Amaka Development Limited v Kenya Rural Roads Authority & another (Civil Suit 38 of 2023) [2024] KEELC 4522 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 4522 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 38 OF 2023

LL NAIKUNI, J

MARCH 18, 2024

BETWEEN

AMAKA DEVELOPMENT LIMITED ..... PLAINTIFF

AND

KENYA RURAL ROADS AUTHORITY ..... 1ST DEFENDANT

AA BAYUSUF AND SONS LIMITED ..... 2ND DEFENDANT

RULING

I. Introduction

1. The application before this Honorable Court for hearing and its determination is the Notice of Motion application by the Plaintiff/Applicant dated 27th October, 2023. It was brought under a certificate of urgency. It was brought by the Applicant under the provisions of Sections 1A, 1B, 3, 3A and 63 of *Civil Procedure Act* Chapter 21 of Laws of Kenya, Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010.

2. Despite of it having been served, there ha been a delay in filing responses by the Defendants herein, Nonetheless, with the leave of Court, eventually the 1st Defendant/Respondent filed their Replying Affidavit and the Court shall be indulging on its contents in detail later on in this Ruling.

II. The Plaintiff/Applicant's case

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

    a. Spent.

    b. That pending the hearing and final determination of this suit, this Honourable Court be pleased to issue interlocutory injunction restraining the Defendants by themselves, their agents, workers, servants, employees, and/or hirelings from constructing, or continuing to construct, the road, described as Bamburi-Mwakirunge-Kaloleni Road on or over its parcel of

land Plot No. MN/II/10445 situated within Mwakirunge area, Mombasa County, or in any manner whatsoever entering and/or interfering with or any part of the said plot.

c. That the costs of this application be provided for.

4. The application by the Applicant is premised on the grounds, facts and testimonial facts of the 12 Paragraphed supporting affidavit of DOMINY LENJO MUSAMULI together with annextures marked as "A" and "B" thereof. The Applicant averred that:

a. The application had been necessitated by the Defendants/Respondents' action in encroaching into the land, being parcel of land No.MN/II/10445 where it's the Plaintiff/Applicant is the absolute and legally registered owner with all the indefeasible rights, interest and title to it and commencing a construction of a road on it without seeking their consent first, or compulsorily acquiring it as of the law provided.

b. As had been deponed to hereinabove, the Plaintiff/Applicant is the registered owner of all that parcel of land known as Plot No. MN/II/10445 situated within the Mwakirunge area, Mombasa County, annexed and Marked "A" is a copy of the document of title.

c. The Plaintiff/Applicant knew that the 1st Defendant was constructing-a road which it referred to as the Bamburi- Kaloleni Road, which according to manner in which it was being constructed, was definitely designed to pass through Mwakirunge, but they did not know that it would pass through their land herein.

d. They were shocked when on 25th September, 2023 the 2nd Defendant workers entered their land herein and commenced the excavation work of a section the said road.

e. By the time they sent surveyors to confirm their claim herein and to prepare a report, the said construction had entered into their land by 186 meters. Annexed and Marked "B" is a copy of the said report by Ms. Pimatech Land Surveyor and Consultants.

f. The Defendants, by their action, had threatened to continue with the said construction on their parcel of land herein and to hand over the same as such for public use without considering the Plaintiff/Applicant's interest, and without compensation. This construction was being hurriedly done in a manner which, apparently was intended to defeat any action which may be brought against it.

g. It was his prayer that the that the Defendants/Respondent be stopped from constructing the section the subject road which was passing over their property until such a time when they would direct it elsewhere or until such a time when the affected portion(s) would be acquired in a procedural manner.

h. It was apparent from the foregoing that the Plaintiff was entitled to the orders sought herein. It was his prayer that this application be allowed.

III. The Replying Affidavit by the 1st Defendant/Respondent

5. While opposing the application dated 27th October, 2023 by the Plaintiff/Applicant herein, the 1st Defendant/Respondent filed a 12 Paragraphed Replying Affidavit sworn by ROLAND MALIKA and dated 18th January, 2024 together with nine (9) annextures marked as "RM – 1 to 9) annexed thereof. He stated as follows:

a. He was a Surveyor in the employment of Kenya Rural Roads Authority, the 1st Respondent, conversant with the matters herein and therefore competent to swear this affidavit.

b. The 1st Respondent is a State Corporation established under the *Kenya Roads Act* 2007 with the mandate to develop, construct and maintain the roads within its mandate.

c. He had read the application by the Plaintiff/Applicant dated 27th October, 2023 and also its contents and that of the Supporting Affidavit of Dominy Lenjo Musamuli sworn on the same day had been explained to him. He wished to respond as follows.

d. He knew for a fact the following information that:-

   i. the suit road, Bamburi – Mwakirunge - Kaloleni C101 was initially a class E road known as E930 Kiembeni-Mwakirunge-Kaloleni.

   ii. Bamburi-Mwakirunge-Kaloleni C101 was gazetted as a Class C public road in the year 2016. Annexed and marked as "RM – 1" was a copy of Kenya Gazette Supplement No. 4 of 22nd January 2016.

   iii. the road was re-classified from class E to class C in the year 2016 because of its socio-economic importance as it connected Mombasa County to several sub-counties including Kaloleni and Ribe, over nine schools and learning institutions including Mwakirunge Primary, Marimani Primary, several dispensaries including Mwakirunge, Marimani, Ribe and chief's offices in Mwakirunge and Marimani and Mwakirunge dump site.

   iv. The Bamburi-Mwakirunge-Kaloleni C101 had been in existence from the year 1965 as per the Mazeras 1:50,000 Topographical Sheet (198/3) Series Y731 Edition 3-SK dated 1965. (Annexed and marked RM 2 a copy of Topographical Sheet (198/3) Series Y731Edition 3-SK dated 1965 respectively).

   v. The suit road had been established to be traversing Crown land (Government land) as per Cadastral Plan FR 8/115 of 12th October, 1920. Annexed and marked as "RM – 3" was a copy of Cadastral Plan FR 8/115 of 12th October, 1920.

e. The updated Mazeras 1:50,000 Topographical Sheet (198/3) Series (SK61)Y731Edition (5A-SK) 5-JICA of 1991 also illustrates the existence of the suit road. Annexed and marked as "RM – 4" was a copy of Topographical Sheet (198/3) Series (SK61)Y731 Edition (5A-SK)5-JICA of 1991).

f. Also, the survey plan of Mwakirunge dump site (FR 414/133) also showed the existence of a road passing alongside, which was the suit road Bamburi-Mwakirunge-Kaloleni C101 and continuing to the suit parcel. Annexed and marked as "RM – 5" was a copy of the Survey Plan).

g. He knew that on 22nd September, 2022 they held a stakeholder's meeting which was attended by among others, residents of the area who confirmed that the road had been in existence since the 1960's. Annexed and marked as "RM – 6" was a copy of minutes of the meeting.

h. In the preparation of the Deed Plan and survey of the suit property in the year 2007, the survey process failed to delineate the C101 Bamburi-Mwakirunge-Kaloleni road which had been in existence on relevant documentation for over 58 years and before the survey of the year 2007.

i. When the 1st Respondent became aware of the irregularity, it wrote a letter to the office of the Director of Survey Kenya seeking the assistance of the Director of Survey in amending all relevant Cadastral Plans along the road to reflect the existence of the 40 meter road. Annexed

and marked as "RM – 7" was a copy of the letter ref KeRRA/03/2/6/Vol.6/1074 and dated 14th September, 2023 to the Director of Surveys)

j. When the 1st Respondent was served with the pleadings relating to this case, it conducted a re-survey to confirm the boundaries of the suit property and the existing road.

k. The re - survey confirmed that Bamburi-Mwakirunge-Kaloleni road C101 had been in existence for more than 58 years as per the topographical map of the year 1965 and 1991.

l. The re-survey also confirmed that Bamburi-Mwakirunge-Kaloleni C101 road together with another road known as P517 form the main access to the suit property Land Reference MN/II/10445 and Mwakirunge Settlement Scheme.

m. He further knew the following facts that:-

   i. The construction of C101 Bamburi-Mwakirunge-Kaloleni had observed the authentic road reserve boundary and had not encroached into the Plaintiff/Applicants land by 186 meters as alleged.

   ii. Consequently, the 1st Defendant/Respondent had neither entered into the Plaintiff/Applicant's land nor done any excavation with a view to create a road thereon.

   iii. The Plaintiff/Applicant had acknowledged in its pleadings having knowledge of the construction of the road and that it would pass through Mwakirunge. The Plaintiff/Applicant therefore knew that the road would pass along its land while maintaining the road boundary.

   iv. A publicity sign was also erected, indicating the nature of the road to be constructed. Annexed and marked as "RM – 8" was a picture taken of the publicity sign.

   v. There existed public utilities such as electricity power lines, Coptic fibre lines passing alongside the road demonstrating the existence of the road. Annexed and marked as "RM – 9" was a picture taken of the public utilities.

   vi. There was no need for compulsory acquisition of the land parcel number MN/II/10445 because as demonstrated, the road had always existed.

   vii. The road had previously undergone routine maintenance works such as bush clearing, heavy grading, gravelling and installation of culverts between the years of 2019 to 2023 and no complaints were ever raised as to its existence or where it passes.

   viii. The upgrading to bitumen standards of C101 Bamburi-Mwakirunge-Kaloleni began on 1st November, 2021 and was estimated to be complete within a period of 24months at a contract sum of Kenya Shillings Two Billion One Ninety Eight Million Seven Sixty Nine Thousand Seven Ninety Four Hundred and Ninety cents (Kshs. 2,198,769,794.90. Annexed and marked as "RM – 10" was a copy of the form of agreement.

n. Therefore, if the upgrading to bitumen standards of C101 Bamburi-Mwakirunge-Kaloleni was stopped, there would be claims by the contractor and huge loss of public funds already allocated to the construction of the road.

o. He had been advised by his advocate on record, that the Plaintiff/Applicant had not provided any security for costs that would be incurred if the construction of the road was stopped.

p. The road had socio-economic importance since it connected the members of public to social amenities such as schools, dispensaries, chief's offices and also links Mombasa County to the largest dump site of Mwakirunge. It carried moderate to high traffic and serves as the shortest link from Mombasa County to Kaloleni and Ribe Sub-Counties. Its upgrading would therefore ensure it continued serving its socio-economic importance.

q. In view of the public interest in the road as demonstrated, the balance of convenience lies against granting the order of injunction sought by the Plaintiff/Applicant.

r. The Plaintiff/Applicant had failed to demonstrate 'a prima facie case" with the likelihood of success.

s. The Plaintiff/Applicant had failed to demonstrate that it would suffer irreparable harm that could not be compensated by way of damages if the orders sought were not granted.

t. The Plaintiff/Applicant had failed to demonstrate the conditions for the grant of the order of injunction sought.

u. He swore this affidavit in opposition to the Plaintiff/Applicant's application dated 27th October, 2023 and prayed that it be dismissed with costs.

IV. The Supplementary Affidavit by the Plaintiff/Applicant

6. With the leave of the Court granted on 29th January, 2024, the Plaintiff/Applicant through Dominy Lenjo Musamuli, swore a 12 Supplementary Affidavit dated 5th February, 2024n. He averred as follows that:-

a. He had deponed in his previous Supplementary Affidavit stating that he was one of the Directors of the Plaintiff/Applicant herein.

b. He swore this affidavit in clarification of the facts alluded to by the 1st Defendant/Respondent in its Replying Affidavit sworn on 18th January, 2024.

c). He had read and understood the contents of the said Replying Affidavit and wished to make the following clarification:-

i) That there had been no road crossing over the suit property. The allegation by the 1st Defendant/Respondent that the road under construction had been in existence over the Plaintiff/Applicant's land since year 1965 was nothing but pure guesswork.

ii) That it was ever apparent from the latest official search issued by the Lands office on 5th February, 2024 that the said property was neither affected by a road or any other kind of wayleave. Annexed and marked "A" as a copy of the said search.

iii) That the property was originally bought by one Edward Lenjo Musamuli (his father) sometimes in the year 1974 from one Betty Daneu, (a British settler/farmer who left the country soon thereafter). Annexed and marked as "B" as a copy of the transfer.

iv) That initially this parcel of land was No. 1480/Section II/MN measuring 1490 Acres (Original No. 820/2).

v) That sometimes, in the year 1987, the late Edward Lenjo Musamuli, in an attempt to sub - divide this land to settle squatters who had invaded the same, which was rejected, managed to secure consent from the Land Control Board, Mombasa dated 5th

November, 1987, and it was apparent that the Land Control Board, Mombasa never, made any mention or observation of the existence of a Government road over the said land. Annexed and marked as "C" was a copy of the said consent.

vi) That later on, sometimes in the year 2007, a portion of the said land measuring 1000 Acres, was bought by the government to settle the aforementioned squatters, leading to the same being subdivided into two parcels namely 10444 and 10445, thereby generating two (2) new deed plans. Portion No. 10444 was sold to the government of Kenya for the aforesaid squatter settlement, leaving the late Edward Lenjo Musamuli with 10445, which was now the suit property. There was no observation or indication of the existence of a road in neither of the said two Deed Plans.

vii) That the late Edward Lenjo Musamuli later transferred the said parcel No. 10445 to the Plaintiff/Applicant herein.

d). It was apparent from the foregoing that the said Mombasa/ Bamburi/Kaloleni Road, if it did exist as a continuous road, never passed over the suit property.

e). The said property borders, among others, parcel No. MN/II/10279,owned but Hacienda Development Holdings, and the fact that the 1st Defendant had issues with the Hacienda Development Holdings over the construction of the subject road was a clear indication that the 1st Defendant was forcing this road in the said neighborhood. In fact, to the best of the Deponent's knowledge, the construction of the section which passed over Hacienda's land was stopped by this Honourable Court for quiet sometimes, and it was apparent from the 1st Defendant's documents that the construction resumed after some kind of a settlement.

f). It was also apparent from the minutes of Stakeholders annexed to the said Replying Affidavit, especially at the third last paragraph of the second page, that this road affected Hacienda's land due to realignments.

g). Had this road been there, as claimed, Mr. Roland Malika, the deponent of the said Replying Affidavit, would not have talked of bush clearing in the process of undertaking its construction, as deponed in paragraph 23 of the same. No bush was expected to grow on an existing road.

h). It was also apparent from the 1st Defendant's letter dated 14th September, 2023 to the Director of Surveys that the 1st Defendant was aware that all the documents in its custody were not acknowledging the existence of the subject road. This was what he told the Director of Surveys:-

> " It has however come to the authority's attention the existence of a Cadastral Plan FR 243/58 authenticated by your office on the 8th December, 1992 which does not acknowledge the existence of this public road".

i). With the foregoing facts, as brought by the 1st Defendant, it would be unsafe to allow the construction of a section of this road on the suit property to continue. Let the Defendants continue with the other sections which never affected the suit property.

j). He prayed that the Notice of Motion application by Plaintiff/Applicant herein be allowed as prayed.

k). The cables and powerlines referred in the said affidavit were laid across the subject locality upon amicable understanding with the land owners.

V. Submissions

7. On 29th January, 2024while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27th October, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 14th March, 2024 by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. The Learned Counsels for the Plaintiff/Applicant being the Law firm of Messrs. Odongo B. O & Company Advocates filed their written Submissions dated 16th January, 2024. Mr. Odongo Advocate commenced his submission by stating that what was before the Court was the Plaintiff/Applicant's Notice of Motion application dated 27th October, 2023. He informed Court that the application basically sought for an interlocutory injunction pending the hearing and determination of this suit. The application, together with the Plaint and other pleadings, were served upon the Defendants promptly.

9. He further informed Court that the 1st Defendant was physically served on 16th November, 2023 and the same was duly received with its official stamp. From the information obtained from Mr. J.M.Rapando Advocate, he was instructed to represent the 1st Defendant in this matter. By the date of filing this Submission nothing in opposition to the application had been filed. He held that the 2nd Defendant was served on 7th November, 2023 and the same was also duly received by its official stamp. By its letter dated 1st December, 2023, it did confirm the receipt of the same and promised to obey the order issued in this matter. Todate, it had not opposed this application. Thus, this application was therefore not opposed. He had waited in vain for the Defendants to file their responses todate. Therefore, they penned down this submission not taking the advantage of getting to know beforehand what may be the Defendants' defense to this suit. (However, its instructive to point out by the Honourable Court herein and the and its on record that, the 1st Defendant/Respondent thereafter and with the leave of Court filed replies and submissions whatsoever).

10. Having said so, the Plaintiff/Applicant's submitted that this application was merited. It met the threshold for granting the orders sought and hence should be allowed. It was anchored on the grounds shown on its face, and supported by the Plaintiffs supporting affidavit sworn on the same date. He urged Court to take into consideration the grounds, the averments contained in the said supporting affidavit, and the sum total of the Plaintiffs case as captured by its Plaint.

    The Learned Counsel contended that the principles for granting interlocutory injunction were set out in the case of "East Africa Industries Ltd -Versus -Trufoods Limited (1972) EA 420. Which principles were reiterated in the case of "Giella – Versus - Cassman Brown (1973) EA 358. The Court held:-

> " A Plaintiff has to show a prima facie case with a probability of success and if the Court is in doubt it will decide, the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages".

    He stated that in the case of:- Giella (Supra) it was held that:-

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in the East Africa case, first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless

the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on a balance of convenience".

11. These principles have stood the test of time, and have all along been followed in all the applications for injunction todate. Therefore, he wished to premise his submission on these principles namely:-

> On Prima Facie case – He averred that that this requirement had been met. The Plaintiff/ Applicant had established a prima facie case with high probability of success. He held that this suit revolved around all that parcel of land known as Plot No.10445/II/MN. This parcel of land is owned by the Plaintiff. See annexture 'A' to the supporting affidavit being the Certificate of Title of the subject parcel of land. It was not in dispute that the Defendants encroached into this parcel of land with the construction of a road intended to join Bamburi and Kaloleni. According to a report by Ms. Pimatech Land Surveyors and Consultants, by the time of coming to Court, the said construction had entered the suit property by 186meters. The said report was the annexture marked "B" by the Plaintiff/Applicant.

12. He asserted that moving into a private land and commencing activities such as the one complained of herein without the owner's consent could only be interpreted as forceful acquisition of private land in disregard of due process. The Act of Parliament which establishes the 1st Defendant, that is the Kenya Road Act, makes provision on how the 1st Defendant can acquire land for road construction. On this point he cited the provision of Section 23 of the said Act provides as follows:-

> " Where an Authority requires any land for its purposes under this Act, such Authority may either-
>
> a. If such land is not public land, acquire such through negotiation and agreement with the registered owner thereof: Provided that, notwithstanding the provisions of Section 6 of the *Land Control Act* (Cap. 302), the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land;

13. He stated that the Defendants entered into the suit property and commenced the construction of a portion of the said road over it without first acquiring it as stipulated in the said provision.

He stressed that from the foregoing that the Plaintiff/Applicant's case was clear and straight forward with a high chances of succeeding.

14. On Irreparable Loss, the Learned Counsel submitted that it was not in dispute that not only that the suit property belonged to the Plaintiff/Applicant; that the Defendants intended to pass a portion of the subject road complained of over it but also that the said portion had not been acquired as of the law demands. He argued that taking into consideration the permanent nature of a road, should the same be done to its completion then that would be end of the same. There was nothing the Plaintiff can do thereafter even if this suit is eventually allowed. In the given circumstance, the Plaintiff/Applicant would lose the said portion together with a road reserve running on it. It was apparent that the 1st Defendant/Applicant was not inclined to compensate the Plaintiff/Applicant. Had that been the case, it would have done so before commencing the said construction. Therefore, the Plaintiff/Applicant satisfied the requirements of the second limb to be granted injunction orders.

15. On the balance of Convenience, the Learned Counsel averred that it tilted in favour of the Plaintiff/ Applicant. As stated hereinbefore, taking into consideration the permanent nature of a road, should

the Defendants be allowed to continue with the construction of the portion of the road that passed through the said property unabated, the result would be permanent. The Plaintiff may not have the means and ability to undo it even if the Judgment was eventually favorable. Therefore, it was apparent that the inconvenience which may be occasioned to the Plaintiff/Applicant if this construction was not stopped and eventually the suit was allowed would be greater than that which may be caused to the Defendants if an order of injunction was granted and eventually the suit was dismissed. The Learned Counsel's contention was that the Defendants would only suffer some delays in their timelines in the completion of that section of the road passing through the Plaintiff's land should the orders be granted.

16. On the contrary, should the construction of the road be left to continue and the Plaintiffs case found to have merit, the Plaintiff would have to remain with that road on the suit land. This was because no survey had been done by the Defendants to ascertain the acreage of the Plaintiff/Applicant's land had been earmarked for the construction of the said road.

In conclusion, the Learned Counsel urged the Honourable Court to grant the prayers sought from the application.

B. The Written Submissions by the 1st Defendant/Respondent

17. As a rejoinder, the Learned Counsel for the 1st Defendant/Respondent being the Law firm of Messrs. J. M Rapando Advocate filed their written submissions dated 22nd February, 2024. Mr. Rapando Advocate held that in addition to these submissions, the 1st Defendant/Respondent relied on the Replying Affidavit by Roland Malika sworn on 18th January, 2024. He rehashed that the Plaintiff/Applicant sought for an order of injunction against the 1st Defendant/Respondent to restrain them from constructing or continuing to construct the road known as Bamburi-Mwakirunge-Kaloleni Road on parcel No MN/II/10445 situated within Mwakirunge area in Mombasa County.

18. The Learned Counsel stated that the 1st Defendant/Respondent's response in opposition to the application was as per the Replying Affidavit sworn by Roland Malika and filed in court on 19th January, 2024. The 1st Defendant/Respondent submitted that the main issue for determination was whether or not the Plaintiff/Applicant had satisfied the conditions for the grant of an order of injunction as set out in the case of "Giella (Supra) as follows:-

    i. An applicant must show a prima facie case with a probability of success.

    ii. The applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

    iii. If the court is in doubt, it will decide an application on the balance of probabilities.

19. According to the Learned Counsel, he wished to submit on three grounds. Firstly, that the Plaintiff/Applicant had not demonstrated a prima facie case with a probability of success. He held that "a prima facie case" was described in the case of MRAO - Versus - First American Bank of Kenya Limited & 2 Others (2003) eKLR as a genuine and arguable case which, based on the material presented before the court, there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the Respondent. He submitted that the Plaintiff/Applicant failed to demonstrate that it has a prima facie case with a probability or success. As per paragraphs 4-11 of the 1st Defendant/Respondent Replying Affidavit, Bamburi-Mwakirunge-Kaloleni C101 was an existing road. It had existed since the year 1965. In its reply, the 1st Defendant/Respondent had relied on Gazette Notice No. 4 of 22nd January, 2016 to demonstrate that the road was gazetted and topographical maps to demonstrate that it existed on the ground. The 1st Defendant/Respondent also relied on the

Cadastral Plan for Mwakirunge Dump site and minutes of a public participation meeting held on 22nd September, 2022 where the locals confirmed the existence of the road.

20. Under the contents of paragraphs 12-13 of the Relying Affidavit, the 1st Defendant/Respondent challenged the Deed Plan and survey of the suit property parcel No MN/II/10445 which failed to recognize the existence of Bamburi-Mwakirunge-Kaloleni C101road. The 1st Defendant/Respondent had relied on a letter which it had written to the Director of Surveys raising the issue and seeking the assistance of the said office in amending all relevant Cadastral Plans along the road to reflect the existence of the 40-meter road. As per paragraphs 14-23 of the Replying Affidavit, the 1st Defendant/ Respondent conducted a re-survey of the affected area and found out that the construction of the suit road had observed the authentic road reserve boundary and had not encroached into the Plaintiff/ Applicant's land by 186 meters as alleged in the Plaintiff/Applicant's Surveyor's report. Consequently, the 1st Defendant/Respondent had not done any excavations on the Plaintiff/Applicant's land with a view to create a road thereon and there was no need for compulsory acquisition of that portion of the suit property. The 1st Defendant/Respondent also relied on pictures taken showing public utilities such as power lines passing along the road on the affected area. Therefore, the 1st Defendant/ Respondent submitted that whereas it had demonstrated that Bamburi-Mwakirunge-Kaloleni C101 road was an existing road and was being constructed within its boundary, the Plaintiff/Applicant has tailed to demonstrate the alleged encroachment and construction of a road on their land.

21. To buttress on this point, the Learned Counsel cited the case of:- "Muriungi Kanoru Jeremiah - Versus - Stephen Ungu M'mwirabua (2015) eKLR, where it was held as per Section 107 of the *Evidence Act* that he who asserted must prove that those facts exist. Thus, he argued that taking that the Plaintiff/ Applicant had failed to prove their allegations as per 'the Muriungi Kanoru case above, it follows that they had consequently failed to establish a prima facie case as described in the MRAO case above. He urged Court to dismiss the application at this stage as was held in the case of Yellow Horse Inns Limited - Versus - Nduachi Company Limited & 2 Others (2017)eKLR. In this case, the Court held that if a prima facie case is not established, then the principles for irreparable injury and balance of convenience will not be considered unless there is doubt and the case ends there. That the three pillars for the grant of injunctive relief must be applied sequentially as separate, distinct and logical hurdles which an applicant ought to overcome in a sequential manner.

22. Secondly, the Learned Counsel argued that the Plaintiff/Applicant had not demonstrated that it would suffer irreparable injury which would not be adequately compensated by an award of damages if the order of injunction sought was not granted. On the contrary, the 1st Defendant/Respondent had demonstrated that the Plaintiff/Applicant had failed to establish a prima facie case with a probability of success. However, should the court be inclined to find that the Plaintiff/Applicant had established a prima facie case with a probability of success, the 1st Defendant/Respondent would establish that the second limb of conditions for the grant of temporary injunction had not been fulfilled. They would demonstrate that the Plaintiff/Applicant would not suffer irreparable injury which would not be adequately compensated by an award of damages if the order of injunction was not granted. On this aspect, the Counsel referred Court to the case of:- "Paul Gitonga Wanjau Versus Gathuthi Tea Factory Co. Ltd & 2 Others (2016) which described irreparable loss as continuous and irreversible. The court also stated that irreparable injury should be substantial and could never be adequately remedied or atoned for by damages. The Plaintiff/Applicant should be denied the order of injunction sought. The Plaintiff/Applicant had failed to prove the construction of the road by the 1st Defendant/Respondent would be encroachment. If anything was to go by, the 1st Defendant/Respondent had demonstrated the existence of the road and that it was being constructed within the authentic road boundary. The 1st Defendant/Respondent had also demonstrated the irregularity with the Deed Plan and survey of

the suit property and the steps it had taken to correct the same. As a result of the Plaintiff/Applicant's failure to demonstrate the alleged encroachment by the road into its land, the Counsel contended that the Plaintiff/Applicant had failed to demonstrate the irreparable loss that it would suffer, which could not be compensated by way of damages if the order of injunction sought was not granted.

23. Thirdly, the balance of convenience tilted against issuing the order of injunction sought. This was due to the public interest over the construction of the road. In the case of "Priscilla Ndunge Kiluu - Versus - Machakos County Government & 2 Others (2018)eKLR, the court dismissed an application to stop the construction of a public road and held that because the construction of a road was in the public interest, the Plaintiff's recourse was to pursue damages and not to stall the construction of a public road. Besides, the 1st Defendant/Respondent had demonstrated that the Plaintiff/Applicant had failed to establish that it would suffer irreparable injury which would not adequately be compensated by an award of damages if the order of injunction was not granted. Further, the 1st Defendant/Respondent had demonstrated in paragraphs 24-27 of its Replying Affidavit the amount of public funds that have been allocated to the Upgrading to Bitumen Standards of the suit road and the loss that is likely to be suffered if the order of injunction sought was granted. The 1st Defendant/Respondent had also demonstrated the socio-economic importance of the road and why it should be upgraded to bitumen standards. Therefore, in view of the above, 1st Defendant/Respondent submitted that the balance of convenience tilted against issuing the order of injunction.

24. In conclusion, the Learned Counsel asserted that taking that the Plaintiff/Applicant had not satisfied the conditions for the grant of the orders of injunction sought, he urged the Honorable Court to dismiss the application with costs.

VI. Analysis and Determination

25. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has two (2) framed the following issues for determination.

    a. Whether the Notice of Motion dated 27th October, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

    b. Who will bear the Costs of Notice of Motion application 27th October, 2023.

Issue No. a). Whether the Notice of Motion dated 27th October, 2023 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

26. Under this sub – title, the main substrata is on whether to grant or not the interim orders of Injunction. The gravamen of the application herein is premised under Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. This provision of the law provides as follows: -

    Order 40, Rule 1

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

    a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

    b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction

to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

27. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella (Supra) where it was stated:-

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

28. The three conditions set out in "Giella (supra)", need all to be present in an application for court to be persuaded to exercise its discretion to grant an order of interlocutory injunction. This was set out by the Court of Appeal in the case of:- "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others [2014] eKLR",

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

29. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in MRAO Limited (Supra):-

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

As the Court previously observed in this ruling, the Plaintiff has averred that it is the registered owner of all that parcel of land known as Plot No. MN/II/10445 situated within the Mwakirunge area, Mombasa County, annexed and Marked "A" is a copy of the document of title. The application was necessitated by the Defendants' action in encroaching into our land, being parcel of land No.MN/II/10445, and commencing a construction of a road on it without seeking our consent first, or compulsorily acquiring it as of the law provided.

30. In the case of "Mbuthia – Versus - Jimba credit Corporation Ltd 988 KLR 1", the court held that;

> " In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the party's cases."

Similarly, in the case of "Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Ltd" the court held that;

> " In an interlocutory application to determine the very issues which will be canvassed at the trial with finality All the court is entitled at this stage is whether the applicant is entitled to an injunction sought on the usual criteria."

31. In the present case, the Defendants by their action, have threatened to continue with the said construction on their parcel of land herein, and to hand over the same as such for public use without considering the Plaintiff/Applicant's interest, and without compensation. This construction was being hurriedly done in a manner which, apparently is intended to defeat any action which may be brought against it. But the court has established that the Plaintiff/Applicant have a legal proprietary interest against the suit property and by that have the right to have the same protected and preserved.

32. Regarding this first condition though, the Plaintiff/Applicant has established that it is the lawful registered Proprietor of the Property. In these circumstances, I find that the Applicant has established that she has a prima facie case with a probability of success.

33. With regards to the second limb of the Court of Appeal in "Nguruman Limited (supra)", held that,

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

34. On the issue whether the Plaintiff/Applicant will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Plaintiff/Applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Plaintiff/Applicant's property is at risk and it has a right to vacant possession.The Plaintiff has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo (Supra)" provides an explanation for what is meant by irreparable injury and it states:-

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

35. Quite clearly, the Plaintiff/Applicant would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Plaintiff/Applicant ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Plaintiff/Applicant has therefore satisfied the second condition as laid down in "Giella's case".

36. Thirdly, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in their favour. In the case of "Pius Kipchirchir Kogo (Supra)" which defined the concept of balance of convenience as:

> " The meaning of balance of convenience will favour of the Plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.
>
> In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting".

37. In the case of "Paul Gitonga Wanjau (Supra), the court dealing with the issue of balance of convenience expressed itself thus:-

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

38. The Plaintiff/ Applicant contends that the balance of convenience tilted in its favour as the legal proprietor of the suit property. The decision of "Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR" where the Learned Judge offered further elaboration on what is meant by "balance of convenience" and stated

> " The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice."

39. From the surrounding facts and inferences raised from the pleadings herein, certainly these are issues to be dealt with by Court upon presentation and testing of the empirical documentary and oral evidence. In simple terms, the Honourable Court would require an opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Plaintiff/Applicant herein and the defence mounted by the Defendants accordingly.

40. In the given circumstances, this may only transpire during a full trial. Bearing this in mind, in the meantime, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits.

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

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

42. I am convinced that if orders of temporary injunction are not granted in this suit, the property in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. In view of the foregoing, I find that the Plaintiff/Applicant has met the criteria for grant of orders of temporary injunction.

Issue No. b). Who will bear the Costs of Notice of motion application dated 27th October, 2023

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

VII. Conclusion & Disposition

44. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Plaintiff/Applicant has a case against the Respondent.

45. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

    a. That the Notice of Motion application dated 27th October, 2023 be and is hereby found to have merit and hence is allowed as per the Court's discretion and the preservation of the suit property.

    b. That pending the hearing and final determination of this suit, this Honourable Court be pleased to issue interlocutory injunction restraining the Defendants by themselves, their agents, workers, servants, employees, and/or hirelings from constructing, or continuing to construct, the road, described as Bamburi-Mwakirunge - Kaloleni Road on or over its parcel of

land Plot No. MN/II/10445 situated within Mwakirunge area, Mombasa County, or in any manner whatsoever entering and/or interfering with or any part of the said plot.

c. That for expediency sake, the suit to be heard on 18th July, 2024. There shall be a mention on 4th June, 2024 for purposes of conducting an intensive Pre – Trial conference under the provision of Order 11 of the Civil Procedure Rules, 2010.

d. That the cost of these application will be in the cause.

It is so ordered accordingly.

RULING THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF MARCH 2024.

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HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. Mr. Odongo Advocate for the Plaintiff/Applicant.

c. No appearance for the 1st and 2nd Defendants/Respondents.