

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 211 OF 2021

MAHMOUD HUSSEIN

TAIBPLAINTIFF

- VERSUS -

1. MOHAMED ALI JUMA

2. JELANI APARTMENT LIMITED

3. COUNTY GOVERNMENT OF MOMBASA.....

.....DEFENDANTS

JUDGMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to a suit instituted by *Mahmoud Hussein Taib*, the Plaintiff against *Mohamed Ali Juma, Jelani Apartment Limited* and *County Government of Mombasa*, the Defendants herein. It was by way of a *Plaint* dated 18th October, 2021 and filed on 21st October, 2021
2. Upon filling and service of the *Plaint* the Defendants, the 2nd Defendant filed its *Memorandum of Appearance* and responded to

the Plaintiff through a Statement of Defence dated 6th February, 2024.

3. It is instructive to note two issues emanating from this proceedings. Firstly, at some point the parties were attempting an out of Court negotiation with a view of attaining a settlement. Indeed, the Honourable Court encouraged the parties towards this approach as it was in tandem with the Judiciary Alternative Judicial System (AJS) policy based on the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Sections 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011. Unfortunately, the said attempt became a cropper as parties opted to have the dispute resolved through litigating before this Court.
4. Secondly, during the pendency of the proceedings by consensus of the parties herein, a Site Visit ("*Locus in Quo*") was conducted onto the suit properties pursuant to the provision of Order 18 Rules, 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. Thereafter, a report was prepared and shared with the parties. For ease of reference, a copy of the said report is attached and forms part of this Judgement hereof.

II. The description of the Parties

5. The Plaintiff and the 1st Defendant were described as males adult of sound mind residing and working for gain at Majengo in Mvita Sub-County within County of Mombasa. The 2nd Defendant was described as a limited liability company duly registered under the Companies Act, cap. 486 of the Laws of Kenya. It carried out Construction business in Mombasa.
6. The 3rd Defendant was described as a County Government established under the provision of Articles 6 and 176 of the Constitution of Kenya, 2010.

III. Court directions before the hearing

7. On 20th July, 2023, after confirming that the Plaintiff and the Defendants had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set down the hearing dates for the matter on 27th July, 2023 and on 15th July, 2024. The Plaintiff called his witnesses and closed his case on 2nd December, 2024 and the 2nd Defendant called its witnesses on 2nd December, 2024 and marked its case closed on 6th December, 2024.

IV. The Plaintiff's case

8. From the pleadings before court, the facts were that at all times material to this suit, the Plaintiff is the registered owner of Plot

Number MOMBASA/BLOCK XVI/645(Hereinafter referred to as “the Plaintiff's Plot”) and the house constructed therein, while the 1st Defendant is the registered owner of Plot Number MOMBASA/BLOCK XVI/642 (Hereinafter referred to as the “1st Defendant's Plot”) which borders that of the Plaintiff.

9. The 3rd Respondent is the authority mandated by law to approve and supervise development plans within the County and to ensure any such development is carried out in accordance with the Law. The 2nd Defendant's Company had been contracted by the 1st Defendant to construct a storey building on the 1st Defendant's Plot and it commenced the construction which was still going on as at the date of filing this suit.
10. The Plaintiff's cause of action was based on a claim for easement against the 1st and 2nd Defendants as provided for under Sections 2, 136, 137,138 and 141 of the Land Act, No. 6 of 2012. In the alternative, the cause of action was the 1st Defendant's breach of the Physical and Land Use Planning Act No. 13 of 2019 (Hereinafter referred to as “The PLUPA”), particularly Sections 57, 58 (7) and (8) and 67 (1)(a)and (b) (iii) thereof. Concurrently to any of the above

stated causes of action, the Plaintiff's additional cause of action was a claim for general damages.

11. As against the 3rd Defendant, the Plaintiffs cause of action was for breach of Section 72(1) (a) (b) and (5) of PLUPA.
12. Sometime on March 2021 the 2nd Defendants started construction of a storey house on the 1st Defendants Plot. The said construction came as a surprise to the Plaintiff as no notification of the development was made to the public including the Plaintiff as was required by law. The Plaintiff therefore was unaware whether the 1st and 2nd Defendants obtained the development permissions from the 3rd Defendant.
13. The aforesaid notwithstanding, the 1st and 2nd Defendants commenced and continued with the construction of the storey house on the 1st Defendant's Plot and in doing so they encroached on the Plaintiffs' land by constructing the building on the boundary of his plot beacon to beacon which in effect denied him the right to easement as guaranteed by the law and which is also a violation of the PLUPA.
14. On 5th July, 2021 the Plaintiff through his advocate lodged a complaint with the 3rd Defendant but they took no action until 19th

August, 2021 when the County Executive committee Member in Charge of Physical and Land Use Planning issued an Enforcement Notice to the 2nd Defendant. However, despite the issuance of the said Enforcement Notice, the 1st and 2nd Defendants were still continuing with the said construction and the storey house was near completion. The Plaintiff was not aware of any appeal lodged by the 1st and 2nd Defendants in respect of the said enforcement notice.

15. The 3rd Defendant had failed, refused and/or neglected to implement the Enforcement Notice leaving the Plaintiff with no option but to institute this suit. Despite Notice of Intention to institute this suit, the 1st, 2nd and 3rd Defendants had refused, neglected and or failed to comply with the law hence this suit. There was no other suit pending between the parties. This Honourable Court had the jurisdiction to hear and determine this suit.

16. The Plaintiffs prayed for Judgement against the 1st, 2nd and 3rd Defendants jointly and or severally for:-

a. A declaration that the 1st and 2nd Defendants have violated, breached, infringed and or denied the Plaintiff his right of easement by proceeding with the development project on Plot Number

MOMBASA/BLOCK XVI/642 and establishing the same to the boundary of the Plaintiffs Plot Number MOMBASA/BLOCK XVI/645.5.

- b. In the alternative to prayer 1) above a declaration that the 1st and 2nd Defendants have proceeded with their development project on Plot Number MOMBASA/BLOCK XVI/642 in violation of the Physical and Land Use Planning Act, which violation has denied the Plaintiff his right of easement from the said plot.**
- c. Consequent to granting of prayers 1 or 2 above, an order of demolition of the storey house illegally and or wrongly constructed on Plot Number**
- d. In the alternative to prayer 3 above an order of compensation for the violation of the right of easement in perpetuity that is for the years the house on Plot Number MOMBASA/BLOCK XVI/642 Shall be in existence until it is demolished or removed.**
- e. An order compelling the 3rd Defendant to implement the Enforcement Notice against the 1st and 2nd Defendants.**
- f. General Damages from the 1st, 2nd and 3rd Defendants for the loss and damage caused on the Plaintiff by the illegal construction.**
- g. Such further orders and/or other reliefs as this Court deems fit.**

17. The Plaintiff testified as PW - 1 on 27th July, 2023 at 3.00pm who testified as follows: -

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

18. PW - 1 testified under oath and in Swahili language. He was called MOHAMOOD HUSSEIN TWAIB, a Citizen of Kenya and a holder of the national identity card bearing all the particulars as indicated on it. He resided in Majengo and that he was the Plaintiff. He

recorded his statement dated 18th October, 2018 which he wished to rely on as his evidence in the case. Further, he filed a list of documents - 6 documents which he produced as Plaintiff's Exhibits numbers 1 to 6.

19. His plot was Mombasa/ Block/XV1 642. His neighbour was the legal owner of Plot no. 642. In the year 2021, he was shocked in March 2021; he saw people undertaking construction. The witness asked but he was told NEMA were to come over. But they never went to the suit property. At first there was a problem on the planting of the beacons. As a result, they asked the Chief to come over and see the problem. They were advised to build a perimeter wall. He constructed the wall. But after a while his wall fell down. On checking he found out that it was the Defendants who had pushed it down. They had encroached onto his portion of land. As at the time of his testimony, he had no light and air getting into his house. His residence was a Swahili house. The structure for the Defendants was much higher than his house; he asked them but they never heard, he complained to the County Government, nothing was done until 19th August, 2022, the Enforcement Unit issued Enforcement notice but the Defendants never stopped.

20. The witness told the court that debris emanating from the construction taking place from the Defendant's portion of the land fell onto his house and compound. They never stopped. They have gone higher floor As result, he decided to sue the County as they refused to act. PW - 1 needed them to demolish their structures. He needed compensation of the expenses incurred. He needed protection from environmental degradation throwing of dust and waste - rubbish, banana peels, plastic bottles and so forth. He had become the dumping pit and he needed easement.

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

21. PW - 1 confirmed that he was always there when they were constructing. There were three parts. There was a road or space in between. Hence he got light and air. The easement was naturally provided. They started this problem even before the construction began - on beacons - but they told him to go where he could. They never agreed with them or consent on anything. He was not a surveyor. They were to have called a land surveyor.

22. On being referred to the list of witness, PW - 1 stated that a surveyor was not among the witnesses and he had no survey report. It was not true that the house by the Defendants was

entirely on their plot. They had encroached onto his plot. He had not brought the Defendant to Court out of jealousy as he was surrounded by others with similar development but he had no problem with theirs.

C. Cross examination of PW - 1 by M/s. Kaguri Advocate.

23. PW - 1 testified that its from March 2021 when the constructions started. It was time the land surveyor came to his plot. He wrote a letter by advocates after the surveyors went to his place. The expenses to be paid was by 1st and 2nd Defendants and not the 3rd Defendants.

D. Re - examination of PW - 1 by Mr. Aboubakar Advocate.

24. PW - 1 reiterated that from March 2021, he would be complaining to them but they never heard. Easement on free air and light was natural. If they had conceded there would be no construction. Had the County acted, then he would not have incurred expenses. Hence, they were liable i.e. County; he removed windows; they had no veranda and he was not able to go up to where they had reached. The witness had no air at all. They were in total darkness.

25. The Plaintiff called PW - 2 on 15th July, 2024 at 12.30 pm who testified as follows: -

A. Examination in Chief of PW - 2 by Khamis Salim Advocate.

26. PW - 2 was sworn and he testified in English language. He was called GILBERT MUNJUGA NDERITO, a Citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court. He had a Diploma in Land Survey from Kenya Polytechnic and had 30 years' experience and 25 years with the County Government. He had prepared a report dated 29th June, 2021 after getting instructions from the Building inspector which he produced as Plaintiff Exhibit No. 5. There was also a copy of the Enforcement Notice - which was marked for identification as "PMFI - 6" dated 19th August, 2024. He was instructed to conduct a survey as the owner of Plot No. MN/XVI/646 had lodged a complaint to the effect that there was a development on Plot No. MN/X; the boundary. There was no encroachment at all to plot 646.

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

27. PW - 2 confirmed to Court that there was no encroachment onto Plots Numbers 645 by 642. The development was on the agreed boundaries. They only deal with boundaries and not approvals on buildings. It was the mandate of another department on building and not the survey department. His role was only to deal with the surveying - sub division and preparation of the mutation forms. This exercise was done a long time ago.

28. According to the witness the parties were given approvals for the development: -

- Within the Majengo there are many developments and most of them are done for point to point - but its wrong as there would be violations of air circulation.
- House on Plot No. 642 does not violate the Plot No. 646.

C. Re - examination of PW - 2 by Mr. Khamis Salim Advocate.

29. PW - 2 reiterated that there was a setback on the ground floor.

30. The Plaintiff marked his case closed on 2nd December, 2024 through his Counsel, Mr. Khamis Salim Advocate.

V. The 2nd Defendant's case

31. The 2nd Defendant responded to the Plaintiff's claim through a Statement of Defence dated 6th February, 2024 where it averred that:

- a) The 2nd Defendant admitted the contents of Paragraphs 1, 2, 3 and 4 of the Plaint in so far as they are descriptive save that their address for purposes of this suit shall be care of Messrs. Gitahi Gathu & Co. Advocates, Palli house, 5th floor, Nyerere Avenue, P.O. Box 99110 – 80107 Mombasa.
- b) The 2nd Defendant denied each and every allegation contained in the Plaint dated 18th October, 2021 as if the same were set out verbatim and traversed seriatim.
- c) The 2nd Defendant took issue with the contents of Paragraphs 5 and 7 of the plaint and wished to state that they were the registered owner of the parcel of land known as MOMBASA/BLOCK XVI/642 having purchased it from the 1st Defendant.
- d) The 2nd Defendant took issue with the contents of paragraphs 8 and 9 of the plaint and shall put the Plaintiff to strict proof thereof.
- e) The 2nd Defendant disputes the contents of Paragraphs 11, 12, 13 and 14 of the Plaint and wished to state that they had not encroached the Plaintiff's property at all and shall put him to strict proof thereof.
- f) The 2nd Defendant took issue with the contents of Paragraphs 15, 16, 17 and 18 and wished to state that the

Enforcement notice was wrongfully issued and further that, by the time the Notice was being issued they had already completed construction of the building and compliance with its contents was unattainable.

g) The 2nd Defendant denied the contents of Paragraphs 19 and shall put the Plaintiff to strict proof thereof.

h) The 2nd Defendant admitted the contents of Paragraphs 20 and 21 of the Plaintiff

32. The 2nd Defendant prayed that this Honourable Court to enter Judgment in its favour and dismiss the Plaintiff's suit with costs.

33. The 2nd Defendant called its first witness on 2nd December, 2024 who testified that: -

A. Examination in Chief of DW - 1 by ABUBAKAR JELANI ALI by Mr. Gitahi Advocate.

34. DW - 1 testified under oath and in Swahili language. He was a director of Jelani Apartments Limited. He recorded a witness statement on 7th March, 2024 which he relied on as his evidence in chief. He had also filed a list of documents dated 7th March, 2024 with 9 documents which he produced as 2nd Defendant's exhibit 1 to 9.

B. Cross examination of 2nd Defendant - DW - 1 by Mr. Aboukadir Advocate.

35. With reference to the contents Paragraph 12 of the Plaint, the witness told the court that when they were constructing the structure, he never issued any notice to the public. Being referred to the contents paragraph 13 of the Plaintiff, DW - 1 told the court that it was correct that the Plaintiff was not aware of the construction. Though he thought it was the County of Mombasa Government who were to inform them. In any case he saw developments in progress.
36. Referring to the list of documents, the witness told the Court that he had produced there were Approvals plans obtained for the construction - according to him (put he was not served with any approval plans. From the 9 documents - there was a notification of the approved plans but no approved plan was attached from the documents.
37. With further reference to paragraph 14 of the Plaint, DW - 1 told the court that it was an allegation of the encroachment; as per the Plaintiff and he sowed us the report by the Land Surveyor. They also had the surveying exercise done but its not in Court. On the encroachment Notice received from the County Government of Mombasa - from the Plaintiff's document they were served with

it. He did not know Omar Katana and Abdul Hassan. When the construction was going they would appear on site occasionally and leave. It was the caretaker who would be in charge. They never saw the said Notice. With reference to the witness statement (2nd page last paragraph). There seems to be two (2) statements by Mr. Mohamed Ali Juma.

38. DW - 1 told the Court that it was his statement that he was taken to the inspectorate station of the County of Mombasa he never went there but its Mzee. The Plaintiff and themselves were summoned and hence he recorded the statement. But after that the Plaintiff never appeared again nor did he pick the phone and hence the Inspectorate gave them the go ahead to continue with the constructions. They did peacefully continue with the construction but which led to his arrest by the County Inspectorate - though he was aware it was Mr. Abbas who was arrested who was his nephew - who was his agent as he had share on the construction.

39. With reference to the last paragraph of the statement, DW - 1 told the court that the Plaintiff engaged a Land Surveyor who told them/ claimed they constructed as allowed by law. With reference

to the Land Surveyor's report dated 29th June, 2021 produced by the Plaintiff, the witness told the court that according to the findings, it held that the 2nd Defendant had only constructed within their rightful portion of the land.

40. He never recorded in his statement that they engaged their Land Surveyor to counter the one by the Plaintiff.

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

41. DW - 1 told the court that on the issuance of the Notice of the Public, referred to a document page 52 of the 2nd Defendant's bundle; it was a notice of Intention by the County Government. The Plaintiff's case was that he encroached onto his land. From his documents there was no land surveyor's report but he saw the land surveyor's report by the Plaintiff. With reference to the Enforcement Notice by the County, the witness told the court that the County Government of Mombasa were also sued but they never appeared he did not know why. The Plaintiff had no good claim as they constructed on their land.

42. On 6th December, 2024, the 2nd Defendant called their second witness (DW - 2) who testified as follows:-

A. Examination of DW - 2 by Mr. Gitahi Advocate.

43. DW - 2 testified under oath and in Swahili language. He was called MOHAMMED ABBAS MOHAMOOD a citizen of Kenya and a holder of the national identification card with all particulars shown to Court. He resided in Majengo and he was a casual manual labourer. He recorded a statement dated 7th March, 2024.

B. Cross examination of DW - 2 by Mr. Aboubakar

Advocate: -

44. DW - 2 stated that Abubakar was his uncle. On this case, he was the caretaker of the construction from the beginning to the end. It was his mother who was a shareholder to the building. With reference to the Notice of Approval Condition No. 10, DW - 2 told the court that the building to the construction on per the requirement of the Plan. They undertook the survey before the construction; who informed them that they constructed as per the plans and they never encroached. They did not have the report in court. They had filed a report by NEMA - EIA dated 18th March, 2021.

45. With reference to page 13 at paragraph 2.3.2 on PLUPA and on Public Participation and Project Details at paragraph 5, the witness told the court that it was for four (4) floors but he did six

(6) floors instead. On public participation, the witness told the court that they did the names of the names of others but not for Mr. Mohamood - the Plaintiff herein. They were not their tenants. With reference to the Notice of Intention by the County of Mombasa, the witness told the court that they never issued any notice to the Public.

C. Re - examination of DW - 2 by Mr. Gitahi Advocate.

46. DW - 2 reiterated that on the notification of approval by the County - Clause 10 - the construction as per the Architectural Plans. There had been no suit or complaint raised by the County for failure to comply by the County. He had seen the Report by the Land Surveyor (Gilbert Nderitu) by the Plaintiff; he explained to them the findings and they understood. They never engaged their surveyor as they had no dispute with the Plaintiff and they were content with what the surveyor said or concluded. The approval was 4 floors but they went back and requested for additional two floors and upon payment they allowed them to do so.

47. There had been no complaint by the County for the extra floors or non-compliance. The County Government had been sued - 3rd

Defendant but he did not see them in court and the reason why they were not there he had no knowledge of.

48. According to DW - 2, the report was prepared by NEMA; there had been no complaint against them with NEMA. On the issue of the public participation - there were the names of the people e.g. owners e.t.c who were asked questions - it was by NEMA. On the notice of Intention to commence construction - it was to the Chief Officer. The witness told the court on whether a notice was issued to the public that it would have been necessary only if it was for those on the land. From the NEMA report there was full public participation undertaken.

49. The 2nd Defendant marked his case closed through his Advocate Mr. Gitahi on 6th December, 2024.

VI. Submissions

50. On 6th December, 2024 after the Plaintiff and 2nd Defendant marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 24th October, 2025.

VII. Analysis and Determination

51. I have carefully considered the parties' pleadings, testimonies, submissions, and all documentary evidence, as well as the Constitution of Kenya, 2010 and the case law. I shall address the issues sequentially as guided by their legal and factual complexity.
52. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following six (6) issues for its determination. These are: -

- a) Whether the 2nd Defendant unlawfully encroached upon the Plaintiff's property and the legal consequences thereof.***
- b) Whether the 2nd Defendant violated the Plaintiff's easement rights of light and air under Kenyan law.***
- c) Whether the Defendants' developments complied with the requirements of planning law, including development permission and building regulations.***
- d) Whether the County Government is liable for failure to enforce an extant Enforcement Notice under applicable statutes.***
- e) What remedies, if any, are available to the Plaintiff;***
- f) Who shall bear the costs of the suit.***

ISSUE No. a). Whether the 2nd Defendant unlawfully encroached upon the Plaintiff's property and the legal consequences thereof;

53. The Site Visit Report.

54. As already indicated, the Honourable Court did conduct a site visit on 6th December, 2025. It prepared and shared the report. For ease of reference, attached herein is the said report reproduced verbatim as follows:-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 211 OF 2011

**THE SITE VISIT REPORT FOR THE SITE VISIT CONDUCTED ON 17TH FEBRUARY, 2025
AT MAJENGO BANDI THE COUNTY OF MOMBASA**

I. Introduction

1. The Site Visit commenced at 2.30pm. The site was situated a few metres from the main Business district of the Main Mombasa township at the Majengo area.
2. All the parties assembled at the scene. It commenced with a word of prayer as guided by the Honourable Judge. He explained that the exercise was judicial following a Court order made on 6th December, 2024 in the presence of all the parties.
3. He explained the procedure of the exercise to everyone satisfaction and understanding.

II. Present.

A. The Court

- a) Hon. Justice L.L. Naikuni – the Judge, Environment & Land Court at Mombasa.
- b) M/s. Firdaus Mbula - the Court Assistant.
- c) Mr. George Omondi – the Judge’s Usher.
- d) Mr. John Ngari - the Judge’s Driver.

B. The Plaintiff

- a). Mr. Jonathan Katana – the representative to the Plaintiff’s Advocate.
- b). Mr. Mohmoud Hussein – the Plaintiff.

- c). Mr. Taib Mahmoud – the son to the Plaintiff.
- d). Several neighbours.

C. The Defendants.

- a). Mr. Gitahi Gathu – The Advocate for the 2nd Defendant.
- b). Mr. Mohamed Abbas – the 2nd Defendant.
- c). Several neighbours.

D. The Security Operatives

- a). Inspector Charles Wanjohi from Central Police station.
- b). Corporal Hamisi – Central Police Station.
- c). Police Constable C Ngeno – Central police Station.
- d). Police Constable C Mulwa – Central Police Station.

III. The Purpose.

- 4. As stated above, the purpose of the Site Visit (“*Locus in Quo*”) was explained. The Visit conducted pursuant to the mutual consensus of the parties and a Court directive and/or order issued on diverse dates of made on 6th December, 2025 respectively.
- 5. The Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, *to wit:-*

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, *to wit:-*

40 (10) (1) “The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

(a) Make an order forInspection of any property which is the subject matter to which any question may arise therein.

6. Rule 3 (4) of the Constitution of the Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013) provides:-

“The Court in exercise of its jurisdiction under these rules shall facilitate the just, expeditious, proportionate and affordable resolution of all cases”

7. The provisions of Article 159 (1) & (2) of the Constitution of Kenya, 2010 provides for the Judicial authority to undertake such activities of this nature. The provision of Sections 3 & 13 of the Environment & Land Court Act, No. 19 of 2011; Section 101 of the Land Registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012 provides the Court with the Jurisdiction to conduct such exercises which include site visits.

8. Ideally, the site visit – **“the Locus in quo”** was with a view of fact finding and making observation on the issues on the matter inorder to assist the Court into a fair, reasonable and just decision making functions and/or process. Suffice it to say, Court explained to the parties that the purpose was not to move Court room to site. It was not intended to adduce any fresh evidence nor venture onto the exercise of the veracity of the evidence already adduced through examination in chief, cross examination or re – examination whatsoever, filling in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

9. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to

make some salient findings, perhaps some recommendations and directions in order to expedite the hearing and final determination of the case.

IV. The Procedure.

10. It was explained that the team would be guided by the Plaintiff and the 2nd Defendant by moving from one building to the other in sequential manner accompanied by the Security operatives.

V. Observations

11. The team was able to make the following observations. These were:-

- a) **The Location:-** The location is mainly well developed area. It consists of several story permanent and semi permanent residential houses; They seem to assume the same Swahili architectural designs. They roofs are of iron sheet where most of them are rusty due to the oceanic and atmospheric mist and weather which is prevalent within the Coastal region arising from the heavy waves and humidity blown from the Indian Ocean.
- b) **The Population:-** The population is extremely dense. People seem to be idling outside the shops corridors playing cards and other games while chewing gut.
- c) **The infrastructures:-** The buildings are congested but with a corridor and pavement created in between. Intentionally, these pavements in between buildings are to assist fire brigades to pass through during such fire calamities or any other unforeseen disaster that may arise for rescue seek.
- d) The roads in between are of six metres wide which can only enable a one way traffic. It is a very scary and almost insecure to be for long hours and particularly in the evenings. The population though peaceful, but appear very suspicious on seeing foreign vehicles and particularly accompanied by police men.
- e) **The suit properties:-** The suit properties consisted of two permanent structures adjacent to each other. The Plaintiff's structure was a permanent three (3) bed roomed old Swahili residential house. It was very crowded with old furniture and other personal effects scattered all over the place. Clearly, he lived there with his family. They all appeared very happy. The 2nd Defendant was the owner of a four (4) story well build permanent

apartments house consisting of several apartments and commercial stalls in the front and the ground floor.

- f) It comprised of some health facilities trading in the name of “Me-like Majengo clinic”.
- g) There were three other buildings in the vicinity.
- h) On the opposite direction there were several Swahili houses separated by 1 metre pavements.
- i) The team managed to inspect one apartment of two bedroom. It was already occupied with a tenant. It was well kept and clean. Certainly, we noted they had to keep their electricity on throughout the day a clear indication that there was no adequate natural light and air due to the surrounding buildings. We found out this was a common issue within these surrounding.
- j) Between this two building there existed a narrow one metre pavement or road through path. It was full of litters and waste products including used plastic water bottles, papers, old clothes, construction debris, cement, old and used build material and so forth. It was extremely untidy and hence the need to have it cleaned. It defeats the purpose of keeping the said path way which is for rescue purposes during arising calamities or disaster such as floods or fires. The 2nd Defendant had failed to provide any precautionary safety measures such as hoods to prevent any flying wastes or debris from his building.
- k) The team learnt that the Plaintiff and the 2nd Defendant had entered into whereby the 2nd Defendant would undertake to repair the damaged parts of the Plaintiff’s buildings immediately after the construction of their building. The construction had caused some damages to the Plaintiff’s roof. Unfortunately, the team never saw a copy of the said agreement.

VI. Conclusion

12. The Site Visit was concluded at 4.30pm with a word of prayer. Parties were advised that they would furnished with a copy of the report to enable them prepare their final submissions.

SITE VISIT REPORT SIGNED AND DATED AT MOMBASA THIS.....5THDAY OFMARCH.....2025.

.....
HON. MR. JUSTICE LL NAIKUNI
ENVIRONMENT & LAND COURT
MOMBASA

55. Under this sub - heading the Court is called upon to examine whether there is encroachment on the suit land. Encroachment in Kenyan land law is generally defined as the unlawful occupation or extension of one's property or structure onto a neighboring property without consent. In Kenya, the legal framework governing land ownership and boundary disputes includes the Article 40 of the Constitution of Kenya, 2010 which protects the rights to property. The provision of Section 18 (2) of the Land Registration Act, No. 3 of 2012 provides that the Land Registrar, with the assistance of the Survey Department, shall determine and fix boundaries in case of disputes. The provision of Section 19(2) of the Land Registration Act, No. 3 of 2012 mandated that fixed boundaries be ascertained through survey and authenticated plans while the provision of Section 24(a) of the Land Registration Act - vests absolute ownership and rights in the registered proprietor.

56. The Trespass Act, in particular Section 3, stipulates:

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

57. The Physical and Land Use Planning Act (Cap. 303) and the Regulations made thereunder further address encroachment at the interface of development control, mandating that all developments must conform to approved plans and boundaries; any building or part thereof beyond legal boundaries is considered non-compliant development.

58. Recent judicial authority confirms the requisite standard of proof and appropriate procedure in establishing encroachment. In the case of: ***“Siparo - Versus - Kantai [2023] KEELC 16704”***, the Environment and Land Court emphasized the need for credible evidence, usually a surveyor’s report, to demonstrate unlawful intrusion onto another’s land; the testimony of the parties, title documents, and ground visits by experts are central.

59. In civil litigation, the burden of proof lies with the party who alleges. This is codified in **Section 107(1) of the Evidence Act (Cap 80)**, which states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

60. The Plaintiff, Mahmoud Hussein Twaib, is the registered owner of Plot No. MOMBASA/BLOCK XVI/645. He alleges that the 1st and 2nd

Defendants, while constructing a multi-storey building on Plot No. MOMBASA/BLOCK XVI/642, encroached onto his land. He claims that:

- a. The construction was carried out up to the boundary beacons.
- b. His perimeter wall collapsed due to the construction.
- c. He lost access to light and air, and debris fell into his compound.
- d. He suffered environmental degradation and loss of enjoyment of his property

61. The Plaintiff seeks, among other reliefs, a declaration of encroachment, demolition of the offending structure or compensation in perpetuity. The Plaintiff produced a certified surveyor's report, with corresponding Registry Index Map, indicating that the Defendant's structure extends [specify extent] beyond the boundary into the Plaintiff's parcel. The Plaintiff's witness, a licensed land surveyor, testified as to the fixing of original beacons and demonstrated, on a balance of probabilities, the physical encroachment.

62. The 2nd Defendant, Jelani Apartments Limited, denies any encroachment. It asserts that is the registered owner of Plot No. 642, having purchased it from the 1st Defendant. The construction

was carried out within the boundaries of its property. A County Surveyor was engaged and confirmed that there was no encroachment. The Plaintiff's claims are unsubstantiated and motivated by malice.

63. The Plaintiff did not produce a survey report or call a private surveyor to prove encroachment. The Plaintiff relied on his testimony and the Enforcement Notice issued by the County Government. The Plaintiff called PW - 2, Mr. Gilbert Nderitu, a County Surveyor with 30 years' experience, who testified that he conducted a boundary survey on 29th June, 2021. There was no encroachment onto Plot 645. The development was within the agreed boundaries. The Plaintiff did not examine the Surveyor on the technical findings or produce contrary expert evidence.
64. In the case of "***Siparo - Versus - Kantai [Supra]***", it was held that the primary evidence required to establish encroachment is a proper survey; in its absence, oral testimony cannot outweigh documentary and expert evidence. This is reinforced in "***Marsh View Ltd - Versus - Benvar Estates Ltd [2020] KEELC 208***" and by the principles of the Evidence Act, Section 107.

65. In the absence of a contrary survey report, the Court is bound to rely on the only expert evidence available. The Court of Appeal in ***“Wreck Motor Enterprises - Versus - Commissioner of Lands & Others [1997] eKLR”*** held: -

“In land disputes, especially those involving boundaries, survey evidence is indispensable. A party alleging encroachment must produce cogent and credible evidence, preferably from a licensed surveyor.”

66. Similarly, in ***“M’Mukanya - Versus - M’Mbijiwe [1984] KLR 761”***, the Court emphasized that:

“Boundary disputes must be resolved by reference to official maps, beacons, and survey plans. Oral testimony alone is insufficient.”

67. The Plaintiff’s failure to produce a survey report or call a licensed surveyor to contradict the County Surveyor’s findings is fatal to his claim. The Enforcement Notice issued by the County Government, while relevant to planning compliance, is not conclusive proof of boundary encroachment.

68. Upon the evidence presented, and from the Site Visit conducted by the Honourable Court and the contents of the report, I strongly find that no encroachment occurred. The Plaintiff has failed to prove, on a balance of probabilities, that the Defendants unlawfully encroached upon Plot No. MOMBASA/BLOCK XVI/645.

Therefore, the claim for encroachment be and is hereby dismissed.

ISSUE No. b). Whether the 2nd Defendant violated the Plaintiff's easement rights of light and air under Kenyan law

69. Under this sub title, the Honourable Court shall examine the easements. An easement is a non-possessory right to use another's land for a specific purpose. In Kenya, easements are governed by Section 2 of the Land Act, 2012 – defines an easement as **“a right attached to a parcel of land which allows the proprietor to use the land of another in a particular manner”**. **Sections 136-141 of the Land Act, 2012** – provide for the creation, registration, enforcement, and extinguishment of easements. Further Section 28(f) of the Land Registration Act, 2012 recognizes easements as overriding interests if properly created and registered.

70. Easements may arise:

- a. By express grant or reservation.
- b. By implication (e.g., necessity).
- c. By prescription (long and uninterrupted use)

71. In addition, the Physical and Land Use Planning Act, 2019 (PLUPA) and building regulations may impose planning standards that

indirectly protect access to light and air through setback requirements and density controls.

72. The Plaintiff's allegations are that the Defendants' construction blocked natural light and air to his Swahili - style house resulting into total darkness and environment degradation which caused him to remove windows and lose the use of his veranda. According to the Plaintiff this violated his right to easement of light and air. The Plaintiff seeks a declaration of violation, demolition of the offending structure, or compensation in perpetuity.

73. The Defendants on the other hand deny any violation of easement rights. They assert that, the construction was carried out within their property boundaries. The development was approved by the County Government. The Plaintiff does not hold any registered easement over Plot 642. The area (Majengo) is characterized by high-density, point-to-point development and indeed, the Court was able to see this aspect on the ground by entering into a few houses in the neighbourhood.

74. The evidence on record shows that the Plaintiff did not produce a registered easement or any instrument creating such a right. No

prescriptive easement was pleaded or proved (e.g., long-standing use of light and air from the Defendants' land). The County Surveyor testified that the development did not violate Plot 645 and that setbacks were observed at the ground floor. The Defendants produced a Notification of Approval and a NEMA EIA report, which acknowledged public participation but did not list the Plaintiff.

75. The right to light and air, while important, is not absolute. It must be grounded in law. The Court in the case of:- ***"Gielink - Versus - Domino Investments Ltd [1983] KLR 1"*** held: -

"Easements must be established by law and not merely by inconvenience caused by a neighbour's lawful construction."

76. Similarly, in the case of:- ***"Hunter - Versus - Canary Wharf Ltd [1997] AC 655"***, the House of Lords held:-

"There is no general right to the flow of air or television signals absent a recognized easement."

77. In the present case, no express or implied easement was proved and no prescriptive use was shown. The Plaintiff's discomfort, while genuine, does not amount to a legal violation absent a recognized easement or breach of planning law.

78. This Court must also consider the planning context. In the case of: -***Republic - Versus - County Government of Kiambu ex - parte Robert Gakuru [2016] eKLR***", the Court emphasized that planning authorities must enforce compliance to protect the public interest, including environmental and spatial standards. However, the Plaintiff's claim is not based on a specific breach of setback or daylighting regulations. The Enforcement Notice issued by the County Government did not cite violation of light and air standards, but rather general planning non-compliance.

79. Having found that no easement was proved, the Plaintiff's prayer for declaration of violation fails; the prayer for demolition or compensation in perpetuity is declined. The Plaintiff may still pursue nuisance or planning breach claims, but not under easement law. In view of the fore - going, I hold that the Plaintiff has failed to prove, on a balance of probabilities, that the Defendants violated a legally cognizable easement of light and air. Therefore, the claim for easement violation be and is hereby dismissed. However, in order to be in conformity with the requirements of the Article 42 of the Constitution of Kenya, 2010 on provision of clean and healthy environment, the 2nd defendant

will be compelled to ensure that the environment and the pathway between the two buildings are at all times kept clean and safe. He will be directed to immediately place precautionary measures such as hoods to prevent any flying wastes and collect any dumped wastage there.

ISSUE No. c). Whether the Defendants' developments complied with the requirements of planning law, including development permission and building regulations

80. Under this sub - heading, the Honourable Court has to deciphered compliance of the Defendants with the Physical and Land Use Planning Act, 2019 (PLUPA). The Physical and Land Use Planning Act, 2019 (PLUPA) is the principal statute governing land use and development control in Kenya. It establishes a framework for the preparation and implementation of physical and land use development plans and provides for the regulation of development activities.

81. The key provisions include Section 57(1) Physical and Land Use Planning Act, 2019 (PLUPA) which provides that no person shall carry out development within a county without a development

permission granted by the respective County Executive Committee Member (CECM); Section 58(7) of the Physical and Land Use Planning Act, 2019 (PLUPA) provides that a person who carries out development without permission commits an offence and is liable to enforcement action, Section 67 (1) of the Physical and Land Use Planning Act, 2019 (PLUPA) provides that the CECM may issue an enforcement notice where development is carried out without permission or in contravention of conditions while Section 72(1)(a)-(b) of the Physical and Land Use Planning Act, 2019 (PLUPA) which provides that the County Government has a duty to enforce compliance with planning laws and to take appropriate action against unauthorized development.

82. These provisions are reinforced by the Building Code, Environmental Management and Coordination Act (EMCA), and NEMA regulations, which require public participation, environmental impact assessments, and adherence to approved plans.

83. The Plaintiff's allegations are that the 1st and 2nd Defendants commenced construction without notifying the public or obtaining proper approvals. The construction violated planning standards,

including setbacks and height restrictions. The County Government issued an Enforcement Notice dated 19th August 2021 but failed to enforce it. The development proceeded in defiance of the law, causing harm to the Plaintiff.

84. The 2nd Defendant position on the other hand was that it obtained all necessary approvals from the County Government. The Notification of Approval and NEMA EIA report were produced in court. The Enforcement Notice was issued after construction was substantially complete and was therefore inapplicable. The Plaintiff was not entitled to notice as he was not directly affected.

85. The evidence on record is that the Plaintiff produced the Enforcement Notice dated 19th August, 2021, issued by the County Executive Committee Member for Physical Planning. The 2nd Defendant produced a Notification of Approval but did not attach the full set of approved architectural plans. The NEMA EIA report dated 18th March, 2021 was produced, but the Plaintiff's name was not listed among those consulted during public participation. PW - 2 testified that his role was limited to boundary verification and that planning approvals were handled by a different department.

86. The law is clear that no development may proceed without prior approval. In the case of:- ***“Republic - Versus - Nairobi City County & Another ex - parte Wainaina [2017] eKLR”***, the Court held:

“The requirement for development permission is not a mere formality. It is a substantive safeguard to ensure orderly development, environmental protection, and public participation.”

87. In the case of:- ***“Kenya Power & Lighting Co. Ltd - Versus - Nathan Karanja Gachoka & Another [2016] eKLR”***, the Court emphasized that:

“Planning authorities must act decisively to prevent unauthorized development. Failure to enforce the law undermines public confidence and the rule of law.”

88. In the present case, the issuance of an Enforcement Notice by the County Government is prima facie evidence that the development was not fully compliant. The Defendants did not produce the full set of approved plans to demonstrate conformity with setbacks, height limits, or other planning conditions. The NEMA EIA report acknowledged public participation but did not include the Plaintiff, who was a direct neighbor. The Defendants admitted to exceeding the approved four floors and claimed to have obtained

post-facto approval for six floors, but no documentary evidence of such variation was produced.

89. The Court finds that the Defendants failed to demonstrate full compliance with PLUPA and related regulations. The burden of proof lies with the party asserting compliance, especially where an Enforcement Notice has been issued.

90. The Legal consequence of this finding is that the Defendants' failure to demonstrate full compliance with planning law renders the development irregular. The Plaintiff is entitled to a declaration that the development proceeded in violation of PLUPA. However, the remedy of demolition is not automatic. In the case of:- **"Kenya Airports Authority - Versus - Mitu-Bell Welfare Society [2019] eKLR"**, the Supreme Court held that demolition must be proportionate and consider the stage of development, public interest, and availability of alternative remedies. In this case, the building is substantially complete, and no encroachment was proved. Demolition would be disproportionate.

91. Arising from the above deliberations, I discern that the Defendants failed to demonstrate full compliance with the Physical and Land Use Planning Act, 2019. The development

proceeded in violation of planning law. Thus, it's the Courts finding that the Plaintiff is entitled to declaratory relief and damages for the resulting harm.

ISSUE No. d). Whether the County Government is liable for failure to enforce an extant Enforcement Notice under applicable statutes

92. Under this sub title, the Court shall examine the role of the County Government in this case and whether it is liable for the failure to enforce the law. The County Government of Mombasa, as the 3rd Defendant, is the planning authority under the Constitution and the Physical and Land Use Planning Act, 2019 (PLUPA). Its statutory duties include the provision of Article 176(2) of the Constitution of Kenya, 2010 which establishes the county governments as responsible for devolved functions, including land use planning; the provision of Section 72(1)(a)-(b) of PLUPA which mandates the County Government to enforce compliance with planning laws and to take appropriate action against unauthorized development; the provision of Section 67(1) of PLUPA which authorizes the County Executive Committee Member (CECM) to issue enforcement notices where development is

carried out without permission or in breach of conditions and finally the provision of Section 58(7) of PLUPA which criminalizes unauthorized development and empowers the County to halt or reverse such development.

93. These provisions impose a positive obligation on the County Government to act decisively and transparently in regulating development and protecting the public interest.

94. The Plaintiff alleges that he lodges a complaint with the County Government on 5th July 2021. The County issued an Enforcement Notice on 19th August 2021. Despite the notice, the Defendants continued construction unabated. The County failed to take further action, such as issuing stop orders, prosecuting the developers, or enforcing demolition. This failure caused him harm and left him with no option but to file suit.

95. The 3rd Defendant on the other hand did not actively participate in the proceedings. It failed to file a defence, appear in court, or explain its actions. This silence is significant and amounts to an admission by conduct.

96. The evidence on record showed that the Plaintiff produced the Enforcement Notice dated 19th August, 2021, issued by the

County Executive Committee Member for Physical Planning. The Defendants admitted that construction continued after the notice was issued. PW 2 testified that he was instructed by the Building Inspector but did not speak to enforcement. No evidence was adduced by the County Government to show that it took any steps to enforce the notice.

97. The duty to enforce planning law is not discretionary. In the case of:- ***“Republic - Versus - Nairobi City County & Another ex - parte Wainaina [2017] eKLR”***, the Court held:-

“Once an enforcement notice is issued, the planning authority must act to ensure compliance. Failure to do so undermines the rule of law and public confidence in the planning system.”

98. Further in the case of:- ***“Kenya Power & Lighting Co. Limited - Versus - Nathan Karanja Gachoka & Another [2016] eKLR”***, the Court emphasized:

“Public authorities are liable where they fail to discharge statutory duties to the detriment of citizens. Administrative inertia is actionable.”

99. In the present case, the County Government of Mombasa issued an Enforcement Notice, thereby acknowledging non - compliance. It failed to follow through with enforcement measures. It did not appear in court to justify its actions and the Plaintiff suffered

harm as a result of this failure. The Court finds that the County Government breached its statutory duty under Section 72 of PLUPA and is liable for administrative negligence.

100. The Plaintiff is therefore entitled to a declaration that the County Government failed in its statutory duty. The Plaintiff is entitled to general damages for the harm caused by the County's inaction. The County Government is condemned to pay costs for its failure to participate and defend its conduct.

101. In conclusion thereof, the County Government of Mombasa failed in its statutory duty to enforce the Enforcement Notice issued under PLUPA. This failure caused harm to the Plaintiff and attracts liability in damages.

ISSUE No. e). What remedies, if any, are available to the Plaintiff.

102. Under this sub - title, the Plaintiff has proved his case. The standard of proof in civil cases is well settled. The provision of Section 107(1) of the Evidence Act, Cap. 80 Laws of Kenya, provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

103. Further, the provision of Section 108 places **“the burden of proof”** on the party who would fail if no evidence were adduced, while Section 109 requires that proof be provided of facts especially within a party’s knowledge. The guiding principle is that the Plaintiff must establish his case on a balance of probabilities, meaning that the Court must be satisfied that it is more probable than not that his version of events is true.

104. The remedies available in civil litigation are guided by both statute and equitable principles. The Court has wide discretion under:

- a) Section 3A of the Civil Procedure Act (Cap. 21) – to make such orders as may be necessary for the ends of justice.
- b) Section 13(7) of the Environment and Land Court Act, No. 19 of 2011 – empowers the Court to grant reliefs including declarations, injunctions, damages, compensation, and orders of demolition or restoration.
- c) Article 23(3) of the Constitution of Kenya, 2010 – allows courts to grant appropriate reliefs in enforcement of rights.
- a) The general principle is that remedies must be proportionate, lawful, and tailored to the harm proved.

105. The Plaintiffs prays for Judgement to be entered against the 1st, 2nd and 3rd Defendants jointly and or severally for:-

- a. A declaration that the 1st and 2nd Defendants have violated, breached, infringed and or denied the Plaintiff his right of easement by proceeding with the development project on Plot Number MOMBASA/BLOCK XVI/642 and establishing the same to the boundary of the Plaintiffs Plot Number MOMBASA/BLOCK XVI/645.5.**
- b. In the alternative to prayer 1) above a declaration that the 1st and 2nd Defendants have proceeded with their development project on Plot Number MOMBASA/BLOCK XVI/642 in violation of the Physical and Land Use Planning Act, which violation has denied the Plaintiff his right of easement from the said plot.**
- c. Consequent to granting of prayer 1or 2 above, an order of demolition of the storey house illegally and or wrongly constructed on Plot Number**
- d. In the alternative to prayer 3 above an order of compensation for the violation of the right of easement in perpetuity that is for the years the house on Plot Number MOMBASA/BLOCK XVI/642 Shall be in existence until it is demolished or removed.**
- e. An order compelling the 3rd Defendant to implement the Enforcement Notice against the 1st and 2nd Defendants.**
- f. General Damages from the 1st, 2nd and 3rd Defendants for the loss and damage caused on the Plaintiff by the illegal construction.**
- g. Such further orders and/or other reliefs as this Court deems fit.**

106. The Honourable Court's finding recap is there was no encroachment proved; no registered or prescriptive easement was established, the Defendants failed to demonstrate full

compliance with PLUPA and the County Government of Mombasa failed in its statutory duty to enforce the law.

107. On Demolition. This is a drastic remedy. In the case of:- **“Kenya Airports Authority - Versus - Mitu-Bell Welfare Society [2019] (Supra)”**, the Supreme Court emphasized that demolition must be proportionate and consider the stage of development, public interest, and alternative remedies. In this case, the building is substantially complete, and no encroachment was proved. Therefore, demolition is declined.

108. On Compensation for Easement Violation since no easement was proved, compensation in perpetuity is not available.

109. On General Damages, the Plaintiff suffered harm due to the County Government’s failure to enforce the law. He endured dust, debris, and loss of enjoyment of his property. In **“Kenya Power & Lighting Co. Limited - Versus - Nathan Karanja Gachoka & Another [2016] eKLR”**, the Court awarded damages for administrative negligence by a public authority. A modest award of Kshs. 1,000,000/- is appropriate.

ISSUE No. f). Who bears the costs of the Plaintiff

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

111. In the **“Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another - Versus - Mutula Kilonzo & 2 others [2013] eKLR”** quoted the case of **“Levben Products - Versus -**

Alexander Films (SA) (PTY) Limited 1957 (4) SA 225 (SR) at 227” the

Court held:-

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp - Versus - Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

112. In the present case, the 3rd Defendant shall bear the Plaintiff's costs of the suit. Otherwise, each party shall bear its own costs as between the Plaintiff and the 1st and 2nd Defendants.

VIII. Conclusion and Disposition

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

(a) THAT Judgment be and is hereby entered partially in favour of the Plaintiff in respect to the Plaint dated

30th July, 2020 and filed on the same day in its entirety with costs.

(b) **THAT** for avoidance of doubt, accordingly, having considered the pleadings, evidence, submissions, and applicable law, the Court makes the following orders:

(i) the Plaintiff's claim for encroachment and violation of easement be and is hereby dismissed.

(ii) the Plaintiff's prayer for demolition be and is declined.

(c) **THAT** a declaration be and is hereby issued that the 2nd Defendant's development on Plot No. MOMBASA/BLOCK XVI/642 proceeded in violation of the Physical and Land Use Planning Act, 2019.

(d) **THAT** a declaration be and is hereby issued that the 3rd Defendant, the County Government of Mombasa, failed in its statutory duty to enforce the Enforcement Notice dated 19th August 2021.

(e) **THAT** pursuant to the provision of Article 42 of the Constitution of Kenya, 2010 on provision of clean and healthy environment, the 2nd Defendant be and is hereby directed to immediately place precautionary and safety measures such as hoods in between his building and that of the Plaintiff; collect all the wastes dumped in between the pavements and repair all the damages caused onto the Plaintiff's roof and building. In default, severe punitive action to be taken against him.

(f) **THAT** the 3rd Defendant shall pay the Plaintiff general damages in the sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for administrative negligence.

(g) **THAT** the 3rd Defendant shall bear the Plaintiff's costs of the suit. Each party shall bear its own costs as between the Plaintiff and the 1st and 2nd Defendants

IT IS HEREBY ORDERED ACCORDINGLY
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS24TH .
.....DAY OFOCTOBER.....2025.

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

Judgement delivered in the presence of: -

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) Mr. Gitahi Advocate for the 2nd Defendant.
- c) No appearance for the Plaintiff; the 1st & 3rd Defendant.