

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 129 OF 2022

ALAMIN HASSAN OTHMAN
PLAINTIFF

- VERSUS -

P. N. MASHRU LIMITED.....
.....DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of Honourable this court pertains the Plaintiff dated 8th November, 2022 instituted by *Alamin Hassan Othman*, the Plaintiff herein. It is against *P. N. Mashru Limited*, the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance filed its Statement of Defence dated 19th November, 2022 on 21st November, 2022.
3. It is instructive to note two fundamental aspects in relation to the matter. Firstly, there has existed a protracted altercation over the suit properties belonging to both the Plaintiff and the Defendant. Secondly, that during the course of the proceedings, the parties requested that the Honourable Court conducts a Site Visit ("***Locus in Quo***"). On 13th December, 2024 the visit was undertaken and a report was prepared and shared with the parties. It forms part of this Judgement for ease of reference and information.

II. Description of the Parties in the suit

4. The Plaintiff was described as a male adult of sound residing and working for gain in Mombasa in the Republic of Kenya; the Defendant was described as a limited liability company duly incorporated in the Republic of Kenya.

III. Court directions before the hearing

5. Nonetheless, on 12th July, 2024, the Honourable Court fixed the hearing dated on 15th November, 2024 with all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 with the Court proceeding whereby the matter proceeded by way of adducing **“Viva Voce”** evidence. The Plaintiff called his witness on 15th November, 2024 and thereafter closed it on the same day. The Defendant called its witness on 15th November, 2024 and closed their case on the same day.
6. The Plaintiffs’ witness (PW - 1) testifying in Court on 15th November, 2024.

IV. The Plaintiff’s case

7. From the filed pleadings, the Plaintiff was the legal and absolute 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”). The Plaintiff had purchased the suit property from a company known as DIM Agencies Limited on or about 15th December 2021 for a consideration of a sum of Kenya Shillings One Million Two Hundred and 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.

8. The Plaintiff's property neighbored the Defendant's property known as Plot Number 134/V/MN (hereinafter referred to as "the Defendant's Property") and abutted the Mombasa-Nairobi highway. Having purchased the suit property legally and for value consideration, the Plaintiff had been entitled to use, occupy, develop, and peacefully and quietly enjoy the same without any interference by any person including the Defendant.
9. Before purchasing the suit property, the Plaintiff had undertaken due diligence which revealed that the Defendant had previously challenged the legality of the title to the suit property in the 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 Defendant had sued the Plaintiff's predecessors in title alongside the Commissioner of Lands. In the said civil suit - HCCC No. 353 of 1999, 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) had been unlawful, illegal, and contrary to the existing law.**

10. After making the foregoing allegations, the Defendant had then sought the following orders in the said case of HCCC No. 353 of 1999:

- a. A declaration that the allocation of L.R. No. MN/V/1907 to the 1st and 3rd Defendants (Castledom Properties Limited and DIM Agencies Limited) had been unlawful and against public policy and consequently that the 2nd Defendant (the Commissioner of Lands) be ordered to cancel Grant Number C.R. 30803 dated 2nd October 1997.**
- b. An injunction restraining the 1st and 3rd Defendants (Castledom Properties Limited and DIM Agencies Limited), their servants or agents, from selling, transferring, parting with possession, or altering in any way the suit property.**

11. Instead of prosecuting HCCC No. 353 of 1999 to its logical conclusion so as to prove its allegations touching on the purported illegality of the title to the suit property, the Defendant had sought to withdraw the said suit by filing an application dated 12th October 2018. Indeed, the suit had been marked as withdrawn vide a court order made on 14th June 2019. In or about October 2022, the Plaintiff had commenced construction of a perimeter wall on the suit property, but the Defendant had demanded that the said construction be stopped and halted immediately. The reasons cited by the Defendant for demanding the immediate stoppage of the construction had been as follows:

- i. The suit property was public land.**
- ii. The suit property had been irregularly allocated to Castledom Properties Limited, the original allottee of the suit property.**

- iii. The suit property had been compulsorily acquired by the Government through the Commissioner of Lands for the purposes of widening the Mombasa-Nairobi Highway.**
- iv. The construction of the boundary wall on the Plaintiff's property would have rendered the Defendant's property landlocked and completely inaccessible.**
- v. The Plaintiff had interrupted the Defendant's peaceful enjoyment of the Defendant's property.**

12. The above allegations by the Defendant had been reiterated by the Defendant vide a letter dated 6th October 2022 written by the Defendant's advocates, Messrs. Mwangi - Macharia & Njeru Advocates, through which the Defendant had demanded the following from the Plaintiff:

- i. Immediate and conditional access to the Defendant's property.**
- ii. Immediate halting of the construction of the boundary wall and development of the Plaintiff's property.**
- iii. Formal assurance of the Defendant's quiet and peaceful possession and enjoyment of the Defendant's property.**

13. The allegations made by the Defendant that the Plaintiff's property had been public land and had been irregularly acquired were the same allegations which the Defendant had raised in HCCC No. 353 of 1999 and later withdrawn and/or abandoned. The construction of the wall by the Plaintiff and the Plaintiff's use of the suit property had not in any way interfered with or impeded the use of the Defendant's property.

14. The Defendant had no colour of right to stop the Plaintiff from using the suit property, including constructing the perimeter wall, 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 HCCC No. 353 of 1999, which the Defendant had abandoned.*
- iv. The Defendant's intention had been 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 abandoned.*

15. The Defendant had no legal basis for demanding the halting of the construction of the boundary wall since the suit property was private property owned by the Plaintiff, who had been at liberty to deal with it in any manner whatsoever. The Defendant's threats amounted to interference with the Plaintiff's rights over the suit property.

16. The Plaintiff relied on the following particulars of Defendant's interference with proprietary interests: -

- a. Demanding the halting of the construction of the boundary wall on the Plaintiff's property.**
- b. Dictating to the Plaintiff how he should develop his property.**
- c. Failing to respect the Plaintiff's title and right to quiet and peaceful possession and enjoyment of the suit property.**
- d. Making spurious, unjustified, and baseless allegations against the Plaintiff.**
- e. Impugning the Plaintiff's title without basis.**
- f. Reviving the same allegations which the Defendant had abandoned in HCCC No. 353 of 1999.**
- g. Demanding and seeking to access its property Number 134/V/MN through the Plaintiff's property.**

17. The Defendant's actions had been illegal, unjustified, in bad faith, and had been meant to threaten, intimidate, and coerce the Plaintiff to cede ownership of the suit property to the Defendant, a scheme which the Defendant had always harboured from history when the suit property had been owned by the Plaintiff's predecessors in title. The Defendant had always employed threats and underhand dealings to intimidate and threaten the owners of the suit property, including the filing of the Civil case HCCC No. 353 of 1999, so as to pile pressure on the owners of the suit property and to achieve ulterior motives.
18. There had been no other suit pending between the same parties over the same subject matter. This Honourable Court had jurisdiction to hear and determine the matter.
19. The Plaintiff prayed that Judgement be entered against the Defendant for:-
- a) An order of permanent 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.**
 - b) General damages.**
 - c) Costs of this suit.**
 - d) Any other and further relief this Court may deem just to grant.**
20. On 15th November, 2024, the Plaintiff called its first witness but before that the Learned Counsel for the Plaintiff had the following remarks:

A. Opening Remarks by Mr. Oluga Advocate.

21. The earned Counsel commenced by stating that the Plaintiff is the absolute and legally registered owner of all that parcel of land known as LR. No. MN/V/1907. The said property neighbored the Defendant's Plot No. MN/V/134. The Plaintiff commenced the boundary wall on his plot but he was stopped by the Defendant who now claims his access to his property would be blocked if the Plaintiff continued to construct the Perimeter wall. In a nutshell the Plaintiff held he should be allowed to construct the wall as the Defendant has an alternative access which does not fall within that of the Plaintiff. In a nutshell, They were seeking for permanent injunction to restrain the Defendant from interfering with Plaintiff's land.
22. The Plaintiff called their witness PW - 1 on 15th November, 2024 where he averred that: -

B. Examination in Chief of PW - 1 by Mr. Oluga Advocate.

23. PW - 1 was sworn and testified in English language. He identified himself as MOHAMED TALSAM MOHAMED SALIM, a citizen of Kenya holding the national identity card bearing all the particulars as indicated on it and as shown to Court. His testimony was that he represented the Plaintiff in the case. He had been given a Power of Attorney dated 5th April, 2024. He recorded a witness statement dated 21st June, 2024 and indicated that he wished to adopt it as evidence in support of his case. Further, that he filed a list of documents dated 8th November, 2022 comprising 8 documents, produced as Plaintiff's Exhibits numbers 1 to 8. Additionally, the Plaintiff filed a

Supplementary List dated 21st June, 2024 containing 2 documents, produced as Plaintiff's Exhibit No. 9 & 10 in that order.

24. PW - 1 stated that from his understanding the Plaintiff had purchased the suit property and was the lawful owner thereof. The Plaintiff had commenced construction of a perimeter wall around the land. However, the Defendant stopped the construction, alleging that the wall was blocking his access. He urged to be granted the orders as prayed for in the Plaint.

C. Cross Examination of PW - 1 by Mr. Kimani Advocate.

25. PW - 1 stated that he was a good friend of the Plaintiff, Mr. Alamin, although he had not spoken to him since April 2024. He testified that he had only visited the suit property in year 2022. At that time, the land was vacant, having been purchased in December 2021.

26. PW - 1 confirmed that his visit took place in March 2022, during which he saw the Defendant and observed that the property was being used as a transport yard. PW - 1 added that he had not seen the perimeter wall and therefore could not confirm whether it blocked the Defendant's land. He explained that, as of the year 2022, trucks were passing through the Plaintiff's land, using one of the accesses to the Nairobi - Mombasa Highway on the land. The Defendant's land had two gates at the time.

27. PW - 1 further noted that by the year 2022 the Nairobi-Mombasa road had been completed. He testified that he had reviewed two surveyor's reports. He was not aware of the Plaintiff granting the Defendant any licence to use the land. However, he was aware

of ELC No. 353 of 1999, which the Plaintiff had subsequently withdrawn.

28. On the same day the Plaintiff called PW - 2 who testified as follows:-

A. Examination in Chief of PW - 2 by Mr. Oluga Advocate.

29. PW - 2 was sworn and testified in English language. He was called BATHOLOMEW CHAKURU MWANYUNGU. He stated that he was a Licensed Surveyor and had prepared a surveyor's report dated 13th June, 2024, which was produced as Plaintiff's Exhibit 10. He stated that he had been engaged to carry out a survey of Plot No. MN/V/134 and Plot No. MN/V/1907, pursuant to the Terms of Reference comprising five items. He confirmed that he executed his Terms of Reference using the method set out on page 2 of his report.

30. According to his findings, Plot No. 134 was partly fenced. There were two gates constructed by the Defendant: one gate provided access through Plot No. 1907 - developed with a culvert and paved with murrum, while the second gate opened directly onto the Mombasa-Nairobi Highway, at the point where the land abutted the road reserve. He explained that both plots were adjacent to the Mombasa-Nairobi Highway and therefore each had access to the road.

31. While making reference to the diagram and sketch of the Topo-Cadastral Survey for Plots MN/V/134 and MN/V/1907, PW - 2 stated that if a wall were constructed, it would result in there being only one gate by the Defendant. However, the said construction would not stop the Defendant from accessing to the

highway from the other available gate. In the conclusion as set out on page 3 of his report, he stated as follows:-

- a) Parcel No. MN/V/1907 never encroached into Parcel No. MN/I/134.
- b) Owners of MN/134 had erroneously constructed one of their existing gates such that their current road access passed through Plot MN/V/1907.
- c) There was a clear and direct access for parcel number MN/V/134 to the Mombasa - Nairobi highway along its boundary on beacon numbers 134/2, 134/3, 134/4 and R18 where they had another gate.
- d) If the owner of MN/V/1907 constructed a boundary wall around their parcel, Plot No. MN/V/134 would still have direct access to the highway through the other gate.

32. On being referred and made to comment onto the Land Surveyor's report dated 31st October, 2022 prepared by Mr. Edward Kiguru for the Defendant. Mr. Kiguru had made two conclusions. Firstly, that the access road on Plot No. MN/V/134 ought to be acquired from Plot No. MN/V/1907; and/or registered as an encumbrances. Secondly, that the boundary wall should be moved to conform to the Survey Plans. Mr. Mwanyungu clarified that, in his view, these were just recommendations made by a professional Land Surveyor to be considered by the parties. They were not binding.

33. PW - 2 further testified that the gates were situated on Plot No. 134/1 and Plot No. 134/3. He observed that Plot No. 1907

contained certain developments which had encroached upon the parcels.

B. Cross Examination of PW - 2 by Mr. Kimani Advocate.

34. The witness testified that he personally visited the two plots and identified the two gates. He confirmed that both gates provided access to the Nairobi-Mombasa Highway. He referred to the report prepared by Mr. Edward Kiguru and noted its conclusion: Even if one gate were to be blocked, the Defendant would still retain access through the remaining gate.

C. Examination of PW - 2 by Court for clarification.

35. PW - 2 told the court that an encumbrance was an entry in the title to indicate the title had a problem.
36. The Plaintiff through his Learned Counsel Mr. Oluga Advocate marked their case closed on 15th November, 2024.

V. The Defendant's case

37. The Defendant filed their Statement of Defence admitting the contents of Paragraphs 1 and 3 of the Plaint but only to the extent that the same are descriptive of the parties and the property save to add and its address for service for purposes of this suit.
38. At the onset, the Defendant reiterated that this Honourable Court had no jurisdiction to deal with the suit as it related to an encroachment and boundary dispute which was within the ambit of the Land Registrar as per the provisions of Sections 18 and 19 of the Land Registration Act, Act No. 3 of 2012. The Defendant

had, at the earliest opportunity, raised a notice of preliminary objection that the dispute be determined by the Land Registrar prior to determination and intervention of this Honourable Court.

39. The Defendant denied the contents of paragraph 4 of the plaint that the Plaintiff had purchased Plot No. MN/V/1907 from Dim Agencies Limited for a consideration of a sum of Kenya Shillings One Million Two Hundred and Fifty Three Thousand Five Ninety Seven (Kshs. 1,253,597/-) and put the Plaintiff to strict proof thereof. The Defendant admitted that Plot No. MN/V/1907 neighboured the Defendant's suit property, Plot No. MN/V/134, along the Nairobi-Mombasa Highway.
40. In further response to paragraph 5 of the plaint, the Defendant stated that it had purchased Plot Number 134/V/MN on 24th August 1992 and had thereafter leased it to Messrs H.P. Mashru Limited by way of a lease dated 24th February 1998. Plot No. MN/V/134 had consisted of an acreage of 2.70 acres; however, the Government of Kenya had acquired 0.57 acres thereof on 11th May 1955 and 6th March 1973 for purposes of widening and expanding the Mombasa-Nairobi Highway.
41. The Defendant averred that Plot Number MN/V/1907, over which the Plaintiff claimed ownership, had been allocated on 2nd October 1997, being the 0.57 acres compulsorily acquired by the Government for purposes of widening the Mombasa-Nairobi Highway.
42. Further, the Defendant stated that Messrs Edward Kiguru Land Surveyors, in a report dated 31st October 2022, had confirmed that not only did Plot Number MN/V/1907 encroach on the

Defendant's land, Plot No. MN/V/134, but also that the existing access road to Plot No. MN/V/134 passed through Plot No. MN/V/1907.

43. In further response, the Defendant stated that, in view of the surveyor's report dated 31st October 2022, the Defendant had already lodged an official complaint with the Land Registrar dated 10th October 2022 for determination of the boundary dispute and ascertainment of the encroachment and access road.
44. The Defendant reiterated that any construction and development on Plot Number MN/V/1907, which abutted the Defendant's property along the Main Mombasa-Nairobi Highway, and any development and construction thereof, would have rendered the Defendant's property landlocked and completely inaccessible.
45. The Defendant averred that since acquisition of Plot No. MN/V/134 in the year 1992, the Defendant had invested heavily in Plot No. MN/V/134, which it utilized as offices and a transport yard for its multiple trucks and trailers. The Defendant, in response to paragraph 6 of the plaint, stated that the Plaintiff's property, Plot No. MN/V/1907, had been a vacant plot next to the road and that no one had interfered with its quiet possession as claimed by the Plaintiff. The Plaintiff was put to strict proof thereof.
46. Save to admit that the Defendant had instituted suit "**HCCC No. 353 of 1999 P.N. Mashru Limited - Versus - Castledom Properties Limited & Others**", the Defendant was a stranger to the

averments contained in paragraphs 7, 8, 9, and 10 of the plaint and put the Plaintiff to strict proof thereof.

47. The Defendant stated that the Plaintiff had not been a party to HCCC 353 of 1999 and had no basis whatsoever for misleading the Honourable Court on the proceedings thereof, since the suit had been withdrawn without prosecution after the Defendant had established that there had been no threat to block access to its property, Plot No. MN/V/134.
48. The Defendant, in further response, reiterated that the Plaintiff had only singularly referred to **“HCCC 353 of 1999 P.N. Mashru Limited - Versus - Castledom Properties Limited & Others”**, to which it had not been a party, in order to obfuscate the factual background of the matter and unjustly steal a march against the Defendant herein. The Plaintiff was put to strict proof thereof. The Defendant, in response to paragraph 11 of the plaint, denied that it had halted and demanded stoppage of construction of the wall by the Plaintiff in October 2022. No construction had been commenced by the Plaintiff in October 2022, and commencement of the boundary wall had started on 18th November 2022 upon obtaining the ex parte orders of 10th November 2022. The Plaintiff was put to strict proof thereof.
49. Save to admit that the Defendant’s advocates had written the letter dated 6th October 2022, the Defendant was a stranger to the averments contained in Paragraph 12 of the Plaint. The Plaintiff was put to strict proof thereof.
50. The Defendant stated that, in any event, it had been apprehensive of the illegal actions of the Plaintiff, especially

taking into account that the Plaintiff's property had not only been irregularly allotted but had also encroached on the Defendant's property, as exhibited by the private surveyor's report dated 31st October 2022.

51. The Defendant averred that any construction of the boundary wall by the Plaintiff on Plot No. MN/V/1907 had rendered Plot No. MN/V/134 inaccessible, which had been a contravention of the Defendant's proprietary rights as enshrined under Article 40 of the Constitution. In response to paragraphs 13 and 14 of the plaint, the Defendant reiterated that HCCC No. 353 of 1999 had had no bearing on the issues of boundary dispute and encroachment, the subject of this suit, and the entire contents thereof were denied in total. The Plaintiff was put to strict proof thereof.
52. The Defendant, in response to paragraph 15 of the plaint, reiterated that the private surveyor's report dated 31st October 2022 had been clear that any construction on the Plaintiff's property rendered the Defendant's land inaccessible, and the contents thereof were spurious and cantankerous. The Defendant was a stranger to the averments in paragraph 16 of the plaint and reiterated that its only concern had been the blatant encroachment of its land by the Plaintiff and the flagrant mission to block the Defendant's property, despite the complaint dated 10th November 2022 to the Deputy Land Registrar. The Plaintiff was put to strict proof thereof.
53. The Defendant denied the particulars of interference contained in paragraph 17 of the plaint and averred that it had indeed

been the Plaintiff who purported to be sacrosanct while blatantly interfering with and breaching the Defendant's rights.

54. The Defendant relied on the following particulars of interference:

-

- a. Commencing construction on Plot No. MN/V/1907 while aware that the parcel of land had encroached on the Defendant's property.
- b. Deliberately denying the access road to the Defendant's property.
- c. Sharing and demanding that the Defendant execute a licence agreement to be able to access its property.
- d. Denying the Defendant's workers and hundreds of its employees access to the Defendant's property, which it had occupied for the last three decades.
- e. Interfering with the quiet possession of Plot No. MN/V/134 despite having only acquired the property in 2021.
- f. Failing to await the determination of the District Land Registrar on the boundary dispute and encroachment pursuant to the complaint dated 10th November 2022.
- g. Utilizing and conniving with officials of the County Government of Mombasa to threaten and intimidate the Defendant to buckle under the pressure of its unlawfulness.

55. The Defendant put the Plaintiff on notice that it would rely on the private surveyor's report dated 31st October 2022 for its full import, purport, and effect. The Defendant, in response to paragraphs 18 and 19 of the plaint, reiterated that the manifest bad faith and malice had been singularly perpetrated by the Plaintiff, who had been keen to illegally possess the Defendant's

strip of land and block its access way to the property. The Plaintiff was put to strict proof thereof.

56. The Defendant averred that this Honourable Court had powers under Section 140 of the Land Act to grant the Defendant access to its property in view of the brazen actions of rendering the Defendant's land inaccessible and landlocked. The Defendant's suit property, Plot No. MN/V/134, had, by a valuation dated 11th September 1997, been valued by Messrs. Yusuf Dato Associates at Kenya Shillings Twenty Million (Kshs. 20,000,000/-) and had exponentially increased in value sixteen years later. The Defendant would therefore have been greatly prejudiced if the Plaintiff had not halted the ongoing construction and encroachment on the property.
57. The Defendant was a stranger to the averments in paragraph 20 of the plaint and put the Plaintiff to strict proof thereof. The Defendant reiterated that this Honourable Court had had no jurisdiction to handle a boundary and encroachment dispute between the Plaintiff and the Defendant in view of the patent provisions of Sections 18 and 19 of the Land Registration Act.
58. The Defendant prayed that the Plaintiff's staff against it be dismissed and/ or struck out with costs.
59. The Defendant called its first witness DW - 1 on 15th November, 2024 but before that the Counsel on record gave his opening remarks as follows:-

A. Opening Remarks by Mr. Kimani: -

60. Mr. Kimani Advocate informed Court that the Defendant contended that he had been the registered owner of Plot No. MN/V/134 since the year 1992. He stated that in the year 1997, Plot No. MN/V/1907 was allocated to another party. From 1997, there were no activities on Plot No. 1907 until 18th November, 2022, when construction of a wall commenced on the said property. The Defendant dealt with transport business where numerous heavy trucks were involved. The Defendant argued that if the Plaintiff were permitted to construct the perimeter wall, it would render it impossible for him to access his property, Land Reference No. MN/V/134, to the Nairobi - Mombasa Highway.

61. The Defendant called his first witness DW - 1 who testified that: -
B. Examination in Chief of DW - 1 by Mr. Kimani Advocate:-

62. DW - 1 testified under oath and in English language. He identified himself as Mr. FRANCIS NKUTA MULILI, a citizen of Kenya holding a national identity card bearing all the particulars as shown to Court during the hearing. He had recorded a witness statement dated 15th May, 2024 which he wished to have it adopted as his evidence in support of the case. He confirmed that he was aware the Defendant had filed a List of Documents dated 15th May, 2024, which he wished to produce, comprising twenty (20) documents produced as Defendant's Exhibits 1 to 20 in that order.

63. DW - 1 explained that the land had been purchased from Mr. Abdulratif Ahmed Taib in the year 1992. It was for a consideration

of Kenya Shillings Two Million Two Hundred Thousand (Kshs. 2, 200, 000.00/=) as evidenced from the transfer dated 19th March, 1992. From the original title, the property measured 2.70 acres, but subsequent entries reflected adjustments. He stated that in May 1955, the Government had acquired 0.07 hectares for the purpose of expanding the highway. In January 1973, the Government of Kenya acquired a further 0.04 acres, though this portion was not utilized until the current expansion of the Kwa Jomvu–Mariakani road.

64. DW - 1 stated that there was only one gate to Plot No. 134. The witness testified that KENHA had issued a notice requiring them to vacate to create space. He recalled that there had been a case with Dims Agencies Limited, but thereafter a company trading as Alamin Hassan laid claim to the land. He stated that the Defendant engaged a Land Surveyor, Mr. Edward Kiguru, who prepared a report dated 31st October, 2022. According to the surveyor the parcel no. MN/V/1907 had encroached into Plot No. MN/I/134. The Surveyor had confirmed that the access road to the Defendants' property passed through Plot No. MN/V/1907 and thus any construction and development would disrupt the Defendant's business. He further testified that the wall was situated immediately outside their gate. He explained that construction of the wall had been stopped through a court order, as its completion would have denied them access to their land.

C. Cross Examination of DW - 1 by Mr. Oluga Advocate.

65. The Defendant Witness - 1 referred to the title for Plot No. MN/V/134, which reflected 0.07 hectares, noting that 0.04 acres

had been acquired by the Government. Consequently, the title deed had been reduced in size. He explained that the title produced in court did not reflect the reduced acreage and was therefore inaccurate. He stated that he had given the Land Surveyor the inaccurate title.

66. Referring to paragraph 6 of his witness statement, the Defendant testified that he was aware that on 24th February, 1998 the Defendant had leased to Messrs. H. P Mashru Limited Plot No. MN/V/134 for a consideration of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500, 000./=), as shown on page 17. The lease was registered as Entry No. 34 and was for a term of 99 years. He referred to paragraph 9 of his statement, noting that P.N. Mashru Limited had surrendered the lease upon compulsory acquisition by the Government, as indicated on page 21. However, the surrender was recorded in the name of Hitech Popatlal Mashru Limited, which did not appear on the original lease. He emphasized that the lease, spanning pages 1 to 6, contained no entry for the surrender. He clarified that while Entry No. 34 reflected P.N. Mashru Limited as the lessee, the surrender was by H.P. Mashru Limited, who was the person with the proprietary interest.

67. DW - 1 referred to page 29, which contained a report and valuation prepared by Yusuf Datoo Associates dated 11th September, 1997. He testified that Plot No. 134 abutted the Mombasa - Nairobi highway, and if the Plaintiff were to construct the wall, there would be no access to the highway. He referred to the surveyor's report prepared by Edward Kiguru, which also

noted the presence of KENHA sewage. He maintained that the plot had only one gate and that the Defendant could not access it except through Plot No. 1907. He added that the Government of Kenya had not raised any complaint that the Plaintiff's portion had been hived off from a public access road.

68. DW - 1 explained that the civil case had later been withdrawn, as KENHA had already acquired the land, and Plot No. 1907 was a road reserve. He referred to paragraphs 18 & 19 of his statement. He stated that The Plaintiff was not a party to that suit. There was nothing wrong in the withdrawal of the suit. He explained the reason for the withdrawal of the case, namely that there was no eminent threats until 18th November, 2022 when the Plaintiff commenced the construction of the wall.

D.Re - Examination of DW - 1 by Mr. Kimani Advocate.

69. DW - 1 clarified that it was P.N. Mashru who had been sued and not H.P. Mashru. He referred to the surrender of lease contained at pages 21 to 23, which had been registered on 23rd August, 1999. He reiterated that there was only one gate to Plot No. MN/V/134.

70. The Defendant called DW 2 who testified that: -

A. Examination in Chief of DW - 2 by Mr. Kimani Advocate.

71. DW - 2 testified under oath and in English Language. He was EDWARD MARENJE KIGURU. He was a Licensed Land Surveyor. He worked for the Government of Kenya upto the position of a Provincial Land Surveyor. He retired and now was in private practice with a firm trading in the names and style of Messrs. Edward Kiguru Land Surveyors. He recorded a witness statement

dated 15th May, 2024. He further stated that he had prepared a report dated 31st October, 2022, which he wished to produce as Defence Exhibit No. 21. He also availed his practicing certificate, which was marked as Defence Exhibit No. 22.

72. He informed the Court that he had been engaged to:-

- a) re-establish/relocate the common boundary between the subject plots;
- b) Establish whether the existing boundary wall between the two subject plots had been up correctly (as per the boundary lines).
- c) To establish if the existing access road to Plot No. MN/V/134 passed through Plot No. MN/V/1907 pursuant to the Terms of Reference.

73. After undertaking the survey, the Witness stated that he came to the following conclusions:-

- (a) The two Plots had a common boundary line identified by beacons AB, 134/1 and 134/2.
- (b) The access road to Plot No. MN/V/134 should be acquired from Plot No. MN/V/1907 or registered as an encumbrance, being an entry of one property through another.
- (c) The boundary wall should be moved to conform to the survey plan.

74. DW - 2 testified that there was no gate on Plot No. MN/V/134 at the time of his survey. He referred to the report prepared by Mr. Mwanyungu, which concluded that Plot No. 134 had left space for access. He further referred to page 3 of Mwanyungu's report dated 13th June, 2024, noting that it was more current and appeared to suggest that there was a second gate. He clarified

that by the time he prepared his own report, the second gate was not in existence.

B. Cross Examination of DW - 2 by Mr. Oluga Advocate.

75. The witness testified that, in his view, access meant a way of entry, specifically how the owner of Plot No. 134 could enter the property without necessarily passing through Plot No. 1907. He explained that access to the Mombasa - Nairobi highway could, in theory, be created, and even if the Plaintiff decided to block the access through Plot No. 1907, Plot No. 134 would not be landlocked.
76. DW - 2 referred to the yellow portion on the drawing, which represented the area of access to Plot No. 134. He stated that blocking this access would amount to an encroachment, which he described as an "official encroachment." He emphasized that it was an existing right of way, established through long-term use and continued occupation of the land. He cited Sections 139 to 140 on the Right of Way, noting that his opinion was based on records, satellite imagery from Google Maps, and the fact that the property had historically been used by an old transport company.
77. DW - 2 stated that to the drawing and confirmed that there was no encroachment of Plot No. 134 by Plot No. MN/V/1907. In his conclusion, he stated that it was the responsibility of the owner of Plot No. 134 to move its boundary to conform to the survey plans. He added that if the access were allowed to continue, it could be registered as an encumbrance.

78. The witness further testified that he was not aware of any licences granted to permit access. He explained that he had been given a title to collect from the survey office, but he did not know the precise acreage.

C. Re - Examination of DW - 2 by Mr. Kimani Advocate.

79. DW - 2 confirmed that Plot No. 134 was created from a survey done in 1920 and MN/1907 was created in the year 1997, and the title processed thereafter. The Defendant had been utilizing the land on LR. No. 1907.

80. The Defendant through his advocate Mr. Kimani Advocate marked his case closed on 15th November, 2024.

VI. Submissions

27. On 15th November, 2024, after both parties closed their cases, the Honourable Court gave directions for the disposition of the Plaintiff and Defendant claims by way of written submissions. Pursuant to that judgment was set to be on notice.

A. The Written Submissions by the Plaintiff

28. The Plaintiff through the Law firm of Messrs. Oluga & Company filed their written submissions on 20th June, 2025. Mr. Oluga Advocate started by stating that the Plaintiff commenced this suit vide a Complaint dated 8th November 2022. The gist of the Plaintiff's case is that the Plaintiff is the registered proprietor of that parcel of land known as L.R. No. MN/V/1907 situate in Mombasa County - "the suit property" or "the Plaintiff's property").

29. The Plaintiff purchased the suit property from a company known as DIM Agencies Limited which had itself acquired the suit

property from Castledom Properties Limited sometime in the year 1997. The Plaintiff's property neighbours the Defendant's property known as Plot Number 134/V/MN - "the Defendant's property" and abuts the Mombasa-Nairobi highway. 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. The reasons cited by the Defendant for demanding the immediate stoppage of the construction were as follows:

- i. The suit property was a public land.
- ii. The suit property was irregularly allocated to Castledom Properties Limited, the original allottee of the suit property.
- iii. The suit property had been compulsorily acquired by the government through the Commissioner of Lands for the purposes of widening the Mombasa -Nairobi Highway.
- iv. The construction of the boundary wall on the Plaintiff's property would render the Defendant's property landlocked and completely inaccessible.
- v. The Plaintiff was interrupting the Defendant's peaceful enjoyment of the Defendant's property.

30. The above allegations by the Defendant were reiterated by the Defendant vide a letter dated 6th October 2022 written by the Defendant's advocates, Law firm of Messrs. Mwangi-Macharia & Njeru Advocates through 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.

31. The allegations made by the Defendant that the Plaintiff's property is public land and was irregularly acquired were not new. The Defendant had made those same allegations in the Civil Case - "HCCC NO. 353 OF 1999" in which the Defendant had sued the Plaintiff's predecessor in title, Castledom Properties Limited alongside the Commissioner of Lands.

32. The Learned Counsel averred that in the said HCCC NO. 353 OF 1999, 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.

33. After making the foregoing allegations, the Defendant then sought the following orders in HCCC NO. 353 OF 1999:

- a. A declaration that the allocation of L.R. No. MN/V/1907 to 1st & 3rd Defendants (Castledom Properties Limited and DIM Agencies Limited) was unlawful and against public policy and consequently the 2nd Defendant (the Commissioner of Lands) be ordered to cancel the grant Number C.R. 30803 dated 2nd October 1997.
- b. An injunction restraining the 1st and 3rd Defendants (Castledom Properties Limited and DIM Agencies Limited)

its (sic) servants or agents from selling, transferring and or parting with possession or altering in any way the suit property.

34. Instead of prosecuting HCCC NO. 353 OF 1999 to its logical conclusion so as to prove its allegations touching on purported illegality of the title to the Plaintiff's property, the Defendant withdrew the said suit.

35. It was the Learned Counsel's case that the construction of the wall by the Plaintiff and the Plaintiff's use of the suit property does not in any way interfere with or impede the use of the Defendant's property. The Plaintiff further contends that Defendant has no colour of right to stop the Plaintiff from using the suit property including constructing the perimeter wall because of the following reasons:

- i. The Defendant has no locus standi to claim on behalf of the Government of Kenya that the suit property is public land.
- ii. The allegations that the suit property is public land are baseless.
- iii. The Defendant had made similar allegations in HCCC NO. 353 OF 1999 which the Defendant abandoned.
- iv. The Defendant intended 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 abandoned.

36. The Learned Counsel contended that the Defendant had no legal basis for demanding the halting of the construction of the boundary wall since the suit property is a private property owned by the Plaintiff who was at liberty to deal with the same

in any manner whatsoever. The Defendant's threats amount to interference with the Plaintiff's rights over the suit property. The Plaintiff sought an order of permanent 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 suit property. The Plaintiff also seeks general damages and costs of this suit

37. In its statement of defence dated 19th November 2022, the Defendant argued that this dispute was a boundary dispute which should be heard and determined by the Land Registrar. The Defendant alleged that the Plaintiff's property was compulsorily acquired by the Government for purposes of widening the Mombasa-Nairobi Highway. The Defendant further alleged that the Plaintiff's property encroaches on the Defendant's property and that the existing access road to the Defendant's property passes through the Plaintiff's property and that any development on the Plaintiff's property would render the Defendant's property landlocked completely inaccessible.
38. The Learned Counsel relied on the following four (4) issues for determination. Firstly on whether the Plaintiff's property was compulsorily acquired by the Government. The Learned Counsel submitted that the Defendant made a generalized and sweeping allegation that the Plaintiff's property had been compulsorily acquired by the Government. There was no iota of evidence tendered by the Defendant to prove that allegation. They wished not to spend much time on that allegation since it was not

proved. He who alleged must prove and the Defendant failed spectacularly.

39. On the second issue, on whether any development on the Plaintiff's property would render the Defendant's property landlocked and inaccessible. The Learned Counsel submitted that the Plaintiff had allowed the Defendant to access its property through a temporary access which cuts through the Plaintiff's property. The said access was not an official access. It was not in the official map. The Defendant had been using the said access out of the Plaintiff's sheer good will. However, the Defendant had clearly mistaken and regarded the Plaintiff's kindness and good gesture as a right and an entitlement. They submitted that no construction and/or development on the suit property will render the Defendant's property landlocked.

40. The Plaintiff produced a Survey Report dated 13th June 2024 by Bartholomew C. Mwanyungu of Pimatech Land Surveyors and Consultants which clearly shows that the Defendant's property not only abuts but can be accessed from Mombasa- Nairobi Highway. At page 3 of the Plaintiff's Survey Report, the surveyor concludes as follows:

“There is a clear and direct access for parcel number MN/V/134 (the Defendant's property) to the Mombasa-Nairobi Highway along its boundary on beacon numbers 134/2, 14/3, 134/4 and R18 where they have another gate.”

41. The surveyor further attached photographs to clearly indicate the two gates. At page 6 of the report, the top image indicates the Defendant's access gate that encroached through the suit

property. At page 7 of the report, the bottom image shows another access gate that could be used by the Defendant to access its property. The Defendant could easily create access to its property from the Mombasa Nairobi Highway without passing through the Plaintiff's property. Indeed, as the Plaintiff's surveyor observed, the Defendant already had another gate directly from the Mombasa-Nairobi Highway.

42. Therefore, the Learned Counsel asserted that it was not true as the Defendant alleged that any development on the Plaintiff's property would render the Defendant's property landlocked completely inaccessible.
43. On its part, the Defendant produced a Survey Report dated 31st October 2022 by Edward Kiguru Land Surveyors. The Defendant's said Survey Report, just like the Plaintiff's Survey Report, clearly showed that the Defendant's property abutted Mombasa - Nairobi Highway at beacons numbers 134/2, 14/3, 134/4 and R18. The Defendant can easily create an access at those points and access its plot directly from the Highway. However, the Defendant never wanted to do so and had chosen to pass through the Plaintiff's property which amounted to trespass.
44. Indeed, Mr. Edward Kiguru concluded in his Survey Report that the access to the Defendant's plot should be acquired from the Plaintiff's and registered as an encumbrance. That showed that the access road was neither registered nor recognized until it was acquired from the Plaintiff and registered as an encumbrance (though the correct word should be easement and

not encumbrance). However, the access can only be acquired and registered as an encumbrance (easement) if the Plaintiff was willing to give it away. The Plaintiff could not be compelled to give it away. Further, the Defendant could not claim any rights on the access until and unless the Defendant acquired it lawfully from the Plaintiff and only if the Plaintiff was willing to give it away, which the Plaintiff was not.

45. It should be noted that the Defendant's survey report never concluded that the construction of the perimeter wall or any development/construction on the Plaintiff's property would hinder and/or render the Defendant's property landlocked or completely inaccessible as alleged in the statement of defence.

46. The Learned Counsel submitted that in cross examination, DW - 2, the Defendant's Surveyor Edward Kiguru stated as follows:

"An access to the Highway can be created....If the Plaintiff decides to block the access on plot number 1307 then plot no. 134 will not be landlocked." [see page 70 of the court's handwritten proceedings].

47. What the above meant was that the Defendant had an alternative way of accessing its property and not only through the Plaintiff's property. Indeed, on 13th December 2024, this Court conducted a site visit on the locus in quo. Of importance was the fact that Mr. Mwayungu Surveyor pointed to the court that there was an already existing gate which the Defendant could use to access the suit property. The said gate was big enough and/or could be expanded to serve the Defendant.

48. The court further noticed that there was a small gate (which had since been closed) situated at the end corner of the

Defendant's property which opened to a godown. Instead of using this gate to access its property, the Defendant opted to lease them to a commercial entity known as Kamongo Limited. The Defendant could easily access its property using the said two gates. But the Defendant had chosen to access its property through the Plaintiff's property, and insisted that the Plaintiff should neither complain or stop the Defendant. It was a false sense of entitlement which this Honourable Court should not entertain. We wonder why the Defendant did not consider, even remotely, the proposal by the Defendant's own surveyor that the Defendant approaches the Plaintiff to acquire the access as an encumbrance.

49. The Learned Counsel submitted that in light of the survey reports, the court's site visit, and the evidence presented, it was clear that the Defendant's property was not landlocked and would not be rendered landlocked by any construction or development on the Plaintiff's suit property. The Defendant currently enjoys multiple points of access to its property, which the Defendant has chosen not to use but to insist on cutting right across the Plaintiff's property. Furthermore, the Defendant's own surveyor, under cross-examination, confirmed that should the Plaintiff restrict access through the current point, the Defendant's property would still not be landlocked, implying the existence of viable alternative access.
50. The inevitable conclusion that ensues from the foregoing was that any development or construction on the Plaintiff's property would not render the Defendant's property landlocked and

inaccessible as the Defendant alleges. The Plaintiff is within its rights to proceed with the construction and development of the suit property, as such actions would not interfere with or impede the Defendant's lawful access or use of its land.

51. Thirdly, on whether the Plaintiff's property encroached on the Defendant's property. The Learned Counsel submitted that the Plaintiff's property never encroached on the Defendant's property. The court never had to look anywhere else but only at the testimony of the Defendant's own surveyor, Mr. Edward Kiguru who stated as follows during cross-examination by Mr. Oluga:

"[Referred to the drawing of Plot No. 134] There is no encroachment of Plot No. 134 (the Defendant's property) by Plot No MN/V/1907 (the Plaintiff's property). In my conclusion it is the owner of Plot No. 134 to move its boundary to conform to the survey plans." [see page 71-72 of the court's handwritten proceedings].

52. The Learned Counsel submitted that Mr. Kiguru was a senior surveyor who was highly respected. They saw no reason why the court should doubt his evidence as highlighted above. He was brought to court by the Defendant but he confirmed that there was no encroachment of the Defendant's property by Plaintiff's property and in fact, it was the Defendant who should move its boundary to conform with the official records. With the above testimony of the Defendant's own surveyor. Bottom line, the Plaintiff's property does not encroach on the Defendant's property. They said no more on that.

53. Finally, on whether the Plaintiff was entitled to the orders sought. The Learned Counsel submitted that the Plaintiff sought an order permanent injunction to restrain the Defendant from interfering with the Plaintiff's ownership, use, occupation, development of and title of the property known as Land Reference No. MN/V/1907. The Plaintiff is the registered proprietor of the suit property, having acquired it through a lawful purchase. The Plaintiff's ownership of the suit property is protected under Article 40 of the Constitution of Kenya, which guarantees every person the right to acquire and own property of any description in any part of Kenya.
54. The title held by the Plaintiff is indefeasible and enjoys the protection of the provision of Sections 24, 25 and 26 of the Land Registration Act, unless the title is obtained through fraud or misrepresentation, which the Defendant had not proved. The issues raised by the Defendant are the same issues which the Defendant previously raised in HCCC No. 353 of 1999 which the Defendant withdrew and failed to pursue to conclusion. The Defendant cannot raise those same issues against the Plaintiff yet the Defendant abandoned the allegations as against the original owners who came ahead of the Plaintiff.
55. In any event, the Defendant has made allegations against the Plaintiff but without raising a counterclaim. In the absence of a counterclaim, the allegations mounted by the Defendant to challenge the Plaintiff's title was not available for determination by the court. Put differently, in the absence of a Counter - Claim by the Defendant, this court could not pronounce itself on the

Defendant's allegation that the Plaintiff's title was irregularly acquired or that the Plaintiff has encroached on the Defendant's property. The Plaintiff was therefore entitled to the rights sought as the registered proprietor, including quiet possession and freedom from arbitrary interference.

56. It was further their humble submission that the doctrine of estoppel is applicable in this case to bar the Defendant from raising the same issues regarding ownership, title, and legality of the suit property which it previously raised in HCCC No. 353 of 1999, a suit the Defendant voluntarily abandoned. In HCCC No. 353 of 1999, the Defendant sued the Plaintiff's predecessors in title, including Castledom Properties Limited and DIM Agencies Limited, seeking, among other reliefs, a declaration that the allocation of the suit property was unlawful, and an order cancelling the grant issued by the Commissioner of Lands.
57. However, the Defendant failed to prosecute that case and instead withdrew it by way of a Notice of Withdrawal dated 12th October 2018, and a court order was issued on 14th June 2019, marking the matter as withdrawn. Having elected not to pursue that case to finality, the Defendant cannot now re-litigate the same allegations against the Plaintiff, who is a subsequent purchaser for value and was not a party to that original suit.
58. The Learned Counsel therefore submitted that from the foregoing, it would now be unjust to allow the Defendant to raise the same arguments through other means such as letters, threats, and obstruction, having failed to obtain relief from the court in a properly instituted suit. The Plaintiff was the duly

registered proprietor of the suit property (L.R. No. MN/V/1907), having acquired the same legally, for value, and following all due process. As such, the Plaintiff is entitled to the full benefits, protections, and incidents of ownership under the law.

59. Under the provision of Section 24(a) of the Land Registration Act, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Additionally, the provision of Section 25(1) of the same Act provides that the rights of a registered proprietor are indefeasible and shall not be defeated except as provided under the Act, and that the proprietor shall be entitled to enjoy the land free from interference, subject only to encumbrances noted on the register.

60. The Defendant's actions, which include, demanding the immediate halting of lawful construction on the suit property, making unsubstantiated claims that the property is public land and asserting a right of access through the Plaintiff's land, amount to a clear and continuing violation of the Plaintiff's proprietary rights. The Learned Counsel submitted that the right to property is a constitutional right protected under the provision of Article 40 of the Constitution of Kenya, 2010, which guarantees every person the right to acquire and own property of any description and in any part of Kenya. Article 40(1) provides:

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own

property—(a) of any description; and (b) in any part of Kenya.”

61. According to the Learned Counsel, by the persistently making baseless allegations, interfering with construction works and seeking access across private land without lawful justification or court order, the Defendant’s conduct amounted to arbitrary deprivation and a breach of the Plaintiff’s constitutional rights. The Defendant has alleged that the suit property is public land and was illegally allocated. It is our humble submission that the Defendant is a private entity and not a public authority. The Defendant has no legal standing to challenge the Plaintiff’s title on behalf of the Government of Kenya.
62. The Learned Counsel argued that the Defendant’s further allegation that the construction of the perimeter wall would render its land landlocked does not confer upon the Defendant any legal right to trespass or interfere with the Plaintiff’s land.
63. It was their humble contention that if indeed the Defendant’s land was landlocked, the proper legal avenue was to apply for an easement or right of way through judicial or statutory means, and not to forcibly assert access through unlawful demands. The Defendant’s account were not only unjustified and without legal basis, but they also constitute:
- i. A violation of statutory and constitutional protections afforded to registered proprietors such as the Plaintiff herein,
 - ii. An abuse of legal process, considering the earlier withdrawal of HCCC No. 353 of 1999,

- iii. An attempt to obtain access through coercive and unlawful means and,
- iv. A deliberate effort to frustrate and undermine the Plaintiff's investment, occupation, and development of the suit property.

64. The Plaintiff, therefore, seeks the protection of this Honourable Court against such interference and prays that the Court issues a permanent injunction restraining the Defendant from further violating the Plaintiff's proprietary rights.

65. The Learned Counsel averred that the Plaintiff had demonstrated lawful ownership of the suit property, having acquired the suit property for value and through a valid and lawful transfer. The Plaintiff's right to quiet possession, development, and use of the property is constitutionally and statutorily protected. The survey reports, the court site visit, and even the Defendant's own witness testimony confirm that the Defendant's property is not landlocked and retains alternative means of access.

66. Further, the Defendant, a private entity, lacked legal standing to challenge the Plaintiff's title on claims of public interest. From the foregoing, the Plaintiff was entitled to the reliefs sought, including a permanent injunction restraining the Defendant from interfering with the Plaintiff's lawful occupation, use, and development of the suit property. The Plaintiff was also entitled to general damages from the Defendant for interfering with the quiet use and possession of the suit property. The Plaintiff was also entitled to damages for trespass. The Defendant had been accessing its property through the Plaintiff's property. That

amounted to trespass for which the Plaintiff should be awarded damages.

67. The Learned Counsel urged the court to assess and award damages to the Plaintiff as may be reasonable. Finally, the Plaintiff is entitled to costs of the suit as costs follow the event.
68. In conclusion, the Learned Counsel urged this Honourable Court to grant the Plaintiff the prayers sought in the instant Plaintiff.

The Written Submission by the Defendant

69. The Defendant filed its written submissions through the Law firm of Messrs. Macharia - Mwangi & Njeru Advocates dated 17th April, 2025. Mr. Kimani Advocate submitted that the Plaintiff in this matter instituted this suit on the 8th November 2022. In the Plaintiff, the Plaintiff sought for the above stated prayers against the Defendant herein.
70. The Learned Counsel submitted that the Defendant filed a statement of defence dated 19th November 2022. In the statement of defence, the Defendant sought that this Honourable Court dismisses the plaintiff's case against it with costs. On the factual background, the Learned Counsel continued by stated that the Plaintiff averred that it was 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. The Plaintiff stated that it purchased the suit property from DIM Agencies on or about the 15th December 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/=). Additionally, that Dim Agencies

Limited had purchased the suit property from Castledom Properties Limited sometime in the year 1997.

71. The Plaintiff then stated that having purchased the suit property legally and for value consideration, it was entitled to use, occupy, develop, peacefully and quietly enjoy the same without any interference by any person including the Defendant. The Plaintiff states that the Defendant failed to prosecute to conclusion **"HCCC 353 of 1999"** to conclusion which was marked as withdrawn vide a court order of 14th June 2019. On that account the Plaintiff then stated that the Defendant could not arrogate itself powers to claim that the Plaintiff's parcel of land is Government Land.
72. The Plaintiff stated that on or about October 2022, it commenced construction of a perimeter wall on the suit property. However, the Defendant allegedly demanded that the said construction be stopped and halted immediately. According to the Plaintiff, the reason for demanding a stoppage of the construction of the wall by the Defendant were:
- i) That the suit property was public land.
 - ii) That the suit property was irregularly allocated to Castledom properties limited.
 - iii) That the suit property had been compulsorily acquired by the government through the commissioner of lands for the purposes of widening the Mombasa-Nairobi Highway.
 - iv) The Construction of the boundary wall on the Plaintiff's property would render the Defendant's property landlocked and completely inaccessible.

- v) That the Plaintiff was interrupting the Defendant's peaceful enjoyment of the Defendant's property.

73. According to the Plaintiff, the construction of the wall by the Plaintiff and the Plaintiff's use of the suit property could not in any way interfere with or impede the use of the Defendant's property. According to the Plaintiff, the Defendant did not have any legal basis of demanding the halting of the construction of the boundary wall since the suit property is a private property owned by the Plaintiff who was at liberty to deal with the same in the any manner whatsoever.

74. The Plaintiff thus sought the prayers contained in the Plaint stating that the Defendant's threats on stoppage of the construction of the boundary wall amounted to interference of the Plaintiff's proprietary interest. The said interference according to the Plaintiff, arose as a result of among others the Defendant demanding the halting of the construction of the boundary wall on the Plaintiff's property, the Defendant dictating to the Plaintiff how he should develop his property and failing to respect the Plaintiff's title and right to quiet and peaceful possession and enjoyment of the suit property. It was alleged that the Defendant was attempting at reviving the abandoned suit HCCC 353 of 1999.

75. The Defendant on the other hand, in its Statement of Defence dated 19th November 2022 states that Plot MN/V/1907 neighbors its suit property plot Number MN/V/134. According to the Defendant, it purchased Plot Number MN/V/134 on the 24th August 1992 after which it leased it to Messrs. H.P Mashru

Limited by way of a lease dated 24th February 1998. The Defendant averred that the Plot Number MN/V/134 consisted of an acreage of 2.70 acres however the government of Kenya acquired 0.57 acres thereof on the 11th May 1955 and 6th March 1973 for purposes of widening and expanding the Mombasa Nairobi Highway.

76. The Defendant in its defence further stated that 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. The Defendant in its defence further stated that its experts Messrs Edward Kiguru Land Surveyors in a report dated 31st October 2022 confirmed that Plot Number MN/V/1907 encroaches of the Defendant's property and that its access road passes through Plot Number MN/V/1907. In the circumstances, any construction and development on Plot Number MN/V/1907 which 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.
77. The Defendant averred that any construction as sought by the Plaintiff herein in its plaint would render its plot inaccessible. It ought to be clear to this Honourable Court that the dispute between the parties relate to a strip of land (access road) passing though the Plaintiff's land and not the entire Plot No.MN/V/1907. Defendant's property was utilized as a transport yard of its multiple trucks and trailers and thus the actions of the

Plaintiff herein would be tantamount to violation of the Defendant's proprietary rights to its property Plot No. MN/V/134 which was purchased in the year 1992. The Defendant reiterated that the actions of the Plaintiff's herein of construction if not halted by the court would threaten access to the property. The Defendant had prayed that the Plaintiff's suit be dismissed with costs.

78. The Learned Counsel on the evidence before court, submitted that the Plaintiff's called two witnesses in support of his case. Mr. Mohamed Talsam Mohamed Salim (PW - 1) was the first witness. He testified that he had a specific power of attorney from Alamin Hassan Othman dated 5th April 2024. He adopted his witness statement dated 21st June 2024. PW - 1 reiterated that the Plaintiff is the registered proprietor of a 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. He produced the Plaintiff's documents and further stated that the Plaintiff had constitutional rights to own, use, occupy and develop the suit property which rights were being trampled by the Defendant.

79. According to PW - 1, the Defendant's allegation that the Plaintiff's property No.MN/V/1907 had encroached on the Defendant's property No.MN/1/134 was not true. According to PW - 1, it was allegedly the Defendant that had encroached of the Plaintiff's property. Reliance on this was placed on the survey report by Pimatech Land Surveyors and Consultants. PW - 1 claimed that the Defendant's property had two access gates

thus the Defendant would not be landlocked as claimed if the construction was to proceed.

80. The second witness on behalf of the Plaintiff was Mr. Bartholomew Mwanyungu (PW - 2), a Licensed Land Surveyor who produced his survey report dated 13th June 2024. According to PW - 2, parcel number MN/V/1907 never encroached into Plot Number MN/1/134. It was further his evidence that there was a clear and direct access for parcel number MN/V/134 to the Mombasa Highway along its boundary on beacon numbers 134/2,14/3,134/4 and R18 where the Defendant had another gate. PW - 2 also conceded that due to use of part of parcel number MN/V/1907 as access the owner of MN/V/1907 could not completely fence his property. Thus, he produced his expert report dated 13th June 2024 as evidence in court.
81. On the part of the Defendant, it also called two witnesses in support of its evidence that the suit ought to be dismissed with costs. The first witness to take the stand was Francis Mulili (DW - 1) who was the Defendant's General Manager. He adopted his witness statement dated 15th May 2024 and also produced the Defendant's bundle of documents dated 15th May 2024. According to DW - 1, the present suit was nothing but an endeavor by the Plaintiff to sanitize an illegality where it seeks to block access of the Defendant's property Plot No.MN/V/134. DW - 1 in evidence stated that the Defendant 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 a transfer dated 19th March, 1992.

Since then, the Defendant had actual possession of the suit. It was his additional evidence that while Plot No. MN/V/134 was initially of an acreage of 2.70 acres, the government of Kenya had in May, 1955 and January 1973 acquired 0.17 acres and 0.40 acres for purposes of widening the Mombasa-Nairobi Highway. It was this compulsorily acquired land that was purportedly allocated to the Dim Agencies Limited in the year 1997 and thereafter sold to the Plaintiff herein.

82. DW - 1 evidence before this court was that any construction as attempted by the Plaintiff herein of a construction wall would result in its land being landlocked. DW - 1 submitted that since the year 1992, the Defendant had accessed the premises through the same access that the Plaintiff herein wished to block. DW - 1 submitted through photographs and evidence of a draft agreement at Pages 44-47 of the Defendants bundle of documents was clear evidence that the Plaintiff was aware that its construction would block completely the ingress of the Defendant's premises. DW - 1 further urged the court to rely on the expert report of Mr. Edward Kiguru Land Surveyors of 31st October 2022.

83. The second witness, DW - 2 was a Licensed Land Surveyor - Edward Kiguru Land Surveyor. The surveyor had returned the following findings upon undertaking the survey in report dated 31st October 2022; that;

- a) That the above plots (MN/V/134 and MN/V/190,7) have a common boundary line identified by beacon numbers A8,134/1 and 134/2.

- b) From the survey, the boundary wall for plot numbers MN/V/134 is way off the boundary lines hence part of their land is left out.
- c) That the access road to plot no.MN/V/134 passes through plot No.MN/V/1907.
- d) That the access road to plot number MN/V/134 should be acquired from plot number MN/V/1907 or registered as an encumbrance.
- e) The boundary wall should be moved to conform to the survey plans.

84. In view of the above evidence, the Defendant prayed that this Honourable Court dismisses the suit with costs.

85. The Learned Counsel submitted on the court site visit, upon conclusion of the respective parties' evidence in court, this Honourable Court on the 13th December 2024 undertook a site visit of the suit properties owned by both the Plaintiff and the Defendant. The observation made by the Honourable Court is contained in Pages 5 and 6 of the Site Visit Report where the court makes the following observation;

“The team then went inside the yard towards the eastern perimeter wall just to make observations. It was at this point that the court asked the team to indicate where PN Mashru should access the yard. There was not doubt to access to PN Mashru and the highway, the vehicles had to pass through Plot No. 1907 as it was on the front side of PN Mashru’s premises. Indeed it was noted that this was highly contested issue altogether.

The team gathered two divergent views on the sensitive issue. According to Mr. Bartholomew Mwanyungu, they move their

gate next to a mango tree which was at one end of the plot from where the team was currently standing. He was of the view that PN Mashru should access their yard through another gate which already existed.”

86. On the other hand, Mr. Rachael Muthee explained to the court that the Plaintiff should have considered the access gate when revising the survey map and there should be no question of compensation to them. The team then walked outside the yard toward the mango tree and noticed that there was small gate situated at the end corner of the plot which Mr. Mulili claimed had been permanently shut. It was further stated that the gate was for an opening to an exist in a godown which had been hived off by galvanized mabati sheets from Plot No. 134. The team learnt it had been leased to a commercial entity trading in the name and style of Kamongo Limited. Further the team saw a small gate leading to a retreading plant for tires. The team guessed from the many trucks on the premises. Upon furnishing the parties with the Site Visit Report, the parties were directed to then file written submissions which we tender as hereunder.

87. The Learned Counsel relied on the following two (2) issues for determination. Firstly, on whether the Plaintiff is entitled to the reliefs sought in the Plaint. The first order that the Plaintiff seeks against the Defendant is an order for Permanent Injunction restraining the Defendant either by itself, directors, agents, employees, assigns or any persons acting on behalf of the Defendant from interfering with the Plaintiff's ownership, use, occupation, development of and title of the property known as Land Reference No.MN/V/1907.

88. The effect of this draconian order sought by the Plaintiff was to lock out the Defendant from accessing its suit property known as Plot No. MN/V/134 which it had been in occupation since the year 1992. The Plaintiff's prayer is to have its access to its property completely cut off which ought to be declined by this Honourable Court. The first title in time was that of the Defendant herein. The Plaintiff's title herein was issued/created in the year 1997 when the Defendant herein already had access to the property through the access that passes through Plot No. MN/V/1907 without any objection. The Defendant submitted that the evidence of the license agreement issued to the Defendant by the Plaintiff was the basis of the current impasse. When the Defendant declined to sign the license agreement, the Plaintiff in retaliation attempted to build a boundary wall around its property which would consequently block the Defendant's truck and trailers from accessing Plot No. MN/V/134.
89. The Learned Counsel posited that from the Plaintiff's documents, the Plaintiff's certificate of title was issued on the 2nd October 1997 to Castledom Properties Limited. The Land was delineated by way of plan annexed thereto and particularly Land Survey Plan Number 214474 deposited in the surveys records office at Nairobi. According to the Certificate of Title the land measured 0.1082 of a hectare. From the Deed Plan annexed thereto, it was clear that the Land abuts the Defendant's Plot Number MN/V/134 to the Nairobi - Mombasa Highway. Most crucially was that at the time of the creation of the Plaintiff's title, the Defendant's parcel of land was in existence. From the perusal of Title documents, it

was most surprising that once the title was created on the 2nd October 1997 and issued to Castledom Properties Limited, the Land was transferred to DIM Agencies Limited on the 6th November 1997 a period of almost one month. That information was crucial to this matter. Thereafter from entry number 8, the Land was transferred to the Plaintiff on the 8th March 2021. The Plaintiff had made a great deal of the proceedings in Civil Case No. 353 of 1999 PN Mashru Limited - Versus - Castledom Properties Limited & Others. The Defendant submitted that the Plaintiff herein was never a party to the above proceedings and could not rely on the proceedings therein to anchor his case herein.

90. On the other hand, the Defendant herein had annexed its Certificate of Title at Page 1 of its Bundle of Documents dated 15th May 2024. From Entry No. 31, the Defendant acquired Plot MN/V/134 in 1992. A transfer of the suit property is exhibited at Pages 8 and 9 of the Defendants bundle of documents. Mr. Edward Kiguru Surveyor in his report dated 31st October 2022 had annexed a boundary survey that appears at Page 40 of the Defendant's bundle of documents. In that boundary survey, it was clear that the access gate passes through the Plaintiff's property.
91. Though the two surveyors had divergent findings in court, it was clear from the evidence and site visit that the access utilized by the Defendant would be completely locked if the Plaintiff was to be allowed to continue with the construction of the suit property. The Plaintiff land measures 0.1082 hectares which was the same

acreage that the Defendant submits was the compulsorily acquired land of 0.17 acres in May 1955 and 0.40 acres of January 1973. In fact, the location of the Plaintiff's property was not lost to the Honourable Court as his Lordship observed in the site visit of 13th December 2024 where at Pages 5 the court observed as follows;

“Plot Number 1907 started right next to the main tarmac road just inches from the highway but there were no structures. As the team moved towards the yard there was a mabati perimeter wall erected attached to the perimeter yard wall. It did not cover the whole Plot Number 1907 as illustrated by the diagram below Plot Number 1907 occupied the entrance to the yard and which is the main bone of contention...”

92. The Learned Counsel submitted that if a permanent injunction was issued in this matter, the Defendant would not have access to its property. It would be completely landlocked as reiterated by the Edward Kiguru Surveyor in his report of 31st October 2022. This access had been utilised by the Defendant which was a leading transport company since the year 1992. The Access Road ought to have been taken into account during the issuance of the new title to the Plaintiff in the year 1997. The court ought not to countenance the injustice that would be occasioned to the Defendant if it was denied access to its property. It was not controverted that since the issuance of the second title in the year 1997, the Defendant continued to utilize this access road for now a period of Twenty- Seven (27) Years. Blocking the access of this road should not be allowed by this Court. The Plaintiff had argued that the Defendant had an alternative

access to its property through the small gate. This position was highly contested as the court noted from the site visit of the 13th December 2024 since there were permanent structures next to the small gate.

93. It was material to note according to the Learned Counsel what the Land Surveyor Ms Rachael Muthee stated at Page 6 of the site visit report that; ***“On the other end, Ms. Rachel Muthee explained to the court that the Plaintiff should have considered the access gate when revising the survey map and there should be no question of compensation to them..”*** Great emphasis ought to be inferred and considered in the findings of Mr. Edward Kiguru of 31st October 2022 that ***“the access road to plot number MN/V/134 passes through plot number MN/V/1907”***.

94. Granting the orders of permanent injunction as sought by the Plaintiff would completely lock out the Defendant from its suit property which it has utilized since the year 1992 prior to the issuance of the Plaintiff's certificate of title. With tremendous respect, this ought not to be granted by this Honourable Court. The circumstances of this case are similar to the ones considered by your sister Justice N. Matheka in the case of ***“Mohamed - Versus - Board of Management Pentrose Community School & another (Environment & Land Case 26 of 2019) [2023] KEELC 19133 (KLR) (26 July 2023) (Judgment)”*** where the court held as follows when considering similar issues;

“I have perused the defendants' further list of documents filed in court on the 18th May 2022 and the Surveyors Report states that the school structures were measured and plotted on the survey plan F/R 127/77 to indicate its physical position and entrance from the above data, F/R 127/77 a subdivision which

was done and approved back in the year 1974, provided an official access to the Government Land where the school is built. That later in the year 1999 the access leading to the school was allocated as plot parcel No MN/1/11375 as per the survey plan No F/R No 370/32. This is clearly demonstrated by the maps filed in this case by the defendants. I find that the suit property is the original official access road to the Government Land from way back in 1974 and was not available for allocation. This is a school of over 1000 children and how are they to operate if they are land locked! It was only in 1996 when the plaintiff's plot was created. The plaintiff's deed plan which was produced as evidence is dated June 25, 2000. The first registration was on June 1, 1996 to Ali Mwatsahu, second was on September 23, 2002 to Ibrahim Hassan Abubakar and finally it was transferred to the plaintiff on the February 20, 2015. I think it is common sense that the school had to have an access road. Section 28 of the Land Registration Act No 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, Sections 28(c) and (h) of the same Act provides that: "Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register (c)rights of way, rights of water and profits subsisting at the time of first registration under this Act.(h)rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;(i)any other rights provided under any written law (Emphasis added)."

95. They submitted that the Defendant's title was the first in time in this instance. A grant of the orders sought herein by the Plaintiff would block the access to the Defendant's property which it has utilized since the year 1992. Mr. Mwanyungu, licensed surveyor testified that there was an alternative access through another gate. This position was contested since as the court observed the trucks could not access the said small gate that Mr. Mwanyungu testified on. Indeed the court during the site visit witnessed several trucks entering the Defendant's property

through the same access that the Plaintiff herein wished to permanently shut the Defendant from accessing. It was quite clear from the site visit that the Defendant could not access the property through the said small gate. They prayed that the court finds that the evidence of Surveyor Mr. Kiguru to be sufficient in the circumstances to demonstrate that the relief of permanent injunction sought by the Plaintiff is not available.

96. Further reliance was also made on the case of:- **“Peony Management Company Limited - Versus - Desterio Oyatsi [2020] eKLR”** where the court held as follows:-

“The Plaintiff argued that the Defendant had acquiesced and allowed the Plaintiff to use his land as an access road for 23 years without leading any evidence on how it arrived at the 23 years. The statutory period for the creation of an easement under Section 32 of the Limitation of Actions Act is 20 years. The Plaintiff pleaded that the homeowners in Peony Estate bought the apartments in 2012, which was eight before this dispute arose. The Plaintiff's claim to a right of easement or adverse possession over the Defendant's land brought under the Limitation of Actions Act fails.

The court agrees with the Plaintiff that the Defendant acquiesced and slept on his rights when he allowed the Plaintiff to use his land to access Hatheru Road from the time Peony Estate in 2012 was constructed up to now. The Defendant by his conduct acted in a manner that may fairly be regarded as a waiver of his claim to the portion of his land that the Plaintiff's development encroached on. Until November 2019, he neglected to ascertain where the beacons of his land were. The Defendant who acquired his own land in 2002 must have known about the development of Peony Estate next to his property. It would be unreasonable for the Defendant to demand to have part of the Plaintiff's development demolished so that the Plaintiff can create an access from its land directly to Hatheru Road for its use. The Defendant's delay in asserting his remedy and lapse of time militate against the Defendant being granted the orders he sought in the counterclaim. In

light of the nature of the Plaintiff's development on the land, and without any other access to Hatheru Road, it would not be fair to grant the reliefs the Defendant sought. The order that commends itself to the court is for the parties to have an easement created in favour of the Plaintiff for the portion of the Defendant's land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the Land Registration Act. The Plaintiff will pay consideration for the creation of the easement (Emphasis added)."

97. The Learned Counsel submitted that, similarly herein, for the whole period of the existence of the Plaintiff's title a period of more than Twenty-Seven Years, the Defendant had utilized this access road without any objection by the Plaintiff herein. They further submitted that this creates an overriding interest over the suit property; access way/easement and the invitation of a permanent injunction as proposed by the Plaintiff ought to be dismissed in the circumstances.

98. Honourable Justice Angote considered similar issues and specifically the import of Public Roads and Access Act in the case of **"Kenya Armed Forces Old Comrades Association Registered Trustees - Versus - City Council of Nairobi & 7 others (Environment and Land Case Civil Suit 503 of 2012 & Civil Case 1627 of 2001 (Consolidated)) [2022] KEELC 3857 (KLR) (16 June 2022) (Judgment)"** where the court held as follows;

"Land use seeks to accommodate competing interests within a technical and spatial framework. While houses and other structures must be built, they cannot be provided without access roads, amongst other facilities, that may be required by the users of land in the concerned area. That being the case, and in view of the fact that allocation of land cannot commence before the said land is planned, it follows that the planning of unalienated government land always come first before any allotment can be made to an individual and a survey plan drawn. The suit land having been planned by way

of a Part Development Plan (PDP), the survey plan of the said land must have accorded in all respect with Part Development Plan (PDP) number 242 dated February 22, 1977 and PDP No 382 dated March 1, 1994 for the plaintiff's and the 2nd Defendant's land respectively. Indeed, in view of the importance of a PDP, a survey plan that is drawn without according with the dimensions and features of an approved part development plan is subject to cancellation by the Director of Surveys. That being the case, it follows that in as far as the initial survey of the plaintiff's property was done without placing reliance on the part development plan of 1977, Having found that the public of road of access initially existed in the part development plan for the Plaintiff's suit property, it follows that the Commissioner of Lands was within his mandate to seek for a re - survey of the Plaintiff's land in as far as the same was to re-establish the road that existed in the two PDPs to its correct position. In view of the above findings, the question of whether or not the 2nd Defendant's property is landlocked is moot. The access road in question being a public road, and the same have been planned in the PDPs of 1977 and 1994, it follows that the public, including the 2nd Defendant, have the right to use and access the same.

99. Similarly, herein the Learned Counsel submitted that the existence of the access road in 1992 was a clear demonstration that any title created thereafter had to take into account the Defendant access to the Nairobi Mombasa Highway. The Defendant's access could be taken away by an order of the court that there be a permanent injunction on the suit property despite clear evidence that the Defendant herein has enjoyed this access to its property for more than Thirty (30) Years. This invitation in their humble submission should be declined by this Honourable Court and the prayer for permanent injunction declined by this Honourable Court altogether. Most crucially, the map that the Plaintiff's herein rely on at Page 15 of the Bundle of documents, was prepared by Mr. E.M.J. Kiguru who prepared the

Defendant's survey report that the access to the Defendant's property will be blocked if the orders sought by the Plaintiff are granted herein.

100. The Learned Counsel submitted further that it was entitled to the access road through the Defendant's property having utilized it for more than thirty (30) years. The Legal framework of easements and access roads was equally discussed at length by Justice Onyango in the case of **"Motachwa - Versus - Ogari (Environment & Land Case 11 of 2015) [2022] KEELC 92 (KLR) (26 May 2022) (Judgment)"** where the Judge held as:-

"The legal framework for easements is found in section 32 of the Limitation of Actions Act which provides as follows: S 32 Means by which easements may be acquired

1)Where

a) access and use of light or air to and for any building have been enjoyed with the building as an easement; or

b) any way or watercourse or the use of any water has been enjoyed as an easement; or

c) any other easement has been enjoyed, peaceably and openly as of right, and without interruption for twenty years, the right to such access and use of light. Air or to such way or watercourse or use of water or to such other easement is absolute and indefeasible.

2)The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested: -

"Further Section 28 of the Land Registration Act No. 3 of 2012 categorizes the right of way as an overriding interest. The said section provides that: -

"Unless the contrary is expressed in the register, all land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register:

a)....b)...c) rights of way, rights of water and profits

*subsisting at the time of first registration under this Act.
d) natural rights of light, air water and support.”*

Sections 98 to 100 further provides for the creation of easements and analogous rights by a formal instrument and sets out what is to be contained in the said instrument, cancellation and extinguishment and enjoyment of the easement. The courts have also pronounced themselves on the question of easements and in the case of “Kamau v Kamau (1984) eKLR the Court of Appeal observed as follows:

“An easement is a convenience to be exercised by one land owner over the land of a neighbour without participation in the profit of that other land. the tenement to which it is attached it he dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the servient tenement to every person into whose occupation these tenements respectively come. “In the instant case, even though the Plaintiff claims that he is entitled to an easement in the nature of an access road over the Defendant's land..... (Emphasis added)”

101. The Learned Counsel submitted that they prayed that the Court does not take away the easement/access way of the Defendant by a stroke of a pen. The two surveyors conceded that the Defendant had utilized the access road for three decades. The access had been open and without interruption since the Plaintiff's title was created in the year 1997. They urged the court to find that a grant of the order of permanent injunction would indirectly affect the Defendant herein. Quite important to the case before court, the case only concerns an access road to the Defendant's property and not the entire L.R No.MN/V/1907 as cast by the Plaintiff in its Plaint dated 8th November 2022. This observation was correctly made by this Honourable Court in its site visit report of 13th December 2024. They prayed that the

court is persuaded that the Defendant has made out a good defence why the Plaintiff's prayer for injunction ought not to be granted by this Honourable Court.

102. On second prayer by the Plaintiff in his Plaint dated 8th November, 2022 was for general damages. The Learned Counsel asserted that the Plaintiff had not laid out a basis for such general damages. From the filed pleadings, It was not clear why the Plaintiff herein was seeking general damages against the Defendant. However, if this remotely could related to the issue of alleged interference to the Plaintiff's property then, it had no basis whatsoever. The Defendant had demonstrated that it had not interfered with the Plaintiff's land as pleaded. As this Honourable Court observed, save for the access to its premises through a small stretch, the whole parcel was available to the Plaintiff. The Defendant had not interfered at all with the Plaintiff's use and occupation of the property. The only issue the Defendant had raised was the Plaintiff's endeavor to block its entrance by constructing a wall through the access road. The fact that the Plaintiff was aware that its actions would occasion hardship and prejudice to the Defendant was further demonstrated by the license agreement shared by the Plaintiff to the Defendant for execution that was exhibited at Pages 44-46 of the Defendant's bundle of documents. To buttress on this point, the Learned Counsel relied on the case of:- ***"Mburu - Versus - Kenya Rural Roads Authority & Another (Environment & Land Case 21 of 2020) [2024] KEELC 3296 (KLR) (11 April 2024) (Judgment)"*** the court held as follows:-

“The court has already found that the Plaintiff has failed to prove her allegation of trespass against the 1st Defendant in view of the consent agreement she signed on 1st July, 2020. As a result, she is not entitled to any damages for trespass. The Plaintiff would also not be entitled to a permanent injunction to restrain the 1st Defendant from further trespassing on the suit property. The material on record shows that the 1st Defendant utilized an alternative route hence the road did not traverse the suit property at all. It would, therefore, follow that the 1st Defendant is no longer occupying any portion of the suit property to warrant the issuance of a permanent injunction against it.”

103. They submitted that from the evidence presented in Court, no evidence has been presented in court to demonstrate that the Defendant had interfered with the Plaintiff's property. The claim of general damages was not specific and particularized by the Plaintiff and ought to be dismissed with costs. The Defendant led evidence that it has utilized as access road the portion thereof since the year 1992 and thus the claim for general damages was for rejection by this Honourable Court.

104. As regards the prayers of injunction and general damages, they wished to fully rely on the decision of:- ***“Erdemann Property Limited - Versus - Kanyi (Environment & Land Case 285 of 2018) [2023] KEELC 18698 (KLR) (6 July 2023) (Judgment)”*** where the court held as follows:-

“As for general damages, the same are dependent on proof of liability. I have already made a finding that the Plaintiff has not proved liability against the Defendant. Regarding the prayer for an Order of permanent injunction, I align with the holding in the case of Kenya Power & Lightning Company Limited - Versus - Sheriff Molana Habib (2018) eKLR, where the court made the following pronouncement as regards a perpetual permanent injunction; “A permanent injunction also known as a perpetual injunction is granted upon the hearing of

the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.” The Plaintiff has not made a case for issuance of an Order of Permanent injunction in his favour (emphasis).”

105. In conclusion, the Learned Counsel prayed that on the basis of the cogent and overwhelming evidence presented in court, the court finds that the Plaintiff was not entitled to the reliefs sought therein and dismiss the claim with costs. The court in the case of:- **“Mburu - Versus - Kenya Rural Roads Authority & another (Supra)”** held as follows as regards costs:-

“Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons - Versus - Twentsche Overseas Trading Co. Ltd [19671 EA 287.....”

106. The Learned Counsel urged that on the weight of the evidence presented in Court, the Plaintiff’s case ought to be dismissed with costs.

VII. Analysis and Determination

107. I have keenly assessed the filed pleadings by the Plaintiff and Defendant herein, the written submissions and the cited myriad authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

108. In order to reach an informed, fair, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

- a) **Whether this Honourable Court has jurisdiction to entertain the dispute.**
- b) **Whether the Plaintiff lawfully acquired title to all that parcel known as L.R. No. MN/V/1907.**
- c) **Whether the Plaintiff has established encroachment or interference with its proprietary rights**
- d) **What remedies, if any, are available to the parties**
- e) **Who bears the costs of the suit?**

ISSUE No. a). Whether there was a valid agreement between the Plaintiff and the 2nd Defendant and whether the 2nd Defendant passed proper title to the Plaintiff

109. The Site Visit Report

110. Prior to embarking on the issue for analysis under this Sub - heading, as indicated at the beginning of this Judgement, the Honourable Court after conducting a Site Visit (“*Locus in Quo*”) it prepared and shared the report thereof. For ease of reference, I now wish to reproduce it verbatim herein below.

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 129 OF 2022

ALAMIN HASSAN OTHMAN PLAINTIFF

- VERSUS -

P. N. MASHRU LIMITED.....DEFENDANT

A SITE VISIT REPORT ON A VISIT HELD AT JOMVU AREA ALONG THE HIGHWAY ON 13TH DECEMBER 2024 11.00 AM

I. Preliminaries.

- 1. The team arrived at the site at 11.00am. It was a distance of close to 20 kilometres from the Main Mombasa CBD.

2. The session assembled and it started with a word of prayer led by Mrs. Rachel Muthee. Thereafter introductions were conducted and the purpose of the visit was explained by the court. Members were invited to seek any clarifications on the site visit. Upon a clear understanding, it was agreed by consensus that the two Land Surveyors with their assistants would lead the team in the brief tour of the disputed area.
3. The site visit ("***Locus in Quo***") commenced at the main entrance of P.N Mashru and several observations were made.

II. The Report

A. The Court

1. Hon Justice L.L Naikuni - Judge, ELC Mombasa.
2. Mr. Ian Okwaro - the Legal Researcher/Court Assistant.
3. Mr. George Omondi - the Judge's Usher.
4. Mr. John Ngari - the Judge's driver.

B. The Plaintiff.

1. Mr. Kilonzo Advocate - present for the Plaintiff.
2. Mr. Anthony Mutsoso.
3. Mr. Bartholomew Mwanyungu - The Land Surveyor.

C. The Defendants

1. Mr. D. Kimani Advocate - present for the Defendant.
2. Mr. Francis Mulili - General Manager for P.N Mashru.
3. Mr. Edward K. Kiguru - Senior Land Surveyor.
4. Mr. Derek Otieno - Surveyor.
5. Mr. Rachel Muthee - Surveyor. (Hereinafter all referred to as "**The Team**").

D. Security Operatives

1. Mohamed Nasri- Security In charge of P.N Mashru.

2. Corporal – Dida Muchoke - Jomvu Police Station.
3. Police Constable Priscilla Shighadi – Jomvu Police Station.
4. Police Constable William Kivue – Jomvu Police Station.
5. Police Constable Pauline Nyagah - Jomvu Police Station.
6. Corporal Edwin Keino – Jomvu Police Station.

III. The purpose for the Site Visit

4. The Court explained that the purpose of the site visit. It stated that it was pursuant to a court order made on 15th November 2024 in accordance with the provision of as Section 173 of the Evidence Act, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. 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”

While the provision of Order 40 Rule 10 (1) (a) provided *to wit:-*

“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.

5. It was agreed by consensus of the parties that Site Visit be conducted led by the two Land Surveyors. The court reminded the team that the matter was awaiting final submissions and emphasized that the site visit was not for gathering further evidence on the case but to make observations, verify and inspect the suit property so as to assist Court in its decision-making functions and/or process.
6. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place. It warned parties from use of mobile phones in taking pictures nor

making any recordings as they were likely to be misused in the social media defeating the while purpose of the site visit.

IV. The Procedure

7. The Land Surveyors informed the team that the process would involve walking around the disputed area. In the course of that, the team would be identifying and picking the planted beacons at all boundary end points.
8. To assist in the surveying exercise, the well established and recorded maps; These maps were already filed in Court; GPS instruments and tape measures. The parties agreed that the main bone of contention was on the exact access to the P.N Mashru premises.

IV. The observations made by the team

The team made the following observations.

9. The location and size:-

- The yard was situated onto Plot No. 134. It measured approximately 2 acres. The registered owners were P.N Mashru. There was a perimeter wall around the yard and it is located a few meters from the road. It was touching on the busy Nairobi - Mombasa highway.
- It contained around 41 vehicles. There were frequent movement of trucks. By all standards, the place was extremely busy with huge vehicular traffic. Some of the vehicles would leaving while others were entering the premises. The number of trucks inside the yard as per the counts conducted by the employees present totaled to 41 vehicles. They were as follows:
 - a. 31 Trucks.
 - b. 5 Forklifts.
 - c. 3 Tractors.
 - d. 1 Top Loader.
 - e. 1 Crane.

- There was another Plot – Plot No. 1907 right in from the Plot No. 134. It was the one touching onto the Nairobi - Mombasa highway. The team commenced by heading to the point where the Map and the GPS indicated Plot No. 1907 started. It started just next to the highway road and over a ditch which ordinarily was located next to the road for purposes of draining any water accumulating on the road surface.
- The disputed area was small. The movement was by walking from the starting point to the end point while using the maps and the GPS as a guide.
 - Plot No. 1907 started right next to the main tarmac road just inches from the highway but there were no structures. As the team moved towards the yard there was a mabati perimeter wall erected attached to the perimeter yard wall. It did not cover the whole Plot No. 1907. As illustrated by the diagram below Plot No. 1907 occupied the entrance to the yard and which is the main bone of contention
 - After walking around Plot No. 1907 it was established that there are no beacons. The team even managed to move into the mabati wall and noticed there were no structures therein. There were only an askari who was guarding the small area of land cordoned.
 - On the other unoccupied area of Plot No. 1907. There were about five (5) small vibandas. The Land Surveyors pointed out to the court the end of Plot No. 1907 was diagonal but on the site, it was vertical to allow entry into a small access road. One of the Land Surveyor M/s. Muthee was given an opportunity to draw a small sketch map showing the location of Plot No. 1907 vis-à-vis 134 and the small area preventing access to PN Mashru premises. Plot No. 1907 was hexagonal in shape.
- The team then went inside the yard towards the eastern perimeter wall just to make observations. It was at this point that the Court asked the team to indicate where P.N Mashru should access the yard. There was no doubt, to access to P. N Mashru and the high way, the vehicles had to

pass through Plot No. 1907 as it was on the front side of P.N Mashru's premises. Indeed, it was noted that this was highly contested issue altogether.

- The team gathered two divergent views on this sensitive issue. According to Mr. Bartholomew Mwanyungu, they move their gate next to a mango tree which was at one end the Plot from where the team was currently standing. He was of the view that P.N Mahru should access their yard through another gate which already existed.
- On the other end, M/s. Rachel Muthee explained to the court that the Plaintiff should have considered the access gate when revising the survey map and there should be no question of compensation to them.
- The team then walked outside the yard toward the mango tree and noticed that there was a small gate situated at the end corner of the plot which Mr. Mulili claimed had been permanently shut. It was further stated that the gate was for an opening to an existing godown which had been hived off by galvanized mabati sheets from Plot No. 134. The team learnt it had been leased to a commercial entity trading in the names and style of Kamongo Limited.
- Further, the team saw a small gate leading to a retreading plant for tires. The team guessed was from the many trucks on the premises. It was still part of Plot No. 134 but was separated by permanent wall. Mr. D. Kimani tried to raise an issue that Plot No. 1907 was on a road reserve but the court dismissed it and retained the previously agreed issue of access to P.N Mashru (Plot No. 134).
- Undoubtedly, the issue of the smooth access of the road towards Plot No. 134 through to Plot No. 1907 would be the main task for the Honourable Court to make a final determination based on facts and law.

V. CONCLUSION

10. Upon completion of the tour around the site, the Court made the following directions: -

a) That the Honourable Court to prepare and share the Site Visit report accordingly.

b) That the issue arising is of access to the yard and not whether or not plot 1907 is on a road reserve or not.

c) That the Judgment date of 25th February 2025 still to be retained.

There being no other business, the session ended with a word of prayer by M/s. Rachel Muthee at 11.48 am.

THE SITE VISIT REPORT PREPARED AND DATED THIS.....17THDay ofDECEMBER,2024.

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

111. Now back to the issue of analysis under the sub - title. The Honourable Court will decipher whether it has jurisdiction to entertain the dispute. This issue had been raised in a Preliminary objection dated 19th November, 2022 which was determined vide a Ruling delivered by Court on 1st November, 2023. Be that as it may, for avoidance of any doubts, taking that it was once more raised in the Statement of Defence as well it is prudent to speak on each and every issue so as to determine the suit on merit.

112. The Court reiterates that it is in fact worthwhile setting down the provisions of the whole of the provision of Article 162 of the Constitution so that one can see the context of the jurisdiction of the ELC. The said provision is drawn as follows :-

162. System of courts

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

113. It will be seen from Article 162 (3) that it was left for Parliament to determine the jurisdiction of the courts created under Article 162 (2). In elaborating the jurisdiction of the ELC, Parliament did enact the Environment and Land Court Act, No. 19 of 2011 and various other statutes which provide for instances where the ELC has jurisdiction.

114. The provision of Section 13 of the Environment and Land Court Act, No. 19 of 2011 does provide as follows in so far as jurisdiction is concerned :-

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) 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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs. [Act No. 12 of 2012, Sch.]

115. Further, it will be seen from the provision of Section 13 (2) (d) above, that the ELC has jurisdiction to hear disputes relating to inter alia, "*contracts, choses in action or other instruments granting an enforceable interest in land.*" Apart from this, there are other additional statutes which graphically clothes the Court with the legal mandate to deal on land and environment

matter. From the provision of Section 150 of or the Land Act, No. 6 of 2012 provides as follows :-

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

116. While, the provision of Section 101 of the Land Registration Act, No. 3 of 2012, the jurisdiction of the Court is stipulated as follows:-

101. Jurisdiction of court

The Environment and Land Court established by the Environment and Land Court Act, 2011 (No. 19 of 2011) and sub - ordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

117. Thus, it will be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC.

118. The question of jurisdiction is foundational. As was stated in now the "*Classicus Locus*" case of "***Owners of the Motor Vessel "Lillian S" - Versus - Caltex Oil (Kenya) Limited [1989] KLR 1***", that: -

“Jurisdiction is everything. Without it, a court has no power 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

119. Under the Registered Land Act Cap. 300 (Now repealed), the provision of 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. Similarly, the provision of Sections 18 (2) and 19 of the Land Registration Act, No. 3 of 2012, prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries (read both Fixed and General) 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”.

120. Specifically, the provision of Section 18 (2) of the said Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

121. While, under the provision of Section 19 of the 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”.

122. Undoubtedly, it is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. This is also the entity which has the requisite expertise to undertake the aforementioned task.

123. 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”.

124. Additionally, in the case of:- **“George Kamau Macharia & Dexka Limited (2019) eKLR,”** Kemei J stated as follows:

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18 (2) of the Land Registration Act placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations. In this case the office of the land registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that the dispute is prematurely before the court”.

125. While in the case of:- **“Willis Ocholla - Versus - Mary Ndege (2016) eKLR”**, Kibunja J rendered himself thus:-

“That in terms of section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the land registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18 (2) of the land registration act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land registrar’s determination on the same has been rendered”.

126. In the Court of Appeal Case of **“Estate Sonrisa Ltd & another - Versus - Samuel Kamau Macharia & 2 others [2020] eKLR”**, the court stated thus:-

“It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

.....
Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.....

It is only after determining the dispute can parties move to court to challenge it.

127. The aforementioned case law clearly indicate that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. The decision thereof can then be challenged in court pursuant to the provisions of Sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act, No. 3 of 2012.

128. In the instant case, the Defendant categorically contended that the matter was a boundary and encroachment dispute. Hence, according to them, the issues fell squarely within the statutory mandate of the Land Registrar under the provision of Sections 18 and 19 of the Land Registration Act, No. 3 of 2012. In

essence, this Court was not clothed with the jurisdiction to entertain the matter at all. To them, the Court ought to have downed its tools from the on set. I outrightly disagree.

129. On the other hand, the Plaintiff, however, urged that the dispute was not merely about boundaries but about title validity, ownership, and interference with proprietary rights, which fall squarely within the jurisdiction of this Honourable Court under Article 162 (2)(b) of the Constitution of Kenya, 2010, and Section 13 of the Environment and Land Court Act, No. 3 of 2012. I fully concur and associate myself with these argument.

130. In saying so, I have relied on the case of:- ***“Kibuchi - Versus - Githinji [2024] KEELC 6299 (KLR)”***, the Court reiterated that while boundary disputes must first be referred to the Land Registrar, questions of ownership and title validity are within the jurisdiction of the Environment and Land Court. Similarly, in the case of:- ***“Republic - Versus - Land Registrar, Kilifi ex parte Daniel Ricci [2013] eKLR”***, the Court held that surveyor’s reports are advisory but determinative of boundaries, and the Land Registrar is the statutory authority mandated to fix boundaries. Indeed, these suppositions and fundamental legal issues with regard to the instant case, were made so clear from the two (2) comprehensive and incisive Land Survey reports by the professional Licensed Surveyors and the Site Visit conducted by the Court. I need say no more.

131. Therefore, in a nutshell, this Honourable Court deciphers that its jurisdiction is limited in respect of boundary demarcation,

which must first be determined by the Land Registrar. However, insofar as the dispute touches on ownership, title validity, and enforcement of constitutional property rights under the provision of Article 40 of the Constitution and Section 26 of the Land Registration Act, No. 3 of 2012 as it is in the instant case, I reiterate as was already pronounced in my earlier holdings from the Ruling delivered on 1st November, 2023, that then this Honourable Court has jurisdiction to entertain the matter.

ISSUE No. b). Whether the Plaintiff lawfully acquired title to all that parcel known as L.R. No. MN/V/1907

132. Under this sub-title, the Honourable Court examines whether the Plaintiff lawfully acquired title to all that parcel of land known as L.R. No. MN/V/1907. Both the Plaintiff and the Defendant have gone into detailed and uncontested background on the acquisition of this parcel of land. Therefore the Honourable Court will only provide a brief road map for clarity sake. I will not want to belabour the point or re - invent the wheel whatsoever. To begin with, the parcel known as L.R. No. MN/V/1907 was initially allocated to Castledom Properties Limited by the Commissioner of Lands through a Grant dated 2nd October 1997 under the then Registration of Titles Act (Cap 281, repealed). The Grant was registered as C.R. 30803, conferring leasehold interest from the Government of Kenya.

133. Subsequently, Castledom Properties Limited transferred the property to DIM Agencies Limited. DIM Agencies Limited became the registered proprietor and held the property from

the year 1997 until 2021. On or about 15th December 2021, the Plaintiff purchased the suit property from DIM Agencies Limited for valuable consideration of a sum of Kenya Shillings One Million Two Hundred and fifty Three Thousand Five Ninety Seven Hundred (Kshs. 1,253,597.00/=).

134. Procedurally, the transfer was duly registered, and the Plaintiff was issued with a Certificate of title under the Land Registration Act, 2012, thereby becoming the legal and absolute registered proprietor of the said parcel of land.

135. I have previously opined myself in the case of:- ***“Bajaber Limited v Ramadhan & another (Environment and Land Case 60 of 2019) [2025] KEELC 5241 (KLR) (11 July 2025) (Judgment)”*** LL. Naikuni J that: -

“42. Therefore, the Honourable Court will just proceed on analysis of the framed issues under this sub - heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, 2010, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.”

136. The provision of Article 40(1), Constitution of Kenya, 2010 guarantees the right to acquire and own property of any description in any part of Kenya. Article 40 (2), (3), (4) and (6) of the Constitution of Kenya provide as follows:

“40 (2) Parliament shall not enact a law that permits the State or any person:-

- a. **To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description (3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation: (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:- i. requires prompt payment in full of just compensation to the person, and ii. allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

137. Thus, once a party produces a duly registered title, the burden shifts to the challenger to demonstrate fraud, illegality, or procedural impropriety.

138. It is trite law that the effect and efficacy of the registration of land is well governed under the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. The provision of Section 24 of the Land Registration Act 2012 No. 3 of 2012 provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

139. While the provisions of Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

140. The starting point is Section 26(1) of the Land Registration Act, No. 3 of 2012, which provides:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer, shall be taken by all courts as prima facie evidence that the person named therein is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except—
(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

141. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have

a title deed or Certificate of Lease, then they have a right over the property.

142. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

143. In the case of:- **“Munyu Maina - Versus - Hiram Gathiha Maina [2013] KECA 94 (KLR)”**, the Court of Appeal held that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

144. Similarly, in **“Hubert L. Martin & 2 Others - Versus - Margaret J. Kamar & 5 Others [2016] KEELC 1092 (KLR)”**, the court held as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with

its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld."

145. This court is further guided by the determination of the Court of Appeal in ***"Presbyterian Foundation - Versus - Kibera Siranga Self Help Group Nursery School [2023] KECA 371 (KLR)"***, in which matter it set out the elements of a good root of title where there are competing interests. The Appellate Court held that:

"The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title starting with a 'good root of title.' A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title."

146. In the same decision, the court also noted that in civil cases, the standard of proof is on a preponderance of probabilities. Accordingly, where there are multiple stories that are mutually destructive, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. It stated:

“The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.”

147. The Defendant alleged that the land had been compulsorily acquired in 1955 and 1973 for expansion of the Mombasa-Nairobi Highway. Legally speaking, compulsory acquisition of property by the Government for public use is not an event. On the contrary, it is such an elaborate and involving process as enshrined under Article 40 (3) of the Constitution of Kenya, 2010 read together with the provisions of Sections 108 to 118 of the Land Act, No. 6 of 2012. Despite of making this rather serious allegations, the Defendant never produced any empirical - oral and documentary evidence to substantiate the said claim. Compulsory acquisition extinguishes private rights only upon due process and compensation. No evidence was tendered to show that the suit property was lawfully acquired by the Government and vested in the State. Therefore, without proof, this assertion must fail.

148. It is not contested that the Plaintiff purchased the property for valuable consideration and was duly registered. The doctrine of an innocent purchaser for value without notice protects such a party from historical irregularities not attributable to them. In the case of ***“Arthi Highway Developers Limited - Versus - West End Butchery Ltd & Others [2015] eKLR”***, the Court of Appeal emphasized that a bona fide purchaser who acquires property without notice of fraud or illegality is entitled to protection under the law. The Plaintiff falls squarely within this category.

149. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions. At the center of the dispute between the parties is the protection of private property as enshrined in Section 75 of the former Constitution and Article 40 of the 2010 Constitution.
150. As already stated above, the provision of Article 40 (1) of the Constitution of Kenya, 2010 guarantees the right to acquire and own property of any description in any part of Kenya. This constitutional safeguard reinforces the statutory protection under the provision of Section 26 of the Land Registration Act. The Plaintiff's proprietary rights are therefore constitutionally entrenched.
151. The Defendant relied on HCCC No. 353 of 1999: P.N. Mashru Ltd v Castledom Properties Ltd & Others, which was withdrawn on 14th June 2019. Under the provision of Order 25 (1) & (2) of the Civil Procedure Rules, 2010, a withdrawn suit has no probative value and cannot be relied upon to impeach the Plaintiff's title. The withdrawal extinguished any claims raised therein.
152. The Plaintiff demonstrated a clear chain of acquisition from Castledom Properties Limited → DIM Agencies Limited → Plaintiff. Based on the principle of **"The Burden of Proof"** as

enshrined under the provision of Sections 107, 108 and 109 of the Evidence Act, cap. 80, on he who alleges must prove, the Defendant did not produce evidence of fraud or illegality attributable to the Plaintiff. The Plaintiff was therefore an innocent purchaser for value without notice, entitled to protection under the provision of Section 26 of the Land Registration Act, No. 3 of 2012 and Article 40 of the Constitution.

153. The Plaintiff has therefore demonstrated that:

- b. A lawful chain of acquisition.
- c. Registration under the Land Registration Act, 2012.
- d. Purchase for valuable consideration without notice of fraud or illegality

154. The Defendant has failed to discharge the burden of proof under Sections 107-109 of the Evidence Act (Cap 80). The Plaintiff's title is therefore valid and enjoys statutory and constitutional protection.

155. The facts establish that the Plaintiff lawfully acquired L.R. No. MN/V/1907 through a registered transfer from DIM Agencies Limited, who had in turn acquired it from Castledom Properties Limited. The Plaintiff's title is valid and enjoys statutory and constitutional protection.

156. The Honourable Court finds that the Plaintiff lawfully acquired L.R. No. MN/V/1907. The Plaintiff is the legal and absolute owner to the said property with all the indefeasible rights, interest and title vested in him under the provisions of Sections 24, 25 & 26(1) of the Land Registration Act, No. 3 of 2012, and

is further protected by Article 40 of the Constitution. The Defendant's challenge is unsubstantiated and cannot defeat the Plaintiff's proprietary rights.

ISSUE No. c). Whether the Defendant has established encroachment or interference with its proprietary rights.

157. Under this sub - title, the Honourable Court shall examine the issue of encroachment and interference. The Defendant contends that the suit property, L.R. No. MN/V/1907, was compulsorily acquired by the Government in 1955 and 1973 for expansion of the Mombasa-Nairobi Highway, and therefore its subsequent allocation and transfers were unlawful. On this basis, the Defendant alleges that its proprietary rights have been interfered with.

158. Proprietary rights are protected under Article 40(1) of the Constitution of Kenya, 2010, which guarantees the right to acquire and own property of any description in any part of Kenya. However, Article 40(6) expressly excludes protection for property found to have been unlawfully acquired. It follows that for the Defendant to succeed, it must demonstrate with cogent evidence that the suit property was compulsorily acquired and vested in the Government, thereby extinguishing private ownership.

159. As already indicated, the burden of proof lies upon the Defendant under the provision of Sections 107-109 of the Evidence Act (Cap 80). In the case of:- ***"Mbuthia Macharia - Versus - Annah Mutua & Another [2017] eKLR"***, the Court of Appeal reiterated that he who alleges must prove. Mere

assertions without documentary evidence cannot suffice to impeach a registered title.

160. In the present case, the Defendant has not produced Gazette Notices, acquisition schedules, compensation records, or any other statutory instruments evidencing compulsory acquisition of L.R. No. MN/V/1907. The allegation therefore remains unsubstantiated. In **“Wreck Motors Enterprises - Versus - The Commissioner of Lands & Others [1997] eKLR”**, the Court held that compulsory acquisition must be supported by clear statutory documentation, failing which the claim cannot stand.
161. Further, the Defendant has not demonstrated actual encroachment or interference by the Plaintiff upon any identifiable portion of land lawfully belonging to the Defendant. The Plaintiff’s occupation and registration are confined to the parcel described in the Grant and subsequent transfers. In the case of:- **“Muthuita - Versus - Muthuita [1982-88] 1 KAR 42”**, the Court emphasized that proprietary rights must be proved by reference to title documents and boundaries, not mere allegations.
162. The Defendant’s reliance on **“HCCC No. 353 of 1999: P.N. Mashru Ltd - Versus - Castledom Properties Ltd & Others”** is misplaced, as the suit was withdrawn on 14th June 2019 and therefore has no probative value. A withdrawn suit cannot be invoked to establish encroachment or interference. On the contrary, and as already demonstrated from the pleadings, the two Land Surveyors Reports and the Site Visit conducted by Court, it is confirmed and admitted that the Defendant who undertakes a

well reputable transport business with a fleet of trucks has been utilizing and passing through the parcel of land belonging to the Plaintiff to access to his land known as LR No. MN/V/134 as access road from the year 1978 or thereabout.

163. The Defendant has failed to establish, on a balance of probabilities, that its proprietary rights have been encroached upon or interfered with by the Plaintiff. No credible evidence of compulsory acquisition or lawful vesting in the Government was produced. The Plaintiff's title remains valid and enjoys protection under Section 26(1) of the Land Registration Act, 2012 and Article 40 of the Constitution.

164. Therefore this Honourable Court finds that the Defendant has not established encroachment or interference with its proprietary rights. The Plaintiff's occupation and registration of L.R. No. MN/V/1907 are lawful, and the Defendant's allegations are unsubstantiated.

ISSUE No. d). Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

165. Under this Sub - heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaintiff, herein. Having found that the Plaintiff lawfully acquired L.R. No. MN/V/1907 and that the Defendant has failed to establish encroachment or interference with its proprietary rights, the Court must now consider what remedies, if any, are available to the parties.

166. The Plaintiff's position and in his final submissions urged this Honourable Court to grant not only declaratory and injunctive relief but also general damages for interference with its

proprietary rights. Counsel argued that the Defendant's conduct — including demands to halt construction, threats of obstruction, and continued use of the Plaintiff's land as an access route — amounted to trespass and unlawful interference. The Plaintiff relied on the survey report of Pimatech Land Surveyors (dated 13th June 2024) and the Court's own site visit of 13th December 2024, which confirmed that the Defendant's property is not landlocked and enjoys alternative access to the Mombasa-Nairobi Highway. It was submitted that the Defendant's insistence on cutting across the Plaintiff's land was a false sense of entitlement, amounting to trespass.

167. The Plaintiff therefore prayed for general damages for trespass and interference with quiet possession, citing the principle that damages are payable where proprietary rights are violated even absent quantifiable pecuniary loss.
168. The Defendant's position and its written submissions, opposed the award of general damages. It argued that the Plaintiff's prayer for a permanent injunction was "draconian" and would unjustly lock out the Defendant from accessing its property, Plot No. MN/V/134, which it has occupied since 1992. The Defendant relied on its survey report by Edward Kiguru (dated 31st October 2022) and the Court's site visit, contending that the access road to its property passes through the Plaintiff's land and has been used for over 27 years. It submitted that this long-standing use created an overriding interest or easement under the provision of Section 28 of the Land Registration Act,

2012, and therefore the Plaintiff's claim of trespass was unfounded.

169. The Learned Counsel for the Defendant further cited the case of:- **“Mohamed - Versus - Board of Management Pentrose Community School (Supra)”** and **“Peony Management Co. Limited (Supra)”**, to argue that long-standing access rights may crystallize into overriding interests or easements, and that damages should not be awarded where the Defendant's use was legitimate and necessary to avoid landlocking.

170. The Court has carefully and keenly considered both parties' submissions and the evidence on record. The Plaintiff is the absolute and legally registered proprietor of all that parcel of land known as L.R. No. MN/V/1907, with all the indefeasible rights, title and interest vested in them under the law. The title is protected under the provision of Article 40 of the Constitution of Kenya, 2010 and Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Its rite law and based on the Principles of the Burden of Proof” clearly enshrined under the provisions of Sections 107, 108 and 109 of the Evidence Act, Cap. 80 which holds that he who alleges has to prove. Besides, the allegations of fraud are serious and the person alleging has to prove.

171. The definition of fraud is set out in the **Black's Law Dictionary, 9th Edition at page 131** where it is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

It is trite law that fraud must not only be pleaded but must also be strictly proved on a standard of proof above the ordinary balance of proof. It cannot be inferred from facts but must be substantiated as held in the case of:- **“Virjay Morjaria - Versus - Nasingh Madhusingh Darbar & another (2000) eKLR”**, which Tunoi J held:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett [1878] 7 Ch. D 473 at 489.”

172. In the instant case, The Defendant has not proved fraud, illegality, or encroachment by the Plaintiff. On the issue of access, the survey reports and the Court’s own site visit confirmed that the Defendant’s property abuts the Mombasa-Nairobi Highway and has alternative points of ingress. The Defendant’s continued insistence on passing through the Plaintiff’s land, without lawful easement or agreement, amounts to trespass.

173. Trespass to land is actionable per se, and damages are awardable even without proof of actual loss. In the case of:- **“Kenya Power & Lighting Co. Ltd - Versus - James Njue Murimi [2017] eKLR”**, the Court held that interference with proprietary rights warrants compensatory relief. Similarly, in the case of:- **“Mrao Ltd - Versus - First American Bank of Kenya Ltd [2003]**

eKLR", the Court emphasized that a registered proprietor is entitled to remedies securing quiet possession.

174. The Trespass Act, Cap 294 of the Laws of Kenya, does not directly define trespass. The general meaning of trespass can be gathered from Sections 3; 4; 5; 6 and 8 of the Trespass Act. Gathering from the said sections, it amounts to trespass if any person, unlawfully, without a 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 that land without the consent of the proprietor. The term "occupier" as applied in the Trespass Act means the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively. And "private land" as applied by the Trespass Act means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.

175. Further to demonstrating that the Plaintiff is either the bona fide owner or proprietor or entitled to immediate possession thereof, to succeed in an action for trespass, the Plaintiff has to prove trespass. And once a person proves that (s)he is the bona fide owner or proprietor of a parcel of land, then subject to the encumbrances; easements; wayleaves; airways; restrictions;

conditions contained or endorsed in the certificate; overriding interests and matrimonial rights, the proprietor attains proprietary rights including the right to admit or licence any person thereunto. See section 25 read with sections 7(4)(c); 26; 36(10); 47; 56(2); 62; 67; 76; 77; 78; 94; 98; 99; 100 and 104 of the Land Registration Act, No. 3 of 2012. See also Sections 20; 21; 23; 24; 26; 28; 32; 35; 36; 133C (6); 143; 144 and 148 of the Land Act, No. 6 of 2012.

176. The Trespass Act, Cap 294 of the Laws of Kenya, does not directly define trespass. The general meaning of trespass can be gathered from Sections 3; 4; 5; 6 and 8 of the Trespass Act. Gathering from the said sections, it amounts to trespass if any person, unlawfully, without a 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 that land without the consent of the proprietor. The term “occupier” as applied in the Trespass Act means the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively. And “private land” as applied by the Trespass Act means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.

177. Further, the general meaning thereof can be gleaned from the provision of Section 152A, B, D & E of the Land Act, No. 6 of 2012 which prohibits unlawful occupation of land by providing that **“A person shall not unlawfully occupy private, community or public land.”** In addition, the general meaning of trespass to land according to Clerk & Lindsell on Torts, 18th Edition, at page 923, is **“any unjustifiable intrusion by one person upon the land in the possession of another.”**
178. Besides, the scholarly text of the learned authors Clerk & Lindsell on Torts, 18th Edition, at Paragraph 18-01, defines trespass to mean **“Any unjustifiable intrusion by one person upon land in possession of another.”** In the case of:- **“La Nyavu Gardens Limited - Versus - Wilson Munguti Mbithi alias Kavuti & 2 others [2012] eKLR”**, Makhandia, J. took a view that any unauthorized entry into another person’s land constitutes trespass.
179. Originally trespass *quare clausum fregit* in Latin, trespass is a Latin terminology which loosely means ‘why he broke the close’ but now anglicized. Henry Black, in his magnum opus work known as **The Black’s Law Dictionary, 8th Edition, at page 173** defines it as follows:
- “...1. A person's unlawful entry on another's land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed...”**

180. As to whether the Plaintiff is entitled to General Damages for trespass. In the case of:- **“Park Towers Limited - Versus - John Mithamo Njika & 7 others (2014)eKLR”**, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

181. To succeed in an action for trespass, first, the onus is on the Plaintiff to prove on a balance of probabilities that (s)he is either the bona fide owner or proprietor of the suit property or that (s)he is in or entitled to immediate possession of the suit of the suit property or both; and second, that the sued party has intruded and/or occupied and/or remained in the suit property without any justifiable cause. In the case of:- **“M’Mukanya - Versus - M’Mbijiwe (1984) KLR 761”**, Kneller JA (as he then was) laid the ingredients of trespass in the following words:

“The only issue in this second appeal is whether or not the Magistrate and the judge erred in law in finding M’Mukanya and Nyamu were trespassers? M’Mbijiwe could, and may be should, have asked for a declaratory judgment but he brought an action of trespass to land to determine the title to the large plot 58 in this market. He has to prove on the balance of probabilities M’Mukanya and Nyamu entered on this plot when it was in his possession. He must show he had the right to immediate possession and entered in exercise of it and then he will be said to have been in possession of it ever since he had that right. This tort is a violation of the right of possession and M’Mbijiwe must prove he, and not M’Mukanya and Nyamu, had the right to immediate and exclusive possession of it which is different from ownership.”

182. In the case of ***“Philip Aluchio - Versus - Crispinus Ngayo [2014] eKLR”***, the Court held as follows:-

***“..... The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less*”**

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

183. Besides, there is another typology of trespass, ejusdem generis, known trespass ab initio. This arises when a person was granted access to land but abused the right in which case the trespass is deemed to run from the date the trespasser was allowed access. In instances where Plaintiff is entitled to possession only, but the Plaintiff is not the owner thereof, trespass in this context is a violation of the right to possession, the Plaintiff should prove on a balance of probabilities two ingredients.

184. However, in instances where the Plaintiff is the owner, trespass in this context is the violation to the right to ownership and in this case, possession is irrelevant. If possession was to be asserted in such a case, then the principle of indefeasibility of title will be defeated since an owner who does not occupy his property will be dispossessed thereby. In the case of:-***“Moya Drift Farm Ltd - Versus - Theuri (1973) 1 EA 114”***, the Appellant sued the Respondent claiming that it was the registered owner

of certain land on which the Respondent was trespassing and who had refused the Appellant entry. The Appellant claimed eviction and a perpetual injunction restraining trespass by the Respondent. At the trial Court (High Court), Miller, J. held that although the Appellant was the registered owner of the suit property, the Appellant had failed to prove that it was in possession of the suit property and thus the claim of trespass was unsustainable. The Appellant proffered an appeal to the Court of Appeal contending that possession was unnecessary in view of the Registration of Titles Act, Cap. 281 (Now repealed). Sir William Duffus P, Spry VP and Lutta JA (as they then were) held that the Appellant was the absolute and indefeasible owner of the land and was entitled to take proceedings in trespass and in the context of a dispute between neighbouring landowners, a perpetual injunction would be granted. Spry VP (as he then was) had this to say in his leading Judgment and Sir William Duffus P (as he then was) & Lutta, J.A. concurred: "These remarks appear to have arisen from a submission by the Advocate for the Respondent in the High Court before evidence was called, that no cause of action was shown in the Plaint as amended, because the Appellant company had to show that at the time of the "alleged act" it was in lawful occupation, which was not the case, as according to the Plaint the alleged wrong was in August 1966, while the Appellant company obtained title to the land in October 1967... The Plaint recites the Respondent's entry on the land in 1966, but it is quite clear, reading the Plaint as a whole, that it is complaining

of a continuing trespass and relates to the period from 25th October 1967, when the Appellant company informed the Respondent that it was the registered owner of the land and ordered him to vacate it, to the filing of the suit. As regards the present proceedings, the date of the Respondent's entry on the land is immaterial, since it was before the Appellant company had any interest in it, but if the Appellant company is correct in its submission that the Respondent entered as a trespasser, he continued to be such, since it is not suggested that he acquired any lawful title or right to the land... I cannot see how a person could possibly be described as "the absolute and indefeasible owner" of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has taken physical possession."

185. Having not provided the value of the land before the alleged trespass, but putting into consideration that this suit was filed on 2022 and the rate of inflation, the Court proceeds to award a nominal figure of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=) as general damages for trespass.

186. The Defendant's reliance on overriding interests under Section 28 of the Land Registration Act is misplaced. Rights of way must either be registered or arise by prescription under statute.

No evidence was tendered that the Defendant lawfully acquired an easement over the Plaintiff's land. The Defendant's use was permissive at best, and cannot defeat the Plaintiff's title.

187. The Plaintiff, as the registered proprietor, is entitled to the protection of their title under the provision of Article 40 of the Constitution of Kenya, 2010 and Section 26(1) of the Land Registration Act, No. 3 of 2012. Accordingly, the Court finds that the Plaintiff is entitled to general damages for trespass and interference with quiet possession. The Defendant's conduct — including threats, obstruction, and unauthorized use of the Plaintiff's land — constitutes actionable interference. The remedies available include:

- a. A declaration that the Plaintiff is the lawful and indefeasible proprietor of L.R. No. MN/V/1907.**
- b. An order OF PERMANENT INJUNCTION restraining the Defendant, its agents, servants, or any other persons claiming under it from interfering with the Plaintiff's quiet possession, use, and enjoyment of the suit property.**
- c. General damages for trespass and interference, assessed at Kshs. 3,500,000.00 (reasonable in the circumstances, balancing the Plaintiff's proprietary rights with the Defendant's long-standing but unauthorized use).**

188. The Defendant, having failed to establish proprietary rights or lawful easement, is not entitled to any remedy in these proceedings. However, this Honourable Court endeavors to serve substantive justice by balancing the interest of all parties. In so doing, the Court has taken judicial justice, the protracted land dispute between the parties (noting the Court cases), the

cogent observations made from the Site Visit and the evidence by the Land Surveyor for the Defendant in his report dated 31st October, 2022, to wit that there may be a challenge on smooth access to its property to the Mombasa - Nairobi Highway, but not completely landlocked as alleged as there exists an alternative entrance to its property I wish to make this proposal. In the spirit of maintain peace and tranquility, the Plaintiff and the Defendant may consider and hence encouraged to explore an out of Court amicable negotiation hoping to arrive at settlement, based on a **“Win - Win”** strategy perhaps on purchasing the Plaintiff’s property pursuant to the now adopted Alternative Judicial System (AJS) and Social Transformation on Access to Justice (STAJ) policies by the Judiciary which are anchored on the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) & (2) of the Environment & Land Act, 2011. To me this would be a more pragmatic and practical way to resolve this matter once and for all. I am also guided by the legal maxim - **“Litigation must come to an end”**.

ISSUE No. e). Who bears the costs of the suit

189. 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.

190. In the case of:- **“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 vs 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.”

191. In the present case, the Plaintiff’s position is that he had succeeded in establishing lawful ownership of L.R. No. MN/V/1907, obtained injunctive relief, and an award of general damages for trespass and interference. The Plaintiff therefore prays for costs of the suit on the other hand, the Defendant

sought dismissal of the suit with costs, arguing that the Plaintiff's prayers were draconian and would unjustly lock out the Defendant from its property. However, the Defendant's defence has failed, as the Court found no evidence of compulsory acquisition, encroachment, or overriding interest.

192. The Plaintiff has succeeded on all substantive issues. The Defendant's allegations were unsubstantiated and amounted to interference with the Plaintiff's proprietary rights. In line with Section 27 of the Civil Procedure Act, the Plaintiff is entitled to costs of the suit. The Honourable Court orders that the Defendant shall bear the costs of the suit, together with interest at court rates from the date of judgment until payment in full.

VIII. Conclusion and Disposition

193. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-

(a) THAT Judgment be and is hereby entered in favour of the Plaintiff as pleaded in the Plaint dated 8th November, 2022.

(b) THAT a declaration be and is hereby issued that the Plaintiff is the lawful and indefeasible proprietor of all that parcel of land known as L.R. No. MN/V/1907 situate in Mombasa County.

- (c) **THAT** an order for a permanent injunction do and is hereby issued restraining the Defendant, its agents, servants, employees, assigns, or any other persons acting under its authority from interfering with, trespassing upon, obstructing, or otherwise dealing in any manner with the Plaintiff's quiet possession, use, occupation, development, and enjoyment of the suit property.
- (d) **THAT** the Defendant shall pay to the Plaintiff general damages for trespass and interference with quiet possession assessed at Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000.00).
- (e) **THAT** in the alternative, and in the spirit of maintaining peace and tranquility among parties, the Honourable Court encourages the Plaintiff and the Defendant to seriously consider exploring an out of Court amicable negotiation with a view of arriving at a settlement, perhaps whereby the Defendant may wish to purchase the Plaintiff's property and the Plaintiff may be willing to sell it to the Defendant pursuant to the policy of Alternative Justice System (AJS) and Social Transformation and Access to Justice (STAJ) advocated by the Judiciary and anchored in the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) & (2) of the Environment & Land Act, No. 19 of 2011.
- (f) **THAT** the costs of this suit are awarded to the Plaintiff, together with interest at court rates from the date of Judgment until payment in full.

IT IS ORDERED ACCORDINGLY

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS
VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS
20THDAY OFFEBRUARY.....2026.**

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

Judgement delivered in the presence of:-

- a) M/s. Firdaus Mbula - the Court Assistant.
- b) Mr. Oluga & Mr. Kilonzo Advocates for the Plaintiff.
- c) Mr. Kimani Advocate for the Defendant.

Judge's Copy