Green Square Limited v Sheladia Associates Inc & 2 others (Environment & Land Case 55 of 2014) [2024] KEELC 3350 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3350 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 55 OF 2014

MC OUNDO, J

APRIL 25, 2024

BETWEEN

GREEN SQUARE LIMITED ..... PLAINTIFF

AND

SHELADIA ASSOCIATES INC ..... 1ST DEFENDANT

ABDUL MULLICK ASSOCIATES LIMITED ..... 2ND DEFENDANT

SBI INTERNATIONAL HOLDINGS AG (KENYA ..... 3RD DEFENDANT

JUDGMENT

1. Vide a Plaint dated 10th October, 2014 and Amended on 10th August, 2016, the Plaintiff herein sought for the following orders;

    i. A permanent injunction do issue so as to prevent or stop any form of interference by the Defendants of the Plaintiff's proprietorship right to ownership, occupation, use, possession, enjoyment and to develop land parcel number L.R No. 631/1033 (I.R. No. 66379)

    ii. That the Defendants be ordered to re-design and shift Mau Summit-Kericho-Nyamasaria road (the road) where it abuts land parcel number Kericho L.R No. 631/1033 (I.R. No. 66379) in conformity with the Government of Kenya Surveyor's findings and advise vide a letter Ref. No. KER/3/VOL. IV/117 dated 7th November, 2014 and that of Datum Survey & Land Consultants duly filed in Court on 21st November, 2014 and 24th November, 2014 respectively.

    iii. Payment of costs including survey fees paid by the Plaintiff and interest of the suit.

    iv. Any other relief that the court may deem fit to grant.

2. The 1st and 2nd Defendants filed their Joint Statement of Defence dated 22nd October, 2014 and Amended on 30th August, 2016 wherein they denied the contents of the Amended Plaint putting

the Plaintiff to strict proof while stating that in September 2005 they had been jointly awarded the tender for Civil Engineering Consultancy Contracts to design, review, and supervise the construction works of the road, by the Government of the Republic of Kenya, vide Contracts Numbers RD-0421 and RD-0422 which was for the construction and/or rehabilitation of Mau Summit-Kericho-Kisumu Road. That the construction contract had been awarded to the 3rd Defendant.

3. That by a letter dated 30th September, 2014, the Plaintiff's contractor, M/s Seyani Brothers & Co (K) Ltd had admitted that the Plaintiff's fence had encroached on the road wherein they had requested for accommodation of one week to remove the same but had renegaded on their promise and had since refused, failed and/or neglected to do so. That the Plaintiff's claim had therefore been insincere and an afterthought and had intended to delay or stall the construction of the said road to the detriment of the government and the general public.

4. That it was the Government and the people of Kenya who stood to suffer irreparable loss and damages arising from the delay in completing the construction of the said road within the contractual timelines which would result into escalation of the said property.

5. The 3rd Defendant on the other hand, vide its Statement of Defence dated 5th September, 2016 had denied the contents of the Amended Plaint putting the Plaintiff to strict proof while stating that it was solely contracted by the Government of Kenya through the Kenya National Highways Authority (KeNHA) to rehabilitate and upgrade to bitumen standards the Mau-Summit-Kericho Nyamasaria road which was a separate contract from the one that had been given to the 1st and 2nd Defendants. That under the said construction contract, the responsibility to avail the land on which the road was to be built lay on the employer, KeNHA hence as a contractor it had no role in determining where and on which land the road should be constructed.

6. That the 3rd Defendant being a contractor, had built the road according to the road designs that had been availed to it by KeNHA under the supervision of the resident engineer hence it had not been a necessary party to the suit. That further, the road in question had already been built, completed and had been in use wherein no part of the Plaintiff's land or buildings had been affected or damaged by its construction. That the Plaintiff had not shown a cause of action against the 3rd Defendant.

7. Vide a Reply to the 1st and 2nd Defendants' Joint Amended Statement of Defence dated 13th September, 2016, the Plaintiff joined issues with the 1st and 2nd Defendants wherein it reiterated the contents of its Amended Plaint and sought for judgement against the 1st, 2nd and 3rd Defendants jointly and severally as per the Amended Plaint, seeking that the 1st and 2nd Defendants' Defence be dismissed with costs.

8. In response to the 3rd Defendant's Statement of Defence dated 13th September, 2016 the Plaintiff's position was that the joinder of the 3rd Defendant in the instant suit had been necessary to enable the court to effectively and completely adjudicate upon and settle all questions surrounding the suit on merit.

9. The matter proceeded for hearing on 23rd September, 2020 whereby Christopher Kiprono Ngeno testified as PW1 to the effect that he was a businessman currently residing in Kericho and was a shareholder and Director of the Plaintiff.

10. He adopted his witness statement dated 20th September, 2016 as his evidence in chief. He also produced the documents dated 20th September, 2016 and filed on 21st September, 2016 as Plaintiff exhibits 1 to 10 stating that he had come to court because the Defendants had alleged that the Plaintiff had encroached on the road. That pursuant to the court's direction, a joint survey had been conducted on the 5th and 6th November, 2014 wherein it had been found that the Plaintiff had not encroached on the road. That

subsequently the road contractor and/or consultant had been asked to re-design the road and confine it to the road reserve. That whereas the said contractor had complied on the ground, no documents had been availed to show a re-design or shifting of the road. He thus asked the court to grant him the prayers sought in the suit since the Defendants had disrupted the work on the Plaintiff's premises for about 10 days. That he was apprehensive that the said Defendants could disturb him in future. He confirmed that the 1st and 2nd Defendants had been the ones involved in the designing the road.

11. On cross-examination by Counsel for the 1st and 2nd Defendants, he testified that whereas he did not see the contracts awarded to the 1st and 2nd Defendants, the contract numbers had been stated even in the earlier defences by the Defendants before the Plaint had been amended. He admitted that he neither knew the specific roles of the 1st and 2nd Defendants as spelt out in the said contract nor did he ask Kenya National Highways Authority (KeNHA) to show him the said roles.

12. On being cross-examined by Counsel for the 3rd Defendant, he confirmed that although he was a shareholder and Director of the Plaintiff, he did not have the authority of the Plaintiff to appear for it. He then proceeded to testify that after the 1st Defendant had written to the Plaintiff claiming that they (Plaintiff) had encroached on the road, the Plaintiff's contractor had responded to the letter indicating the Plaintiff's readiness to remove a temporary wall enclosure that the apparently encroached on a road reserve.

13. He confirmed that the order dated 27th October, 2014 did not mention the 3rd Defendant, nonetheless, the said 3rd Defendant had been present when the survey was conducted. That although he did not know who had designed the road, he confirmed that the 3rd Defendant's work had been merely construction wherein he had not interfered with the Plaintiff's building. That whilst he had nothing to show that the three Defendants were working together, they had all participated in the road construction work. He further admitted to not having anything to show what cause of action should be taken against the 3rd Defendant.

14. On being re-examined, the Plaintiff testified that they had been satisfied with the report of the joint survey that had been conducted by Daytime survey and County surveyor wherein it had been found that he had not encroached on the road. He also confirmed that subsequently, the contractor had moved the markings and placed the items where they were supposed to be, which was outside his piece of land. That there having been a confirmation that he had not encroached on the road reserve, he was now satisfied with the situation as it is.

15. That what had been outstanding was the new road design that the contractor was to furnish the Plaintiff with. That the said documents had neither been availed to them nor to the court since the redesign that had been filed in court in the year 2016 did not have authentication from KeNHA. He thus sought that the court assists him in procuring an authentic redesign so that it could be a public record to give him some security.

The Plaintiff thus closed its case.

16. The defense opened its case by calling John Absoloms Okumu who testified as DW1 to the effect that he was a civil engineer registered by Engineers Board of Kenya (EBK) as a consultant civil engineer. That he was a private consulting engineer consulting for the government as well as private entities. That in October 2014, he had been a resident engineer for a road project of Mau Summit junction through Kericho Town to Kisumu for his then employer, Sheladia Associates in-cooperated in the USA, jointly with Abdul Mallick Associates Limited the 1st and 2nd Defendants herein. That subsequently, he was testifying on behalf of the 1st and 2nd Defendants.

17. He adopted his witness statements dated 22nd October, 2014, 21st March, 2016 and 13th July, 2016 as his evidence in chief and proceeded to testify that the client of the project had been KeNHA which is an Agency of the Kenyan Government. That the 1st and 2nd Defendant's work as the consultants was to implement the design that had been issued by KeNHA by employing staff that would ensure that the work/project was done according to the design and quality specified, as well as within the time and costs specified by the employer. That his role was outlined in his first witness statement.

18. He testified that as a consultant he was to look at the design and the features on the ground and see whether the design complied with those features especially the boundaries of the route corridor. That there had been two sections, the first one being from Mau Summit Kericho-Kisumu junction and the second portion being from the Kisumu junction upto Kisumu–Nyamasaria.

19. That during the construction and upon arriving in Kericho town around the location of the Plaintiff's property, they had encountered a mabati fence that seemed to have encroached on the road reserve. That subsequently, the contractor had written a letter to him, as the resident engineer, notifying him of the said obstruction wherein he had written a letter dated 29th October, 2014, to the Plaintiff who was the property owner, notifying him of the portions of his fence that had encroached on the road reserve. He produced the said letter dated 29th October, 2014 as Df exh 1.

20. He then proceeded to testify that they received a response from the Plaintiff vide a letter dated 30th September, 2014 signed by one Mr. Harrison Yego requesting for time to remove the said fence. He produced the said letter as Df exh 2. That the mabati fence had then been removed within the 7 days but the next thing he heard was that the Plaintiff had filed suit against them. He confirmed that SBI International Holdings were the contractors.

21. His testimony was that when the contractor had notified him of the obstruction, they had skipped that particular section of the road and the work at that section had been stopped. He testified that a letter dated 11th October, 2014, had been addressed to the 1st and 2nd Defendants with attention to himself informing them of the obstruction which had impeded continuation of the works. He produced the said letter as Defence Exhibit 3.

22. He referred to pages 4 to 8 of Drawings of designs in their Document 4 wherein he confirmed that the same had been the designs of the road. That there had been a cross-section prepared by the contractors and checked by the resident engineer for implementation based on the design issued by the employer. He produced the said design as Defence Exhibit 4(a-e). He also testified that he had also taken photographs of the affected section of the road which photographs were contained in pages 9 to 11 of document number 5. He explained that the photographs on pages 10 and 11 showed a mabati fence (hoarding) which the Plaintiff had put up and which had obstructed part of the road. He produced the said photographs as Df exh 5 (a-c) before testifying that after the matter was filed in court, parties had agreed that the disputed part of the road be re-designed.

23. That he had witnessed the re-survey which had been done by the Government surveyor and a private survey and whose conclusion had been that, at two points within the Plaintiff's property, the road reserve had encroached by 0.7 meters and 1.6 meters respectively wherein the County Surveyor's conclusion had been for the road to be re-designed at the place where there had been an issue. That there had been compliance, the road was constructed and now it passed outside the Plaintiff's property and that he had been the one who had signed the said re-design. He produced the redesigned signed drawings as Df exh 6.

24. The witness confirmed that in his profession, it was normal for roads to be encroached on and vice versa wherein many times the issue would be resolved out of court on site. That the instant dispute

had been a small case which could have been resolved out of court. That whereas the responsibility to clear the road reserve was done by the employer, if they were small issues, they resolved the same themselves but if parties were not agreeable, they would refer the matter to Kenya National Highways Authority (KeNHA.)

25. His evidence was that in the instant case, the Plaintiff had not given them an opportunity to resolve the issue before the matter was brought to court and in any event, the project had been completed, the road was in use and the Plaintiff's property was intact. Further, that his employer, Kenya National Highways Authority (KeNHA) had not been joined to the instant suit.

26. On being cross-examined by the Counsel for the 3rd Defendant, he clarified that they had a team on the Mau Summit to Kericho road and another team on the Kericho to Kisumu road where he had been the team leader. That his role had been limited to ensuring that the construction was done according to the design and quality. He confirmed that the construction had been undertaken by the 3rd Defendant whose employer, like the 1st and 2nd Defendants' was KeNHA. That his duty was to ensure that the 3rd Defendant constructed the road according to his employer's specifications and that they were representing KeNHA in the said project.

27. That in case any issues arose, the constructors would report to the 1st and 2nd Defendants. He reiterated that the designs had been provided to them by the employer wherein the construction of the road had been as per the designs received. That the 3rd Defendant was to comply by those designs and could not veer off the same hence when the said 3rd Defendant came across the obstruction they wrote a letter to the 1st and 2nd Defendant to resolve the issue.

28. That although he could not remember when the 3rd Defendant had come back to the area that they had skipped, however, the same had been after the redesign had been drawn. That whilst a contract could allow a contractor to propose and redesign to the consultant for his approval, in the instant case, the 3rd Defendant could not re-design without an input of the employer hence the 3rd Defendant had to wait for the 1st and 2nd Defendants to issue further instructions based on that section.

29. That it was only after the 3rd Defendant had received the new instructions and redesigns, that they had gone back to complete that particular section, which had been very minor.

30. He confirmed that the encroachment had been 0.7 meter and 1.6 meters and that it had only affected the drain on the side of the road. He reiterated that the issue that had been raised by the Plaintiff was usually matters that could be solved by the engineer on site but they had not been given an opportunity to solve the same. That had they been given an opportunity, such a resolution would have involved the Plaintiff and DW1 and not the 3rd Defendant unless on invitation.

31. On being cross-examined by the Counsel for the Plaintiff, he testified that whereas he could not remember the name of the Government Surveyor as it had been a while, a joint survey had been done and that he had been present. Further that it had been the Government Surveyor who had made a report in the presence of the Plaintiff's representative although he could not remember seeing the Plaintiff's Counsel. That he had agreed with the conclusion of the Government Surveyor wherein the 3rd Defendant had shifted the road as instructed by himself and pursuant to the surveyor's conclusion. He confirmed that the road had been redesigned by the consultant, the 1st and 2nd Defendants who had been represented by himself. He further confirmed that the employer KeNHA had provided the designs wherein the redesign had been done on site by himself and the 1st and 2nd Defendants' team, before submitting it to KeNHA after which it had been implemented and the completion report signed and submitted to KeNHA to form part of the records. That he had however not seen any document from KeNHA since they were not parties to the suit.

32. When he was referred to Defence Exhibit 3, he confirmed that the same was a letter in which he had stated that he had encountered an obstruction on the section where the survey had been done and that it had been the same section that the Plaintiff had complained about. That he had written the said letter before the contractor wrote their letter since there had been a mabati fence which was encountered when they were setting out the site. That he saw the mabati as had been seen in Defence Exhibit 6. He explained that he had not been complaining in the said letter, but was just notifying the Plaintiff that some part of his fence had encroached on the road reserve.

33. That however, when they had set out the design, they had realized that some section of the road was going into the property but when the surveyors did their survey, it had turned out that the boundaries were intact hence they had to re-design the road. He reiterated that they had not been given time to resolve the matter on site before coming to court and that since the instant dispute had been a small matter whose resolution was just a re-design, the same would have been done without instituting a suit in court. He explained that the instant dispute had not been a unique case since in every road construction, there would be encroachments where most cases were resolved on site. That had they been given an opportunity to resolve the issue, it would have taken them a week or two to resolve the same and they would not have ended up in court.

34. He maintained that they did not bring down anything, neither the fence nor the massive development. That further, the earthmovers did not enter the boundaries of the Plaintiff's property.

35. When he was re-examined, he confirmed that there had been an order that had directed the 1st and 2nd Defendants to re-design the section of the road to which they had complied as per the drawings produced as Df exh 6. He confirmed that the said re-design had been prepared by himself, the 1st and 2nd Defendants as a team and that they had a mandate to so re-design.

36. He also confirmed that as per his second statement his mandate also included re-designing of the road. That he had given Df exh 6 to KeNHA upon conclusion of the works and had no authority to share the same with other parties although he had filed the said drawings in court and also served them upon the Plaintiff's counsel which document was authentic.

The 1st and 2nd Defendants thus closed their case

37. DW2, one James Muhara Muiga introduced himself as the 3rd Defendant's Operations Manager. He adopted his witness statement dated 10th July, 2023 as his evidence in chief and then testified that he was aware that the 3rd Defendant had been sued for encroachment while undertaking a road construction. That the said construction was pursuant to a contract awarded by KeNHA covering an area from Mau Summit Junction to Kericho.

38. He produced a contract for the rehabilitation of Mau Summit – Kericho Kisumu road which was executed in December 2009 between the Director General of KeNHA and SBI International Holdings as Df exh 7 and explained that their role in the contract was to build the road as per the design provided by the employer KeNHA, since they were the contractors and were supervised by the 1st and 2nd Defendants consultants who were also contracted by KeNHA.

39. That during the operation at the site, everything that was to be implemented had to be approved and inspected by the consultant including the materials and standard of the goods to be used on site. That when the obstruction was encountered, they informed the supervisor who was the resident engineer and thereafter abandoned that section of the road. That they had subsequently written a letter to the supervisor/resident engineer as they could not take any action without his approval, wherein the

resident engineer had informed them that he would take up the matter with the owner of the property so as to resolve the issue.

40. That about a month later, they had re-visited the problematic area. He confirmed that they needed confirmation of cross-section drawing and designs and that were they to take down the fence, they needed to get approval. That they had received a redesign from the resident engineer and the works had been completed wherein they had handed over the project to the government. That the Certificate of Completion meant that they had completed all the works and were awaiting to hand over subject for inspection by the resident engineer. That the document was usually issued by KeNHA. He produced the said Certificate of Completion as Df exh 8.

41. He produced the handing over notes as Df exh 9 stating that the said document was issued as a declaration that the work was complete and handed over to KeNHA thus they no longer had authority over it.

42. He also produced a letter of extension of defects liability dated 17th May, 2016, as Df exh 10 wherein he explained that the same had been issued to the contractor to repair any damages, if any and upon inspection, on the road wherein the period had been extended to 4th March, 2017 for Road 421 and 31st October, 2016 for road 422 for which road No. 421 was the matter before court.

43. His testimony was that the 3rd Defendant could not implement any of the prayers sought by the Plaintiff and sought that the 3rd Defendant be struck out of the case since all authority lay with the employer and the 3rd Defendant could not implement anything without the approval of the employer.

44. On cross-examination by the Counsel for the 1st and 2nd Defendants', he confirmed that when they encountered the encroachment, they had notified the Resident Engineer through a letter. That he knew that the matter had been resolved because they had later completed works. He reiterated that the designs they were implementing had come from their employer KeNHA.

45. On being cross-examined by the Counsel for the Plaintiff, he confirmed that he was employed by the 3rd Defendant in the year 2009 and was its Operations Manager and representative wherein he ran all the operations in the company including supporting engineering department and Managing Director, although he was not an engineer. That his training was in procurement and Administration wherein he possessed a degree in (Purchase, Procurement and Administration).

46. He explained that the 3rd Defendant's mother company was based in Switzerland. When he was referred to the findings of the Joint Survey Work, he reiterated that as a contractor, the 3rd Defendant could only carry out the works given to them by the employer. That everything had been done in collaboration and working in consultation to implement the employers work.

47. He confirmed that upon encountering with the problem while working as per the design provided, it had been after the surveyors had conducted the survey, that they had implemented the new design. He also confirmed that after encountering the obstacle, they had first lodged a complaint and abandoned that section wherein they had only continued working therein after they had received the re-design from the resident engineer as approved by the employer – KeNHA.

48. That they had implemented the project as per the guidance of the consultant since they could not communicate directly with KeNHA. That whilst he was neither blaming the contractor nor consultant, he could not confirm if the documents were available to the public because it was the consultant who had the design.

49. In re-examination, he confirmed that Df exh 7 was the contract between the Director General KeNHA and SBI International Holding where by KeNHA had been described as an employer. He

also confirmed that the Engineer therein defined was the resident engineer who was the 1st and 2nd Defendant according to the suit.

50. He also confirmed that the term ''setting out'' as depicted at page 36 clause 4.7 of the contract meant ''scaling out the work''. That it had been their duty to follow the marking and that was when they had encountered the encroachment. That the 'Contract drawings' referred to in clause 103 of the contract was information by the employer to the effect that drawings had been provided and additional drawings could be found with the resident engineer.

51. The 3rd Defendant closed its case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiff's submissions.

52. The Plaintiff vide its written submissions dated 23rd November, 2023 framed its issues for determination as follows:

    i. Does the Plaintiff have any cause of action against the Defendants?

    ii. Did the Plaintiff prove its case on a balance of probabilities?

    iii. Who is supposed to pay costs to the Plaintiff?

53. The Plaintiff maintained that the joint survey that had been carried out on 5th November, 2014 and 6th November, 2014 pursuant to a Consent order of 27th October, 2014 had concluded that the road reserve that had been marked by the contractor/consultant, the Defendants herein, had encroached into the Plaintiff's land parcel number Kericho LR. No. 631/1195. That further, contrary to DW1's letter dated 29th September, 2014 and his evidence in court, it had been confirmed by the surveyors who had conducted the joint survey that the Plaintiff's parcel of land L.R No. 631/1195 had not encroached on the road reserve hence the Defendants herein had been advised to shift and/or redesign the road.

54. That indeed the Defendants had produced evidence in court indicating that they had shifted the road and carried out a re-design of the said road section hence they must have complied with the aforementioned advice notwithstanding the court's observation than an authentic road re-design had not been produced. That in the circumstances, the Plaintiff's prayer (i) (a) in its Amended Plaint had now been settled.

55. That the Defendants had simply been mitigating on the costs that the Plaintiff had been seeking, when the 1st and 2nd Defendants asserted that the instant matter had been minor yet the Plaintiff had rushed to court.

56. Regarding the third-party proceedings, it was the Plaintiff's submissions that from the pleadings filed, documents produced in court and the testimonies of the Defendants' witnesses, it could be deduced that there had been a clear nexus amongst the Defendants hence they had been properly joined in the Plaintiff's pleadings/suit. That whereas the Defendants kept on referring to Kenya National Highway Authority (KeNHA), none of them had filed a third-party proceeding against the said KeNHA. That the least they would have done was to call a witness from KeNHA to support their case but they had failed to do so.

57. On the issue regarding the Plaintiff's authority to plead, the Plaintiff's submission was that its witness one Mr. Christopher Kiprono Ng'eno PW1 had confirmed in his verifying affidavit that he was a shareholder and a Director of the Plaintiff and that he had been authorized to file a suit on Plaintiff's behalf. That in any event, the Defendants never raised an issue in their defence nor did they apply to

have the Plaintiff's suit struck out by way of a Preliminary Objection. That on the contrary, the 3rd Defendant's witness, one James Muhara Muiga had neither stated in court nor produced in court an authority to appear, testify or plead on behalf of the 3rd Defendant. That in his testimony, the said Mr. Muiga had stated that the 3rd Defendant had still been undertaking projects in Nyahururu, yet not a single engineer who had been familiar with road construction had testified in court hence Mr. Muiga's testimony ought to be disregarded for being incompetent to appear or plead on behalf of the 3rd Defendant.

1st and 2nd Defendants' Submissions.

58. The 1st and 2nd Defendants first summarized in details the factual background of the matter as well as the evidence as adduced in court before framing their issues for determination as follows:

    i. Whether or not the Plaintiff had established a case to warrant the grant of an order of permanent injunction against the Defendants.

    ii. Whether or not the Defendants should be ordered to redesign and shift the road where it abuts the Plaintiff's property.

    iii. Whether or not the Defendants should pay to the Plaintiff cost of survey of Kshs. 68,000/=.

    iv. Who should pay the costs of this suit.

59. On the first issue for determination, the 1st and 2nd Defendants placed reliance on the decided case of Nguruman Limited v Jan Bonde Nielsen & Others, Civil Appeal No. 77 of 2012 [2014] eKLR and Principles of Injunctions, (1987) Interlocutory or Permanent by Richard Kuloba on the triple requirements to be proved for the grant of a permanent injunction, to submit that they had not disputed the proprietary rights of the Plaintiff over the suit land neither did they have a claim, right or interest whatsoever over the suit land. That on the contrary, they had actually recognized the Plaintiff's proprietary rights and interests over the suit land hence DW1's letter to the Plaintiff regarding the obstruction to the road on his property.

60. That there had not been evidence on record to show that they had interfered with or threatened to interfere with the Plaintiff's proprietary right to ownership, occupation, use, possession, enjoyment and to develop the suit land so as to warrant the grant of a permanent injunction against them. That whereas the only evidence that the Plaintiff had relied on was DW1's letter dated 29th October, 2014, the said letter had not in any way constituted an interference or a threat of interference. They thus submitted that besides the said letter notifying the Plaintiff of existence of obstruction, it merely beseeched the said Plaintiff in the politest language to remove the obstruction hence there was no way that the contents of the said letter could be construed to have amounted to interference or threatened interference with the Plaintiff's proprietary rights over the suit land.

61. That further, the said letter should not be considered in isolation but alongside the other actions that followed it being the response by the Plaintiff whereby it had requested for one week to remove the obstruction followed by the immediate action by the Defendants to stop working in the affected section pending the removal of the obstructions and did not take any step to remove the obstruction themselves.

62. That as DW1 had testified, whereas it was common in road construction works to experience situations of encroachment by the road reserve into a private land or vice versa, they always resorted to amicable resolution of the dispute on the site but where that failed, they would refer the matter to the client

for resolution. They thus submitted that considering the marginal extent of the encroachment in the instant case, the matter would have been amicably resolved within a period of one or two weeks.

63. That the Plaintiff had not met the requisite legal threshold for the grant of equitable relief of a permanent injunction as there had not been an ongoing interference, threat or future interference with the Plaintiff's rights over the suit land by the Defendants. That indeed, the Defendants had completed the road project way back in the year 2018 wherein they had handed over the road to their mutual client, KeNHA hence their contracts had been executed with no outstanding obligations and/or private or personal proprietary rights.

64. That indeed the designs prepared by KeNHA had resulted into a potential encroachment by the road reserve into the Plaintiff's property at two beacon points by negligible margins of 0.7 meters and 1.6 meters respectively for which the Plaintiff was not likely to suffer irreparable damage which could not be compensated by an award of damages. They urged the court to take judicial notice that the government had the right to compulsorily acquire land for purposes of development subject to compensation to the land owner hence damages would be an adequate remedy.

65. That further, were an order of a permanent injunction be granted, it would affect a party that had not been joined in the instant proceedings, that is, the Government of Kenya or its agencies such as Ministry of Roads or KeNHA or their successors in any future road works on the said road around the Plaintiff's property, thus condemning them unheard which was against the rules of natural justice.

66. On the second issue for determination as to whether or not the Defendants should be ordered to redesign and shift the road where it abuts the Plaintiff's property, the 1st and 2nd Defendant's submissions was that the said prayer could not be granted as it had been overtaken by events. Then road had been redesigned, pursuant to the advise by the District Surveyor Kericho, and constructed. That the said prayer had been ill-advised and totally misconceived.

67. The Defendants further submitted that it was trite law that parties were bound by their pleadings hence the request that they supply the Plaintiff with copies of the new road design drawings must fail as that was not a prayer sought in the Plaintiff's Amended Plaint. That the said informal request should not be granted. That nonetheless, they had served the Plaintiff twice with the new designs through his Counsel.

68. As to whether or not the Defendants should pay to the Plaintiff costs of survey of Kshs. 68,000/=, the 1st and 2nd Defendants submitted that the survey fees were in the nature of special damages that should be specifically pleaded and proved for which the Plaintiff had failed to comply. That the two invoices relied upon by the Plaintiff in support of its claim for the sum of Kshs. 68,000/= were not a conclusive proof of expenditure but merely showed that payment had been demanded. No Payment Receipt had been exhibited by the Plaintiff.

69. That further the first invoice for a sum of Kshs. 58,000/= was dated 11th August, 2014 yet the dispute herein was first brought to the Plaintiff's attention vide DW1's letter of 29th October 2014 hence the said invoice had pre-dated the instant dispute. That subsequently, the said invoice had related to a survey exercise that had been undertaken by the Plaintiff of its own accord to establish the beacons to its property for purposes of the development it had been undertaking at the property. That the said exercise had resulted in the production of the Beacon Certificate dated 13th August, 2014, which had formed one of the Plaintiff's exhibits hence the Defendant could not be held responsible for such expenses.

70. That the invoice dated 11th November, 2014 for a sum of Kshs. 10,000/= had been raised after the filing of the instant suit and within the time the resurvey had been undertaken, the same did not show

on the face value that it had been with regards to the re-survey. That the burden of proof that the same had related to the re-survey lay with the Plaintiff who instead of discharging the said burden on a balance of probabilities, had opted to bungle everything by making the instant invoice to be part of the earlier invoice. That in any case, the present invoice had been for a sum of Kshs. 10,000/=and could not therefore, be proof of a claim for Kshs. 68,000/=.

71. That further, the decision to bring in a private surveyor who was bound to charge survey fees had been the Plaintiff's election as the Defendants had been comfortable with the government surveyor who had not charged any fees for the re-survey work. That in any event, the Plaintiff should not be allowed to visit upon the Defendants, the cost which could have been avoided.

72. Regarding who should pay the costs of the present suit, it was the 1st and 2nd Defendants submission that costs followed events. That in the instant case, the Plaintiff had failed to prove its claim hence the entire suit was for dismissal with costs.

3rd Defendant's Submissions

73. The 3rd Defendant vide their written submissions dated 1st December, 2023 had also summarized the factual background as well as the Defence evidence adduced in court and then framed its issues for determination as follows:

    i. Whether the Plaintiff had satisfied the requirements for the issuance of the permanent injunction orders sought herein.

    ii. Whether the Plaintiff warrants to be awarded the survey fees and other incidental costs in the matter herein, and if so, whether the 3rd Defendant is a liable in any way whatsoever.

    iii. Whether the Defendants should be ordered to redesign and shift the road where it abuts the Plaintiff's property.

    iv. Who is entitled to be awarded costs in the suit herein.

74. On the first issue for determination as to whether the Plaintiff had satisfied the requirements for the issuance of the permanent injunction orders sought, the 3rd Defendant also placed reliance on the conditions for the grant of a permanent injunction as had been set out in the decided case of Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012; [2014] eKLR as well as on the Principles of Injunction by Richard Kuloba (supra) to submit that from the facts herein and the evidence adduced in court, it had been clear that neither of the Defendants, and more so the 3rd Defendant, had or had harbored any interest, whatsoever, to challenge the Plaintiff's legal rights to the suit property and/or had interfered, used and/or possessed the same.

75. That all of the Defendant's dealings and interactions with the suit property had been limited to determining the exact geo-position of a negligible portion of the Plaintiff's property with the intention of confirming whether or not it had strayed into the road reserve and therefore had amounted to an obstruction of the then ongoing constructions. That there had not been injury suffered by the Plaintiff as the 3rd Defendant had actually skipped the contentious part of the construction and had only came to construct on the said area once the road had been re-surveyed.

76. That further, there was no probability of any future injury to the Plaintiff as it did succeed to put up a mall in the suit property and the Mau Summit-Kericho-Kisumu Road project also got redesigned, completed and handed over to KeNHA without any harm whatsoever befalling the Plaintiff. That subsequently, there had been no legal or practical basis for the issuance of a permanent injunction as the matters herein had been overtaken by events and rendered nugatory thus the court should reject this

prayer as granting the same would be of no practical effect but rather, it would amount to a mockery of the court's powers.

77. On the second issue for determination, the 3rd Defendant placed reliance on a combination of decisions in the decided case of China Wu Yi Limited & another v Irene Leah Musau [2022] eKLR where the court had quoted with approval the Court of Appeal case in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 and Joseph Kipkorir Rono v Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003 to submit that the survey fees sought by the Plaintiff in the instant matter was in the form of special damages which ought to have not only be specifically pleaded, but also proved to be awarded. That in the instant case, the Plaintiff had only pleaded for survey fees in its amended Plaint but had not specifically pleaded the payment it needed and neither had it adduced relevant proof to back up its claim for the survey fees.

78. It was the 3rd Defendant's submission that it was trite that a party was bound by its pleadings hence it would be unimaginable overstretch of legal bounds for the Plaintiff to demand that the court awards it survey fees that it had not pleaded nor proved. That there had been no proof of evidence, in the form of a receipt or transaction messages, to prove payment to its surveyors. That invoices only proved a demand of the quoted sums and not their payment.

79. That even if the Plaintiff had pleaded and proven its claim for the surveyor fees, the orders of the court was to the effect that the re-survey of the suit property be carried out by a government surveyor hence it had been the Plaintiff's own choice to hire a private surveyor to survey the suit property hence it could not beleaguer the Defendants especially the 3rd Defendant who had no role whatsoever in the said re-survey, with the costs of its private ventures.

80. As to whether the Defendants should be ordered to redesign and shift the road where it abuts the Plaintiff's property, the 3rd Defendant reiterated the evidence it had adduced in court to the effect that it had been the main contractor in the project and its work had been limited to carrying out construction based on the road design that had been availed to it by the 1st and 2nd Defendants. That it had not been within its mandate to design the project or carry out any amendment but had promptly informed the 1st and 2nd Defendants of the obstruction it had come across at the Plaintiff's property.

81. That the Defendants herein had played distinct roles thus such a prayer could not be made globally to all the Defendants. That in any case, the question of the designs had been resolved upon the presentation of the re-designs by the 1st and 2nd Defendants thus the matter should be left to rest at that.

82. Regarding who was entitled to be awarded costs, reliance was placed on the Supreme Court's decision in the case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR to submit that the costs of the instant suit be awarded to the Defendants, the Plaintiff not having made out a case against them. That from the foregoing, the Plaintiff's Amended Plaint dated 10th August, 2016 be dismissed with punitive costs, the Plaintiff had failed to withdraw the suit herein even when it had become apparent that the road had been re-designed, completed and handed over to KeNHA without any part of its property being interfered with and for the Plaintiff's continued beleaguering the Defendants with incessant frivolous applications aimed at unnecessarily dragging the matter herein.

Determination.

83. The Plaintiff in this matter filed suit against the Defendants vide a Plaint dated 10th October, 2014 which was Amended on 10th August, 2016 seeking orders of a permanent injunction to issue so as to prevent or stop any form of interference by the Defendants of the Plaintiff's proprietorship right to ownership, occupation, use, possession, enjoyment and to develop land parcel number L.R No.

631/1033 (I.R. No. 66379) He also sought that the Defendants be ordered to re-design and shift Mau Summit-Kericho-Nyamasaria road (the road) where it abuts his parcel of land in conformity with the Government of Kenya Surveyor's findings and lastly that the Defendants meet the cost of the suit including the survey fees paid by the Plaintiff and interests of the suit therein. He also sought for any other relief that the court may deem fit to grant.

84. In response to the Plaintiff's suit and in their defence the Defendants herein argued that the 3rd Defendant was contracted by the Government of Kenya through the Kenya National Highways Authority (KeNHA) to rehabilitate and upgrade to bitumen standards of the Mau-Summit-Kericho Nyamasaria road. That the 1st and 2nd Defendants were thus awarded the tender for Civil Engineering Consultancy Contracts to design, review, and supervise the construction works of the road by the Government of the Republic of Kenya vide Contracts Numbers RD-0421 and RD-0422. That they had carried out the works as per the road design wherein they had completed their task and handed the project over to their employer the Kenya Highway Authority. (KeNHA). That the road in question was now in use wherein no part of the Plaintiff's land or buildings had been affected or damaged by its construction. That the Plaintiff had not shown any cause of action against them.

85. The matter had proceeded for hearing wherein the evidence was adduced as herein above contained in the judgment and where I find the issues for determination as being;

    i. Whether there should be a permanent injunction issued against the Defendants.

    ii. Whether the Defendants should redesign and shift the road where it abuts the Plaintiff's property.

    iii. Whether the Plaintiff is entitled to an award of damages and costs for survey fees.

    iv. Whether the Plaintiff's case has been overtaken by events.

    v. Who should pay the costs of the suit.

86. On the first issue for determination, it is trite that an order of permanent injunction fully determines the right of the parties before the Court and is thus a decree of the court. A permanent injunction is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. The Court thus has, under the provisions of Sections 1A, 3 & 3 A of the Civil Procedure Code, powers to grant the said order of permanent injunction, if it feels that the right of a party has been fringed, violated and/or threatened.

87. I am persuaded by the holding of the High Court in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where it had been held inter alia as follows:

> "...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."

88. In the present case, whilst the Plaintiff had sought for a permanent injunction against the Defendants stopping them from any form of interference on his proprietorship right to ownership, occupation,

use, possession, enjoyment and to develop land parcel number L.R No. 631/1033 (I.R. No. 66379), the evidence as adduced in court which is not controverted was to the effect that there had been completion of the Mau Summit-Kericho-Kisumu Road project as per the Certificate of Completion produced as Df exh 8, which project had then been handed over, as per the handing over notes produced as Df exh 9, to the Kenya Highway Authority (KeNHA). Further evidence on record had been that no harm had occasioned to the Plaintiff's property being land parcel No. L.R No. 631/1033 (I.R. No. 66379). To this effect thereof and in view of the authority cited herein above, I find that there had been no legal or practical basis established for the issuance of a permanent injunction as the matters herein had been overtaken by events and rendered nugatory.

89. On the second issue for determination as to whether the Defendants should redesign and shift the road where it abuts the Plaintiff's property, again the evidence on record was to the effect that during the construction of the Mau Summit-Kericho-Kisumu Road and upon a re-survey by both the Government surveyor and a private surveyor, there had been a conclusion that at two points within the Plaintiff's property, the road reserve had encroached by 0.7 meters and 1.6 meters respectively wherein the County Surveyor's had opined that the road be re-designed at the place where there had been an issue. That there had been compliance, and the road was finally constructed outside the Plaintiff's property. The redesigned signed drawings had been produced as Df exh 6. To this end it is clear that the prayer cannot be granted as it had been overtaken by events and therefore this prayer like the first prayer is naught.

90. On whether the Plaintiff was entitled to an award of damages as costs for survey fees, the Plaintiff herein sought that he be awarded Kshs. 68,000/=, as costs for the survey fees. Again, it is trite that such costs are in the nature of special damages that should be specifically pleaded and proved. Indeed in the case of Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal had observed as follows;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

91. In Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 it had been held that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

92. As held in Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku, [2006] eKLR that special damages are, in layman's language, a reimbursement of what the Plaintiff has actually spent or lost, as a consequence of the tortuous act by the Defendant/tortfeasor. All that the law requires is that the said special damages are pleaded, particularized, and proved. Upon that the Court awards, not assesses, the figure proved. In the present case, I am in agreement with the submissions by the defence that invoices are not conclusive proof of expenditure but merely show that payment has been demanded. Indeed no Payment Receipts had been exhibited by the Plaintiff of his expenditure on the survey.

93. The provisions of Section 107-109 of the *Evidence Act* are clear to the effect that he who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. There having been no proof of the special damages occasioned to the Plaintiff as alleged, this line of argument must fail.

94. Lastly on whether the Plaintiff's case has been overtaken by events, the Black's Law Dictionary, 9th edition defines a "moot case" as

> "a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights", and as a verb, as meaning "to render a question as of no practical significance".

95. In Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) vs. County Government of Nairobi [2019] eKLR, Mativo, J. stated that:

> "A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact."

And that,

> "No court of law will knowingly act in vain. The general attitude of courts of law is that they are loathe in making pronouncements on academic or hypothetical issues as it does not serve any useful purpose. A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the Plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity."

96. Given those parameters, I find that the orders herein sought by the Plaintiff seeking to restrain the Defendants from interfering with his proprietorship right to ownership, occupation, use, possession, enjoyment and to develop land parcel number L.R No. 631/1033 (I.R. No. 66379) as well as to re-design and shift Mau Summit-Kericho-Nyamasaria road (the road) where it abuts his parcel of land are moot as they were overtaken by events, the road having been re-designed, constructed, completed and handed over to KeNHA, without interfering with the Plaintiffs property, wherein it is in use. Indeed in the Plaintiff's own words he had testified that;.

> ''After a joint survey was done, we are satisfied with the results.
>
> The joint survey was done by Daytime survey, County surveyor. They found that I had not encroached on the road.
>
> The contractor moved the markings and put items where they were supposed to be outside my piece of land.
>
> There was confirmation that I had not encroached on the road reserved.
>
> I am satisfied with the situation as it is."

97. In the end, I find that the Plaintiff's suit lacks merit and the same is herein dismissed with costs.

DATED AND DELIVERED IN NAIVASHA VIA MICROSOFT TEAMS THIS 25TH DAY OF APRIL 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE