN OTHMAN PLAINTIFF

AND

PN MASHRU LIMITED DEFENDANT

RULING

I. Introduction

1. This is an omnibus Ruling regarding two (2) Notice of Motion applications placed before this Honorable Court for its determination. One is dated 8th November, 2022 by Alamin Hassan Othman, the Plaintiff herein instituted under a Certificate of urgency, whilst, the other is dated 19th November, 2022 was filed by a company by limited guarantee trading in the names and style of P.N Mashru Limited, the Defendant herein.
2. Upon service, and while opposing the application by the Plaintiff herein, the Defendant filed a Replying Affidavit dated 19th November, 2022. At the same time, they also raised a preliminary objection dated 19th November, 2022 challenging the jurisdiction of the Honourable Court. At the same time, while responding to the application dated 19th November, 2022 by the Defendant, the Plaintiff herein filed a seven (7) Grounds of opposition dated the 26th April, 2023.
3. For good order, the Honourable Court will deal with all these pleadings simultaneously but separately.

II. The Notice of Motion application dated 8th November, 2022 by the Plaintiff

4. This application was brought under the provisions of Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 1 of the Civil Procedure Rules, 2010. The Plaintiff sought for the following orders:-



- a. Spent.
 - b. Spent.
 - c. Pending hearing and determination of this suit, there be and is hereby issued an order of injunction restraining the Defendant either by itself, directors, shareholders, officers, agents, employees, assigns or any person acting on behalf of the Defendant from interfering with the Plaintiffs' ownership, use, occupation, development of and title of the property known as Land Reference No. MN/V/1907.
 - d. Costs of this application be borne by the Defendant.
5. The application by the Plaintiff/ Applicant is premised on the grounds, testimonial facts on the face of the application and the averments made out under the 23 Paragraphed Supporting Affidavit of Alamin Hassan Othman together with seven (7) annexures marked as "AHA 1 to 7" annexed thereto. The Plaintiff/Applicant averred that:
- i. The Plaintiff is the registered proprietor of the leasehold interest from the Government of Kenya of all that parcel of land known as L.R. No. MN/V/1907 situate in Mombasa County (Hereinafter referred to as "The Suit Property" or "the Plaintiff's property"). A copy of the certificate of title annexed and marked as "AHA – 1".
 - ii. The Plaintiff purchased the suit property from a company known as DIM Agencies Limited in or about 8th March 2021 for a consideration of a sum of Kenya Shillings One Million Two Fifty Three Thousand Five Ninety Seven Hundred (Kshs. 1,253,597.00/=). DIM Agencies Limited on the other hand had acquired the suit property from Castledom Properties Limited sometime in the year 1997. A copy of the agreement of sale dated 15th December, 2020 annexed and marked as "AHA – 2" and a copy of the transfer dated 15th January, 2021.
 - iii. The Plaintiff's property neighbors that of the Defendant's property known as Plot Number 134/V/MN (hereinafter "the Defendant's property") and abuts the Mombasa-Nairobi highway.
 - iv. Having purchased the suit property legally and for value consideration, the Plaintiff was entitled to use, occupy, develop and peacefully and quietly enjoy the same without any interference by any person including the Defendant.
 - v. The Defendant had previously challenged the legality of the title of the suit property in the Civil case of: "HCCC No. 353 of 1999: P. N. Mashru Limited – Versus - Castledom Properties Limited & 3 others (hereinafter simply referred to as "HCCC NO. 353 OF 1999") in which the Plaintiff sued the Plaintiff's successors in title alongside the Commissioner of Lands. A copy of which was marked and annexed as "AHA – 3".
 - vi. In the said HCCC NO.353 OF 1999, the Defendant had alleged that:
 - a. The suit property had been compulsorily acquired by the Government of Kenya to widen the Mombasa-Nairobi Highway.
 - b. The allocation of the suit property to CASTLEDOM PROPERTIES LIMITED, the original allottee and the subsequent transfer to DIM AGENCIES LIMITED (the Plaintiff's successor in title) was unlawful, illegal and contrary to the existing law.
 - vii. The Defendant sought, inter alia, declaration that the allocation of L.R. No. MN/V/1907 to the Plaintiff's predecessors in title, Castledom Properties Limited and DIM Agencies Limited



was unlawful and against public policy and consequently the Commissioner of Lands be ordered to cancel the grant.

- viii. Instead of prosecuting HCCC NO. 353 OF 1999 to its logical conclusion so as to prove its allegations on the purported illegality of the title to the suit property, the Defendant sought to withdraw the said suit by filing an application dated 12th October 2018 (Annexed and marked AHA 4 is a copy of the application dated 12th October, 2018). The suit was indeed marked as withdrawn vide a Court Order made on 14th June 2019. Annexed herewith and marked as “AHA - 5” was a true copy of the said Ruling and marked as “AHA - 6” was a true copy of the order ensuing therefrom.
- ix. In or about October 2022, the Plaintiff commenced construction of a perimeter wall on the suit property but the Defendant demanded that the said construction be stopped and halted immediately for the reasons that:
 - a. The suit property was a public land.
 - b. The suit property was irregularly allocated to Castledom Properties Limited, the original allottee of the suit property.
 - c. The suit property had been compulsorily acquired by the government through the Commissioner of Lands for the purposes of widening the Mombasa-Nairobi Highway.
 - d. The construction of the boundary wall on the Plaintiff's property would render the Defendant's property landlocked and completely inaccessible.
 - e. The Plaintiff was interrupting the Defendant's peaceful enjoyment of the Defendant's property.
- x. The above allegations by the Defendant were reiterated by the Defendant's advocates, Messrs. Mwangi - Macharia & Njeru Advocates vide a letter dated 6th October 2022 in which the Defendant demanded the following from the Plaintiff:
 - a. Immediate and conditional access of the Defendant's property.
 - b. Immediate halting of the construction of the boundary wall and development of the Plaintiff's property.
 - c. Formal assurance of the Defendant's quiet and peaceful possession and enjoyment of the Defendant's property. (Annexed herewith and marked as “AHA - 7” was a true copy of the letter dated 6th October by the said Messrs. Mwangi -Macharia & Njeru Advocates).
- xi. The allegations made by the Defendant that the Plaintiff's property was publicland and was irregularly acquired are the same allegations which the Plaintiff had raised in HCCC NO. 353 OF 1999 and later withdrew and abandoned.
- xii. Having challenged the legality of the suit property in HCCC NO. 353 OF 1999 which it subsequently abandoned, the Defendant was estopped from interfering with the Plaintiff's title, ownership, use and enjoyment of the suit property especially because the Plaintiff was an innocent subsequent purchaser for value consideration.
- xiii. The construction of the wall by the Plaintiff and the Plaintiff's use of the suit property never in any way interfere with or impede the use of the Defendant's property. The Defendant had no



colour of right to stop me from using the suit property including constructing the perimeter wall because of the following reasons:

- a. The Defendant had no “locus standi to claim on behalf of the Government of Kenya that the suit property was public land.
 - b. The allegations that the suit property was public land were baseless.
 - c. The Defendant had made similar allegations in HCCC NO. 353 OF 1999 which the Defendant abandoned.
 - d. The Defendant’s intention was to revive HCCC NO. 353 OF 1999 through the backdoor by making the same allegations which the Defendant had made in the said case but later withdrew.
- xiv. The Defendant had no legal basis for demanding the halting of the construction of the boundary wall since the suit property was a private property owned by the Plaintiff who was at liberty to deal with the same in any manner whatsoever.
 - xv. The Defendant’s actions were illegal, unjustified, in bad faith and are meant to threaten, intimidate and coerce the Plaintiff to cede ownership of the suit property to the Defendant.
 - xvi. The Defendant had always employed threats and underhand dealings to intimidate and threaten the owners of the suit property including the filing of HCCC NO. 353 OF 1999 so as to pile pressure on the owners of the suit property and to achieve ulterior motive.
 - xvii. The Plaintiff had constitutional rights to own, use, occupy, develop and enjoy the suit property which rights the Defendant had infringed and trampled on by his actions pleaded herein.
 - xviii. It was in the interest of justice that the orders sought in the application were granted so that the Plaintiff could use and enjoy the suit property which he legally and validly owns, without any threats and interference by the Defendant.

III. The responses by Defendant

6. On 21st November, 2022, the Defendant filed a 40 Paragraphed Replying Affidavit sworn on 19th November, 2022 by the FRANCIS MULILI, the General Manager of the Defendant in opposition of the application. It was together with thirteen (13) annexures marked as “FM – 1 to 13” annexed thereto: -
 - a. The Defendant herein is the bona fide and registered owner of Plot Number MN/V/134. Annexed hereto and marked as “FM - 2” was a true copy of the Certificate of Title over Plot Number MN/V/134. The Defendant herein purchased Plot No. MN/V/134 for a consideration of a sum of Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2,200,000.00/-) from Abdullatif Ahmed Taib as evidenced by the transfer dated 19th March 1992. Annexed hereto and marked as “FM - 3” was a copy of the transfer dated 19th March 1992 between Abdullatif Ahmed Taib and the Defendant herein.
 - b. Plot No. MN/V/134 had an acreage of 2.70 acres, however the Government of Kenya in May 1955 and January 1973 acquired 0.17 acres and 0.40 acres respectively for purposes of widening the Mombasa - Nairobi Highway. Annexed hereto and marked as “FM - 4” was a bundle of documents confirming acquisition of the 0.17 acres and 0.40 acres by the Government. On the 24th February 1998, the Defendant herein leased to Messrs. H. P. Mashru Limited Plot Number MN/V/134 for a consideration of Kenya Shillings Three Million Five Hundred Thousand



(Kshs. 3,500,000/-). Annexed hereto and marked as “FM - 5” was a copy of the lease between the Defendant and Messrs. H. P. Mashru Limited dated 24th February 1998.

- c. On the 18th August 1999 and 4th November 1999, Messrs. H.P. Mashru Limited surrendered the lease to the Defendant herein for money consideration. Annexed hereto and marked as “FM - 6 (a)(b)” were copies of the Surrender of Lease dated 18th August 1999 and 4th November 1999. From the year 1992, the Defendant herein had had quiet possession of Plot No.134/V/MN where significant development of offices and transport yard had been undertaken by the Defendant which was a leading transportation company in East Africa. Annexed hereto and marked as “FM - 7” was a copy of the valuation report dated 11th September 1997 confirming the foregoing.
- d. The compulsorily acquired land above was allotted as plot Number MN/V/1907 which the Plaintiff herein was laying claim of ownership over the property. Annexed hereto and marked as “FM - 8 (a)(b)” are copies of a letter dated 07th June, 2022 by the Plaintiff and a certificate of postal search dated 28th July 2022 over Plot No.1907/V/MN. Prior to the institution of this suit the County Government of Mombasa on instructions of the Plaintiff had continued to write several letters to the parties on purported surveying services over Plot Number MN/V/1907 as recently as 12th October 2022. Annexed hereto and marked as “FM - 9 (a) and(b))” are copies of letters dated 12th October, 2022 and 22nd June, 2022.
- e. The Defendant obtained approval for construction of a boundary wall over Plot No.MN/V/1907. Annexed hereto and marked “FM - 10” as a copy of the notification of approval form PPA 2 dated 27th October 2021. In view of the letters above by the County Government of Mombasa, the Defendant herein procured a private surveyor report by Messrs. Edward Kiguru Land Surveyors dated 31st October 2022 confirming that the Plaintiff’s property Plot Number 6MN/V/1907 had encroached the Defendant’s property.
- f. In addition, the surveyor had in his report confirmed that the access road to Defendant’s property passes through Plot No. MN/V/1907 and thus any construction and development by the Applicant herein will disrupt the Defendant’s business. Annexed hereto and marked “FM - 11” was a copy of the surveyors report dated 31st October 2022 by Messrs. Edward Kiguru Land Surveyors.
- g. On account of the surveyors report, the Defendant herein had lodged a complaint with the District Land Registrar Mombasa to determine the boundary dispute and encroachment by the Plaintiff herein. Annexed hereto and marked as “FM - 12” was a copy of the complaint of the boundary dispute complaint dated 10th November 2022 before the Land Registrar. This Honourable Court has no jurisdiction to determine the issue of boundary dispute prior to the determination of the Land Registrar in compliance with the provision of Sections 18 and 19 of the [Land Registration Act](#), No, 3 of 2012.
- h. The Plaintiff herein was aware of encroachment and the fact that its property blocked the access road to the Defendant’s property having shared with the Defendant a draft licensed agreement which was yet to be executed. Annexed hereto and marked as “FM - 13” was a copy of the license agreement shared by the Plaintiff herein to the Defendant. In order for the Plaintiff herein to invite the court’s discretion to issue a temporary injunction, it must demonstrate that it had “a prima facie case with probability of success, that it would suffer irreparable loss that could not be compensated by way of damages and that the balance of convenience tilted in its favour.



- i. As demonstrated above, the Land Surveyors report confirmed that any construction by the Plaintiff herein would not only encroach on the Defendant's property but it likely to render the Plaintiff's property inaccessible and landlocked. In view of the fact that the boundary and encroachment aspects have not been determined by the Land Registrar as enjoined by the statute, the Plaintiff herein had not established a prima facie case with probability of success.
- j. Unlike the Defendant herein who had had quiet possession of Plot No.MN/V/134 for a period of three decades, the Plaintiff herein only purchased the vacant Plot NNo.MN/V/1907 last year and there was no evidence that if injunction orders was not issued that it was likely to suffer irreparable loss that could not be compensated by any form of damages. The Defendant's herein utilized its property as offices and a transport yard for its hundreds of motor vehicle trucks and thus any injunction orders blocking access to its property is likely to occasion it irreparable loss that could not be compensated by any form of damages.
- k. In addition, the Defendant was likely to face multiple suits from third parties on account of denied access to its property if the goods which required haulage was obstructed by the Plaintiff's inimical and capricious actions of construction and blocking access to the property. The balance of convenience clearly tilted in favour of the Defendant herein who not only stood to suffer great prejudice if the construction persisted but also to suffer loss of the property in view of the encroachment confirmed by the Land surveyor's report dated 31st October 2022.
- l. It was imperative that the Plaintiff herein was not allowed to perpetuate an illegality of ongoing construction especially where the Defendant herein has raised serious concerns of encroachment, boundary dispute and blockage of the access road by the Plaintiff herein. The Plaintiff herein made numerous reference to HCCC 353 of 1999 which had no bearing to this dispute since not only was the Plaintiff not a party to that suit but the main issues herein for determination was on the encroachment and boundary dispute which fell within the purview of the Land Registrar.
- m. There was nothing wrong with withdrawal of HCCC No.353 of 1999 since there was no eminent threats until the 18th November 2022 when the Plaintiff herein had commenced construction of the property on account of the ex – parte injunction orders issued on the 10th November 2022. Its advocates wrote the letter dated 6th October 2022 in view of the threatened construction and the hastened construction of Plot No.MN/V/1907 by the Plaintiff herein was singularly meant to undermine the Defendant's proprietary interest.
- n. The Defendant herein had every right to defend its proprietary rights especially when there was threatened construction of the property by the Plaintiff who had not only encroached on its property but also keen to block access to the Defendant's property to the great detriment and prejudice of the Defendant's transportation business. Contrary to the allegations that the Defendant's actions were unjustified, in bad faith and meant to make the Plaintiff cede ownership, the Defendant was relying on an expert's report confirming that it was indeed the Plaintiff herein who was capricious, unreasonable and motivated to scuttle the ownership of the Defendant's property by encroaching and denying the Defendant access to its property.
- o. The access rights are recognized rights under the *Land Act* and the Plaintiff herein could not unreasonably use the court process to curtail the proprietary rights of the Plaintiff. This Honourable Court has powers to interrogate the route of the Plaintiff's title and was not sufficient for the Plaintiff to keep referring to HCCC No.353 of 1999. It was only mete



and proper that the Honourable Court had the Land Registrar determine the boundary and encroachment dispute prior to allowing the Plaintiff herein to perpetuate illegality.

- p. The actions of the Plaintiff of undertaking the construction over Plot No. MN/V/1907 would be a violation of the Defendant's proprietary interest enshrined under the provision of Article 40 of *the Constitution* of Kenya, 2010. The Defendant had had physical occupation and quiet possession over Plot Number MN/V/134 since the year 1992 and thus any disruption and construction on Plot No. MN/V/1907 would be greatly detrimental to the Defendant's proprietary rights. No amount of damages can compensate the actions and violations that would be occasioned to the Defendant herein if the construction by the Plaintiff persist on an encroached property to the detriment of the Respondent herein.
- q. This Honourable Court to strike a blow for the rule of law in this case. The Plaintiff had failed to satisfy the limbs for grant of temporary injunction including failure to establish any prima facie case with probability of success. The Court had a Constitutional duty to do justice to the Defendant by discharging and setting aside the ex - parte temporary injunction orders of 10th November 2022 and refer this matter to the Land Registrar for determination of the boundary dispute. The Affidavit is in objection and opposition of the Defendant's application dated 8th November, 2022.

IV. The Preliminary Objection by the Defendant

- 7. On 21st November, 2022, as indicated above, the Defendant filed an objection dated 19th November, 2022. It was attacking legal validity and efficacy of the Notice of Motion application dated 8th November 2022 and the entire suit by the Plaintiff. It was based, inter alia on the grounds THAT:
 - i. This Honourable Court has no jurisdiction to determine the boundary dispute between the Plaintiff and the Defendant.
 - ii. The Plaintiff had encroached on the Defendant's property, Plot. No. MN/V/134 and was keen to block the Defendant's access road.
 - iii. This suit offended the mandatory provisions of Sections 18 and 19 of the *Land Registration Act*, Act No. 3 of 2012.
 - iv. The application dated 8th November 2022 and the entire suit was inherently bad in law and otherwise an abuse of the court process.

V. The Notice of Motion application dated 19th November, 2022 by the Defendant.

- 8. As stated earlier, the Defendant also filed a Notice of Motion application dated 19th November, 2022. It brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 40 Rule 7 & Order 51 Rule 15 of the Civil Procedure Rules, 2010, Articles 48 & 159 of *the Constitution* of Kenya 2010. The Defendant sought for the following orders:-
 - a. SPENT
 - b. That this Honourable Court do discharge, vary and set aside Ex-parte temporary injunction orders issued by this Honourable Court on the 10th November 2022.
 - c. That costs of this application be borne by the Plaintiff/Respondent.



9. The application by the Defendant herein as an Applicant was premised on the grounds, testimonial facts and the averments made out under the 36 Paragraphed Supporting Affidavit of FRANCIS MULILI together with the 15 annexures, annexed thereof. The Defendant herein deposed that:
- a. The Defendant is the registered owner of all that piece of land known as Plot Number MN/V/134.
 - b. The Defendant/Applicant purchased Plot Number 134/V/MN on the 24th August 1992 and thereafter leased it to Messrs. H. P. Mashru Limited by way of a lease dated 24th February 1998.
 - c. Plot No.MN/V/134 consisted of an acreage of 2.70 acres, however, the Government of Kenya acquired 0.57 acres thereof on 11th May 1955 and 6th March 1973 for purposes of widening and expanding the Mombasa-Nairobi Highway.
 - d. Plot Number MN/V/1907 which the Plaintiff herein claim over ownership was allocated on the 2nd October 1997 being the 0.57 acres compulsorily acquired by the government for purposes of widening the Mombasa-Nairobi Highway.
 - e. Plot Number MN/V/1907 abuts the Defendant's property to the Main Mombasa-Nairobi Highway and any development and construction thereof would render the Defendant's property landlocked and completely inaccessible.
 - f. Since acquisition of Plot No. MN/V/134 in the year 1992, the Defendant had invested heavily on Plot Number 134/V/MN which it utilized as offices and transport yard of its multiple trucks and trailers.
 - g. Messrs. Edward Kiguru Land Surveyors in a report dated 31st October 2022 confirmed that not only does Plot Number MN/V/1907 encroached on the Defendant's land Plot No.MN/V/134 but that the existing access road to Plot No.MN/V/134 passed through Plot No. MN/V/1907.
 - h. In view of the report dated 31st October 2022 by the private surveyor, the Defendant herein wrote to the District Land Registrar in a letter dated 10th November 2022 to determine the boundary dispute in consonance with the provisions of Sections 18 and 19 of the [Land Registration Act](#) No.3 of 2012.
 - i. The Plaintiff herein had at all material times been aware of the encroachment of its suit property on the Defendant's property.
 - j. Additionally, the Plaintiff being aware that the Defendant's access road passes through Plot No.MN/V/1907 shared a draft license agreement with the Defendant to execute.
 - k. The Plaintiff had through his employees, agents, servants and workers on the strength of the exparte temporary injunction orders issued on the 10th November 2022 commenced construction on the property Plot No.MN/V/1907 from the 18th October, 2022 which would completely render the access to the Defendant's property Plot No.MN/V/134 impossible and inaccessible.
 - l. From the foregoing, the ex-parte temporary injunction orders issued on the 10th November 2022 were issued through material misrepresentation and concealment of facts by the Plaintiff herein.



- m. In view of the explicit provisions of Sections 18 and 19 of the *Land Registration Act* this Honourable Court has no jurisdiction to determine the boundary and encroachment dispute between the Defendant and Plaintiff herein.
- n. The Ex - Parte temporary injunction orders issued on 10th November 2022 were so drastic and capricious to the Defendant herein which is the registered owner of Plot No.MN/V/134 and would therefore be denied access to its property which it had held for more than three decades.
- o. The Ex - Parte temporary injunction orders issued on 10th November 2022 were extremely prejudicial to the lawful and registered owner of Plot No.MN/V/134 which was not availed an opportunity to be heard.
- p. The Plaintiff was not a party to the civil case “ELC Case No. 353 of 1999 P. N. Mashru Limited (Supra) and only made reference to this matter to obfuscate the main issues of boundary between it and the Defendant herein.
- q. The Plaintiff herein only acquired Plot No.MN/V/1907 last year and was keen to sabotage the Defendant's business by denying it entry of its workers, employees and multiple motor vehicle trucks to Plot No. MN/V/134.
- r. It was clear that the Plaintiff obtained the Ex - Parte injunction orders of 10th November 2022 with the sole intention of perpetuating illegality of blocking the access road and encroaching the Defendant's property, Plot No.MN/V/134 prior to determination of the dispute by the Land Registrar.
- s. It would be great travesty of justice for the legitimate and bona fide owner of Plot No.MN/V/134 to be unlawfully kept off from its property on account of the Respondent relying on an ex parte injunction order obtained through fundamental material mis-representation.
- t. It was in the interest of justice that the Ex - Parte temporary injunction orders issued on the 10th November 2022 be forthwith discharged, set aside and varied seriatim in view of the material concealment of facts by the Plaintiff and prior to the Plaintiff completely blocking the Defendant's access to its property.
- u. The actions of the Plaintiff of undertaking construction on Plot NO. MN/V/1907 on the strength of the Ex - Parte orders of 10th November, 2020 would occasion the Defendant irreparable loss that could not be compensated by any form of damages.
- v. In entirety the Plaintiff's action of undertaking the ongoing construction on Plot No. MN/V/1907 while encroaching a property and blocking access way to the Defendant's property would be a violation of the Defendant's proprietary interest enshrined under the provision of Article 40 of *the Constitution* of Kenya, 2010.
- w. The Defendant had had physical occupation and quiet possession over Plot Number MN/V/134 since the year 1992 and thus any disruption and construction of the purported Plot No.MN/V/1907 would be greatly detrimental to the Defendant's proprietary rights.
- x. The net effect of the Plaintiff's actions of erecting boundary wall and development on Plot No.MN/V/1907 would be to render the Defendant's property inaccessible thereby affecting contracts of employees and service delivery of third parties who had executed haulage contracts with the Defendant herein.



- y. The Defendant was likely to face multiple suits if the Plaintiff proceeded with the construction and erection of the boundary wall and development over the purported Plot No.MN/V/1907 on account of the orders issued on the 10th November 2022.
- z. The Defendant's application disclosed "a prima facie case" with a probability of success and is important that the Land Registrar determines the boundary dispute and issues of encroachment prior to completion of the construction by the Plaintiff herein.
 - aa. No amount of damages can compensate the actions and violations that would be occasioned to the Defendant herein if the construction by the Plaintiff persisted on the strength of the Ex -Parte temporary orders of 10th November 2022.
 - ab. In light of the foregoing, the balance of convenience heavily tilted in favour of the Defendant who was highly prejudiced by the Ex - Parte temporary injunction orders of 10th November 2022.
 - ac. It was in the interest of justice that the Ex - Parte temporary injunction orders issued on the 10th November 2022 be forthwith discharged, set aside and varied seriatim in view of the material concealment of facts by the Plaintiff and the grave prejudice on the Defendant.

VI. The grounds of Opposition as a response by the Plaintiff to the Notice of Motion dated 19th November, 2022

- 10. The Plaintiff opposed the Defendant's application dated 19th November, 2022 through filing of a 7 paragraphed Grounds of Opposition dated 26th April, 2023 on the following basis:
 - a. The alleged encroachment on the Defendant's Plot Number MN/V/134 by the Plaintiffs Plot Number MN/V/1907 was not true and could not be a valid ground to set aside the orders of 10th November 2022 because of the following reasons:
 - i. The Defendant purchased its Plot Number MN/V/134 on 24th August 1992 - October 1997. The properties had been in existence side by side for over 25 years hence any purported dispute concerning their boundaries was statute-barred by limitation.
 - ii. The alleged boundary dispute was raised by the Defendant on 11th November 2022 after this suit had been filed and the order made. The alleged boundary dispute was therefore a scheme cleverly hatched by the Defendant to defeat this suit and to seek the setting aside of the orders in issue.
 - b. The Defendant's property was not landlocked. The Defendant had deliberately refused to access its property from the part touching the main Nairobi-Mombasa Highway but had instead insisted on accessing its property through the Plaintiff's plot.
 - c. The Plaintiff had not blocked the Defendant's access even after obtaining the orders of 10th November 2022 despite the access by the Defendant being illegal.
 - d. Indeed this Honourable Court on 28th February 2022 ordered, without any objection from the Plaintiff, that the Plaintiff allows the Defendant to continue using the access pending hearing and determination of the applications. Hence the Defendant's complaint that the interim orders were being used by the Plaintiff to block the Defendant's access no longer had any basis.



- e. The issues raised by the Defendant were the same ones that the Defendant had raised in Case No. 353 of 1999.
- f. The Defendant could not cite its use of an illegal access through the Plaintiff's property to agitate property rights. No rights could accrue out of an illegal act.
- g. The Defendant should access its property through the position abutting the main tarmac road which had been identified by the Defendant's own surveyor using points: 134/2 to 143/3;143/3 to 134/4; and the stretch marked R/8.

VII. Submissions

11. On 28th February, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 8th November, 2022, 19th November, 2022 and the preliminary objection dated 19th November, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 27th April, 2023 a ruling date was reserved on Notice by Court accordingly on notice.

A. The Written Submissions by the Plaintiff

12. The Plaintiff through the Law firm of Messrs. Oluga & Company Advocates filed their submissions dated 26th April, 2023. Mr. Oluga Advocate averred that his submissions were in respect of the following:
 - i. The Plaintiff's application dated 8th November 2022;
 - ii. The Defendant's Notice of Preliminary Objection dated 19th November 2022; and
 - iii. The Defendant's application dated 19th November 2022.
13. On the Defendant's preliminary objection. The Learned Counsel argued that the contention by the Defendant that this court lacked jurisdiction to hear and determine the suit because the subject matter thereof was a boundary dispute. Thus, the suit offended the provisions of sections 18 and 19 of the Land Registration Act. The Plaintiff's submissions on the Preliminary Objection were simple and straightforward.
14. First, there was no boundary dispute between the Plaintiff and the Defendant over their adjacent parcels of land. He informed Court that the two plots had existed side by side for the last 25 years. The Defendant had never raised the purported boundary dispute for that entire period. It was only after this suit was filed on 9th November 2022 that the Defendant served the Land Registrar with a letter on 11th November 2022 alleging that there was a boundary dispute between the two plots. Immediately, thereafter the Defendant came to this court to raise the objection citing the alleged boundary dispute as a basis of the same. If there was a genuine boundary dispute between the two plots, the Defendant could not have waited for over 25 years to raise the same.
15. Therefore, the purported boundary dispute was a smoke screen, only raised by the Defendant pretentiously to defeat this case. The same was raised after this case had been filed and could not be used to defeat the case. Since the two properties had existed side by side for over 25 years, the purported boundary dispute was being raised in the year 2022 which was way beyond the 12 years within which a dispute touching on land should be raised. Therefore, he argued that the purported boundary dispute could not be cited as a basis of preliminary objection because the same was statute-barred.



16. Furthermore, the Learned Counsel asserted that the Plaintiff had not pleaded boundary dispute in his suit. In the entire Plaint, there was no averment that there was a boundary dispute between the two plots. He therefore did not understand how the suit could be defeated on the basis of an imaginary boundary dispute which only existed in the Defendant's fertile imagination and which had not been pleaded in the Plaint. The Defendant could plead anything it wished just to defeat the case. Therefore, this suit could not be assessed based on what the Defendant imagined was a boundary dispute but which was not pleaded in the Plaint and did not form the basis of this case..
17. He averred that the Defendant was at liberty to proceed with its imaginary boundary dispute before the Land Registrar but let the Plaintiff's case which deals with a totally different issue, being the Defendant's interference of the Plaintiff's property to proceed. Thus, the Defendant's Notice of Preliminary Objection was for dismissal.
18. On the application dated 19th November, 2022, the Learned Counsel submitted that the Defendant's application sought have the interim orders made by this court on 10th November 2022 be set aside. The Plaintiff opposed the Defendant's application through Grounds of Opposition dated 26th April 2023. Grounds (a) to (d) of the Defendant's application merely gave history of the two properties. The question of whether the Plaintiff's property was compulsorily acquired for expansion of Nairobi-Mombasa Highway was raised by the Defendant in Case No. 353 of 1999, which the Defendant withdrew. The issue had been raised again in this case in utter bad faith.
19. On the allegation that the use and development by the Plaintiff of its plot would render the Defendant's property landlocked and completely inaccessible, the Learned Counsel submitted that the said allegation was NOT true. Without belabouring much, the Defendant's own Survey Report prepared by Edward Kiguru showed that the Defendant's property abuts the Nairobi-Mombasa Highway at points which the surveyor had been identified as: 134/2 to 134/3; 134/3 to 134/4; and a stretch marked and identified as R/8.
20. Instead of accessing its property from the Nairobi-Mombasa Highway through the portions abutting the said Highway as identified by the surveyor above, the Defendant insisted on accessing the property right through the middle of the Plaintiff's property. The Defendant's property was NOT landlocked. The Defendant had an alternative access to its property from the Highway but had instead deliberately chosen to illegally access its property right through the middle of Plaintiff's property; an act which amounted to trespass. The Defendant could not seek to set aside the interim orders issued by this court to protect the Plaintiff's property and use the Defendant's illegal act of trespassing on the Plaintiff's as a ground to set aside the orders. An illegal act of trespass could not give rise to any right to the Defendant.
21. On the allegation that the orders should be set aside because the court has no jurisdiction since this is a boundary dispute, they had addressed the issue above whereby the Learned Counsel had shown the court that there was no boundary dispute between the two plots and even if there were, the same would be statute-barred since the two properties have been in existence side by side for over 25 years and therefore a statute-barred claim could not be used to set aside the interim orders. The Learned Counsel wished not revisit their submissions on the issue. Clearly, the Defendant's application was for dismissal.
22. On the Application by the Plaintiff dated 8th November, 2022, the Learned Counsel moved to the Plaintiff's application dated 8th November 2022. The Plaintiff's application was for injunction pending hearing and determination of this case. The applicable principles were those laid down in the case of "Giella – Versus - Cassman Brown & Co. Ltd [1973] EA 358" to the effect that the applicant must show a prima facie case with a probability of success or that if the injunction is not granted the applicant will suffer irreparable injury that cannot be compensated by an award or damages. If in doubt, the court



- should decide the application on the balance of convenience. Therefore the issue for consideration by this Honourable Court at this juncture is whether the Plaintiff has met the conditions necessary for the grant of the orders sought in the application.
23. On whether the Plaintiff has established a Prima facie Case, the Learned Counsel submitted that there was no dispute that Plaintiff is the registered proprietor of the L.R. No. MN/V/1907 - "the Plaintiff's property". The Plaintiff purchased the suit property from DIM AGENCIES LIMITED which on the other hand had acquired the suit property from Castledom Properties Limited. It was also not in dispute that the Defendant had previously challenged the legality of the title of the Plaintiff's property in Case No. 353 of 1999 where the Defendant had alleged that:
- i. The suit property had been compulsorily acquired by the Government of Kenya to widen the Mombasa-Nairobi Highway.
 - ii. The allocation of the suit property to CASTLEDOM PROPERTIES LIMITED, the original allottee and the subsequent transfer to DIM AGENCIES LIMITED (the Plaintiff's successor in title) was unlawful, illegal and contrary to the existing law.
24. In the said Case No. 353 of 1999, the Defendant sought, inter alia, declaration that the allocation of the Plaintiff's property to the Plaintiff's predecessors in title, Castledom Properties Limited and DIM Agencies Limited was unlawful and against public policy and consequently the Commissioner of Lands be ordered to cancel the grant. Instead of prosecuting Case No. 353 of 1999 to its logical conclusion so as to prove its allegations on the purported illegality of the title to the Plaintiff's property, the Defendant withdrew the said suit vide a court order made on 14th June 2019.
25. In or about October 2022, the Plaintiff commenced construction of a perimeter wall on the suit property but the Defendant demanded that the said construction be stopped and halted immediately for the reasons that:
- a. The Plaintiff's property is a public land.
 - b. The Plaintiff's property was irregularly allocated to CASTLEDOM PROPERTIES LIMITED, the original allottee of the same.
 - c. The Plaintiff's property had been compulsorily acquired by the Government of Kenya through the Commissioner of Lands for the purposes of widening the Mombasa-Nairobi Highway.
 - d. The construction of the boundary wall on the Plaintiff's property would render the Defendant's property landlocked and completely inaccessible, an allegation which the Defendant had reiterated in this suit.
 - e. The Plaintiff was interrupting the Defendant's peaceful enjoyment of the Defendant's property.
26. The above allegations by the Defendant were reiterated by the Defendant's advocates, Messrs. Mwangi - Macharia & Njeru Advocates vide a letter dated 6th October 2022 in which the Defendant demanded the following from the Plaintiff:
- a. Immediate and conditional access of the Defendant's property.
 - b. Immediate halting of the construction of the boundary wall and development of the Plaintiff's property.
 - c. Formal assurance of the Defendant's quiet and peaceful possession and enjoyment of the Defendant's property.



27. The Learned Counsel submitted that the allegations made by the Defendant that the Plaintiff's property was public land and was irregularly acquired were the same allegations which the Plaintiff had raised in Case No.353 of 1999 which the Defendant later abandoned. The Defendant was accordingly estopped from raising the same issues as a basis to interfere with the Plaintiff's title. On that score alone, the Plaintiff had "a prima facie case with a probability of success. It did not matter that the Plaintiff was not a party to Case No. 353 of 1999. What mattered was that the said case related to the Defendant's allegation that the title to the Plaintiff's property was illegal. The central issue in Case No. 353 of 1999 was the legality of the title of the property which the Plaintiff now owned. It did not matter that at the time, the Plaintiff's property was owned by a different person. The change in ownership of the Plaintiff's property could not change the fact that the Defendant had challenged the legality of the title of the said property and was therefore estopped from challenging the same title once again.
28. The Learned Counsel further argued that the construction of the wall by the Plaintiff and the Plaintiff's use of the suit property did not in any way interfere with or impede the use of the Defendant's property. He had already shown the Court that the Defendant's property was not landlocked as the Defendant wanted the court to believe. The Defendant had a direct access to its property from the Nairobi-Mombasa Highway through the points identified by the Defendant's own surveyor as had been highlighted hereinabove. It was therefore the Defendant who was interfering with the Plaintiff's property and should be restrained from doing so.
29. Further, the Defendant had no colour of right to stop the Plaintiff from using its property including constructing the perimeter wall thereon because of the following reasons:
- i. The Defendant had no "locus standi" to claim on behalf of the Government of Kenya that the suit property was public land.
 - ii. The allegations that the suit property was public land were baseless.
 - iii. The Defendant had made similar allegations in Case No. 353 of 1999 which the Defendant abandoned.
 - iv. The Defendant's intention was to revive Case No. 353 of 1999 through the backdoor by making the same allegations which the Defendant had made in the said case but later abandoned.
 - v. The Defendant should access its property through the parts of the Defendant's property which touch the Nairobi-Mombasa Highway and the Defendants should be restrained from using the access which passed directly through the Plaintiff's property.
30. Further the Learned Counsel submitted that the Defendant had no legal basis for demanding the halting of the construction of the boundary wall since the suit property was a private property owned by the Plaintiff who was at liberty to deal with the same in any manner whatsoever. The Defendant's actions were illegal, unjustified, in bad faith and were meant to threaten, intimidate and coerce the Plaintiff to cede ownership of the suit property to the Defendant. Since the access which the Defendant had been using falls right in the middle of the Plaintiff's property, the Plaintiff attempted to grant a license to the Defendant but that attempt was thwarted by the Defendant who failed to sign the License Agreement. Instead of signing the License Agreement, the Defendant has been bulldozing its way by forcefully and illegally passing right through the middle of the Plaintiff's property.
31. The Learned Counsel urged the Honourable Court to rely on the Defendant's own Survey Report by Edward Kiguru which clearly showed that the Defendant could directly access its property from the Nairobi-Mombasa Highway without passing in the middle of the Plaintiff's property.



32. On the issue of whether the Plaintiff will suffer irreparable injury, the Learned Counsel submitted that the Plaintiff commenced the reception of a perimeter wall around its property. The same was intended to safeguard the Plaintiffs property from potential invasion. If the orders sought were not granted, the Plaintiff would not be able to secure its property and was likely to suffer irreparable injury by losing the said property to grabbers including the Defendant herein who had been ogling the Plaintiffs property.
33. To buttress his point, the Learned Counsel referred Court to the case already cited by the Defendant of “Wairimu Mureithi – Versus - City Council of Nairobi, Civil Appeal No. 5 of 1979 [1981] KLR,322”, injunction should be granted if the Defendant would not be in a financial position to pay damages. In this case, the Defendant had not demonstrated that it was capable of paying any damages that this court may award to the Plaintiff if injunction was not granted.
34. On the issue of balance of convenience, the Learned Counsel told the court that since each party had its own property with direct access to the Nairobi-Mombasa Highway, the balance of convenience tilted in favour of granting the orders sought in the Plaintiffs application so that each party could access their respective property directly from the Nairobi - Mombasa Highway, without interfering with the other.
35. In conclusion, the Learned Counsel contended to have said enough to demonstrate that the Plaintiff's application dated 8th November 2022 should be allowed while the Defendant's application and Notice of Preliminary Objection both dated 19th November 2022 were for dismissal with costs.

VIII. Analysis and determination

36. I have carefully read and considered all the pleadings herein being the two applications dated 8th March, 2022 and 19th November, 2022 and also the Preliminary Objection dated 19th November, 2022 by the Defendant herein, the written submissions, the authorities cited to boot, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
37. In order to arrive at an informed, fair, just and reasonable decision, the Honorable Court has framed three (3) issues its determination. These are:-
 - a. Whether the Preliminary objection dated 19th November, 2022 raised by the Defendant herein meets the threshold founded in Law and precedents and hence merited?
 - b. Whether the Notice of Motion application dated 19th November, 2022 by the Defendant/ Applicant meets the threshold required of vacating of the injunctive orders under Order 40 Rule 7 of the Civil Procedures Rules, 2010.
 - c. Whether the Notice of Motion dated 8th November, 2022 by the Plaintiff/Applicant meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
 - d. Who will bear the Costs of Notice of Motion application dated 8th November, 2022, the Preliminary Objection dated 19th November, 2022 and the Notice of Motion application dated 19th November, 2022.

ISSUE No. a). Whether the Preliminary objection dated 19th November, 2022 raised by the Defendant herein meets the threshold founded in Law and precedents and hence merited?

38. From the very onset, its imperative that the Honourable Court commence by dealing the preliminary objection first and foremost. Legally speaking, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on



whether what has been raised herein fits the said description. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

39. The circumstances under which a preliminary objection may be raised was explained by the Court of Appeal in the case of “Mukisa Biscuit Manufacturing Co. Ltd - Versus - West End Distributors Ltd (1969) EA 696”, as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

40. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

41. As a basis for the objection, the issue as to whether this court has jurisdiction to determine the Plaintiff’s application and perhaps the suit has been raised. Primarily, the Defendant holds that according to it, this was a boundary dispute involving the two adjacent parcels of land belonging to the Plaintiff and the Defendant. Resultantly, the Defendant has advanced an argument, and rightfully so that all boundary dispute were not available before this Court but fell within the domain of the Land Registrar pursuant to the provision of Sections 18 and 19 of the [Land registration Act](#), No. 3 of 2012. While I cite the case of “Azzuri Limited – Versus – Pink Properties Limited (2018) eKLR” which is on all fours, I cannot agree with the Defendant more. It is on this rationale that the Defendant held pronto that this Court lacked Jurisdiction. Indeed, this is pure issue of law.

The Plaintiff has repeatedly stated that the Defendant extended the boundary into his land and that the Defendant has argued that Plaintiff has encroached on the Defendant’s property, Plot.No.MN/V/134 and is keen to block the Defendant’s access road. One issue resonates from the above analysis that the dispute is a boundary one.

42. On the issue of jurisdiction, the Halsbury’s Laws of England 4th Edition Volume 9 at page 350 defines the term as-

“....the authority which the court has to decide matters that are litigated before it or take cognizance of matters prosecuted in a formal way for decision....” (The same was reiterated by John Beecroft Saunders in his treatise words and phrases Legally Defined Volume 3 at page 113)

43. The “locus classicus’ case on jurisdiction was:- “Owners of the Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1” where the Justice Nyarangi, J stated:-

“Jurisdiction is everything. Without it, a Court has no powers to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....where a Court takes it



upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”

Additionally, in the Supreme Court of the Republic of Kenya decision in the case of “Samwel Kamau Macharia and another- Versus - Kenya Commercial Bank Ltd and others (2012) eKLR”, it was held that-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law.....”

44. This Court’s jurisdiction is anchored in the provisions of Articles 159 (1) and (2) and 162 (2) (b) of the Constitution of Kenya 2010; Section 3 and 13 of the Environment & land Court Act, no. 19 of 2011; Section 1010 of The Land Registration Act, No. 3 of 2012 and Section 150 of the land Act, No. 6 of 2012. see also the Supreme Court of the Republic of Kenya decision in “Republic – Versus - Karisa Chengo and 2-others (2017) eKLR”.
45. The jurisdiction of this Court flows from Article 162(2) (b) of the Constitution which is read together with the provisions of Section 13(2) of the ELC Act. The latter provides as follows;
- “In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—
- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) any other dispute relating to environment and land.”
46. Under the Registered Land Act Cap 300 (repealed), Section 21(4) deprived this Court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided under the laws.
47. The provision of Section 18 (2) of the Land Registration Act, 2012, similarly prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. It provides as follows:
- “The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”.
48. On a legal viewpoint, the provision of Section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar. Under the provision of Section 19 of the Land Registration Act, 2012, the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:
- “19(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts



thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

- 2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
 - (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”.
49. I have noted that the Defendant contends that this court has no jurisdiction to hear and determine the suit because the subject matter thereof is a boundary dispute and therefore the suit offends the provisions of sections 18 and 19 of the Land Registration Act. According to the Plaintiff, there is no boundary dispute between the Plaintiff’s plot and the Defendant’s plot. The two plots have existed side by side for the last 25 years. The Defendant has never raised the purported boundary dispute for that entire period. It is only after this suit was filed on 9th November 2022 that the Defendant served the Land Registrar with a letter on 11th November 2022 alleging that there was a boundary dispute between the two plots and thereafter the Defendant came to this court to raise the objection citing the alleged boundary dispute as a basis of the same. If there was a genuine boundary dispute between the two plots, the Defendant could not have waited for over 25 years to raise the same. Therefore, the purported boundary dispute is a smoke screen, only raised by the Defendant pretentiously to defeat this case. The same was raised after this case had been filed and cannot be used to defeat the case.
50. As already quoted, in the Court of Appeal Case of “Azzuri Limited – Versus - Pink Properties Limited [2018] eKLR”, the court stated as follows in relation to the application of Section 18 of the Land Registration Act:
- “This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession”.
51. Critically, from the surrounding facts and inferences, it is clear the two parcels of land have existed for such a long period of time – close to over twenty (20) years. Besides, there was a Civil suit - “HCCC No. 353 of 1999: P. N. Mashru Limited – Versus - Castledom Properties Limited & 3 others that was instituted by the Defendant herein over the same subject matter but which never pleaded on existence of any boundary dispute. Better still, I had a chance to go through the Plaint dated 8th November, 2022 and the prayers by the Plaintiff are not those seeking to stop encroachment and those in line of a boundary dispute. Moving on to the Defence by the Defendant dated 19th November, 2022, I have noted that they have not directly pleaded the issue of boundary dispute from their pleadings. The provision of Order 2 Rule 6 of the Civil Procedure Rules, 2010, parties are bound by their pleadings. I wonder why no party has ever raised the issue of boundary dispute until now. Nonetheless, for the benefit of doubt, I have noted that the Defendant brings on board particulars of interference stating that the Plaintiff’s construction as encroached in its land. The allegations though cannot be



substantiated at this early stage and the Plaintiff has maintained that the dispute between the parties has nothing to do with boundaries. Guided by the provision of Sections 107 to 112 of the *Evidence Act*, Cap. 80 on the Burden of proof, it is he who alleges that prove, and without any empirical evidence nor solid proof by the Defendant on this being a boundary issue, I find the Preliminary objection lacks merit. For these reasons, therefore, this matter should be heard to its logical conclusion being that it is too soon to conclude without hearing the evidence of both parties.

ISSUE No. b). Whether the Notice of Motion dated 8th November, 2022 by the Plaintiff/Applicant meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

52. The application herein is premised under 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.

53. 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.”

54. 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 (supra)”,

“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".

55. In dealing with the first condition of "prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited vs First American Bank of Kenya Ltd & 2 others (supra)",

"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"

56. From the pleadings, the Plaintiff contended that he is the registered proprietor of the leasehold interest from the Government of Kenya of all that parcel of land known as L.R. No.MN/V/1907 situate in Mombasa County (hereinafter "the suit property" or "the Plaintiff's property").The Plaintiff purchased the suit property from a company known as DIM AGENCIES LIMITED in or about 8th March 2021 for a consideration of a sum of Kenya Shillings One Million Two Fifty Three Thousand Five Ninety Seven Hundred (Kshs. 1,253,597.00/=). DIM Agencies Limited on the other hand had acquired the suit property from Castledom Properties Limited sometime in 1997.The Plaintiff's property neighbors the Defendant's property known as Plot Number 134/V/MN (hereinafter "the Defendant's property") and abuts the Mombasa-Nairobi highway.Having purchased the suit property legally and for value consideration, the Plaintiff is entitled to use, occupy, develop and peacefully and quietly enjoy the same without any interference by any person including the Defendant.

57. The Defendant on the other hand argued that it is the bona fide and registered owner of Plot Number MN/V/134 evidenced by a copy of the certificate of title over plot number MN/V/134. The Defendant herein purchased Plot No. MN/V/134 for a consideration of a sum of Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2,200,000/-) from Abdullatif Ahmed Taib as evidenced by the transfer dated 19th March 1992.Plot No. MN/V/134 had an acreage of 2.70 acres, however the Government of Kenya in May 1955 and January 1973 acquired 0.17 acres and 0.40 acres respectively for purposes of widening the Mombasa-Nairobi Highway. On the 24th February 1998, the Defendant herein leased to Messrs. H.P. Mashru Limited Plot Number MN/V/134 for a consideration of Kenya Shillings Three Million Five Hundred Thousand (Kshs 3,500,000/-). On the 18th August 1999 and 4th November 1999,Messrs H.P. Mashru Limited surrendered the lease to the Respondent herein for money consideration.

58. I wish to refer to 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 parties cases."

59. 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."



60. Regarding this first condition though being that being that both parties contend ownership to the land, I find that an interlocutory injunction would be the most appropriate to grant to preserve the property, I find that the Plaintiff herein has established that they have a prima facie case with a probability of success.

61. 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 facie, 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.”

62. On the issue whether the Applicant 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 property is at risk. The suit property had been compulsorily acquired by the government through the Commissioner of Lands for the purposes of widening the Mombasa-Nairobi Highway. The Defendant contended that the construction of the boundary wall on the Plaintiff’s property would render the Defendant’s property landlocked and completely inaccessible. The judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (supra)” 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.”

63. In this instance, the Defendant contends that the Plaintiff was interrupting the Defendant’s peaceful enjoyment of the Defendant’s property. They have argued that them being a leading transportation business and taking that they would slumped with a floodgate of court cases due to the injunction ordered has not been demonstrated as no evidence to this effect was produced to persuade the Court think otherwise. Indeed, the Defendant has not shown that the damage suffered would not be compensable through damages. To me the Plaintiff, has therefore satisfied the second condition as laid down in “Giella’s case”.

64. Thirdly, the Plaintiff has to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo vs 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”.

65. In the case of “Paul Gitonga Wanjau vs 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.”

66. The Plaintiff/Applicant contends that the balance of convenience tilts in his favour because he owns the suit property and has the right to develop it. While the Defendant on the other hand argues that the construction of the boundary wall is an infringing on their right to enjoy their property. Therefore, a finding in favour of the Defendant would be the option that guarantees the lower risk of injustice. The balance of convenience therefore tilts in the Defendant’s favour.

67. The decision of “Amir Suleiman vs 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.”

68. Bearing this in mind, 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. No party should proceed with any construction or activity on the suit property until conclusion of the suit.

69. In “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...”

70. 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 find that for purposes of preservation of the suit property, an order of temporary injunction should be issued as against both parties. Therefore, the application dated 8th November, 2022 must succeed.

ISSUE No. c). Whether the Notice of Motion application dated 19th November, 2022 by the Defendant/Applicant meets the threshold required of vacating of the injunctive orders under Order 40 Rule 7 of the Civil Procedures Rules, 2010?

71. In determining this issue I must consider that the law demands of justice that in allowing ex-parte proceedings, courts should balance the right of the individual to receive fair notice against the need for the court to step in to prevent imminent harm. In the case of “Abraham Lenauia – Versus - Charles Ketekya Nkaru (2016) eKLR” the court cited the case of “Ex Parte Princess Edmond De Polignac 1917 I KB 48 at Page 509” where Washington L.J observed as follows:

“It is perfectly well established that a person who makes an application in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him “

72. The principles which can be deduced from the above authority are fairness, justice and caution in conducting proceedings to adjudicate disputes between two disputants agitating for their respective rights within an adversarial system such as ours. Similarly, the granting or setting aside of an injunction is in the discretion of the Court. Such discretion however, will be exercised judiciously and not capriciously.

73. In the case of “St Patrick’s Hill School Ltd – Versus - Bank of Africa Kenya Ltd [2018] eKLR”, it was held: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

74. Instructively, the court has unfettered discretion to discharge or vary an injunction if the ends of justice demand so. Interim injunctions are not meant to be punitive of a party to a proceeding. They are meant to preserve the state of things pending the court investigating the dispute. Interim injunctions do not suspend obligations of the parties. They are rather meant to afford the parties an opportunity of being heard on their grievances.

75. Further, I will here echo Makau J when he delivered himself in “Ochola Kamili Holdings Ltd – Versus - Guardian Bank Ltd [2018] eKLR”, thus: -

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be



used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

76. This Honourable Court has already opined itself before in this ruling granting the interlocutory injunction on the merits of preserving the suit property until the final determination of this suit, the injunctive orders issued in the interim are for the preservation of the suit property while during the subsistence of the application and its determination. For this reason, this application dated 9th November, 2022 fails.

ISSUE No. d). Who will bear the Costs of Notice of Motion application 8th November, 2022 and Notice of Motion application dated 19th November, 2022 and the preliminary objection dated 19th November, 2022.

77. It is trite law that the issue of Costs is at the discretion of the Court. Previously, I have well stated in several precedents and most especially in the case of:- “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“58. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

78. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the event, it means the result and out come of any legal action in a litigation process.
79. In this case, although the Plaintiffs/Applicant has been successful and hence entitled to the costs from the applications dated 8th November, 2022, 19th November, 2022 and the Preliminary objection dated 19th November, 2022, taking that the matter is still proceeding on, the costs will be in the cause.

IX. Conclusion & disposition

80. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards the principles of preponderance of probabilities and the balance of convenience.
81. 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 Preliminary Objection dated 19th November, 2022 raised by the Defendant herein be and is hereby found to lack merit hence overruled.
- _SUBPARA b.



THAT the Notice of Motion application dated 8th November, 2022 by the Plaintiff/Applicant be and is found to have merit hence hereby allowed only for the purpose of preserving the suit property.

- c. THAT the Notice of Motion application dated 19th November, 2022 by the Defendant/Applicant be and is hereby found to lack merit and has been overtaken by events hence dismissed.
- d. THAT an order of Temporary injunction do issue restraining the both the Plaintiff and the Defendant either by themselves, officers, agents, employees, assigns or any person acting on their behalf on behalf of the Defendant from interfering with the Plaintiffs' ownership, use, occupation, development of and title of the property known as Land Reference No. MN/V/1907 pending the determination of this suit.
- e. THAT prayer (d) above is to the extend that this Honourable Court do hereby issue an injunction prohibiting the Plaintiff from the continued construction of the boundary fence until the conclusion of this suit.
- f. THAT for expediency sake, this suit to be heard on 27th May, 2024. There be a mention date on 26th February, 2024 for purposes of conducting a Pre – Trial Conference and taking specific directions on conducting a Site Visit under the provision of Orders 11 and 18 Rules 11 of the Civil Procedure Rules, 2010 respectively.
- g. THAT the cost of the Notice of Motion application dated 8th November, 2022, the Notice of Motion application dated 19th November, 2022 and the Notice of Preliminary objection application dated 19th November, 2022 shall be in the cause.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MISCROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 1ST DAY OF NOVEMBER 2023.

.....

HON. MR. JUSTICE LL. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant;**
- b. No appearance for the Plaintiff**
- c. No appearance for the Defendant**

