



**REPUBLIC OF KENYA**

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

**ELC NO. 440 OF 2016**

**FAIRVIEW ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**ANN WANGARI KIRIMA.....1<sup>ST</sup> DEFENDANT**

**THERESIA WAIRIMU.....2<sup>ND</sup> DEFENDANT**

**(sued as the ADMISTRIXES OF THE ESTATE**

**OF THE LATE GERISHON KAMAU KIRIMA)**

**MARIA NJERI.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before me is the Plaintiff's interlocutory application dated 27<sup>th</sup> April, 2016 in which the Plaintiff has sought several orders most of which are injunctive in nature. The orders sought in the application are as follows:-

1. That the application be certified as urgent and the same be heard ex-parte in the first instance in respect of prayers 2, 4, 5 and 6.
2. That court be pleased to grant an order of temporary injunction restraining the Defendants/Respondents, whether by themselves, their employees, agents, servants, assignees and anybody else acting under the authority of the Defendants/Respondents from building, constructing, barricading, obstructing, or in any way whatsoever refusing and or denying the Plaintiff, its employees, its servants, agents, licensees, customers and vehicles access through the access road situated on the land known as L.R No. 79/1 and also known as 12685/32 to 12685/1 pending the interpartes hearing and determination of this application.
3. That the court be pleased to grant an order of interlocutory injunction restraining the Defendants/Respondents, whether by themselves, their employees, agents, servants, assignees and anybody else acting under the authority of the Defendants/Respondents from building, constructing, barricading, obstructing, or in any way whatsoever refusing and or denying the Plaintiff, its employees, its servants, agents, licensees, customers and vehicles access through the access road situated on the land known as L.R No. 79/1 pending the interpartes hearing and determination of this suit.
4. That the court be pleased to grant the Plaintiff a temporary injunction restraining the

Defendants/Respondents from interrupting and interfering with the Plaintiff's right of access and quiet enjoyment of the road of access in dispute pending the interpartes hearing and determination of this suit.

5. That the court be pleased to issue an order directing the Defendants/Respondents and their agents, employees and servants to remove the barriers and gate erected on the disputed road of access within the parcels of land known as 12685/31, 12685/30, 12685/29, 12685/28, 12685/25, 12685/24 and 12685/21 all on the land formerly known as L.R. No. 79/1 leading to and serving the Plaintiff's land reference numbers L.R No. 28092/2, L.R No. 25257/6 and 25752/7 all formerly part of the land known as L. R. No. 79/2 and 4879/3.

6. That the court be pleased to issue an order under its inherent jurisdiction, restraining the Defendants/Respondents, their agents, servants and assignees from mortgaging, selling, disposing off, alienating or damaging, renting, leasing, giving of any easement or right of way of the access road in dispute within the land formerly known as L.R No. 79/1 until the hearing and determination of this suit on merits.

7. The costs of this application be awarded to the Plaintiff/Applicant.

8. That O.C.S Kiambu Police Station do supervise the enforcement of this Order.

The facts giving rise to this suit and the application before the court are set out in the plaint dated 27<sup>th</sup> April 2016 and the various affidavits which have been filed by the Plaintiff in support of the said application. In the plaint dated 27<sup>th</sup> April 2016, the Plaintiff averred that it was at all material times the registered proprietor of all those parcels of land formerly known as L.R. No. 79/2 and L.R No. 4879 (hereinafter referred to as "Plot No. 79/2 and "Plot No. 4879" respectively). The Plaintiff averred that Plot No. 79/2 and Plot No. 4879 shared a boundary with a parcel of land formerly known as L.R No. 79/1 (hereinafter referred to as "Plot No. 79/1") on the northern and eastern side. The Plaintiff averred that, sometimes in the year 1983 the proprietor of Plot No. 79/1, the late Gerishon Kirima sub-divided the said parcel of land into thirty two (32) portions namely, L.R No. 12685/1 to L. R. No. 12685/32. The Plaintiff averred that Plot No. 79/2 and Plot No. 4879 are at the back of the new parcels of land L.R No. 12685/1 to L.R No. 12685/32 and can only access Kiambu Road directly through L.R No. 12685/30 and L.R No. 12685/31 which are two of the sub-divisions which came about after the sub-division of Plot No. 79/1 as aforesaid. The Plaintiff averred that save for the way of access through L.R. No. 12685/30 and L.R No. 12685/31 (hereinafter "Plot No. 12685/30" and "Plot No. 12685/31"), the plaintiff has no other direct access to Kiambu road from plot No. 79/2 and Plot No. 4897.

The Plaintiff averred that it purchased Plot No. 79/2 and Plot No. 4897 in the year 1978 and has since then enjoyed peaceful, open and uninterrupted use of the access road through Plot No. 12685/30 and Plot No. 12685/31 which are the sub-divisions of the former Plot No. 79/1 as aforesaid. The Plaintiff averred that in the year 2010, it amalgamated Plot No. 79/2 with Plot No. 4897 and sub-divided the amalgamated plot into several portions for various uses. The resultant parcels were L.R No. 25257/8, L.R No. 25752/7, L.R No. 28092/2 and LR No. 28093 (hereinafter plot No. 25257/8, Plot No. 25752/7, Plot No. 28092/2 and Plot No. 28093 respectively"). The Plaintiff averred that during the sub-division of the said amalgamated parcel of land, the Plaintiff surrendered to the government portions thereof for use as public access road which road was connected to the access road which the plaintiff had used over the years through Plot No. 12685/30 and Plot No. 12685/31 to Kiambu road.

The Plaintiff averred that on 23<sup>rd</sup> April 2016, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants through their servants and agents unlawfully blocked the Plaintiff's access to Kiambu Road through Plot No. 12685/30 and Plot No. 12685/31 which the Plaintiff had used for over 38 years. The Plaintiff averred that the 1<sup>st</sup> and 3<sup>rd</sup> defendant's acts aforesaid were unlawful, high handed and were carried out in bad faith. In the alternative to the foregoing, the Plaintiff averred that in the year 1982, the late Gerishon Kirima submitted a scheme for the sub-division of Plot No. 79/1 to the Director of Surveys which scheme was approved and authenticated by the Director of Surveys by the production of survey plan No. F/R 163/24. The Plaintiff averred that in the said sub-division scheme, the late Kirima provided for a public road of access from the

Plaintiff's land aforesaid through Plot No. 79/1 to Kiambu road which road of access appears in the survey plan aforesaid. The Plaintiff averred that the approval of the said sub-division scheme and the production of the said survey plan with access road from the Plaintiff's land aforesaid to Kiambu road were conclusive as to the existence of the said road and rights flowing therefrom. The Plaintiff averred that it carried out amalgamation, sub-division and change of user of its former parcels of land known as Plot No. 79/2 and Plot No. 4897 on the basis of the said survey plan No. F/R 163/24.

The Plaintiff averred that the continued closure of the said road of access had subjected it to financial loss and exposed its business to irreparable damage. The Plaintiff sought the following reliefs against the Defendants in its plaint:-

- a) That the Plaintiff is entitled to an easement as surveyed and authenticated by the Director of Survey in the survey plan F/R 163/24 which is twenty meters wide over land parcel L. R. No. 79/1 and which the Plaintiff, its employees, agents, customers, clients and guests have openly and peacefully without any interruption used as an access road to and from the Plaintiff's Land 28092/2, 25257/8, 25752/7, and 28093 and formerly known as Land reference 79/2 and 4897 since the year 1978 which is a period of over twenty years preceding the plaint.
- b) That the title of the late Gerishon Kamau Kirima in respect of the said portion of access road surveyed and authenticated by the Director of Survey in the survey plan F/R 163/24 which is twenty meters wide over land parcel No. L.R. No. 79/1 is extinguished under the Limitation of Actions Act Cap 22.
- c) That the Plaintiff is under Section 38 of the Limitation of Actions Act entitled to be registered as the owner of the easement shown as surveyed and authenticated by the Director of Survey in plan F/R 163/24 which is twenty meters wide over land parcel No. L.R No. 79/1 as road of access.
- d) In the alternative and without prejudice to (c) above, that this court declares that the public access road surveyed and authenticated by the Director of Survey in the survey plan F/R 163/24 which is twenty meters wide over land parcel No. L.R. No. 79/1 is public road and should be registered as such by the Chief Registrar of Lands.
- e) A permanent injunction be issued to restrain the Defendants or their agents, employees or workers from erecting, constructing, building, structures, obstacles, fences or any development on the access road surveyed and authenticated by the Director of Survey in the survey plan F/R 163/24 which is twenty meters wide overland parcel No. L.R No. 79/1 leading to Kiambu road.
- f) A mandatory injunction to compel the Defendants to remove any obstruction, structure, building and gate that have been erected and constructed on the said portion of access road of land surveyed and authenticated by the Director of Survey in the survey plan F/R 163/24 which is twenty meters wide over land parcel No. L.R No. 79/1.
- g) That the cost of this suit be awarded to the Plaintiff.

In its affidavit in support of the application which was sworn by Leonard Oliver Kibinge on 28<sup>th</sup> April 2016, the Plaintiff reiterated the contents of the plaint which I have highlighted above. The Plaintiff annexed to the affidavit of Leonard Oliver Kibinge a copy of instrument of conveyance dated 27<sup>th</sup> July 1978 through which it acquired Plot No.79/2 and Plot No.4897 and maps to show the location of the said parcels of land on the ground and the access road in dispute. The Plaintiff also annexed to the said affidavit survey plan No. F/R 163/24 which it claimed to be showing the current state of Plot No. 79/1 after the sub-division thereof. The plaintiff also annexed to the said affidavit copies of the sub-division scheme for Plot No. 79/2 and Plot No. 4897 and the deed plans for the resultant plots. The Plaintiff contended that the exhibited maps, survey plan, sub-division scheme and deed plans show the existence of an access road from the Plaintiff's parcels of land through the former Plot No. 79/1 to Kiambu Road. The Plaintiff also annexed a copy of a letter dated 25<sup>th</sup> April, 2016 from its surveyor one, J. M. Gatome & Associates confirming the existence of a 20meter road passing through L.R No. 12685/30 and L.R No.

1268531 to the Plaintiff's land. According to the said surveyor, the said access road was created during the sub-division of L.R No. 79/1.

The Plaintiff stated that the dispute between it and the defendants started in November 2015 when the 1<sup>st</sup> Defendant unlawfully denied the Plaintiff's licensee a right of way through the disputed access road. When contacted, the 1<sup>st</sup> defendant is said to have informed the plaintiff of her unhappiness with the development which the Plaintiff intended to carry out on its land. The plaintiff annexed a copy of a letter of complaint by its said licensee, Wanho International Holdings. The plaintiff stated that it referred the dispute to the National Land Commission (NLC) for mediation. In the meantime, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants started fencing L.R No. 79/1 in March 2016.

The Plaintiff stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had given it an assurance that they would not block its access to Kiambu road. The Plaintiff stated that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not honour their undertaking to the Plaintiff and on the night of 23<sup>rd</sup> April, 2016, they erected poles and barricaded the Plaintiff's access road to Kiambu road the use of which the Plaintiff had enjoyed for over 38 years. The Plaintiff annexed to the affidavit of Leonard Oliver Kibinge aforesaid photographs showing how the said access road was blocked by the Defendants. The plaintiff stated that on or about 25<sup>th</sup> April, 2016, it received a letter from the National Land Commission to the effect that the sub-division of plot No. 79/1 had not been registered. A copy of the letter was annexed to the Plaintiff's supporting affidavit. The Plaintiff stated that it was engaged in farming more particularly, coffee, dairy, bee keeping and horticultural crops. The Plaintiff contended that as a result the blockage of access to its farm by the Defendants, vehicles could not access the same and it was bound to suffer financial loss and loss of business which could not be compensated in damages. The plaintiff stated that the defendants stood to suffer no prejudice if the orders sought were granted.

The plaintiff's application was opposed by the Defendants through separate replying affidavits. The 1<sup>st</sup> Defendant opposed the application through the affidavit she swore on 25<sup>th</sup> May 2016 in support of her Notice of Motion application dated 25<sup>th</sup> May, 2016 which is still pending hearing. The 1<sup>st</sup> Defendant contended that the Plaintiff's application and the entire suit were bad in law, frivolous, vexatious and gross abuse of the process of the court. The 1<sup>st</sup> Defendant accused the Plaintiff of non disclosure of material facts. The 1<sup>st</sup> Defendant stated that Plot No. 79/1 was purchased by the late Kirima in 1965 and that after the late Kirima's demise in December 2010, the 1<sup>st</sup> and 2<sup>nd</sup> defendants obtained orders in Nairobi High Court Succession Cause No. 1298/2011 on 3<sup>rd</sup> April 2016 to fence the estate property including Plot No. 79/1 so as to protect the same. The 1<sup>st</sup> Defendant admitted that the Plaintiff's former parcel of land known as Plot No. 79/2 was adjacent to Plot No. 79/1. The 1<sup>st</sup> Defendant contended however that as at the time the late Kirima purchased Plot No. 79/1, the said plot had direct access to a 60 meter road off Kiambu road which access was also open to the owners of Plot No. 79/2.

The 1<sup>st</sup> Defendant contended that the Plaintiff interfered with the access through the said 60 meter road off Kiambu Road following the sub-divisions that it carried out in 1980's which did not take into consideration how it would access Kiambu road from the parcels of land that remained in its name. The 1<sup>st</sup> Defendant contended further that the foregoing notwithstanding, the Plaintiff still had alternative access to Kiambu road. The 1<sup>st</sup> Defendant pointed out that one of the said alternative access routes was through Muthithi road. The 1<sup>st</sup> Defendant stated that the intended sub-division of Plot No. 79/1 was not completed and as such no public road could have been created out of the same. The 1<sup>st</sup> Defendant stated that the dispute over the access road started when they stopped a foreign company to whom the plaintiff had sold a portion of its land from transporting its construction materials through Plot No. 79/1. The 1<sup>st</sup> Defendant stated that an attempt was made to resolve the dispute through the office of Kiambu County Commissioner and that at a meeting that was held for that purpose, the surveyor who was present confirmed that there was no access road through Plot No. 79/1 and that a resolution was made that the alleged access to the Plaintiff's land should remain closed. The 1<sup>st</sup> Defendant denied that the Plaintiff had acquired prescriptive rights over the alleged access road. The 1<sup>st</sup> Defendant contended that in view of the

deliberate and fraudulent misrepresentation on the part of the plaintiff, the plaintiff was not deserving the conservatory orders sought.

The 2<sup>nd</sup> Defendant opposed the application through a replying affidavit sworn on 23<sup>rd</sup> May 2016. The 2<sup>nd</sup> Defendant denied the existence of a right of way through Plot No. 79/1. Like the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant contended that the sub-division of Plot No. 79/1 was not completed and as such could not give rise to the purported road of access claimed by the Plaintiff. The 2<sup>nd</sup> Defendant denied the existence of Plot No. 12685/1 to plot No. 12685/32 which the Plaintiff claimed to have arisen from the sub-division of Plot No. 79/1. The 2<sup>nd</sup> defendant maintained that Plot No. 79/1 is still intact and exhibited a copy of certificate of official search on the register of the said parcel of land to substantiate the claim. The 2<sup>nd</sup> Defendant contended that they were authorized by the High Court in Succession Cause No. 1298/2011 to fence and protect Plot No. 79/1 and as such this court cannot be called upon to review the said order. The 2<sup>nd</sup> Defendant contended further that the Plaintiff had relied on unregistered and unauthenticated survey plan made in 1980's to stake a claim over the alleged access road.

The 3<sup>rd</sup> Defendant opposed the plaintiff's application through a replying affidavit sworn on 23<sup>rd</sup> May 2016. The 3<sup>rd</sup> Defendant admitted that the Plaintiff's parcel of land is adjacent to Plot No. 79/1 owned by the late Kirima. The 3<sup>rd</sup> Defendant reiterated the contention by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that Plot No. 79/1 was fenced pursuant to a court order that was issued in High Court Succession Cause No. 1298 of 2011 and that both Plot No. 79/1 and Plot No. 79/2 that was owned by the Plaintiff initially had direct access to a 60 meter road off Kiambu road. The 3<sup>rd</sup> Defendant stated that the Plaintiff remained with this direct access to the 60 meter road off Kiambu road even after it sub-divided Plot No. 79/2 and sold a portion thereof to Kiambu High School. The 3<sup>rd</sup> Defendant contended that in addition to the access to Kiambu Road through the said 60 meter road, the Plaintiff could also access Kiambu Road through Milimani Road. The 3<sup>rd</sup> Defendant stated that in 1982 the late Kirima wished to sub-divide plot No. 79/1. Towards this end, a sub-division scheme was prepared in which he proposed to surrender to the government part of plot No. 79/1 as access road for the sub-divided plots. The 3<sup>rd</sup> Defendant stated that the late Kirima changed his mind on the sub-division before the same was approved and as such no sub-division took place and no portion of plot No. 79/1 was surrendered to the government as a road of access. The 3<sup>rd</sup> Defendant contended that even after the Plaintiff amalgamated L.R No. 79/3 (remainder of Plot No. 79/2) and L.R No. 4897/2 ("Plot No. 4897") to give rise to L.R No. 2525/7 ("Plot No. 2525/7"), the Plaintiff still enjoyed direct access to Kiambu road through the 60 meter road off-Kiambu road and Muthithi road. The 3<sup>rd</sup> Defendant stated that all was well until the Plaintiff sub-divided the amalgamated plot which gave rise to Plot No. 2525/2 to 2525/5. The 3<sup>rd</sup> Defendant contended that during this sub-division, the Plaintiff assumed erroneously that access road that the late Kirima had provided for in his proposed sub-division scheme would serve as its access to Kiambu road from the new plots. The 3<sup>rd</sup> Defendant maintained that the Plaintiff had alternative access roads to its parcels of land. The 3<sup>rd</sup> defendant contended that when the Plaintiff sub-divided and sold a portion of the amalgamated Plot No. 2525/7, it failed to reserve its access to Kiambu Road through the 60 meter road off Kiambu road. The 3<sup>rd</sup> Defendant contended that the Plaintiff however maintained its access to Kiambu road through Muthithi road which access the Plaintiff was still using. The 3<sup>rd</sup> Defendant denied that the Plaintiff's parcels of land lack access to Kiambu road. The 3<sup>rd</sup> Defendant also denied the existence of Plot No. 12685/1 to Plot No. 12685/32 and maintained that Plot No. 79/1 is still intact and that there was no access road through it to Kiambu road from the plaintiff's land a fact which was confirmed by Kiambu Security Committee and the National Land Commission. The 3<sup>rd</sup> Defendant contended that she fenced Plot No. 79/1 on instructions from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had obtained a court order to fence the properties of the late Kirima. The 3<sup>rd</sup> defendant denied that the Plaintiff had acquired prescriptive rights over the disputed access road and contended that at no time did the late Kirima give the Plaintiff unfettered access to Kiambu road through Plot No. 79/1. The 3<sup>rd</sup> Defendant contended that the orders sought by the Plaintiff if granted would be highly prejudicial to the Defendants and would contravene the orders which were given in the Succession Cause aforesaid.

The parties filed further affidavits with leave of the court. The Plaintiff filed a supplementary affidavit sworn by Leonard Oliver Kibinge on 26<sup>th</sup> May, 2016 in response to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's replying affidavits mentioned above. The Plaintiff contended that it had over 100 employees who access its premises through the disputed access road which had been closed by the Defendants. The Plaintiff contended that the Defendant had from 17<sup>th</sup> May 2016 stopped the use of the disputed access road by all persons including school children and other pedestrians who had earlier been allowed to use the road. The plaintiff stated that due to this turn of events, the Plaintiff's employees were now using a hole dug under away leave to access the Plaintiff's premises at the risk of electrocution and drowning in a nearby river. The plaintiff contended that the court order which had been cited by the Defendants as the basis for blocking the disputed access road had nothing to do with the said access road. The Plaintiff reiterated that it had used the access road through Plot No. 79/1 from 1978 without any interruption from the late Kirima when he was alive. The Plaintiff reiterated that the access road in dispute had been in use since 1909 and that in 1967 the road was the subject of a maintenance agreement between the owners of LR. No. 79/1, LR No. 79/2, L.R No. 4897 and L.R. No. 4776. The Plaintiff contended that the access road had been recognized as an easement in earlier conveyances involving the said parcels of land. The Plaintiff annexed to the supplementary affidavit photographs showing how the said access road had been blocked and the means being used by its employees to access its premises. The Plaintiff also annexed amongst other documents, earlier titles (indentures) for the land where the disputed access road is situated to show that the said access road was recognized as an easement as way back as 1924. The plaintiff also annexed copies of the management agreement that had been entered into by the owners of land that were being served by the said access road in 1967. The Plaintiff contended that it had been solely maintaining the access road since 1978 when it purchased Plot No. 79/2 and Plot No. 4897 from the previous owners. The Plaintiff denied that it sold any land to Kiambu High School. It also denied the existence of alternative routes to Kiambu road from its parcels of land.

The 2<sup>nd</sup> defendant filed a further replying affidavit on 7<sup>th</sup> June 2016 in which she mentioned for the first time a civil case between the plaintiff and Wanho International Holdings Ltd. which was the subject of Nairobi ELC No. 1222 of 2015. The 2<sup>nd</sup> Defendant contended that that suit was relevant to this suit. The 2<sup>nd</sup> Defendant contended that the Plaintiff has sought access road in respect of a property that came into being in the year 2008 and which it had sold to Wanho International Holdings Ltd.

The 3<sup>rd</sup> Defendant also filed a further affidavit on 7<sup>th</sup> June 2016. The 3<sup>rd</sup> Defendant's affidavit also touched on Nairobi ELC No. 1222 of 2015 between the Plaintiff and Wanho International Holdings Ltd. The 3<sup>rd</sup> Defendant contended that the Plaintiff had failed to disclose to the court that it had sold a portion of Plot No. 79/2 and Plot No. 4897 to Wanho International Holdings Ltd. and that there was a case between them pending in court. The Plaintiff filed a further supplementary affidavit on 23<sup>rd</sup> June 2016 in response to the further replying affidavits by 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The Plaintiff's application was argued orally before me. At the hearing of the application, Ms. Warui advocate who was later joined by Mr. Muite S.C appeared for the Plaintiff while Mr. Ojiambo S.C appeared with Mr. Jelle for the 1<sup>st</sup> Defendant. Mr. Mwenesi and Mr. Nyamu appeared for the 2<sup>nd</sup> defendant while Ms. Wangui Shaw appeared for the 3<sup>rd</sup> Defendant. The advocates for the parties argued at length for and against the application and submitted a number of authorities. For the purpose of this ruling, I would only summarize the submissions that were made on behalf of each of the parties to the dispute before me.

#### **The submissions by the Plaintiff:-**

In her submission, Ms. Warui to a large extent reiterated the contents of the affidavits that were sworn by Leonard Oliver Kibinge in support of the Plaintiff's application which I have highlighted in detail hereinabove. Ms. Warui submitted that the application before the court seeks to compel the Defendants to allow the Plaintiff to use an access road through Plot No. 79/1 to its parcel of land pending the hearing and determination of this suit. Counsel submitted that the Plaintiff had used the disputed access road for 38 years and that that use was brought to a halt on the night of 23<sup>rd</sup> April 2016 when the Defendants

blocked the same. Counsel submitted that the closure of the said access road was carried out illegally and was unjustified. Counsel submitted that before the disputed access road was formally created by the late Gerishon Kirima through the sub-division of Plot No. 79/1 in the year 1983 the same had existed as an easement and was in use by the successive owners of Plot No. 79/1, Plot No. 79/2 and Plot No. 4776. Counsel submitted that following the blockage of the said road of access, the Plaintiff's parcel of land was now land locked. Neither the Plaintiff nor its employees could access the Plaintiff's parcel of land from Kiambu road. Counsel submitted that the Plaintiff's employees were now using unorthodox means to access the Plaintiff's premises some of which are dangerous and the Plaintiff risks being sued for any injuries which may be occasioned to the said employees. Counsel submitted that the access road which has been blocked by the Defendants is the only way known to the Plaintiff's employees for entering and leaving the plaintiff's premises. Counsel submitted that contrary to the assertions by the Defendants, the Plaintiff has no alternative access to its premises from Kiambu road. Ms. Warui submitted that the access road in dispute has been in use by the Plaintiff since 1978 and as such the Defendants would not suffer any prejudice if the orders sought are granted. Counsel submitted that in the circumstances of this case, the balance of convenience tilts in favour of the Plaintiff whose business would come to a complete halt unless the orders sought are granted. Counsel submitted that the Plaintiff has established a strong case with a probability of success against the defendants and that damages would not be able to remedy the Defendants unlawful acts complained of.

#### **The submissions by the 1<sup>st</sup> Defendant:-**

Mr. Ojiambo S.C who appeared for the 1<sup>st</sup> Defendant reiterated that the fencing of Plot No. 79/1 which is complained of by the Plaintiff was done pursuant to an order that was made by Lenaola J. on 26<sup>th</sup> March 2013 in the succession cause concerning the estate of Gerishon Kirima (Nairobi Succession Cause No. 1298/2011). Senior Counsel submitted that if the Plaintiff was aggrieved with the said order or acts done pursuant thereto, the best forum for such grievance would have been the succession court and not this court which cannot vary the said order. Counsel submitted that until varied, that order remained inviolable. Counsel submitted that in seeking the aid of this court to review the said order, the Plaintiff is calling upon the court to sit on appeal against an order issued by a judge of concurrent jurisdiction. Counsel submitted that it was the 1<sup>st</sup> Defendant's wish that the hearing of the Plaintiff's application be stayed until after the court had determined whether it has jurisdiction to entertain the application.

#### **The submissions by the 2<sup>nd</sup> Defendant:-**

Mr. Mwenesi for the 2<sup>nd</sup> Defendant reiterated the submissions by Mr. Ojiambo S.C. He submitted that the fencing complained of by the Plaintiff was done pursuant to the order that was issued by Lenaola J. on 26<sup>th</sup> March 2013. Mr. Mwenesi submitted that this court has no jurisdiction to review the said order which was issued by the Succession Court. Mr. Mwenesi submitted that the Plaintiff's entire case revolves around a property formerly known as Plot No. 79/1. Counsel submitted that Plot No. 79/1 is not the same as Plot No. 12685/30 and Plot No. 12685/31 in respect of which the Plaintiff has sought relief. Counsel posed that, if Plot No. 79/1 does not exist as claimed by the Plaintiff, on what property does the easement claimed by the Plaintiff attach? Mr. Mwenesi submitted that if the property that was burdened by an easement ceases to exist, the easement becomes extinguished. Counsel submitted that plot No. 12685/1 to Plot No. 12685/32 does not exist. Counsel submitted that since the Plaintiff is uncertain as to the property in respect of which his easement claim is based, the orders sought cannot be granted. Counsel submitted that without pleading properly which parcel of land is the dominant tenement and which one is the servient tenement, the Plaintiff has not established a prima facie case with a probability of success. Counsel submitted that the Plaintiff has claimed a 20 meter access road between Plot No. 12685/30 and Plot No. 12685/31 which parcels of land do not exist. Counsel submitted that the Plaintiff had a duty to produce evidence regarding the existence of the said two parcels of land once the defendant placed before the court a certificate of official search showing that Plot No. 79/1 has not been sub-divided and that no road of access passes through it. Mr. Mwenesi submitted that even after a sub-division scheme has been approved, until the sub-division is registered and titles issued for the sub-divided plots, no rights arise from such a scheme. Counsel submitted further that the Plaintiff's claim over a 20 meter access road has no basis because the access road which the Plaintiff claims to have existed since 1924 was a 16

feet road from the indentures which the Plaintiff has relied on in support of its case. Counsel submitted further that the Plaintiff's claim to the historical easement cannot stand. This is because, after the easement was created, the dominant tenement and servient tenements were sub-divided and ceased to exist. Counsel submitted that this suit has been brought in aid of the development which the Plaintiff and Wanho International Holdings Ltd. are engaged in on the parcels of land formerly known as Plot No. 79/2 and Plot No. 4897. Counsel submitted that to this extent, the suit that has been filed by the Plaintiff against Wanho International Holdings Ltd. (hereinafter "**Wanho**") namely, Nairobi ELC No. 1222 of 2015 is very relevant to these proceedings. Counsel submitted that the agreement that was entered into between the Plaintiff and Wanho provided that Wanho was to develop a four (4) lane 1.3 km road which road was to pass through the disputed access road. Counsel submitted that the Plaintiff had acknowledged that the access road that they had agreed upon with Wanho could not materialize and agreed to provide Wanho with alternative access road. Counsel submitted that in the circumstances, the Plaintiff cannot be heard to say that it would suffer irreparable harm if the disputed road is not opened. Counsel submitted that the Plaintiff's claim to the disputed access road through prescription cannot stand. Counsel put reliance on section 37 of the Limitation of Actions Act. Counsel submitted that a right to an easement does not accrue until a copy of the judgment establishing the same has been registered against the title to be burdened by the easement. Counsel submitted that the Plaintiff has not obtained any judgment and as such has not acquired any easement. Counsel submitted that even if it is assumed that the plaintiff has acquired an easement, it is not clear whether the easement is over the 16 feet road of access referred to in the indentures that the plaintiff had relied on in support of his claim or the four (4) lane access road referred to in the agreement between the Plaintiff and Wanho. Counsel submitted further that under Section 98(7) of the Land Registration Act, easement cannot be acquired through long and uninterrupted use of land. Counsel submitted that an easement must be created and in the absence of any instrument placed before the court creating the alleged easement, there is no prima facie case established against the Defendants.

Mr. Mwenesi submitted further that the orders sought by the Plaintiff cannot issue for various reasons. Counsel submitted that the court cannot issue a prohibitory injunction to restrain an act which has already taken place. In support of this submission reliance was placed on the cases of **Esso Kenya Limited Vs Mark Makwata Okiya (1992) eKLR** and **Samuel Njehia Gitau Vs. Joyce Wanjiku (2014) eKLR**, Counsel submitted that in the circumstance of this case, the balance of convenience tilts in favour of the defendants in that the Defendants have already fenced Plot No. 79/1 so as to protect it and that the Plaintiff has alternative access road to its premises. Counsel submitted that the Plaintiff should have come to court before the fencing was done. Counsel submitted that since the Plaintiff has alternative roads of access to its premises, what the Plaintiff is seeking is not an easement of necessity. Counsel cited the case of **Barclays Bank D.C.O vs. Patel (1970) E.A 88** in support of his easement of necessity argument. He submitted that an easement of necessity does not require registration and that the Land Act, 2012 recognizes such easement and provides for a procedure of acquiring the same. Counsel submitted that an easement of necessity arises only when no access road exists and that since the material before the court shows that the Plaintiff has alternative access to its premises, it does not qualify for such easement.

Counsel submitted further that the Plaintiff is guilty of material non-disclosure and this should disentitle it to the orders sought. In support of this submission, Counsel cited the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited (1989) KLR 1**. In conclusion, Counsel submitted that prayer 5 cannot be granted because the parcels of land referred to therein are non-existent while granting of prayer 6 would be tantamount to interfering with the power of the administrators of the estate of Gerishon Kirima. Counsel urged the court not to exercise its discretion in favour of the plaintiff.

#### **The submission by the 3<sup>rd</sup> Defendant:-**

Ms. Shaw for the 3<sup>rd</sup> Defendant submitted that prayer 2 of the application cannot be granted because the court cannot restrain an act which has already taken place. Counsel submitted that prayers 3 and 4 cannot be granted because the fencing complained of by the Plaintiff was done pursuant to a court order that was made by a court of competent jurisdiction. With regard to prayer 5, Counsel submitted that the prayer is in the nature of a mandatory injunction which can only be granted in clearest of cases. Counsel submitted that the Plaintiff has not established such a case. On prayer 6 of the application, Counsel submitted that

the same cannot issue unless the Plaintiff shows that the suit property is in danger of being disposed of. Counsel submitted that the Plaintiff did not demonstrate such possibility. Ms. Shaw submitted that the Plaintiff has not established a prima facie case against the Defendants that would entitle it to the orders sought. Counsel submitted that if the Plaintiff is landlocked as it claims, it should have moved the court for access road under section 140 of the Land Act, 2012. Counsel submitted that since the Plaintiff is not landlocked, it would not have succeeded under section 140 of the Land Act, 2012. Counsel submitted that in the face of clear provisions under the Land Act, 2012 dealing with easements, it was not necessary for the Plaintiff to rely on common law. Counsel submitted that the fact that the Plaintiff had given Wanho an alternative access road lends support to the Defendant's contention that the Plaintiff has alternative road of access to its premises.

Counsel submitted that Plot No. 79/1 has not been sub-divided and as such Plot numbers 12685/21/24/25/28/30 and 31 in respect of which the Plaintiff has sought orders do not exist. Counsel submitted that the Plaintiff has not established a prima facie case with a probability of success. On the issue of balance of convenience, Ms. Shaw adopted the submissions by Mr. Mwenesi. On the alleged suffering by the Plaintiff's employees in accessing the Plaintiff's premises, Counsel submitted that they have access to the premises but were merely taking dangerous short cuts "the Kenyan way". Counsel took issue with the further supplementary affidavit that was sworn by Leonard Oliver Kibinge on 7<sup>th</sup> June 2016 in response to the further replying affidavits by the Defendants. Counsel submitted that the affidavit is defective the same having been commissioned by a Ms. Caroline Maina who is said to be a partner in the firm which is acting for the Plaintiff herein. Counsel urged the court to strike out the affidavit and to dismiss the Plaintiff's application.

#### **The Plaintiff's submission in reply to the Defendant's submissions:-**

Mr. Muite S.C who appeared with Ms. Warui submitted that what is before the court is an interlocutory application and as such what the court is supposed to consider is whether the plaintiff has established the conditions for granting such injunction. Mr. Muite submitted that the Defendants had made submissions at length on the merit of the Plaintiff's case. He submitted that at this stage, the court is not supposed to go to the merit of the parties' respective cases. He submitted that in view of the business being undertaken by the Plaintiff, the balance of convenience tilts in favour of granting the injunction sought. He submitted further that the plaintiff has been using the disputed access road since 1978. Mr. Muite submitted that the material which has been placed before the court shows that the said access road has been in existence. He wondered why the late Kirima had signed an agreement for the maintenance of the road in 1967 and later on provided for it in the sub-division scheme for plot No. 79/1 if at all the road did not exist. Counsel submitted that a mandatory injunction should issue to compel the Defendants to open the access road which they have blocked. He submitted that the Defendant's cannot close the road and then argue that the same cannot be opened. With regard to the order by Lenaola J., Mr. Muite submitted that the order merely permitted the fencing of the late Kirima's land. It did not direct the Defendant's to fence the access road in dispute. Mr. Muite urged the court to grant the application by the plaintiff.

On her part, Ms. Warui submitted that the Plaintiff is properly before the court. Ms. Warui submitted that under Sections 30, 32, 33, 39 and 41 of the Survey Act, once a sub-division scheme has been approved and numbers assigned to the new plots, the original number ceases to exist. Ms. Warui submitted that pursuant to Section 37(b) of the Limitation of Actions Act, the late Kirima had been holding the access road in trust for the Plaintiff. She submitted further that under sections 28(c) and (h) of the Land Registration Act, 2012, a right of way is recognized as an overriding interest and does not require registration to be valid. On the Defendant's submission that the Plaintiff's claim cannot be sustained on account of the provisions of section 98(7) of the Land Registration Act, 2012, Ms. Warui submitted that the Plaintiff's right over the access road in dispute arose in 1978 and as such cannot be taken away by section 98 (7) of the Land Registration Act aforesaid. In support of this submission Ms. Warui referred the court to Section 106 of the Land Registration Act, 2012. On the pending case between the Plaintiff and Wanho, Ms. Warui submitted that the dispute in that case is has no connection to the Plaintiff's claim herein. Ms. Warui submitted that the dispute in that case concerned L.R No. 28093 which the plaintiff had sold to Wanho while the suit herein is concerned with the Plaintiff's parcels of land known as, L.R. No. 35257/6 and LR No. 25752/7. Ms Warui submitted that it is in respect of these parcels of land that

the easement is sought. Ms Warui denied that the Plaintiff is guilty of material non disclosure. She submitted that the Plaintiff disclosed to the court all the material that was relevant to its claim herein. Counsel submitted that easement can be acquired through prescription. In this regard, the court was referred to section 7 of the Land Act, 2012 and Section 28(2) (c) and (h) of the Land Registration Act, 2012. Counsel reiterated that the Plaintiff has established a prima facie case with a probability of success. On the Defendant's contention that the Plaintiff has come to court late in the day, Ms. Warui submitted that when the Plaintiff came to court, the Defendants had only erected poles on the access road but had not installed the electric fence. Ms. Warui submitted that the Defendants should not be allowed to take advantage of their own wrong doing. On the alleged defectiveness of Leonard Kibinge's affidavit sworn on 7<sup>th</sup> June 2016, Ms. Warui submitted that under Order 19 of the Civil Procedure Rules, the court can receive an affidavit notwithstanding the defect in the form thereof. She contended that the affidavit is defective only on form. Counsel urged the court to admit the affidavit in the spirit of Section 1A and 1B of the Civil Procedure Act. She urged the court to allow the plaintiff's application.

At the conclusion of the submissions by all the parties, Mr. Paul Muite S.C made an application for the court to visit the parcels of land which are the subject of the easement claim. The application was opposed by all the Defendants and was disallowed by the court for reasons which are on record.

### **Determination of the application:**

As Mr. Muite had rightly pointed out in his submissions, what is before the court is an interlocutory application for injunction. In the case of **Giellavs. Cassman Brown and Company Limited [1973] E.A 358** which was cited by Mr. Muite, it was held that an applicant for a temporary injunction must establish:-

- (i) A prima facie case with a probability of success.
- (ii) That if the injunction is not granted, he will suffer irreparable injury which cannot be compensated by an award of damages and,
- (iii) If in doubt, the court shall determine the application on a balance of convenience.

In the case of **Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125**, the court defined a prima facie case as:-

**“a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff has sought both prohibitory and mandatory injunction. I am in agreement with the submission by Ms. Shaw for the 3<sup>rd</sup> Defendant that a mandatory injunction will only be granted by the court in clearest of cases. In the case of **Shepherd Homes Ltd. vs. Sandham (1971) I Ch 340, Meggery J.** stated as follows on the court's jurisdiction to grant interlocutory mandatory injunction:-

**“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”**

In the case of **Redland Bricks Ltd. vs. Morris (1970) AC 652** the court stated that jurisdiction to issue a mandatory injunction;

**“is a jurisdiction to be exercised sparingly and with caution but in the proper case, unhesitatingly”**

In the case of **Nguruman Limited vs. Jan Bonde Nielsen, Civil Appeal No. 77 of 2012**, the court stated that:-

**“The Party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”**

The court went further to state that:-

**“.....in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for injunction has a right which has been or is threatened with violation.”**

It is on the foregoing principles that the Plaintiff's application falls for consideration. The Plaintiff's case is two pronged. What is in dispute between the parties herein is a road of access to Kiambu road said to be between L.R No. 12685/30 and L.R No. 12685/31 which are said to be sub-divisions of the parcel of land formerly known as L.R No. 79/1. The Plaintiff has claimed this road of access first, by prescription. The Plaintiff has claimed that it acquired the parcels of land formerly known as L.R. No. 79/2 (“Plot No. 79/2”) and L.R No. 4897 (“Plot No. 4897”) in 1978. The Plaintiff has contended that since 1978 the plaintiff, its employees, agents, clients, guests and customers have been using this access road which is 20 meters wide to access Kiambu Road. The Plaintiff has claimed that it has acquired an easement by prescription over this access road as a result of long and uninterrupted use of the same for over 38 years. The Plaintiff has contended that in recognition of this easement, the late Gerishon Kirima sub-divided, plot No. 79/1 in 1983 into thirty two (32) portions (Plot No. 12685/1 to Plot No. 12685/32) and provided for and surrendered this road to the government as a public road of access. The Plaintiff has contended that when it amalgamated and sub-divided Plot No. 79/2 and Plot No. 4897 in the year 2010 into several plots, among others LR No. 25257/8, LR No. 25752/7, LR No. 28092/2 and L.R No. 28093/2 the sub-division scheme was drawn and approved on the understanding that this easement existed. The Plaintiff has contended that having acquired the said access road by prescription, it was illegal for the Defendants to deny the Plaintiff access to Kiambu road through the same from its parcels of land mentioned above.

The Plaintiff has put forward an alternative claim in respect of the disputed access road. The plaintiff has contended that the disputed access road is a public road and as such the Defendants have no right to prevent the Plaintiff from using the same to access Kiambu road. The Plaintiff has contended that in 1983, the late Gerishon Kirima sub-divided Plot No. 79/1 and created 32 new subplots in the process of which he surrendered the disputed access road to the government as a public road. The Plaintiff has contended that the road appears in the approved and authenticated survey plan No. F/R 163/24. The Plaintiff has contended that the Defendants have no right to interfere with its use of a public road of access.

As I have stated herein earlier, the Defendants have put forward several objections to the Plaintiff's claim over the disputed access road. With regard to the Plaintiff's claim over the said access road by prescription, the Defendants have contended among others that the claim does not lie because under the Land Registration Act, 2012, no easement can be acquired on account of continuous uninterrupted use of land. The Defendants have also contended that even if the Plaintiff could acquire easement by prescription, the easement does not accrue until after the Plaintiff has obtained judgment establishing the easement and the judgment has been registered against the title of the servient land which in this case has not happened. The Defendants have argued further that since the parcels of land for which the easement is sought have been sub-divided on several occasions, the Plaintiff has not come out clearly on the land for whose benefit the easement is sought and the property to be burdened by the easement. The Defendants have also argued that the Plaintiff has not come out clearly as to whether the easement sought is 20 meters or 16 feet access road. The Defendants have also argued that the plaintiff has not moved the court properly. The Defendants have contended that if indeed the Plaintiff was landlocked, the Plaintiff should have moved the court under Section 140 of the Land Registration Act, 2012 to be granted access.

The Defendants have argued that the Plaintiff has not followed that route because it is not landlocked. The Defendants have contended that the Plaintiff has two (2) alternative roads of access to Kiambu road.

With regard to the Plaintiff's claim over the disputed access road on account of the same being a public road that was surrendered to the government of Kenya by the late Kirima, the Defendants have contended that Plot No. 79/1 has never been sub-divided. The Defendants have contended that the late Kirima intended to sub-divide the said parcel of land but later changed his mind. The Defendants have contended that the survey plan number F/R 164/23 which is the basis of the Plaintiff's claim is not authenticated by the Director of Surveys and as such cannot give rise to any interest in land.

I have carefully considered all the material placed before the court by the parties and the arguments that were made before me. From the material on record, there is uncontroverted evidence that there existed a road of access traversing Plot No. 4776, the former Plot No. 79/2 and Plot No. 4897, and Plot No. 79/1 to Kiambu road. The history of this access road goes back to 1924. There is a mention of this road in the indenture dated 9<sup>th</sup> February 1924 annexed to the affidavit of Leonard Oliver Kibinge sworn on 26<sup>th</sup> May, 2016 as annexure "LOK8". A clear illustration of this access road is given in annexure "LOK 11" to the said affidavit. The road is clearly marked in the sketch map at page 8 of the said annexure. The owners of Plot No. 4776, Plot No. 79/2, Plot No. 4887 and Plot No. 79/1 had in fact agreed on how to maintain the said access road in 1967. The late Gerishon Kirima who was the owner of Plot No. 79/1 is one of the persons who entered into this agreement. All these facts are not disputed. It is therefore not in dispute that there was an access road from the parcels of land formerly known as Plot No. 79/2 and Plot No. 4897/1 through Plot No. 79/1 owned by the late Kirima to Kiambu road. The plaintiff has contended that when it purchased Plot No. 79/2 and Plot No. 4897/1 in the year 1978, the said access road was in place and it used the same during the lifetime of the late Kirima and after his death until the night of 23<sup>rd</sup> April 2016 when the Defendants erected poles and barricaded the said road. The Plaintiff has contended that as at the time when the Defendants blocked this road, the Plaintiff had used the same to access Kiambu road for over 38 years. The Plaintiff has placed evidence in the form of Google Maps and topographical maps which clearly show the existence of this road of access. I am satisfied on the material before me that an access road existed through Plot No. 79/1 owned by the late Kirima to Kiambu road and that the same was being used by the Plaintiff to access Kiambu road. When the late Kirima decided to sub-divide plot No. 79/1 in the year 1983, he provided for this access road in the sub-division scheme. Similarly, when the Plaintiff sub-divided Plot No. 79/2 and Plot No. 4897 in the year 2010 its sub-division scheme took into account the said access road and was approved on the basis that the road existed.

The Defendants have not denied that they have blocked the access road in dispute and barred the Plaintiff from using the same to access Kiambu road. Their contention is that the Plaintiff has no right to use the road and that it has alternative access to Kiambu road. Whether or not the Plaintiff has a right to use the disputed access road and whether the Plaintiff has alternative access to Kiambu road are issues which I cannot determine in the application before me. The same will have to await the trial of the suit. I am satisfied on the material before me that the Plaintiff has established a prima facie case with a probability of success that it has acquired an easement over the access road in contention by prescription. Whether or not this easement is over access road measuring 20 meters wide or 16 feet wide will have to be settled again, at the trial. Section 32(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides that where any way has been enjoyed as an easement peaceably and openly as of right and without any interruption for 20 years the right to such way becomes absolute and indefeasible. Section 38(3) of the said Act provides that a proprietor of land who has acquired an easement under Section 32 of the Act aforesaid may apply to the High Court for an order vesting the easement in him.

Section 37 (b) of Limitation of Actions Act provides that before the easement acquired under Section 32 of the Act is established by an order obtained under Section 38 of the Act and registered against the title of the land affected thereby, the person for the time being registered as the proprietor of the affected land, shall hold the land the subject of the easement in trust for the person who has acquired the easement.

I am not in agreement with the submissions by the Defendants that until the easement is established by a judgment obtained under section 38 of the Act and registered against the land affected thereby, the same does not come to existence. I am of the view that the easement is acquired under Section 32 of the Act

and once acquired, the vesting thereof upon the person who has acquired the same and the registration of the same against the title of the land affected thereby is a mere formality. I also disagree with the submissions by the Defendants that Section 98(7) of the Land Registration Act, 2012 bars the acquisition of easement by prescription. I am of the view that that part of the Land Registration Act, 2012 deals solely with the creation of easements. The same does not deal with easements acquired under the Limitation of Actions Act, Cap 22 Laws of Kenya. I am not persuaded that by Section 98(7) of the Land Registration Act, the legislature intended to abolish the acquisition of easement by prescription. I am of the view that if that was the intention, the same would have been expressed in clear terms and through appropriate amendment to the Limitation of Actions Act, Cap 22 Laws of Kenya. Section 7 of the Land Act, 2012 whose commencement date is the same as that of the Land Registration Act, 2012 provides at Section 7(b) that prescription is one of the methods through which title to land may be acquired. Section 28(c) and (h) of the Land Registration Act which is said to have outlawed the acquisition of easement by prescription provides that rights of way and rights acquired or in the process of being acquired by virtue of any written law **“relating to the Limitation of actions or by prescription”** (emphasis mine) are overriding interest and does not require registration to be valid. In light of the express provisions of the Limitation Actions Act, Cap 22 Laws of Kenya and the provisions of the Land Act and Land Registration Act which I have cited above, the Defendant’s contention that an easement cannot be created by prescription has no basis.

As I have stated above, Section 32 of the Limitation of Actions Act provides that one can acquire easement by prescription. On the other hand, Section 38(3) of the said Act gives this court jurisdiction to vest the easement acquired by prescription upon the proprietor of land who has acquired the same. In the case of **Gatimu Kinguruvs. Muya Gathangi (1976 – 80) 1 KLR 317, Madan J.A**, stated as follows at page 331:

**“In interpreting a statute, in the absence of express provision to that effect, it is always wrong for the court to whittle down the rights and privileges of the subject. The courts task is to protect the right and privileges of the people, not to clip and shear them.”**

In the case of **East African Railways Corporation vs. Antony Sefu, Dar-es-salaam HCCA No. 19 of 1971, (1993) E.A 327**, it was held that:

**“A statute cannot be construed to oust the jurisdiction of a superior court in the absence of clear and unambiguous language to that effect.”**

The Defendants had also argued that the sub-division and sale of a portion of the former Plot No. 79/1 and Plot No. 4897 to a third party and the sub-division of Plot No. 79/1 extinguished the easement if any that had existed in favour of the Plaintiff. Without deciding the matter with finality, I am not in agreement. A right acquired over land by prescription attaches to the land and moves with it. I am of the view that such right cannot be defeated by the sub-division or transfer of the servient land. In the case of **Githu vs. Ndeete (1984) KLR 77** it was held that:

**“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”**

I am of the view that the same reasoning will apply to easement acquired by prescription.

The other argument that was put forward by the Defendants was that the Plaintiff has approached the court improperly in that it should have moved the court under Section 140(1) of the Land Act, 2012 for an access order. I find no merit in this argument. As I have stated above, the Plaintiff has a right under the Limitation of Actions Act, Cap 22 Laws of Kenya to have the easement which it claims to have acquired over the disputed access road vested in it. It is not for the Defendants to decide for the Plaintiff how to approach the court or the remedies to seek.

My findings above would have been sufficient to dispose of the Plaintiff’s application. However, the advocates for the parties made lengthy submissions on the merit of the Plaintiff’s alternative claim. This

ruling will not be complete if I fail to express my views on the arguments by counsels on this claim. In its alternative claim, the Plaintiff had contended that the disputed access road is a public road which was created by the late Kirima following the subdivision of Plot No. 79/1 in the year 1983. The plaintiff argued that the Defendants have no right to block a public road.

I am unable to determine with finality at this stage whether the survey plan for the sub-division of Plot No. 79/1 was authenticated by the Director of Surveys or a surveyor authorized by the Director of Surveys for that purpose. On a prima facie basis however, it is my finding that there is sufficient evidence of such authentication. A perusal of survey plan No. 163/24 shows on the face thereof that the same was authenticated by the Director of Surveys on 14<sup>th</sup> May 1983. It is also clear from the said survey plan that the sub-division of Plot No. 79/1 was completed and the sub-divided plots assigned new land reference numbers. What remained in my view was the preparation of deed plans and registration of titles for the new plots after which the register for Plot No.79/1 was to be closed.

Section 43(1) of the Survey Act, Cap 299 Laws of Kenya provides that:-

**“All plans authenticated under the Act, purporting to be signed by the Director, or by a Government Surveyor authorized by the Director in that behalf, or to be sealed with the seal of the survey of Kenya, shall be presumed, until the contrary is proved to have been signed by the Director or by a Government Surveyor authorized as aforesaid, or to have been sealed with the seal of the survey of Kenya as the case may be.”**

Section 33 of the Survey Act gives the Director of Survey power to cancel an authenticated survey plan before the same is used for the purposes for which it was produced. Section 30(2) of the said Act provides that no plan deposited in the survey office shall be altered or amended in any way without the permission of the Director of Surveys. I am of the view that under the provisions of the Survey Act, Plot No.79/1 was subdivided by the late Kirima in 1983. I am of the opinion that once Plot No. 79/1 was subdivided and a survey plan for the subdivision produced and authenticated by the Director of Surveys, the said parcel of land remained sub-divided for the purposes of the Survey Act until the authenticated survey plan that was produced for the purposes of its subdivision was cancelled. In view of what I have set out above, the Defendants’ contention that Plot No. 79/1 was not sub-divided is not supported by the law and the material on record. The existence of Plot No.79/1 in the register after the said subdivision does not in my view mean that the said parcel of land was not sub-divided under the Survey Act. Plot No. 79/1 remains whole in the searches which were exhibited by the Defendants merely because of none registration of the new plots which resulted from the sub-division of the said plot and not because the plot has not been sub-divided. A letter from the National Land Commission dated 22<sup>nd</sup> April 2016 attached to the affidavit of the 3<sup>rd</sup> Defendant sworn on 23<sup>rd</sup> May 2016 confirms that Plot No. 79/1 was indeed subdivided save that the sub-divided plots have not been registered.

Since Plot No. 79/1 was sub-divided and a survey plan in respect of the sub-division authenticated and kept at the office of the Director of Surveys, the Plaintiff cannot be faulted for having relied on the survey plan No. F/R 163/24 while sub-dividing Plot No. 79/2 and Plot No. 4897. Regulation 29(1) of the Survey Regulations, 1994, provides that before carrying out a survey, the surveyor has a duty to obtain information of any previous survey of the land to be surveyed and of any adjoining plot. Regulation 91(1) of the said Regulations provides that all boundaries abutting any property which has been surveyed must be shown on survey plan. I see no reason therefore for demonizing the plaintiff for sub-dividing its former parcels of land namely, Plot No. 79/2 and Plot No. 4897 and providing access to Kiambu road through Plot No. 12685/30 and Plot No. 12685/31 (unregistered) which are sub-divisions of Plot No. 79/1 in accordance with the authenticated survey plan No. F/R 163/24. I am of the view that until the Director of Surveys withdraws or cancels the survey plan No. F/R 163/24, the public road provided in the said plan remains as such. I am of the view therefore that the Plaintiff has also established a prima facie case for its claim over the disputed access road on the alternative ground that the same is a public road of access to Kiambu road.

The Defendants had raised other grounds apart from what I have set out above in opposition to the Plaintiff’s application. An argument was put forward by all the Defendants that the fencing of the Plot

No. 79/1 was done pursuant to the order that was given by Lenaola J. on 26<sup>th</sup> March 2013 in Nairobi Succession Cause No. 1298/2011. I have perused a copy of the said order which is attached to the affidavit of the 3<sup>rd</sup> Defendant sworn on 23<sup>rd</sup> May 2016. I am in agreement with the submission by the Plaintiff that this order did not direct the Defendants to fence off and block an access road which the Plaintiff had used for several years to access Kiambu road. The Plaintiff is not complaining about the fencing of Plot No. 79/1 but about the Defendant's act of blocking its road of access through the said plot to Kiambu road. I am of the view that the order issued by Lenaola J. on 26<sup>th</sup> March 2013 cannot sanitize or legalize the acts complained of by the Plaintiff.

The Defendants had also claimed that the Plaintiff is guilty of material non disclosure and as such is not deserving of the equitable remedies sought. It has not been demonstrated by the Defendants that the Plaintiff kept from the court any material fact with the intention of misleading the court into granting the orders sought. In any event, the court did not grant to the plaintiff any *ex parte* order. I have perused the pleadings in Nairobi ELC No. 1222 of 2015. I am not satisfied that the disclosure to the court of the existence of that case would have swayed the mind of the court one way or the other in determining the present application. For the foregoing reasons, I am not persuaded that the Plaintiff is guilty of non-disclosure of material facts.

The Defendants argued further that the injunction sought cannot be granted because the acts which are sought to be restrained have already taken place. In other words, the Defendants want the status quo to be maintained. I am in agreement with the Plaintiff that in view of the findings that I have made above, the position advanced herein by the Defendants cannot be sustained by the court. As rightfully submitted by the Plaintiff, the Defendants cannot seek the aid of the court to retain what they have obtained illegally. In the case of, **Kamau Mucuha vs. The Ripples Limited (Civil Application No. Nairobi 186 of 1992 (unreported))**, Justice Cockar J.A stated that;

**“A party as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act....”**

In the case of, **Jaj Superpower Cash and Carry Ltd. vs. Nairobi City Council & 2 Others, Court of Appeal at Nairobi, Civil Appeal No. 111 of 2002 (unreported)** the court stated as follows;

**“This court has recognized and held in the past that it is a trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”**

Having found that the Plaintiff has established a *prima facie* case against the Defendants with a probability of success, I need not to consider whether the Plaintiff stands to suffer irreparable harm which cannot be compensated in damages. Even if I was to determine the issue, from the material before me, I am satisfied that this would be the case. It is not in dispute that the Plaintiff was using the access road in dispute to access Kiambu road before it was blocked by the Defendants. The nature of the business being carried out by the Plaintiff is not contested. There is also no dispute that the Plaintiff's business is dependent on the availability of this access road. With the road closed, the Plaintiff's business would no doubt suffer. I am in agreement with the Plaintiff that the loss which would result if the orders sought are not granted cannot be compensated by an award of damages. In any event, as I have observed above, a party cannot be allowed to illegally subject another to incur loss because he can pay the damages incurred. The Defendants had submitted at length that the Plaintiff has alternative access to Kiambu road. This was contested and a request by the Plaintiff for the court to visit the Plaintiff's parcels of land to verify the existence of the alleged alternative roads of access was opposed vigorously by all the Defendants. On the material before me, I am unable to determine the existence of the said alternative roads. The determination of the issue will have to await the trial.

I have said enough to show that the Plaintiff has met the conditions for granting both prohibitory and mandatory injunction sought. I wish to add that even if I had entertained some doubt on the merit of the

Plaintiff's case, I would still have made an order to maintain the status quo that was obtaining prior to the blockage of the disputed access road pending the hearing and determination of this suit. In the case of **E. Muiru Kamau & Another vs. National Bank of Kenya Ltd. (2009)eKLR**, the court observed that;

**“The courts including this court in interpreting the Civil Procedure Act must take into consideration the overriding objective as defined in the two Acts. Some of the principal aims of the overriding objective include the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of all is maintained and that as far as practicable to place the parties in equal footing.”**

What I have gathered from the material before me is that the Defendants were of the view that the Plaintiff and a company to which it had sold a portion of its land (Wanho) were trespassing on Plot No. 79/1. I am of the view that since the Plaintiff had used the access road through Plot No. 79/1 for considerable length of time a fact which was known to the Defendants, the Defendants should have brought legal proceedings against the Plaintiff and Wanho to which it had sold a portion of its parcel of land to restrain them from trespassing on Plot No. 79/1 rather than taking the law into their own hands and forcefully blocking the disputed road of access through Plot No. 79/1. It is the duty of this court to put the parties back to the position in which they were before the forceful blockade so that each can argue their respective cases on a level praying ground.

Furthermore, in the case of **Ougo & Another Vs. Otieno [1987] KLR 364**, the Court of Appeal held that;

**“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute is decided at the trial.”**

In the final analysis and for the foregoing reasons, I find merit in the Notice of Motion dated 27<sup>th</sup> April, 2016. The same is allowed in terms of prayers 3, 4, 5 and 6 thereof. The Plaintiff shall have the costs of the application.

**Delivered and Signed at Nairobi this 14<sup>th</sup> .day of October, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Ms. Warui for the PlaintiffMr.

Mr. Jelle for the 1<sup>st</sup>Defendant

Mr. Mwenesi and Mr. Nyamu for the 2<sup>nd</sup> Defendant

Mr. Mwenesi for Ms. Shauu for the 3<sup>rd</sup> Defendant

Kajuju Court Assistant