Gateway Marine Services Limited & another v Yakub & 4 others (Environment & Land Case 217 of 2021 & 29 of 2022 (Consolidated)) [2024] KEELC 4274 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4274 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 217 OF 2021 & 29 OF 2022 (CONSOLIDATED)

LL NAIKUNI, J

MAY 14, 2024

BETWEEN

GATEWAY MARINE SERVICES LIMITED .... PLAINTIFF

AND

MOHAMED OSMAN YAKUB .... 1ST DEFENDANT

ALTAF MOHAMED HUSSEIN .... 2ND DEFENDANT

JAHANGIR KASAMALI TEJANI .... 3RD DEFENDANT

BELPORT LIMITED .... 4TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 29 OF 2022

BETWEEN

BELPORT LIMITED .... PLAINTIFF

AND

GATEWAY MARINE SERVICES LIMITED .... DEFENDANT

RULING

I. Introduction

1. The Honorable Court was called upon to make determination over four (4) applications spread out in the two (2) files – ELC No. 217 of 2021 and ELC No. 29 of 2022 which have been handled together and/or run together for convenience sake. It is instructive to note that these two files though touching the same subject matter, were never consolidated as one would have expected.

2. The said applications were namely:-

    a. the Notices of Motion application dated 27th October, 2021 in ELC Case No. 217 of 2021;

    b. the Notices of Motion applications dated 15th March, 2022, 24th March, 2022 and 4th April, 2022 in ELC No. 29 of 2022 respectively.

3. Upon service of the application to the Respondents, the 4th Defendant inn ELC Case No 217 of 2021, responded through a replying affidavit dated 27th February, 2022 to the Notice of Motion application dated 27th October,2021 and the Plaintiff/ Respondent in ELC No. 29 of 2022 responded to the Notice of Motion application dated 24th March, 2022 through a replying affidavit dated 5th April, 2022. It is instructive to take cognizance of the fact that during the proceedings tow distinct activities took place on these matters. Firstly, on 6th May, 2022, the Honourable Court on request by the parties conducted a Site Visit ("Locus in Quo") pursuant to the provision of Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010 and a report which was shared is attached to this ruling. Secondly, parties were encouraged and indeed engaged in intensive out Court negotiation in tandem to the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Sections 20 (1) and (2) of the Environment & land Court Act, No. 19 of 2011. Although, the negotiation became a cropper, but this Court still feels strongly, in the given circumstances, that there exists high hopes and the best avenue to resolve this dispute is through exploration of the Alternative Dispute Resolution (ADR).

4. Be that as it may, for ease of reference, the Honourable Court will be dealing with each of these applications separately and simultaneously in order of when they were filed in Court. Eventually, the Court will deliver one omnibus Ruling taking that the parties and the subject matter being the same.

II. The Notice of Motion application dated 27th October, 2021

5. The application was brought under the provision of Sections 1A,1B, 3A & 63 of The *Civil Procedure Act*, Cap. 21 and Order 40 of the Civil Procedure Rules, 2010. The Plaintiff in the ELC Case No. 217 of 2021 sought for the following orders:-

    a. Spent.

    b. Spent.

    c. That the Defendants be retrained whether by themselves or their servants or agents from illegally and unlawfully blocking the Plaintiff's access to its property or in interfering in any manner whatsoever with its business activities and/or creating a nuisance by blocking access to the Plaintiff's property pending the hearing and determination of this suit.

    d. That the costs of this application be provided.

6. The application by the Plaintiff/ Applicant herein was premised on the grounds, testimonial facts and averments made out under the 16 Paragraphed Supporting Affidavit of –BOB WEYN, a director of the Plaintiff/ Applicant herein sworn and dated 27th October, 2021 with one (1) annexture marked as "BW -1". The Deponent averred that:

    a. The Plaintiff herein occupies the properties known as MN/V/1788 and MN/V/1893at Kibarani, Makupa Causeway ['the Plaintiffs Properties].

    b. The 4th Defendant herein, Belport Limited ['Belport'] is a quasi-partnership Company owned as to 50% by the Third Defendant, Jahangir Kasamali Tejani and his Son Faraaz Jahangir Tejani and 50% by himself and his Partner, Fernando Marques through African Marine Technologies

Limited. The Deponent is the Managing Director of Belport whereas the 3rd Defendant is its Non-Executive Director.

c. Belport was the proprietor of MN/V/1792 which was sub - divided and a road [public road] excised therefor which was demarcated as MN/V/1792/2. This public road serves the properties known as MN/V/1788 and MN/V/1893 occupied by the Plaintiff, this being the only access to these properties from the Makupa Causeway.

d. Belport is also the proprietor of the property known as MN/V/2436 that abuts the aforestated public road and the property adjourning to it namely MN/V/2385 [jointly 'the Belport Properties'].

e. The parties have in the past shared a fairly cordial relationship and given the 50:50structure of Belport, it was agreed that both quasi - partners would utilize the Belport properties in the same proportion for their own use.

f. Unfortunately, a dispute arose amongst the quasi-partners and the Third Defendant in wrongful usurpation and abuse of powers, had sought to unlawfully takeover possession of the Belport properties last week and, in the process, had also trespassed onto the Plaintiff's properties. In addition to this and in complete disregard of the fact that the Plaintiff's properties were served by a public road, the Third Defendant, together with the 1st and 2nd Defendants who were neither employees of Belport nor have any instructions from it, had encroached onto the said public road and blocked the Plaintiffs access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it.

g. On the morning of Thursday 21st October 2021, they managed to seek the assistance of the Police in having the barriers erected removed and the blocked access to the Plaintiffs property cleared. He understands and verily believed that the 1st Defendant, at 13.09Hrs, then went to Mikindani Police Station and alleged that he was the General Manager of Belport and reported that whilst he was in custody of the Police, three men allegedly broke the main gate Belport's main gate and stole the same.

h. The gate being referred to in this report was the unlawful barrier that the First Defendant had erected on the public access road abutting Belport's property and serving the Plaintiffs properties.

i. The 1st Defendant had never been appointed as General Manager of Belport nor had he nor the Second Defendant been engaged in any capacity whatsoever to act on behalf of Belport.

j. Yesterday (25th October, 2021) the 1st, 2nd and 3rd Defendants had engaged a Security Company, trading as Farsight Security and who had placed two guards at the top yard who had refused to take any instructions from him or any of his agents acting on behalf of Belport and the 1st to 3rd Defendants had blocked the entrance gate serving the Plaintiff's properties yet again hindering its free and uninterrupted use of the public road serving its properties and access thereto.

k. The Police had again cleared the access gate but it appeared that the 1st to 3rd Defendants were intent on continuing with and persisting in their wrongful and unlawful actions of blocking access to the Plaintiff's properties, creating a disturbance and a nuisance and frustrating the Plaintiff and its quite use and enjoyment of its properties and the peaceful carrying out of its business thereof.

l. Unless restrained by this Honourable Court, it was clear that the First to Third Defendants intend to persist in their wrongfully and unlawful and malicious conduct which appeared to be intent for collateral purposes.

m. He annexed in the affidavit a bundle and collectively mark as Exhibit 'BW-1' the relevant documents and photographs pertaining to this matter.

n. Therefore, he prayed that this Honorable Court allow the Plaintiff's application as prayed.

III. The response to the Notice of Motion application dated 27th October, 2021

7. The 4th Defendant in ELC Case No. 217 of 2021 through its director FARAAZ TEJANI, responded to the application through a 19th paragraphed replying affidavit dated 27th February, 2022 where he averred as follows:-

a. The Application by the Plaintiff was without any merit, or basis. It was a blatant attempt by the Plaintiffs officers to trespass on to the Defendant's parcel of land and interfere with our quiet possession and enjoyment of the same.

b. The 4th Defendant, Belport Limited is the legal proprietor of all that parcel of land known as Land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa.

c. The Plaintiffs is the owner of all that parcel of land known as MN/V/1788 and MN/V/1893 which lie adjacent to the Defendant's plot being land Reference No. 2529Section IV Mainland North and Land Reference No. 2385(Section V Mainland North).

d. Contrary to the Plaintiff's assertions, there was no access road that had been hived off from any of the 4th Defendant's parcels of land, more particularly Land Reference No 2529(Ong No.1792/2), for purpose of accessing the Plaintiffs parcel of land but it was instead the Plaintiffs officials who have with deliberate malice trespassed and encroached onto the 4th Defendant's parcel of land under the guise that there was an access road.

e. The access road stated in the Plaintiffs application was created to create an access to L.R No.7 Section IV Mainland North (owned by Chesterton Limited) which lies to the North of LR No. 2529.

f. Sometimes in the year 2016, they retained the service of B.C Mwanyungu, Licensed Surveyor who conducted a survey on the boundaries of LR Nos. 1792 and 2385 Section V Mainland North. He prepared a report wherein he concluded that the activities of the Plaintiff employees and officials had resulted in their illegal encroachment onto our parcel of land. (He annexed and produced as evidence a copy of the survey report marked as FT1).

g. In addition to the survey of 2016,a further survey done in March 2021 by Ms. Coast Survey clearly depicted an encroachment by the Plaintiff vide the murram access road that it had created over our parcel of land. (He annexed and produced as evidence a copy of the survey report marked as FT2).

h. Another survey conducted on 8th July 2022 by Edward Kiguru Land Surveyors confirmed the position that access road referred to by the Plaintiff had encroached onto our parcel of land (He annexed and produced as evidence a copy of the survey report marked as “FT – 3”).

i. The Plaintiffs parcel of land had their own access points at the front of the said parcels and as such there was no reason at all for them to trespass onto the 4th Defendant's property. These access points could be seen from Plaintiffs bundle of documents. (He annexed and produced as evidence a copy of Mapsheet for the Area from the Survey Department at Bima Towers Mombasa marked as "FT - 4").

j. Considering the above, it was evident that the Plaintiffs were the ones interfering with the Defendant's use of its property and as such the orders sought by the Plaintiff could not be issued as they sought to have this court aid them in their illegal action of trespassing and encroaching onto the 4th Defendant's parcel of land.

k. Further, the orders sought were to prevent the Defendant from its right to possess and enjoy its property without any unwanted disturbance.

l. As a result if the Plaintiffs employees and agents' constant trespass onto the 4th Defendant's parcel of land, they had suffered loss and damage, as the Plaintiff's officials had resorted to using police to harass them and their employees and forcefully continue their illegal use of their parcel of land.

m. The Plaintiffs employees and agents had also dumped containers onto our parcel of land and erected temporary structures thereon without their consent and attempts to have them remove the same have borne no fruit as the Plaintiffs officials had disregarded their demands.

n. The Plaintiffs officials had also retained the services of a security Company, Seneca Security Services, who had also trespassed onto the 4th Defendant's parcel of land, under the directives of the Plaintiffs officials.

o. The Plaintiffs allegation that there the 1st to the 3rd Defendant's herein had trespassed onto the Plaintiffs property or had blocked the 1st Defendant's employees from using the alleged public road was untrue and meant to mislead this Court into granting the Plaintiff the orders sought to the detriment of the Defendants.

p. The affidavit was in opposition to the Plaintiff's application of 27th October, 2021and ask this Honorable Court to the application with costs to the Defendants.

IV. The Notice of Motion application dated 15th March, 2022 by the Plaintiff in ELC No. 29 of 2022

8. The application was brought under Order 40, Rules 1(a), 3 and 9 of the Civil Procedure Rules, 2010 and Section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya. The Plaintiff/Applicant in ELC No. 29 of 2022 sought the following orders:-

    a. Spent.

    b. Spent.

    c. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining, barring, stopping and or preventing the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, and constructing, erecting, renovating and/ or in any manner interfering with any and or both of Plaintiffs parcel of land known as Land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940and Land Reference No. 2385 (Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa.

d. That the OCS, Changamwe Police Station to ensure due compliance with the Orders.

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

9. The application by the Plaintiff/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 29 Paragraphed Supporting Affidavit of –FARAAZ TEJANI, a director of the Plaintiff/ Applicant herein sworn and dated 27th October, 2021 with eleven (11) annextures marked as "FT1 to 11". The Deponent averred that:

   a. The Plaintiff remains the registered and beneficial owner of Land Reference No 2529(Orig No. 1792/2)Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa. He annexed and produced Certificate of Titles for LR 2529 & 2385 Section V Mainland North marked FT 4 & FT 5 respectively).

   b. The Defendant/ Respondent is the registered and beneficial owner of Property Title No 1899 Section V Mainland North and Land Reference No. 1788 Section V Mainland North also situate in Mombasa.

   c. Parcel No. 2529 Section IV Mainland North and Land Reference No. 2385 (Orig No.1900/1)Section V Mainland lies adjacent to the Respondent's property No 1899 Section V Mainland North and Land Reference No.1788 Section V Mainland North.

   d. The Respondent, without any colour of right, unlawfully and without any regard to the established boundaries and beacons, intentionally and deliberately encroached and trespassed onto the Applicant's parcel of land and proceeded to convert the said encroached portion into access road into the Respondents property.

   e. The Respondents illegal action above mentioned was despite the fact that they had a separate access leading to their property which was legally established.

   f. As a result of the said encroachment, they had been deprived of and denied its rights to use, utilize and enjoy their property and they had consequently suffered loss and damage as they had been unable to utilize the property owing to the illegal and unlawful access road wrongfully created into their parcel of land and currently being utilized by the Respondent.

   g. The said encroachment by the Respondent into the Plaintiff/Applicant's parcel of land was wrongful, illegal, unlawful and without any justification whatsoever.

   h. In addition, the said encroachment by the Respondent was an infringement of their property rights and was against the law.

   i. After the trespass and encroachment, the Respondent proceeded to illegally, unlawfully and wrongfully dump containers and erect temporary structures on their parcel of land, without their knowledge, or consent or authority.

   j. The Respondents action of trespassing, encroaching and development onto our parcel of land was wrongful, illegal, unlawful and an infringement of their rights to their property.

   k. They wrote a letter dated 29th September, 2021addressed to the Respondent wherein they demanded that the Respondent remove all the containers placed onto our parcel of land by the Respondent and vacate the suit property. However, the Respondents had adamantly refused to comply with the aforesaid notice. Annexed in the affidavit and produced as exhibit a true copy of the said letter marked as "FT – 6").

l. The Defendant retained the services of Senaca Security Services to offer security to its property above mentioned but who without the authority permission and consent of the Applicant trespassed onto the Applicant land above mentioned.

m. He wrote an email to Senaca Security Services on 4th October 2021 notifying them of the trespass and demanded that they vacate the Applicant property forthwith owing to the said trespass. The said Security firm through its response of 5th October 2021 declined to heed to the demand by the Applicant but rather stated that they were directives by the Respondent. He annexed and produced as exhibit a true copy of the said email of 4th October 2021 and response thereto of 5th October 2021 marked as "FT – 7" and "FT – 8" respectively).

n. Sometimes in the year 2016, they retained the service of B.C Mwanyungu, a Licensed Surveyor to establish the following

    i. The extend and development around and within the boundaries of LR Nos. 1792 and 2385 Section V Mainland North

    ii. The ground position and any encroachment into the above mentioned plots.

o. After a physical inspection and survey was conducted by the said Mr. Mwanyungu, he prepared a Survey Report dated 30th May 2016 wherein he made, inter alia, the following observations:

    b. The activities of the Defendants plots Nos. 1899 and 1788 have encroached onto the Plaintiffs parcel of land. (He annexed and produced as exhibit a true copy of the said Report marked as "FT – 9").

p. On 10th March 2021,while undertaking a Survey on its parcel of land for purposes of sub division, the Ms. Coast Survey prepared a topographical survey of the ground position wherein the drawing clearly depicted an encroachment by the Defendant vide the murram access road that it had created over their parcel of land. He annexed and produced a exhibit a true copy of the Survey marked as "FT – 10").

q. Sometimes in January 2022, we obtained the Map sheet for the Area from the Survey Department at Bima Towers Mombasa to ascertain the actual position of the properties. From the Survey Map, it was evident that the Respondent had an access road leading to its property. He annexed and produced as exhibit the said Map Sheet marked as "FT – 11").

r. The Defendants have blatantly and capriciously failed to heed their legitimate demands. The Respondent with total impunity had deliberately chosen to ignore the demands issued to it by them and had continued to illegally and unlawfully trespass and encroach onto their land, to their detriment.

s. In the circumstances, they had approached this Court seeking injunctive reliefs to safe guard the property pending hearing of the motion and ultimately the suit. The Respondent had no right or any interest, legal or otherwise, to occupy their property.,-Further, the occupation by the Respondent of their property was therefore illegal and a brazen affront to the law. The Respondents action of encroaching on and occupying their parcel of land aforesaid amounts to an arbitrary deprivation of their Rights and Interests over the subject property.

t. They came to this Court to seek protection and enforcement of its Rights and Interests over Land Reference No.2529 (Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1)Section V Mainland North CR No.41347situate

at Kibarani, within Mombasa County, over which parcel of land it is registered as the exclusive proprietor.

u. It was only fair and in the interest of justice that an injunction be granted to prevent the Respondent from further trespassing and or interfering with the Plaintiff/Applicant's property pending the hearing and determination of the dispute by this Honourable Court.

v. In view of the nature of this matter and so as to protect their interest and the Plaintiff/ Applicant's property it was imperative that an temporary injunction be issued restraining the Respondent, his agents, assigns and servants from interfering with the Applicants parcels of land pending the hearing and determination of this application and eventually the suit.

w. It was in the best interest of all the parties that the orders herein be granted. Unless the orders sought were granted, he would suffer irreparable injury.

V. The Notice of Motion application dated 24th March, 2022 by the Defendant in ELC No. 29 of 2022

10. The Application was brought under the provision of Sections 1A, 1B, 3A & 63 of the *Civil Procedure Act*, Cap. 21 and Order 40 Rule 7 of the Civil Procedure Rules, 2010. The Defendant/Applicant sought for the following orders:-

a. Spent.

b. Spent.

c. Spent.

d. Spent.

e. That the Order made by this Honourable Court on 16th March 2022 be set aside;

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

11. The application by the Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 18th Paragraphed Supporting Affidavit of –BOB WEYN, a director of the Defendant herein sworn and dated 24th March, 2022. The Deponent averred that:

a. The Defendant occupies the properties known as MN/V/1788 and MN/V/1893 at Kibarani, Makupa Causeway [hereinafter called 'the Defendant's Properties'].

b. It was in the interests of fairness and justice that this application be allowed;

c. The Plaintiff had not served upon the Defendant the pleadings nor the order of this Honourable Court as it was required to do in law.

d. There was a dispute in the Plaintiff's Company between the shareholders thereof being 50% owned by Mr. Jahangir Kasmali Tejani and his son, Faraaz Jahangir Tejani and as to 50% owned by African Marine Technologies Limited by which Mr. Bob Weyn and Fernando Marques were the principal shareholders;

e. Belport was the proprietor of MN/V/1792 which was sub - divided and a road [public road] excised therefrom which was demarcated as MN/V/1792/2. This public road served the properties known as MN/V/1788 and MN/V/1893 the Defendant's Properties, which were occupied by the Defendant. The public road was the only access to the Defendant's Properties from the Makupa Causeway. Belport is also the proprietor of the property known as MN/

V/2436 that abuts the aforestated public road and another property adjourning to it namely MN/V/2385 [jointly 'the Belport Properties'].

f. The parties had in the past shared a fairly cordial relationship and given the 50:50 quasi-partnership structure of Belport, it was agreed that both quasi-partners would utilize the Belport Properties in equal proportion for their own use. The African Marine Technologies Limited's portion was being used by the Defendant given that ultimate beneficial interests lies with the same parties as African Marine Technologies Limited.

g. Unfortunately a dispute arose amongst the shareholders of Belport and Jahangir Kasamali Tejani and Faraaz Jahangir Tejani, in wrongful usurpation and abuse of powers, sought to unlawfully takeover possession of the Belport Properties sometime in October 2021 and, in the process, trespassed onto the Defendant's Properties (which were occupied by the Defendant). In addition to this, and in complete disregard of the fact that the Defendant's Properties were served by a public road, Jahangir Kasamali Tejani and Faraaz Jahangir Tejani together with Mohamed Osman Yakub and Altaf Mohamed Hussein, who were neither employees of Belport nor had any instructions from it, encroached onto the said public road and blocked the Defendant's access to its Properties by erecting barriers on the public access road and preventing the Defendant from using it. Noting that the access was a public access available to the public and all users.

h. On Thursday 21st October 2021,the Defendant managed to seek the assistance of the Police in having to clear the barriers erected removed blocking the access to the Defendant's Properties. Mohamed Osman Yakub, then went to Mikindani Police Station and alleged that he was the General Manager of Belport and reported that whilst he was in custody of the Police, three men allegedly broke the main gate Belport's main gate and stole the same. The said Mohamed Osman Yakub has never been appointed a General Manager of Belport nor its employee nor has he ever been connected with it. The gate being referred to above was an unlawful barrier that Mohamed Osman Yakub had erected on the public access road abutting Belport's property and serving the Defendant's properties.

i. This necessitated the filing of the Civil suit – "ELC No. 217 of 2021 - Gateway Marine Services Limited – Versus - Mohamed Osman Yakub, Altaf Mohamed Hussein, Jahangir Kasamali Tejani and Belport Limited].

j. However in order to attempt to have the shareholders' dispute resolved amicably, African Marine Technologies Limited engaged Mr. Vikram Kanji and the Tejani's engaged Mr. Abdulhamid Aboo both being Advocates of the High Court of Kenya.

k. A meeting was held at Mr. Aboo's office sometime towards the end of October 2021/ early November 2021, between Mr. Kanji and Mr. Khagram of Messrs. A. B. Patel &Patel, Advocates and Mr. Aboo, it was agreed that no precipitate action would be taken by either party to avoid jeopardizing the settlement discussions between the parties. Consequently, the Defendant never pursued the aforesaid suit and, as the court record would show, never even served process on the Defendants in that case as it did never want to prejudice the goodwill in the discussions between Mr. Kanji and Mr. Aboo. There was goodwill exhibited on both sides to resolve the differences.

l. With complete lack of candour and in bad faith, the Tejani's under the guise of the Plaintiff, had brought these proceedings and hade wrongfully, surreptitiously and misleadingly obtained adverse Orders against the Defendant in order to improve their bargaining position in the settlement discussions which were ongoing. Unfortunately, having obtained the Orders

surreptitiously without being entirely candid with this Honourable Court, the Tejani's together with Mohamed Osman Yakub and Altaf Mohamed Hussein abused the process of the law by locking the access gates on the public road servingthe Defendant's Properties known as MN/V/1788 and MN/V/1893 and simply pasted a copy of the Court Order on the Second Gate. So far, no process or the Order have been formally served upon the Defendant. This action had been unlawfully taken by the Tejani's and others without due regard to the wording of the Court Order. The Court Order does not authorize closure of the public road.

m. The Plaintiffs actions were unlawful and constituted an illegal blocking of a public access road. Since their unwarranted illegal and unlawful actions, the Tejani's together with Plaintiff and Mohamed Osman Yakub and Altaf Mohamed Hussein, on 22nd March 2022, locked the two gates on the public road which serve the Defendant's Properties. Since then, the Defendant's business had not only been halted as no trucks or other vehicles could leave or access its premises but, the Defendant's employees who were at work having been wrongfully detained and/or imprisoned against their will and had been unable to leave the Defendant's premise to go home. Upon their complaint late last evening, the Police yet again got involved to have the Defendant's employees freed from their wrongful and unlawful confinement under the guise of this Honourable Court's orders.

n. There was only one access to the Defendant's premises using the public road and gates which had been wrongfully and unlawfully been blocked by the aforementioned individuals under the guise of these proceedings which, incidentally, had not been authorized by the Plaintiff company. As he stated earlier, he was the Managing Director of the Plaintiff Company and he had not been aware that any meeting of the directors was called for purposes of resolving that this action be taken. In this regard, it would be noticed from the alleged authority filed in these proceedings that the date of the meeting was neither stated thereon nor was the purported resolution sealed as it alleged to be and was only signed by the Tejani's.

o. Unless the orders issued by this Honourable Court, which were being misused and abused by the above named individuals were stayed, not only did the Defendant stood to suffer irreparable loss and damage but more fundamentally, its employees who could not leave the yard on the 21st March 2022 would not be able to leave the Defendant's premises without any hinderance and were effectively unlawfully jailed and/or imprisoned against their own free will. It was also apparent that unless restrained by this Honourable Court, these individuals, and particularly, Mohamed Osman Yakub and Altaf Mohamed Hussein, intend to persist in their wrongful, unlawful and malicious conduct which appeared to be intent for collateral purposes.

p. He annexed in the affidavit in a bundle and collectively marked as Exhibit 'BW - 1' all the pleadings in the Civil Case – "elc no. 217 of 2021 - Gateway Marine Services Limited -Versus - Mohamed Osman Yakub, Altaf Mohamed Hussein, Jahangir Kasamali Tejani and Belport Limited] which were relevant to these proceedings and which the Defendant placed on a back burner as a sign of its goodwill to allow the amicable settlement discussions proceed without any party feeling the other had stolen a march on it.

q. He annexed in the affidavit in a bundle and collectively marked as Exhibit "BW – 2" all the other relevant documents pertaining to this matter which all spoke for themselves including photographs showing the wrongful and unlawful conduct of the individuals named above.

r. He prayed for the Honourable Court allow the Defendant's application as prayed.

VI. The response to the Notice of Motion application dated 24th March, 2022

12. The Defendant through its director, FARAAZ TEJANI, opposed the notice of motion application through a 42 paragraphed Replying Affidavit where he deposed that:-

    a. The Application by the Defendant was without any merit, attempted to create non-existent issues between the parties all of which was in order to hoodwink the Court into believing that there existed an internal wrangling between the directors as opposed to dealing with the real issues in disputes being that of trespass and interference with the Plaintiffs parcels of land herein below mentioned.

    b. The Defendants filed their application in bad faith and blatantly lied to this Honourable Court all in an attempt to mislead the Court so that it should stay and or set aside the otherwise proper interim orders of 16th March 2022 and issued on 21st March 2022.

    c. The attempt by the Defendant to have the interim orders of preservation stayed and ultimately set aside was just an attempt by the Defendants to further their unlawful activity of trespassing and encroaching into the Plaintiff property being Land Reference No 2529(Orig No.1792/2)Section V Mainland North CR No 65940 and Land Reference No.2385 (OrigNo. 1900/1) Section V Mainland North CR No.41347 situate in Mombasa and a further attempt to continue interfering with the Plaintiff properties above mentioned.

    d. The Defendants had alleged that the Orders of 16th March 2022 and issued on 21st March 2022 and the pleadings in this matter were not served upon them as required by law and on the strength of the alleged non service, they were now seeking to have the Orders set aside.

    e. The above allegation was a blatant lie as the Court Order of 16th March 2022 and issued on 21st March 2022 was served upon the Respondent on 22nd March 2022.

    f. The Secretary of the Respondent Madam Shazia Firoz, who was also the personal assistant of Bon Weyn, acknowledged the receipt of the said orders by signing and stamping at the back of the said court order. (Annexed in the affidavit and produced as exhibit a true copy of the Affidavit of Service and Received Order marked as "FT - 1 & "FT – 2" respectively).

    g. Not only were the Orders served, the Defendant was also served with the Motion dated 15th March 2022 and the Plaint dated 14th March 2022, all of which the Defendant duly acknowledged receipt of the same by stamping on all the above mentioned documents. (Annexed in the affidavit and produced as exhibit a true copy of the said Stamp received copies of the pleadings marked as a bundle as "FT – 3").

    h. In addition to the above proper service, the directors of the Defendants herein were also personally served, vide their respective email addresses, with their letter dated 25th March 2022 and the Orders of this Honourable Court of 16th March 2022 and further advised to ensure utmost compliance with the same.(He annexed in the affidavit and produced as exhibit a true copy of the said letter dated 25th March 2022 and email of same date both marked as "FT – 4").

    i. Therefore, it was not true as alleged by the Defendants, that the pleadings and the Orders were not served upon them. This was only but a lie to the Court to try and persuade the Court in staying the said Order. The Defendants never approached the Court with clean hands as was required by law when seeking ex parte orders and as such, the Defendant ought not to be granted the Orders it was seeking.

j. It was trite law that a party must approach the Court with clean hands especially when seeking ex parte orders to be issued. The Defendants action of perpetrating falsehood and misinformation in a bid to have interim orders stayed and or set aside was an attempt to steal a match not only on the Plaintiff but also the Court.

k. The claim before the Court was that of trespass and interference of the Plaintiff's property by the Defendant.

l. The Defendants had through their Affidavit sworn by Bob Weyn in support of the said motion expressly admitted that they were using access road hived off from LR No.1792 to access their properties being 1788 and 1893.

m. The Defendant at paragraph 5 of his Affidavit in Support confirmed to be accessing its properties being LR No.1788 and 1893 using the access road (1792/1) that was created from LR No. 1792 (now LR No.2529).

n. It was not true that the access road LR No. 1792/1 led to the Defendants properties and or any of them as alleged. The said access road was created in order to create an access to LR No.7 Section IV Mainland North (owned by Chesterton Limited) which lies to the North of LR No. 2529.

o. For the Defendant to access his property using the above-mentioned access road, it had to and MUST trespass and cut through the Plaintiff property being LR No.2529.

p. The Deed Plans to the Defendants properties as well as those of the Plaintiff properties confirmed the Plaintiffs position that the access road leading to the Defendants properties aforementioned was not through LR No. 1792/1 as alleged by the Defendant but the front opposite side of the Defendants land.

q. Even from the topographical report filed by the Respondent, at page 48 of its Bundle in the Notice of Motion dated 24th March 2022, clearly depicted the actual fact that they were trespassing the Applicants property to access their property No. 1788 from the back despite having an access road from the front part. (Annexed in the affidavit and produced as exhibit marked as "FT – 5").

r. The Deed Plan for the Defendants property LR No.1788 Section IV Mainland North, supported the position that the access road leading to the said property was from the front side and not through the Plaintiffs property as alleged by the Respondent.

s. From the Deed Plan, existing track leading to the Respondents property was not vide the access road (being LR No. 1792/2) as used by the Respondent. He annexed in the affidavit and produced as exhibit the Deed Plan for the Defendants property being LR No.1788Section IV Mainland North marked as FT6).

t. The usage of the access road (being LR 1792/1)by the Respondents in accessing their property automatically led to the trespassing and interfering with the Plaintiffs parcel of land above mentioned. The Deed Plan for the Plaintiffs Applicants property LR No. 2529 (Deed Plan No.335817) clearly showed that there was no access road through the property that led to either of the Defendants properties being LR No. 1788 and or 1899. (He annexed and produced as exhibit a true copy of the said Deed Plan No.335817 of 20th April 2012 marked as "FT – 7").

u. LR No. 2529 was formerly LR No.1792.LR No.1792 was divided in order to create an access road leading to Plot No. 7 which is adjacent to I.R No.1792 to the North and hence the creation of the straight access road (1792/1) which was on the right of LR No.2529 (formerly 1792). He annexed and produced as Exhibit a true copy of the former Deed Plan for LR No.1792 marked as FT8).

v. This was all but an attempt by the Respondents to seek to confuse the mind of the Court by believing the lie that they had always tried to perpetrate that the access road leading to their property was that leading to LR No. 7 Section IV Mainland North.

w. It was thus abundantly evident that the Defendants had continued to trespass and interfere with the Plaintiffs parcels of land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No. 2385(Orig No. 1900/1) Section V Mainland North CR No.41347 situate in Mombasa and or a part of them by continuing to trespass and encroach thereon despite having a separate access road.

x. The suit herein was properly filed after the Plaintiff having resolved by virtue of a resolution passed that the same be filed against the Defendant. He was well aware that the Resolution was duly sealed and supplied to their advocates for purposes of proceeding with the suit. It was therefore not true that the Resolution was not sealed. The same was duly sealed by the seal of the Plaintiff. He annexed and produced as exhibit a true copy of the said Resolution marked as "FT – 9").

y. Further the Company's Articles of Association at Article 6 thereof clearly stated that the Quorum shall be constituted if not less than two persons are present at the said meeting and who were holding not less than 50% of the paid up capital of the Company. He annexed in the affidavit and produced as exhibit a true copy of the said Articles of Association of the Plaintiff marked as "FT – 10").

z. Jahangir Kassamali Tejani and himself cumulatively hold 50% of the Company and as such they had the necessary quorum to hold the meeting whereby we passed the aforesaid resolution. He annexed and produced as exhibit a true copy of the Plaintiffs CR 12 marked as "FT – 11").

aa. From the CR12, its evident that the Defendants Director, Mr. Bob Weyn was not the Managing Director as alleged and further nor were there any Non-Executive Director as alleged by Mr. Bob Weyn. This was all but an attempt to confer upon himself non - existent positions.

ab. With respect to the alleged issues that there existed an internal wrangling between the Directors of the Plaintiff is further from the truth and a figment of the Defendants imagination.

ac. The issues in this suit are primarily and fundamentally pertaining to trespass, encroachment and interference with our parcels of land by the Defendant.

ad. The interim orders in place ought not to be discharged at it had been confirmed by the Defendants that they were trespassing and encroaching onto the Plaintiff property LR No. 2529 and 2385.

ae. Even the Defendants employees had and were still continuing to trespass into their properties above mentioned to access the Defendants property thereby putting their property at risk and interference by third parties.

af. Despite of the Plaintiff being the actual registered owners and proprietors of their subject properties, the Defendant had instructed the guards from Senaca EA Limited not to grant

access to the Plaintiff and or their representatives onto their own property thereby curtailing their constitutional rights to their property which action by the Defendant in an infringement on the Plaintiff right to property as provided under Article 40 of *the Constitution* of Kenya.

ag. They were not aware and had not been served with the pleadings in the civil case of "ELC No. 217 of 201 - Gateway Marine Services Limited – Versus - Mohamed Osman Yakub & Others".

ah. On 1st April 2022, their Advocate wrote a letter of even date addressed to Messrs. Abdulhamid Aboo of Aboo and Company Advocate whereby he sought confirmation from the said Senior Advocate regarding the veracity of the statements made by Bob Weyn at paragraphs *10* & 11 of his Supporting Affidavit of 24th March 2022. He annexed and produced as exhibit a true copy of the said letter marked as "FT – 12").

ai. In response thereto, Mr. Aboo wrote a response dated 1st April 2022 wherein he stated as follows:

    i. He was not aware of the alleged civil suit - ELC Case No. 217 of 2021

    ii. The existence of the above mentioned case was never mentioned to him by either Mr. Vikram or Mr. Sanjeev

    iii. He was advised that Bob Weyn was using Belport property to obtain access to another property of his own down under via Belport.

    iv. Mr. Aboo met with Mr. Vikram and Mr. Sanjeev at his offices whereby it was agreed that they(Vikram and Sanjeev)would convey to him a proposal which he would they convey to Mr. Jahangir;

    v. That nothing was conveyed by Mr. Vikram even after various reminders on whatsapps and by phone for many months.

    vi. That he had committed to Mr. Jahangir to stop any action that he may wish to take. He did not make any promises to Mr. Vikram or Sanjeev. He annexed and produced as exhibit a true copy of the said letter marked as "FT – 13").

        a. Therefore, he invited this Honourable Court to dismiss the Defendant's Notice of Motion dated 24th March 2022 with costs and further invite this Honourable Court to confirm the said Orders until the suit was heard and determined.

VII. The Notice of Motion application dated 4th April, 2022 in ELC Case No. 29 of 2022 by the Plaintiff/Applicant

13. The application was brought under the provision of Section 5 of the *Judicature Act* Cap. 8 Laws of Kenya and Parts 23 and 81 of the Civil Procedure (Amendment No.2) Rules 2012 (English), Section 3A of the *Civil Procedure Act*, Cap.21. The Plaintiff in the civil case numbers ELC. No. 29 of 2022 sought for the following orders: -

    a. Spent.

    b. That the Defendant's Director, Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn, Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited, be all summoned before this Honourable Court to show cause why they should not be committed

to civil jail for blatantly refusing, neglecting and or failing to comply with the orders of 16th March 2022 and issued by this Honourable Court on the 21st March 2022.

c. That on failing to show necessary cause, the Directors of the Defendant, Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn & Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited, be all, or either of them as determined by the Court, committed to prison for a maximum period of six(6) months for contempt of court.

d. That the Defendant's Director, Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn, Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited named contemnors or either of them as determined by the Court, be barred from addressing this Honourable Court in this matter unless and until they shall have purged themselves of the contempt.

e. That any other or further orders as this Honourable Court deems fit and appropriate.

f. That the costs of these contempt proceedings be borne by the Respondent.

14. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 33rd Paragraphed Supporting Affidavit of –Faraaz Tejani, a director of the Plaintiff/ Applicant herein sworn and dated 4th April, 2022 with sixteen (16) annextures marked as “FT 1 to 16”. The Deponent averred that:

i. Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn & Fernando De Oliveira were the Respondent's Director, responsible for the overall management of the Respondent. Annexed in the affidavit and produced as exhibit a true copy of the Defendants’ CR12 Form marked as “FT – 1”).

ii. On 16th March 2022, the Honourable Court issued restraining Orders against the Respondents and in particular made the following orders:-

a. That pending the hearing and determination of this application inter parties, a temporary injunction be and is hereby issued restraining, barring, stopping and or preventing the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, trespassing, and constructng, erecting, renovating and or in any manner interfering with any and or both of Plaintiffs parcel of land known as Land Reference No 2529(Orig No.1792/2) Section V Mainland North CR No 65940and Land Reference No.2385 (Orig No.1900/1)Section V Mainland North CR No.41347 situate in Mombasa

b. That the Notice of Motion dated 15th March 2022 be served for inter parties hearing on 6th April 2022 before ELC No. 3

iii. Said order contained a Penal notice on its face and specified the consequences of disobedience. Annexed in the affidavit and produced as exhibit a true copy of the Order marked as “FT – 2”).

iv. The said Court Order of 16th March 2022 and issued on 21st March 2022 was served upon the Respondent on 22nd March 2022.

v. The Secretary of the Respondent Madam Shazia Firoz, who is also the personal assistant of Bon Weyn, acknowledged the receipt of the said orders by signing and stamping at the back of the said court order. Annexed in the affidavit and produced as exhibit a true copy of the Affidavit of Service and Received Order marked as “FT - 3 & 4” respectively).

vi. Not only were the Orders served, the Defendant was also served with the Motion dated 15th March 2022 but also the Plaint dated 14th March 2022, all of which the Defendant duly acknowledged receipt of the same by stamping on all the above mentioned documents. Annexed in the affidavit and produced as exhibit a true copy of the said Stamp received copies of the pleadings marked as a bundle as "FT – 5").

vii. The directors of the Respondents had the power to order compliance and or to comply with the court order obey all court orders served upon them without delay or obstruction.

viii. The said Orders, were also served via email enclosed to their letter dated 23rd March 2022 upon the General Manager Senaca EA Limited who were also advised of its contents and further advised to comply with the same and ensure that they never breached its terms and contents. Annexed and produced as exhibit a true copy of their letter dated 23rd March 2022 and email of 23rd March 2022 marked as a bundle as "FT – 6")

ix. The Directors of the Defendants herein were also personally served, vide their respective email addresses, with their letter dated 25th March 2022 and the Orders of this Honourable Court of 16th March 2022 and further advised to ensure utmost compliance with the same. Annexed in the affidavit and produced as exhibit a true copy of the said letter dated 25th March 2022 and email of same date both marked as "FT – 7").

x. Despitethe Court Order issued and served PERSONALLX upon the Directors on 25th March 2022 the Respondents, their Directors, their agents, servants and representatives of the Respondents have blatantly breached the same:

xi. On the alleged acts of contempt the deponent relied on the following:-

  h. By allowing the continuing interference with the Applicants parcels of land being No 2529(Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa in blatant disregard of the Court Order.

  i. The said Directors and their servants had failed and continued to trespass and encroach on the Applicants parcel of land above mentioned contrary to the Order.

  j. Despite of the Respondent having acknowledged the receipt of the said orders, and being aware of the order, the Respondents agents and servants and security guards had prevented the Applicants and their representatives from accessing, dealing with their parcels of land above mentioned contrary to the said orders.

  k. In addition the Respondents continue in their illegal acts by continuing to interfere with the Applicants parcels of land above mentioned.

  l. The Respondent had continued to retain the services of Senaca EA Limited who had continued to interfere with the Applicants parcel of land by blocking the Applicant from accessing its parcel of land.

  m. The Respondents had refused to comply through acts of omission and commission as aforesaid.

  n. To date the Applicant could not access their property owing to the continued interference by the Respondent in blatant disregard of the orders of the Honourable Court.

xii. The Respondents Directors were able to comply with the court order without complications but had made a deliberate choice to disobey the same.

xiii. The Respondents action amounted to interference with the administration of justice, blatant disregard of the law and was a mockery of the legal justice system.

xiv. Immediately upon the issuance of the Orders of the Court of 16th March 2022, the Plaintiff retained the services of Guardco Security Guards Limited to provide security services on the Plaintiff property and to ensure that the said property was not trespassed. Annexed in the affidavit and produced as exhibit a true copy of the said retention letter dated 23rd March 2022 marked as "FT – 8").

xv. Although the Guards managed to access their property, they faced sever resistance from the Respondents and their agents who excessively interfered with their work by forcefully entering into the Plaintiff property and trespassing into it in order to gain access to the Defendants property which lies adjacent to the Plaintiff properties above mentioned.

xvi. On the night of 23rd March 2022,the Respondents agents and security guards attacked the security personnel of Guard Co Security Guards Limited by assaulting them by beating them up and chasing them out of the Plaintiff property.

xvii. The Defendants security guards, Senaca Security Services Limited then proceeded to lock up the gate leading to the Plaintiff property and thereafter, had declined to grant access to the Plaintiff and or their representatives from accessing its parcels of land.

xviii. The Director of Guard Co Security Guards Limited, Mr. Hamza Modhar proceeded to report the incident of 23rd March 2022 at Mikindani Police Station where the said report was records in the Occurrence Book as Report No. OB 25/25/03/22. He annexed and produced as exhibit a true copy of the said extract of the Occurrence Book (OB) marked as "FT – 9").

xix. The said security firm, wrote a letter dated 25th March 2022 addressed to them whereby they advised of the criminal incident perpetrated by the agents and security guards of the Respondent, under the instruction of the Respondent, and further advised that owing to the hostility by the Respondents agents, it was impossible to access their property above mentioned. Annexed and produced as exhibit a true copy of the said letter marked as "FT – 10").

xx. For purposes of ensuring compliance and adherence to the orders of the Court, they wrote a letter dated 23rd March 2022 addressed to the Sub County Police Commander, Mikindani Police Station whereby they sought assistance from the Police to ensure compliance with the orders of the Court. He annexed and produced as exhibit a true copy of the said Letter marked as "FT – 11").

xxi. The Defendant had continued to disobey the Orders issued by continuing to illegally occupy, use, trespass and interfere with their parcel of land above mentioned.

xxii. The trespass was in fact confirmed by the Respondents Director, Bob Weyn in his Affidavit sworn on 24th March 2022 wherein he stated that he used the access road (being I.R No.1792/2) leading to Plot No.7 Section IV Mainland North (owned by Chesterton Properties Limited) to access his properties being 1788 & 1893 Section IV Mainland North. He annexed in the affidavit and produced as exhibit a true copy of the Respondent's Directors Affidavit marked as "FT – 12").

xxiii. Even from the topographical report filed by the Respondent, at page 48 of its Bundle in the Notice of Motion dated 24th March 2022, clearly depicts the actual fact that they were trespassing the Applicants property to access their propertyNo.1788 from the back despite having an access road from the front part. (Annexed in the affidavit and produced as exhibit marked as "FT – 13").

xxiv. The said access road never led to the Defendants parcels of land above mentioned and for the Defendants to access their property through the said access road, they MUST trespass and encroach through the Plaintiff parcel of land LR No.2529 Section IV Mainland North.

xxv. Even the Deed Plan for the Defendants property LR No.1788 Section IV Mainland North, supported the position that the access road leading to the said property was from the front side and not through the Plaintiffs property as alleged by the Respondent. From the Deed Plan, existing track leading to the Respondents property was not vide the access road(being LR No. 1792/2) as used by the Respondent. Annexed and produced as exhibit the Deed Plan for the Defendants property being LR No.1788Section IV Mainland North marked as FT14).

xxvi. The usage of the access road (being LR 1792/1) by the Respondents in accessing their property automatically led to the trespassing and interfering with the Plaintiffs parcel of land above mentioned.

xxvii. The Deed Plan for the Plaintiffs Applicants property LR No. 2529 (Deed Plan No.335817) clearly showed that there was no access road through the property that led to either of the Defendants properties being LR No. 1788 and or 1899.

xxviii. LR No.2529 was formerly LR No.1792.LR No.1792 was divided in order to create an access road leading to Plot No.7 which was adjacent to LR No.1792 to the North and hence the creation of the straight access road (1792/1) which was on the right of LR No.2529 (formerly 1792).(annexed and produced as Exhibit a true copy of the former Deed Plan for LR No. 1792 marked as "FT – 16").

xxix. This was all but an attempt by the Respondents to seek to confuse the mind of the Court by believing the lie that they had always tried to perpetrate that the access road leading to their property was that leading to LR No.7 Section IV Mainland North.

xxx. Thus, it was abundantly evident that the Defendants had continued to trespass and interfere with the Plaintiffs parcels of land Reference No 2529 (Orig No. 1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa and or a part of them by continuing to trespass and encroach thereon despite having a separate access road.

xxxi. Orders of the Court, MUST, for all intents and purposes, be obeyed. However, the Respondents had deliberately chosen to disregard the same, blatantly disobey the orders of this Honourable Court.

xxxii. Therefore, it was in the interest of justice and in preserving the integrity of this Honourable Court that the application be heard and allowed as prayed.

VIII. Submissions

15. On 19th October, 2023 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 27th October, 2021, 15th March, 2022, 24th March, 2022 and 4th April, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to

that all the parties obliged and on 5th February, 2024 a ruling date was reserved on 2nd May, 2024 by the Honourable Court accordingly.

A. The written submissions of he Plaintiff for the Notice of Motion application dated 27th October, 2021

16. The Plaintiff in ELC No. 217 of 2021 and Defendant in ELC No. 29 of 2022 through the Law firm of Messrs. A.B. Patel & Patel LLP filed their written submissions dated 16th October, 2023. Mr. Sanjiv Khagram Advocate commenced his submissions by stating that the application dated 27th October, 2021 was brought under the provision of Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Cap. 21, It sought for an order restraining the Defendants/Respondents whether by themselves and/or their servants or agents from illegally and unlawfully blocking the Plaintiff's access to its property or in interfering in any manner whatsoever with the its business activities and/or creating a nuisance by blocking access to the Plaintiff's property pending the hearing and determination of this suit.

17. He stated that the submissions were made in support of the above mentioned application (hereinafter referred to as "the Plaintiff's Application). It was firmly premised on the grounds appearing on the face of it and further supported by the affidavit of Bob Weyn (hereinafter referred to as "the Plaintiffs Affidavit") attached thereto with annexures in the bundle of document also containing the Plaint, list of witnesses and documents all filed as a bundle in this Honourable Court's registry on 29th October, 2021 (the whole bundle was Paginated from Page 1-14).The application was feebly opposed by the 4th Defendant who filed the Replying Affidavit of one Faraaz Tejani sworn and filed on even date of 27th February, 2022.

18. On the facts, the Learned Counsel informed Court that it was not in contest that the Plaintiff, Gateway Marine Services Limited, occupied the properties known as MN/V/1788 and MN/V/1893 which were situate at Kibarani, Makupa Causeway, Mombasa('the Plaintiffs Properties'). Equally, it was not in contest that the 4th Defendant herein, Belport Limited ('Belport') was a Quasi - Partnership Company owned as to 50% by the 3rd Defendant, Jahangir Kasamali Tejani and his Son Faraaz Jahangir Tejani and 50% by Bob Weyn together with his Partner, Fernando Marques through Messrs. African Marine Technologies Limited. Mr. Bob Weyn was the Managing Director of Belport whereas the 3rd Defendant was its Non - Executive Director.

19. Belport was the proprietor of MN/V/1792 which was subdivided and a road [public road] excised which was demarcated as MN/V/1792/2. This public road served the Plaintiff, being the only access to its properties aforementioned was from the Makupa Causeway. According to the Learned Counsel, the Honourable Court would recall this from the site visit that was conducted on 6th May, 2022.Belport was also the proprietor of the property known as MN/V/2436 that abuts the aforestated public road and the property adjoining to it namely MN/V/2385 [jointly 'the Belport Properties'].

20. It was the humble submission of the Learned Counsel and as could be observed from the pleadings filed before the Honourable Court, that parties had in the past shared a fairly cordial relationship and given the 50:50 structure of Belport, it was easily agreed that both quasi-partners would utilize the Belport properties in the same proportion for their own use.

21. Unfortunately, this tranquility had been cut short by a dispute that had arisen amongst the quasi – partners. Indeed, the 3rd Defendant in wrongful usurpation and abuse of powers, wrongly and unlawfully took over possession of the Belport properties and in the process trespassed also onto the Plaintiff's properties. In addition to this and in complete disregard of the fact that the Plaintiffs properties were served by a public road, it was noteworthy to bring to the court's attention that the 3rd

Defendant, together with the 1st and 2nd Defendants who were neither employees of Belport nor had any instructions from it, had encroached onto the said public road and blocked the Plaintiffs access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it.

22. According to the Learned Counsel given the circumstances aforementioned, the Plaintiff on the morning of Thursday 21st October, 2021 sought the assistance of the Police in having the erected barriers removed and the blocked access to the Plaintiffs property cleared. The 1st Defendant, purporting to be the general manager of Belport, went to the Mikindani Police Station later on and filed a report that that whilst he was in custody of the Police, three men allegedly broke the main gate (Belport's main gate) and stole the same.

23. The Applicant wished to point out that the gate being referred to in this report was the unlawful barrier that the 1st Defendant had erected on the public access road abutting Belport's property and serving the Plaintiffs properties. The 1st Defendant had never been appointed as General Manager of Belport nor had he nor the 2nd Defendant been engaged in any capacity whatsoever to act on behalf of Belport. This position remained uncontroverted by the Defendants in their response to the application and further in their pleadings filed in court in this matter. The Defendants went even further in their unlawful acts by engaging the services of a security firm on 25th October, 2021 which deployed and placed two guards at the top yard who have refused to take any instructions from Mr. Bob Weyn, a 50% shareholder of Belport claiming to be under instructions from the Defendants to block the entrance gate serving the Plaintiffs properties yet again hindering its free and uninterrupted use of the public road serving its properties and access thereto.

24. Although the police managed to clear the road, the 1st to the 3rd Defendants were still intent on continuing with and persisting in their wrongful and unlawful actions of blocking access to the Plaintiffs properties, creating a disturbance and a nuisance and frustrating the Plaintiff and its quite use and enjoyment of its properties and the peaceful carrying out of its business thereof hence the filing of this application and suit seeking the restraint orders against the Defendants. In the circumstances, it was the Learned Counsel's contention that unless restrained by this Honourable Court, it was clear that the Defendants intended to persist in their wrongfully and unlawful and malicious conduct which appeared to be intent for collateral purposes.By this Honourable Court's permission, parties had tried to negotiate with the view of having a settlement recorded in court but the Learned Counsel averred that the negotiations failed having been frustrated by the 1st to the 3rd Defendants.

25. On the issue of law and evidence, the Learned Counsel submitted that it was now well settled law that the granting of injunctive reliefs was a discretionary exercise predicated upon three (3) interdependent and sequential limbs to wit:

    a. that the claimant has established "a prima facie case" with a probability of success; once established,

    b. the claimant ought to prove that an award of damages would be insufficient to alleviate an damage caused and finally;

    c. when in doubt, the court would decide the application on a balance of convenience as was held in the celebrated cases of "Giella – Versus - Cassman Brown & Co. Limited 6 [1973] EA 358" and "Nguruman Limited – Versus - Jan Bonde Nielsen & 2 Others, [2014] eKLR".

26. Applying these principles to the instant case, and on whether the Plaintiff/Applicant had shown a prima facie case with a probability of success, the Learned Counsel submitted that the Court of Appeal

in another celebrated case of "MRAO Ltd – Versus - First American Bank of Kenya Ltd & 2 Others [2003] KLR 123" (Attached hereto and marked 'A'), defined a prima facie case as:

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

27. The Plaintiff/Applicant as could be observed from the submissions above, had presented before court material enough to come into a comprehensive and formidable conclusion that indeed the Plaintiff's rights had been infringed by the Defendants which called for an explanation. Clearly, from the evidence tendered, there was no and could be no doubt as to the lack of bona fides and candor on the part of the Defendants herein and most particularly the 1st to 3rd Defendants herein and established a prima facie case with a probability of success in the matter.

28. The Learned Counsel asserted that there was indeed a serious or fair issue to be tried between the Plaintiff and the Defendants as could be observed in the Affidavit of Mr. Faraaz Tejani - a director of Belport-who denied the fact that there was an access road that was hived off Belport's properties for purposes of gaining access to the Plaintiffs properties but rather that the access was meant for another property, L.R. No. 7 Section IV Mainland North. When in actual sense due to the common directorship/ownership of the Plaintiff and the 4th Defendant which saw a fairly cordial relationship enjoyed in the past wherein it was easily agreed that both quasi-partners would utilize the Belport properties in the same proportion for their own use and hence the access to Plaintiffs properties was created.

29. He submitted that it was until when the tranquility was cut short with a dispute that arose amongst the quasi-partners that the Defendants in wrongful usurpation and abuse of powers, wrongly and unlawfully took over possession of the Belport properties and in the process not only trespassed onto the Plaintiff's properties but also encroached onto the public road that was created for the Plaintiff to gain access to its properties by erecting barriers on the said public access road in a bid to prevent the Plaintiff from using it. During the court site visit conducted on 6th May, 2022 at 12.25PM, this Honourable Court had the opportunity to witness the situation on the ground and even saw the only two possible scenarios of unlocking and/or accessing the Plaintiff's properties now that the Defendants had breached the gentleman's understanding that span over 9 years giving the Plaintiff access to its properties. The two scenarios would be:

    i. Accessing the Plaintiffs properties from the extreme lower side, the Plaintiff having made an arrangement with the Kenya Forest Department-see Paragraphs VI(d) and the diagram at (g) on Pages 6 & 7 of the Site Visit Report, or

    ii. Accessing them through the proposed access road on the rare side of the Plaintiffs properties which was completely cumbersome and impossibledue to its narrowness, likelihood of encroachment, insecurity issues and also the cost involved in refurbishing it for usage considering the geographical nature of the area-see Paragraphs Vl at Pages 7-10 of the Site Visit Report.

30. The Learned Counsel submitted that in the circumstances, they could only submit that based on the set of facts of the case as submitted that based on the set of facts of the case as submitted by the Plaintiff, may this Honourable Court make a finding that the Defendants had not given plausible reasons for having so acted thereby infringing on the Plaintiffs proprietary and proceed to grant an injunction on this tenet of law as bound by the principles announced in the Mrao Case.

31. According to the Learned Counsel, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused. No doubt, the Plaintiff stood to suffer and continues to suffer irreparable damage and loss due to the Defendants' actions to block the Plaintiff's access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it. The 3rd Defendant, together with the 1st and 2nd Defendants who were neither employees of Belport nor had any instructions from it, had encroached onto and blocked the Plaintiff's access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it. These individual had never been appointed in any capacity in the 4th Defendant company and purported to be or act like Executive Directors of the 4th Defendant and proceeded to abuse their positions by unilaterally removing the Security Company engaged by Belport without any consultation or authority of the said Company.

32. The incident of 25th October, 2021 wherein the 1st, 2nd and 3rd Defendants engaged a Security Company, Farsight Security who placed two guards at the top yard with strict instructions not to take any orders from Belport or its Managing Director and further the blockage of the entrance gate serving the Plaintiffs properties hindered free and uninterrupted use of the public road serving the Plaintiffs properties and access thereto making it run at a loss. The Honourable Court would recall that during the site visit there was a queue of trailers that were denied access to the Plaintiffs properties on that which action really frustrated causing it to run into losses as it was unable to enjoy a quite use and enjoyment of its properties and the peaceful carrying out of its business thereof. Therefore, unless restrained by this Honourable Court, it was clear that the 1st to the 3rd Defendants intended to persist in their wrongful and unlawful and malicious conduct which appeared to be intent for collateral purposes. On the issue of when in doubt the court would decide the application on a balance of convenience, the Learned Counsel submitted that the balance of convenience in this case lied more with the Plaintiff for the simple reasons that the purpose of an interlocutory injunction was to preserve the substratum of the case. The Plaintiff having established a prima facie case, the only way to preserve the property and to avoid it going to waste due to the frustrations orchestrated by the Defendants was to restrain the Defendants whether by themselves or their agents and/or servants from illegally blocking the Plaintiffs access to its property or in any way interfering with its business activities by blocking access to the Plaintiffs properties.

33. To buttress on his points, the Learned Counsel referred Court to the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factory Company Limited & 2 others (2016) eKLR" whereby the court dealing with the issue on 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 injury 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 on convenience lies."

34. Therefore, he submitted that this Honourable Court should look at the greater harm that had befallen the Plaintiff who was unable to access its properties due to the unlawful actions of the Defendants

thereby injuring her business activities. Thus, the Plaintiff stood to suffer a greater loss if it would not be allowed to access its properties. The result was that the balance of convenience favoured the Plaintiff/ Applicant in this case and may this Honourable Court proceed to grant the orders prayed and fix the main suit for hearing on a priority basis.

35. The Learned Counsel argued that this Honourable Court has a greater duty to ensure that it maintained the integrity of the system of administration of justice and ensure that justice was not only done but was seen to be done by, amongst other measures, protecting property owners from illegal and unlawful actions perpetuated for ulterior and extraneous considerations as observed in the actions of the Defendants herein. The Plaintiff's application be allowed as prayed.

B. The written submissions of the Plaintiff on the Notice of Motion applications dated 24th March, 2022 and 4th April, 2022

36. The Plaintiff in the ELC No. 29 of 2021 through the Law firm of Messrs. Khalid Salim & Company Advocates filed the written submissions dated 19th October, 2022. Mr. Khalid Salim Advocate submitted that the applications for determination by this Honourable Court are as follows:

    a. Notice of Motion dated 4th April 2022 filed by the Plaintiff, Belport Limited seeking to have Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn, Fernando De Oliveira and John Sanga who were the Defendant's directors and the General Manager of Senaca EA Limited held in contempt of court for having deliberately defied and disobeyed the Orders of this Court of 16th March 2022 and issued on 21st March 2022.

    b. Notice of Motion dated 15th March 2022 by the Plaintiff seeking interim orders of injunction restraining the Defendants from trespassing and or interfering in any manner whatsoever with Plots known as Land Reference No 2529 (Orig No.1792/2)Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa pending hearing and determination of this suit.

    c. Notice of Motion dated 24th March 2022 by the Defendants seeking to have the Orders of 16th March 2022 set aside.

37. According to the Learned Counsel, it was trite law that where there existed an application for contempt of court orders, the same ought to be heard in priority to any other pending applications. This position was well settled in law and was affirmed by Justice Ibrahim(as he then was) in "Econet Wireless Kenya Limited – Versus - Minister for Information and Communications of Kenya and Another [2005]eKLR" where the said Judge stated as follows:

> " It is my view that due to the gravity with which the law and the court is deem any contempt of court or allegations thereof, the court usually under an obligation to deal with such contempt of court or investigate allegations that it has taken place. This is in particular where the alleged contemnor is a party in proceedings and is affected by the orders granted by the court."

38. Where an application for committal for contempt of court orders were made the court would treat the same with a lot of seriousness and urgency and more often would suspend any other proceedings until the matter was dealt with and if the contempt was proven to punish the contemnor or demand that it was purged or both. For instance, an alleged contemnor would not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt was heard. The reasons for this approach were obvious-a contemnor would have no right of audience in any court of

law unless he/she was punished or he/she purged the contempt. So, the court was obliged to hear the application for committal first before any other matter. This was a general rule which must be applied strictly. In light of the above decision, they invited this Honourable Court to agree with the Applicant herein by proceeding to deal with their motion above mentioned before any other application before it and in particular, the one by the Defendant seeking to have the Orders of 16th March 2022 set aside.

39. On the Plaintiff's Notice of Motion application dated 4th April, 2022, the Learned Counsel submitted that vide a Notice of Motion application dated 4th April 2022, the Plaintiff herein sought for the orders as already set out above in this Ruling. The application was supported by an affidavit sworn by Faraaz Tejani on the 4th April 2022. According to the Learned Counsel, the brief facts were that the Plaintiff is the owner of the parcels of land known as Land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1)Section V Mainland North CR No.41347 situate in Mombasa. Through its advocate on record it filed this suit on 16th March 2022 and simultaneously filed a notice of motion dated 15th March 2022 under certificate of urgency seeking for the orders already set out above in this Ruling.

40. On 16th March, 2022, the Honourable Court issued restraining Orders against the Respondents and in particular made the following orders:

    a. That pending the hearing and determination of this application inter parties, a temporary injunction be and is hereby issued restraining, barring, stopping and or preventing the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, trespassing, and constructing, erecting, renovating and or in any manner interfering with any and or both of Plaintiffs parcel of land known as Land Reference No 2529(Orig No. 1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa

    b. That the Notice of Motion dated 15th March, 2022 be served for inter parties hearing on 6th April 2022 before ELC No.3

41. The extracted order was served at the Respondent's offices on the 22nd of March 2022 and receipt was acknowledged. The same was also served on the Defendant's directors as seen on the company's CR12 form (annexure as “FT – 1” in their application), through their respective email addresses on the 25th of March 2022. It is the Plaintiff contention that the defendant's directors, agents/servant and/or representatives, despite being served with the orders blatantly and with impunity breached the same by among others:

    a. Allowing the continuing interference with the Applicants parcels of land being No 2529(Orig No.1792/2)Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa in blatant disregard of the Court Order.

    b. Continuing to trespass and encroach and interfere with the Applicants use of the stated parcel of land contrary to the Order.

    c. Preventing the Applicants and their representatives from accessing, dealing with their parcels of land above mentioned contrary to the said orders through use of security guards from Senaca East Africa Ltd

    d. Blocking the applicants access to the above stated parcels of land contrary to this court's orders

42. The Plaintiff contended that these actions amounted to interference with the administration of justice and were a blatant abuse of the law and a mockery of the legal justice system. In proving that the

Defendants were indeed served, they immediately proceeded to instruct their advocates to have the said orders set aside on 24th March 2022, only 3 days after the said orders were issued.

43. The Learned Counsel relied on the following issues of determination which was whether the Plaintiff application for contempt against the Defendants officials should be allowed. These were firstly, whether the Plaintiff application should be allowed. The Learned Counsel submitted that a party accused of contempt would not be heard by the court unless said party purged themselves of the contempt. To buttress on this point, the Counsel cited the case of:- "Cecil Miller – Versus - Jackson Njeru & Another [2017]eKLR" where the court held the ingredients to be established when deciding an application for contempt are as follows:

> " a) The terms of the order (or injunction or undertaking were clear and unambiguous and were binding on the defendant.
>
> b) The Defendant had knowledge of or proper notice of the terms of the order.
>
> c) The Defendant has acted in breach of the terms of the order.
>
> d) The Defendant conduct was deliberate."

44. He averred that the orders extracted in thus suit were directed towards the Defendant, Gateway Marine Services Limited. It was known that a company was not natural persons and was incapable of committing an illegality on its own. In this instance, the person in charge of running the company or responsible for its conduct of business was the one guilty of contempt. In this case, that would be the companies named directors. He further referred Court to the case of "Eliud Muturi Mwangi (Practicing) in the name and style of Muturi &Company Advocates) – Versus - LSG Lufthansa Services Europa/Africa GMBH & another [2015]eKLR" the court in its ruling held that:

> " Citing third parties for contempt, the law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples arecontempt on the face of the court, contempt by officers of a company or corporation. contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title."

45. A party was under an obligation to comply with a court issued order. What was important, was that the party had knowledge of the order. Court orders were binding on parties to whom it was addressed until they were discharged. The Counsel referred Court to the provision of Section 29 of the *Environment and Land Court Act*, whereby it was an offence punishable, upon conviction to a fine of not exceeding a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/=) or to imprisonment for a term not exceeding two years, or to both, if any person refused, failed or neglected to obey an order or direction of the court given under the Act. Ibrahim J in "Econet Wireless Kenya Ltd (Supra)", stated:

> " It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obeyit unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void".

46. The orders in question here were extracted on 21st March 2022. They were promptly served on the Defendant on the 22nd March 2022 by a court process server. Receipt was acknowledged by the Defendant's Human Resource Manager one Ms. Shazia Firoz. A stamp bearing the name of the Defendant could be seen at the back of the order produced as annexure as "FT – 4" and there was an affidavit of service to this effect indicating the date, time, person upon whom service was effected and place of service. The Defendant's directors were also served with the said order through their email addresses on 25th March 2022 while the general Manager of Senaca EA Limited was served on 22nd March 2022. They had thus established that the Defendant's officers and those of Senaca were indeed aware of the court orders all this while. The terms of the orders of 16th March 2022 were clear, unambiguous and binding on the Defendant company. The orders restrained, prohibited, barred and/or prevented the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, trespassing, and constructing, erecting, renovating and or in any manner interfering with the subject parcels of land, pending the hearing of the Plaintiffs application.

47. The Learned Counsel submitted that on the act of contempt done by the Defendant's officers. Despite the existence of the said orders which restrained, prohibited, barred and/or prevented the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, trespassing, and constructing, erecting, renovating and or in any manner interfering with the subject parcels of land, the Defendants agents, directors and representative repeatedly flouted the same by continuing to trespass on to the plaintiffs parcel of land and use the road on said parcels to access their parcel of land. This fact was confirmed by the Defendant's Director, Bob Weyn during the site visit conducted by this Honorable court on the 6th May 2022. The court itself was able to note the continued trespass occasioned by the Defendants as vehicles were noted to be using the road cutting through the Plaintiffs parcel to access the Defendant's parcel.

48. The Learned Counsel submitted that in addition, the Defendant's officers used security guards from Senaca East Africa Limited who blocked the Plaintiffs officers from accessing their parcel of land, despite officers from the said Senaca Limited also being aware of the courts orders. All the parties against whom the orders of contempt were sought had been shown to have been aware of this court's orders and knew of the terms contained therein. The Respondent's directors decision as well as the actions of the officials from Senaca EA Ltd not to comply with the orders was thus willful, intentional and blatant. The Plaintiff had shown that all the ingredients that constitute contempt had been met. They submitted that this court should hold that the directors of both the Defendant and Senaca EA Limited should be held to be in contempt of the orders of 16th March 2022.

49. The Learned Counsel cited Justice Odunga in his ruling of "Republic – Versus - County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR", quoted a myriad of cases which in a nutshell all affirm this position:

> " That court orders are not issued in vain, they are meant to be obeyed until the same are discharged and/or set aside, no matter whether they are regular or irregular obtained and that such disobedience should be punished in order to maintain and safeguard the rule of law, as well as the courts' authority and dignity.

50. In line with the above submissions, the Learned Counsel urged the Honourable Court to allow the application of 4th April, 2022.

51. On the Notice of Motion application dated 15th March, 2022, the Learned Counsel submitted that the application sought for the orders already stated out above in this Ruling. Without belaboring the court on the background of this matter, the Learned Counsel submitted on whether or not the Plaintiff

had met the threshold for granting the orders of injunction as it was not in dispute that the above mentioned parcels of land were owned by the Plaintiff. Further, it was also not in dispute that the Defendant continued to trespass and interfere with the Plaintiff parcels of land above mentioned to the detriment of the Plaintiff. He also stated that the principles and requirements to be considered by any court when faced with an injunction application were found in "Giella – Versus - Cassman Brown (Supra) in the words of Spry J;

> " 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 an application on the balance of convenience."

52. On the issue of a prima facie case with a probability of success, the Learned Counsel relied on the case of "Mrao Limited (Supra).

53. From the foregoing sentiments, the Learned Counsel submitted that the Plaintiff had shown that it had a prima facie case with a probability of success. The Plaintiff had established legal ownership of the subject properties and interest in the plots as provided for under the provision of Article 40 of *the Constitution* of Kenya, 2010. To him the same was not in question. The Plaintiff had demonstrated a clear violation and infringement of their rights and they were entitled protection of these rights under *the Constitution* and the *Land Registration Act*.There was very clear evidence that the Defendant had trespassed and encroached into its parcel of land under the guise that it was a public access road. As submitted above, there was need to have the Defendants, directors and employees restrained from continuing accessing their parcel of land through the Plaintiff's parcel.

54. The Defendants agents had also taken it upon themselves to further frustrate the Plaintiff usage of its own property by dumping containers, erecting temporary structures thereon and place security guards on the said premises. This had been proven through the Plaintiff exhibits marked as "FT - 6" and "FT - 7". On the issue of irreparable injury, which would not adequately be compensated by an award of damages, the Learned Counsel also submitted that in the event sought herein were not granted, the Plaintiff stood to suffer irreparable loss that cannot be compensated by way of damages. He held that in the case of: "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai [2018] eKLR" the learned judge stated that irreparable harm 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."

55. The issue of irreparable injury tied in with the violation of the Plaintiffs right over its property in the event the orders sought are not granted, the Defendant would continue with the trespass and encroachment of the Plaintiffs land. This violation could not be quantified into any monetary compensation in the event it was allowed to continue.

56. The Learned Counsel relied on the sentiments said in the case of:- "Almed – Versus - Mannasseh Benga & Another [2019] eKLR" where the court held that:

> " Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for

consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it."

57. In the instant matter, the balance of convenience tilted in favor of the Plaintiff, the registered proprietor of the suit property. The Plaintiff a right to protect and enjoy its property and to, which rights have currently been curtailed by the Defendant. The Defendant officials intended to mis(use) this court to aid them in further abusing the Plaintiffs proprietary rights. This could be seen through their application where they were asking this court to set aside the orders of 16th March 2022 when its actually the Defendants violating the Plaintiff legal rights to its properties. Therefore, the Learned Counsel invited this Honourable Court to allow the Plaintiff 's motioned as prayed.

58. On the notice of motion application dated 24th March, 2022, the Learned Counsel submitted that the Defendant after being served with the Orders and the pleadings, promptly filed an application on the 24th March 2022 where it sought the orders as already set out above from this Ruling. The application was supported by an affidavit sworn by one of the Defendant's directors Bob Weyn on the same date. The deponent claims that he was a director of the Plaintiff company and that he together with Fernando Marques (also a director of the Defendant Company) have a 50% ownership of the company. The other 50% is owned by of Mr. Jhangir Kasamali Tejani, and Mr. Faaraz Tejani. He states and confirms that Belport Limited (the Plaintiff)is the proprietor of parcels No MN/V/2436 and MN/V/2385. The Defendant is the proprietor of Plots No 1788 and MN/V/1893. It was also stated that the Plaintiff owns Plot No MN/V/1792 which was subdivided and a road excised form it i.e.MN/V/1792/2.

59. The gist of the application was that the shareholders of the Plaintiff and Defendant companies were currently embroiled in a dispute wherein of Mr. Jhangir Kasamali Tejani, Mr. Faaraz Tejani, had attempted to unlawfully take possession of Belport properties including erecting barriers on the access road and preventing the Defendants employees and other members of the public from using the same. These disputes between the officers of the two companies led to the filing of the civil suit ELC (Mombasa) No. 217 of 2021, which had however not been pursued as the parties were attempting to settle the matter amicably. It was the Defendant's contention that Mr. Jhangir Kasamali Tejani, in bad faith had gone and filed this suit, in order to improve their bargaining position in the settlement discussions.

60. It was deponed that the Mr. Jhangir Kasamali Tejani, Mr. Faaraz Tejani, Mr. Mohamed Osman Yakub and Mr. Altaf Mohamed Hussei were using the orders of 16th March 2022 to frustrate the Defendant and its employees by preventing them from accessing their plots through the access road. The deponent also alleged that there was no resolution by the directors authorizing the institution of this suit. The Plaintiff had responded to the application through a Replying Affidavit sworn by Faraaz Tenjani on 5th April, 2022 wherein he denied the statements that internal wrangles between the directors were the reason for this suit.He stated that the Defendants prayers sought to set aside the order was merely meant to ensure that the Defendants and employees could continue with their trespassing and encroachment of the Plaintiffs property. The Deponent reiterated that the Orders of 16th March 2022 were indeed served on all the relevant parties and service was acknowledged by stamping copies of the pleadings and the orders.

61. It was also stated that the Defendant deponent had admitted to using the access road hived off from Plot No L.R 1792 to access their plots. The documents annexed to the Defendant application alluded to this fact as well as to the fact that the Defendant parcels of land could be accessed through the access road in front of their own parcel of land. As such there was completely no need for the Defendants to trespass and use plot 1792/2 to access their property. The Plaintiff stated that the access road was

created to be used by another proprietor i.e. Chesterton road to access LR No 7Section IV Mainland North which lies to the north of Plot No 2529. In fact, the Deed Plans for both the Plaintiff and the Defendant's properties showed that the Defendants property had its own access point which was not Plot No 1792/2.

62. On the issue of whether a resolution was passed before institution of this suit, the Plaintiff that the Company's Articles of Association provided that quorum shall be duly constituted by not less than two persons holding not less than 50% of the Company's paid ups capital.As such there was proper quorum constituted when the resolution to institute this suit was passed. The Plaintiff also denied that Bob Weyn was the Managing Director of the Plaintiff company and denied knowledge of the suit ELC (Mombasa) No. 217 of 2021 or the settlement discussions alleged in the Defendant supporting affidavit.

63. On the issue of determination the Learned Counsel relied on the following. Firstly, on whether there was a proper resolution by the Plaintiff Company to institute this suit. The Learned Counsel submitted that the Defendant alleged that this suit was defective as there was no proper resolution by the Plaintiff company's directions agreeing that this suit be instituted. The Defendant's Deponent Mr. Bob Weyn stated that he together with Mr. Fernando Marques own 50% of the shareholding in the Plaintiff Company. He stated in paragraph 14 of the supporting affidavit that he was the Managing Director of the Plaintiff Company and that he was never made aware of any meeting where it was resolved that this suit be filed. The Plaintiff dispute this position stating a proper meeting was held and a resolution passed in accordance with the Memorandum and Articles of Association for Belport Ltd, which provided that quorum shall be duly constituted by the sitting of not less than two members who hold not less than 50% of the paid-up share capital.

64. It is trite law that commencement of legal proceedings by a company must be authorized through a resolution passed by the company's board of directors in a general or special meeting. He submitted that a special resolution was indeed passed on 9th March 2022. The resolution was sealed with the seal of the company and there was sufficient quorum as per the Memorandum and Articles of Association of Belport Ltd. The resolution was signed by two directors of the company.

65. Secondly, on whether the Plaintiffs through its officers had illegally blocked the Defendant's access to its parcel of land Plots No 1788 and MN/V/1893 or had the Defendant trespassed and encroached onto the Plaintiffs parcel, the Learned Counsel submitted that the Defendants also sought to have this court restrain the Plaintiffs officials from blocking its use of what its stated was the public access road LR No 1792/2. The Defendant's stated that this road served as an access to its properties i.e. Plots No MN/V/1788 and MNN/V/1893.

66. From the Defendant's own documents attached to the application, particularly the Topo cadastral survey, one could clearly see that the alleged public road clearly cut across plot No 2436. The "public road" was not a public road at all but went through private property. The Respondent parcel of land could clearly be accessed from the front as they had an access road in that area. It was not clear as to why then, the Defendants' agents and employees would prefer to use the road on the Plaintiffs parcel of land. The Plaintiffs actions of blocking the Defendant from using the access were not illegal but were in protection of its rights over the parcel and prevention of trespass by the Defendant.

67. The Defendant continued usage of the access road amounted to trespass and deprived the Plaintiff of the right to use their property as they see fit.The provision of Order 40 Rule 7 of the Civil procedure Rules, 2010 allows courts to set aside or vary orders of injunctions upon an application by an aggrieved

party. To support the point, the Counsel cited the case of:- "Ochola Kamili Holdings Limited – Versus - Guardian Bank Ltd [2018] eKLR", thus:-

> " The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter….Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice".

68. To him, the Defendants had failed to show how the orders granted by this Honourable Court were oppressive toward them. The allegation that its employees cannot access its yard or would be detained inside the yard for lack of an access and exit road had been shown to be untrue as the Defendant property had its own legally established access and exit point. The allegations that two of the Plaintiffs directors had obtained the orders by misleading means had also been shown to be untrue. The issue of non-service of the suit, application and orders upon the Defendant had also been debunked. There was no agreement that the parties would negotiate a settlement in the civil case of ELC (Mombasa) No. 217 of 2021.In any event, the Plaintiff had every right to protect its interest over its property regardless of the mentioned suit. In essence, the Defendants' grounds for setting aside the orders had no legs to stand on. Should these orders be stayed or set aside, it was the Defendant and its employees and agents who would benefit from this.

69. Finally, the Learned Counsel thus humbly asked this court to dismiss the Defendant application of 24th March 2022 and allow the Plaintiff application of 15th March 2022 with costs to the Plaintiff.

C. The written submissions of the Defendant in ELC No. 29 of 2022

70. The Defendant in the ELC No. 29 of 2022, through the Law firm of Messrs. A. B. Patel & Patel Advocates filed their written submissions dated 20th October, 2023. Mr. Sanjiv Khagram Advocate commenced the submissions by stating that this Honourable Court's attention was drawn to the record of 20th June, 2022 in the civil case of:- "ELC. Case No. 217 of 2021 - Gateway Marine Services Limited – Versus - Mohamed Osman Yakub & 3 Others (hereinafter 'ELC. 217 of 2021) wherein this court directed that for smooth management and administration, this matter be mentioned together with civil case "ELC. Case No. E029 of 2022 - Belport Limited – Versus - Gateway Marine Services Limited (hereinafter ELC.E029 of 2022).

71. Further, this Honourable Court on 28th July, 2022 in ELC.217 of 2021 directed that all the applications filed in the two matters aforementioned be heard together and later on proceeded to issues directions that the said applications be dispensed with by way of written submissions. The Defendant herein wished to adopt and rely on its pleadings, the averments contained in its affidavit sworn by Bob Weyn on 27th October, 2021 in support of its Motion dated on 27th October, 2021 and the submissions filed on the said Motion all in ELC. 217 of 2021 whilst making these submissions. In this matter the parties have each filed the following applications. In so far as the Plaintiff herein is concerned;

a. The Notice of Motion Application dated 15th March, 2022 and filed on 16th March, 2022 seeking injunctive orders against the Defendant and a further order directing the OCS Changamwe Police Station to ensure compliance, and

b. The Notice of Motion dated 4th April, 2022 and filed on even date for contempt against the Bob Weyn and two others for the disobedience of the orders issued on 16th March, 2023.

72. The Defendant's;

Notice of Motion dated 24th March, 2022 and filed on even date seeking to stay and set aside the orders of 16th March, 2023, restrain the Plaintiff from blocking the Defendant's access to its properties and directions for hearing of ELC. 29 of 2022 and ELC.217 of 2021 together.

73. According to the Learned Counsel, the Defendant also filed and would rely on the Replying Affidavit of Adam Ahmed Adam sworn on 30th May, 2023. The facts according to the Learned Counsel were as already stated above in this Ruling. The Learned Counsel submitted that on Thursday, 21st October 2021, the Defendant managed to seek the assistance of the Police in having to clear the barriers erected removed blocking the access to the Defendant's Properties. Mohamed Osman Yakub, then went to Mikindani Police Station and alleged that he was the General Manager of Belport and reported that whilst he was in custody of the Police, three men allegedly broke the main gate Belport's main gate and stole the same. The said Mohamed Osman Yakub has never been appointed a General Manager of Belport nor its employee nor has he ever been connected with it. The gate being referred to above was an unlawful barrier that Mohamed Osman Yakub had erected on the public access road abutting Belport's property and serving the Defendant's properties. To him this road was for use by all the public.

74. This action, necessitated the filing of ELC No. 217 of 2021 which however in the spirit of negotiating with the view of settling the dispute between the shareholder, African Marine Technologies Limited engaged Mr. Vikram Kanji and the Tejani's engaged Mr. Abdulhamid Aboo both being Advocates of the High Court of Kenya. Wherein the two gentlemen conducted a meeting at Mr. Aboo's office sometime towards the end of October 2021/early November 2021, wherein it was agreed that no precipitate action would be taken by either party to avoid jeopardizing the settlement discussions between the parties. It was in this spirit that the Defendant herein never pursued its matter in ELC. 217 OF 2021 (see annexure marked as "BW - 1" of the Defendant's Affidavit at Page 13 in response to the Plaintiff's Notice of Motion) and, the court record will show that it did not even serve process on the Defendants in that case as it did not want to prejudice the goodwill in the discussions between Mr. Kanji and Mr. Aboo.

75. At the time there was goodwill exhibited by the parties from both divides and an amicable settlement was in the offing. To this end he only refer this Honourable Court to the proceedings recorded in ELC. 217 of 2021 on the following material dates to wit:

i. 30th November, 2021-when the Plaintiff therein (Gateway Marine Services Ltd) sought for more time to serve the Defendants therein,

ii. 18th January, 2022 -when the Plaintiff requested for and was granted time and encouraged by court to engage the Defendants with a view of having the matter settled out of court,

iii. 22nd February, 2022 -the court granted the parties 30 more days to finalize on the negotiations, and thereafter on,

iv. 26th April, 2022- when the court was informed that the negotiations had collapsed and that no agreement has been reached between the parties.

76. However, without any colour of right and complete lack of candor, the Plaintiff not only did they commence these proceedings wherein they wrongfully, surreptitiously and misleadingly obtained adverse Orders against the Defendant but also surreptitiously without being entirely candid with this Honourable Court obtained orders against the Defendant. The Plaintiffs officers proceeded to abuse further the orders obtained by locking the access gates on the public road serving the Defendant's Properties known as MN/V/2739 and MN/V/1899 and simply pasted a copy of the Court Order on the Second Gate. Consequence of which, the Defendant access to its properties was unlawfully taken by the Plaintiff without due regard to the wording of the Court Order.

77. It was the Plaintiffs position that the Defendant whilst trying to access its property, had trespassed against the Plaintiffs properties and further stated that the Defendant's access lied in front of its properties. This position by the Plaintiff was practically impossible as was observed by the court during the site visit. Mr. Adam Ahmed Adam, a senior citizen in the Kibarani where the suit properties lied, in his affidavit sworn on 30th May,2023 authoritatively states that over the years since the 1950's unplanned developments had taken place in disputed site wherein he had seen many buildings built even on road reserves including in particular, a mosque which has served the area residents since for close to 35 years at least if not more.

78. It was his unshaken evidence that with this state of affairs, the access to their properties in the Kibarani locality became very constrained. Especially the access passage which now became so narrow that no commercial vehicles could use the access even for large passage cars or pick-ups since the access was very tight. No action had ever been taken to remove the developments on the road reserves and doubted it would happen due to the existence of the mosque on the said reserve road. This Honourable Court made reference on this in the Site Report.

79. It was the Learned Counsel's submission that this Honourable Court never agreed with the Defendant that indeed it was physically impossible to use that purported road especially for heavy commercial vehicles like the ones used by the Defendant. Mr. Adam in his affidavit confirms that the disputed access road had always existed and had been used since colonial times for access to a shooting range that was located at the back bordering the Ocean to the North of the disputed road. Even the Water Pipeline supplying Mombasa was located adjacent to the existing road and the road was used to service the Pipeline.

80. On the law, the Notice of Motion Application dated 4th April, 2022 and filed on even date citing the Defendant's officers in contempt of the court orders issued on 16th March 2022. The Learned Counsel submitted that the Defendant and all of its including those officers and the named alleged contemnors had always been good law abiding citizens and respecters of the legal institutions like the court. Even this Honourable Court seeks to punish for contempt in order to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt was a discretionary one and should be used sparingly. This was observed by the Supreme Court of Canada in "Carey – Versus - Latken, 2015 SCC 17(16th April 2015)" while it was expounding on the three elements of civil contempt of court which must be established to the satisfaction of the court cited in the case of "Margaret Nanguve Ikong – Versus - Justis Etyang Orodi & another [2021] eKLR" wherein the court stated that:

> " a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect the court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort

81. According to the Learned Counsel, it was a well established principle of law (see the case of "Cecil Miller (Supra) referred to by the Plaintiff in its submissions at Page 5) that for one to succeed in civil contempt proceedings, the applicant has to prove:

a) the terms of the order,

b) Knowledge of these terms by the Respondent,

c) Failure by the Respondent to comply with the terms of the order.

82. On the terms of the order, the Learned Counsel argued that to form the basis of committal for contempt of court, an order must be clear and unambiguous. The order obtained on 16th March, 2023 by the Plaintiff never allowed the Plaintiff to proceed and unlawfully takeover possession of the Defendant's properties and/or hold the Defendant at ransom from proceeding smoothly with its operations particularly, and in complete disregard of the fact that the Defendant's properties are served by a public road, proceeded to encroach onto the said public road and blocked the Defendant's only access to its properties by erecting barriers on the public access road and preventing the Defendant from using it.

83. The order was in basic and simple English granted in favour of the Plaintiff against the Defendant temporarily "……….restraining, barring, stopping and or preventing the Defendant, its Directors, agents etcetera and demolishing blocking, and constructing, erecting, renovating………" Completely contrary to what the Plaintiff sought to enforce as against the Defendant. So much that the Defendant as submitted above got the assistance of the Police to remove the erected barriers that blocked the access of the Defendant's property cleared and the some of the Defendant's staff who were confined against their will In the Defendant's properties released.

84. The gate, referred to herein, was the unlawful barrier that the Plaintiff's officers and/or goons for hire had erected on the public access road abutting the Plaintiff's property and serving the Defendant's properties. It was the Learned Counsel's submission that the court order never authorized the closure of the public road. That not being enough, the Plaintiff went further in their unlawful acts by engaging the services of a security firm on 25th October, 2021 which deployed and placed two guards at the top yard with instructions not to take any instructions from Mr. Bob Weyn, a 50% shareholder of Belport claiming to be under instructions from the Defendants to block the entrance gate serving the Plaintiff's properties yet again hindering its free and uninterrupted use of the public road serving its properties and access thereto.

85. This was not what the order was meant to do and although the police managed to clear the barricade, Plaintiff was still intent on continuing with and persisting in their wrongful and unlawful actions of blocking access to the Plaintiff's properties, creating a disturbance and a nuisance and frustrating the Defendant from enjoying its quiet use and enjoyment of its properties and the peaceful carrying out of its business thereof hence the filing of this application and suit seeking the restraint orders against the Defendants.

86. According to the Learned Counsel, it was suffice to submit on this tenet of aw that whilst the terms of the order were clear, there was no disobedience from neither the Defendant nor the alleged contemnors as alleged by the Plaintiff. On this principle of law alone, the Learned Counsel submitted that the court should reject the application and not issue any orders requested by the Plaintiff but dismiss it with costs to the Defendant.

87. On the knowledge of these terms by the Respondent, the Learned Counsel asserted that the Defendant only became aware of the order and the application when the Plaintiff blocked its access to its property

and pasted the court order on the second gate.It was trite law that unless the court dispenses with service, a Judgment or order may not be enforced by way of an order for committal unless a copy of it had been served on the person required to do or not do the act in question. The provision of Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which was effected by leaving the order with the person to be served.

88. Their court had also held that personal service of orders and a penal notice was a requirement in contempt of court proceedings. The Learned Counsel referred this Honourable Court to the Court of Appeal decision in the case of:- "Nyamodi Ochieng Nyamogo & Another – Versus - Kenya Posts & Telecommunications Corporation (1994) eKLR" where the twin issues of the necessity for personal service of both the order and the application for contempt and the endorsement on the face of the order of what was popularly referred to as 'the penal notice' were discussed. As far as service is concerned the Court of Appeal noted as follows:

> " Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co Advocates, in acknowledgement of receipt of the said orders. Service on Wetangula & Co does not constitute personal service on any of the three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co, Advocates, on 25th October,1993, and 1st November, 1993, therefore, is a wasted effort."

89. The Learned Counsel submitted that the courts had described personal service as "an elementary but mandatory procedural rule which in contempt proceedings had been prescribed as "personal service". It was the position as it had been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors was demonstrated, they would be found culpable of contempt even though they had not been personally served with the orders and penal notice. To this end, the Defendant and the alleged contemnors were never aware of the order of this Honourable Court either directly or otherwise as was contemplated in the case of:- "Kenya Tea Growers Association - Versus - Francis Atwoli & Others, Nairobi High Court Constitutional Petition No 64 of 2010": [also "Husson – Versus - Husson, (1962) 3 AII E.R.1056"] on the issue of knowledge of a court order.

90. According to the Learned Counsel, the Honourable Court would observe from the affidavit of service (as per the Annexure marked as "FT – 3") at Paragraph *3* that the process server, Patrick Mwema, alleges to have served the court process and order upon an unnamed human resource manager of the Defendant who acknowledged service by only stamping on the court documents. The stamps are seen at annexures as "FT – 4" and "FT – 5" annexed to the affidavit of service. Whilst the Defendant in the Supporting Affidavit of Faraaz Tejani at Paragraphs *5* and *6* aver that the service of the court process and order was done upon a Madam Shazia Firoz, alleged personal assistant of Bob Weyn, who accepted service by signing and stamping at the back of the order. This was not true and neither did the annexures confirmed this position.

91. As submitted under the averments made out under Paragraphs *7*,*8*, *9* and *10* above and further as the court observed during its site visit that these two companies co-existed and it was more likely that anybody even from the Plaintiff company had an access of the Defendant's stamp and received the court process and order and never told the alleged contemnors of it. The allegations at Paragraphs 7, 8, 9 and 10 of the Plaintiff's affidavit in support of the application together with the annexures therein never confirmed receipt of the emails sent out to the contemnors. Consequently, the Plaintiff could not confirm to this Honourable Court that there was personal service upon the directors, their agents, servants and/or representatives of the Defendant as alleged. Even during the mediation on the shareholders' disputes, the Plaintiff (the Tejanis) never had the decency of even notifying the Defendant

of the orders of this court. Perhaps this would have sold them off from the agreement that neither party was not to take any precipitate action whilst the talks were on going?On this tenet alone they beseeched this Honourable Court to proceed and dismiss the application for contempt with costs to the Defendant.

92. On the issue of the failure by the Respondent to comply with the terms of the order. The Learned Counsel submitted that one could only comply to something (an order) if he/she was aware of its existence the same having been brought to his/her knowledge. As submitted above, the Defendant's directors are law abiding citizens and even when they got knowledge of the order as submitted in Paragraph *16* above. In the difficult situation they found themselves in they had now come to this Honourable Court for protection. The Defendant was not the villain here. It was but a victim of an abuse of the process of this Honourable Court by the Plaintiff who played the victim.

93. Nonetheless, there was need to note that the order issued by this Honourable Court never allowed the Plaintiff through its officers, the Tejani's together with Mohamed Osman Yakub and Altaf Mohamed Hussein, to lock the access gates on the public road serving the Defendant's Properties known as MN/V/2739 and MN/V/1899. This was despite the fact that no process or the Order having been formally served upon the Defendant or even the alleged contemnors. This action was unlawfully taken by the Tejani's and others without due regard to the wording of the Court Order which Court Order did not authorize the closure of the said public road.

94. The net effect of such unlawful and illegal action caused the Defendant to suffer irreparable loss and damage but more fundamentally, the Defendant's employees who were on duty and in the yard on 21st March, 2022 could not leave the yard and were effectively unlawfully jailed and/or imprisoned against their own freewill in the circumstances. It took the intervention of the police to have them released. The Learned Counsel submitted that the act or omission constituting disobedience of an order may be intentional, reckless, careless, or quite accidental and totally unavoidable. It was his argument that the Plaintiff had not demonstrated exactly how the Defendant disobeyed the orders of this Honourable Court and therefore no breach had been established. However, if indeed the alleged contemnors did disobey the orders of this court (a position which was vehemently denied) then the same was unintentional as they were not aware of it until when their access to the Defendant's offices were blocked was when they cited the pinned order. The Learned Counsel submitted that the Defendant had no intentions of disobeying the orders of this court.

95. The Learned Counsel averred that the Honourable Court would recall that parties were right in the middle of negotiations on the shareholder ship of the Plaintiff and there was goodwill exhibited by the parties from both divides and an amicable settlement was in the offing when out of nowhere and without any colour of right and complete lack of candor, the Plaintiff not only did they commence these proceedings wherein they wrongfully, surreptitiously and misleadingly obtained adverse Orders against the Defendant but also surreptitiously without being entirely candid with this Honourable Court obtained orders against the Defendant. Which orders as submitted above, they abused by locking the access gates on the public road serving the Defendant's Properties.

96. It was therefore their submission that the application for contempt before this Court had not met the required threshold on the standard of proof required in matters concerning contempt of Court that was higher than that in normal civil cases. One could only be committed to civil jail or otherwise penalized on the basis of evidence that left no doubt as to the contemnor's culpability. The Supreme

Court of Kenya in the case of:- "Republic – Versus - Ahmad Abolfathi Mohammed & Another [2018] eKLR" held that:-

> "The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order 9 (emphasis mine)."

97. Thus, it was his submission that the Plaintiff had failed to establish that the alleged contemnors deliberately and/or willfully disobeyed the orders of this Honourable Court as submitted above. The reason why courts would punish for contempt of court was to safeguard the rule of law which was fundamental in the administration of justice. It had nothing to do with the integrity of the judiciary or the court or even the personal ego of the Presiding Judge. Neither was it about placating the applicant who moved the court by taking out contempt of court proceedings. It was about preserving and safeguarding the rule of law. The question that to pause for consideration was, will the rule of law be preserved and protected were the alleged contemnors found guilty in the circumstances? The answer could not be in the affirmative. It would be a miscarriage of justice. The flipside was that it was the Plaintiff who in turn had abused the orders that were granted to it by this Honourable Court on16th March, 2022 by proceeding to not only encroach onto the public road serving the Defendant's properties but also blocking the Defendant's access to its properties by erecting barriers on the public access road and preventing the its staff from using it. The Plaintiff's officers went further to lock up the Defendant's staff in yard as submitted above. In the circumstances, he prayed that the application be dismissed with costs and the Defendant's Notice urgency be allowed as prayed.

98. On the issue of the Plaintiffs Notice of Motion Application dated 15th March, 2022 and filed on 16th March,2022. These applications sought for injunctive orders against the Defendant and a further order directing the OCS Changamwe Police Station to ensure compliance. Whilst, the Defendant's Notice of Motion dated 24th March, 2022 and filed on even date sought to stay and set aside the orders of 16th March, 2022, restrain the Plaintiff from blocking the Defendant's access to its properties and directions for hearing of ELC. 29 of 2022 and ELC. 217 of 2021 together. The Learned Counsel submitted that the Defendant herein wished to submit on the two applications together as the Defendant's application dated 24th March, 2022 and the supporting affidavit thereof (hereinafter 'the Defendant's application') respond to the Plaintiffs application dated 15th March, 2022 (hereinafter 'the Plaintiffs application).

99. The issue arising from the two applications were whether the Plaintiff was entitled to the orders sought in its application dated 15th March, 2022. The answer the Honourable Court, could not be in the affirmative as shall be further submitted below. The Defendant adopted and relied on the submissions above, those that were filed in civil case ELC (Mombasa) No. 217 of 2021 by the Plaintiff therein, the Affidavit of one Adam Ahmed Adam sworn on 30th May, 2023 and e-filed on 19th September, 2023 and will beseech this Honourable Court to dismiss the Plaintiffs application with costs to the Defendant.

100. On the law, the Learned Counsel contended that the orders sought by the Plaintiff against the Defendant were misconceived and untenable in law and further that the Plaintiffs Affidavit in Support thereof its application was replete with falsehood and should be disregarded. One of the most fundamental preliminary issue that he wished to bring to the attention of this Honourable Court was whether the Plaintiff authorized for the filing of this suit against the Defendant.

101. It is trite law that a company could not institute a suit in its own name unless such action has been sanctioned by either its Board of Directors or through a general or special meeting. Such sanction was to be evidenced by a resolution to that effect. In the instant matter and as submitted earlier, the Plaintiff,

as at the time of filing the Defendant's application, the Plaintiff had not served upon the Defendant the pleadings nor the order of this Honourable Court as it was required to do in law. Nonetheless, he wished to resubmit that there was a dispute in the Plaintiff's Company between the shareholders thereof being 50% owned by Mr.Jahangir Kasmali Tejani and his son, Faraaz Jahangir Tejani and as to 50% owned by African Marine Technologies Limited by which Mr. Bob Weyn and Fernando Marques were the principal shareholders. There was need to note that Mr. Bob Weyn was the Managing Director of Belport Limited whereas the Tejani's were non - executive directors as was Mr. Fernando Marques. As seen from the Annexure marked as "FT – 2" of the Plaintiffs affidavit. There was no meeting held or a resolution passed by the Plaintiff-Belport Limited to bring these proceedings as against the Defendant. Indeed, as could be observed from the purported resolution annexed by the Plaintiff, it was neither dated nor sealed and was only signed by the Tejani's.

102. According to the Learned Counsel submitted the Plaintiff attempted to sanitize this irregularity by annexing "FT – 9" a purported dated company resolution in the Replying Affidavit of Faraaz Tejani sworn on 5th March, 2022 and filed on 5th April, 2022 in response to the Defendant's concerns. The fact still remained that there was no meeting held on 9th March, 2022 or any other time as submitted above. Moreover, the Plaintiff had further failed to file a competent Verifying Affidavit as required under the strict provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 which reads:

> " Where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

103. Effectively, this means that the suit before this Honourable Court had been instituted by Mr. Faraaz Tejani without the authority of the company through its Board of Directors which correctly documented in annextures marked as "FT – 2" of the Plaintiff's affidavit shows that there were a total of 5 Directors/shareholders or through a special meeting. Thus, it was his submissions that the suit before this Honourable Court was, in the circumstances, incompetent and must be struck out as was held in the case of "Directline Assurance Company Limited – Versus - Tomson Ondimu [2019] eKLR" which cited the case of "East African Portland Cement Limited – Versus - Capital Markets Authority & 4 others [2014] eKLR" wherein the Honourable Lady Justice Mumbi Ngugi concurred with the reasoning held in "Affordable Homes Africa Limited – Versus - Ian Henderson & 2 Others HCCC No 524 of 2004" held that:

> " that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers...The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. The Superior Court went on to state, "...what comes out clearly is the fact that in instances of a company, the institution of a suit can only be instigated by way of a resolution. This is in due appreciation that a company is a legal entity whose operations are driven by the relevant authorized officers."

104. Hon. Njagi, in the case of "Affordable Homes Africa Limited – Versus - Ian Henderson & 2 Others HCCC No. 524 of 2004" cited in "Kenya Commercial Bank Limited – Versus - Stage Coach

Management Ltd [2014] eKLR" observed further that where there was no authority from the board of Directors to institute the suit, the consequence would be as follows:

> "...........in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all (emphasis is mine)."

105. The Court of Appeal in the case of "Spire Bank Limited – Versus - Land Registrar & 2 others [2019]eKLR" gave a fair warning on such kind of situations and stated as follows:-

> "...........It is essential to appreciate that the intention behind Order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court(emphasis mine) The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them.... With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

106. According to the Learned Counsel, it was therefore crystal clear from the Plaintiff's Annexure marked as "FT – 3" and as averred by Mr. Bob Weyn in his affidavit in Support of the Defendant's Application that there was no meeting held by the Plaintiffs directors to institute these proceedings and obtain orders against the Defendant. In fact, Mr. Weyn, being a co-director of the five director, the company's seal that was affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. With this in mind, the Learned Counsel stated that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized. The Learned Counsel prayed for the Plaintiffs application and the entire suit failed on this principle of law alone.

107. In the alternative and without prejudice to the submissions above, it was the Defendant's humble submission that it is trite law that a person who made an ex parte application to the Court, such as the one made by the Plaintiff in its application 15th March, 2022, was under an obligation to the Court to make the fullest possible disclosure of all material facts within his/her knowledge, and if he/she never made that fullest possible disclosure, then he/she could not obtain any advantage from the proceedings and he/she would be deprived of any advantage may have already obtained by him/her. That was perfectly plain and required no authority to justify it as was held in the case of "Republic – Versus - Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac [1917]1 KB 486" cited in the case of "Morris Muumba Ndeti & 6 others (Suing on their behalf and as officials of Kaseve Welfare Society) – Versus - Harp Housing Limited [2021] eKLR".

108. The Learned Counsel opined that the Plaintiff in its application approached this Honourable Court with tainted hands on account of material non-disclosure and misrepresentation as submitted above and in the civil case of ELC (Mombasa) No. 217 of 2021 by the Defendant herein and this Honourable Court should not proceed to grant any orders sought in its application. By failing to disclose such material facts to this Honourable Court which could lead it to decide otherwise, the Plaintiff failed to show a gesture of good faith and therefore could not be granted the equitable remedy sought as was held in the case of:- "Abdul Sultani Lalani & 5 others – Versus - IFG Fund LLP & 3 others [2021]

eKLR" when the court was faced with a similar issue and cited the decision of an English Court in the case of "Tate Access Floor – Versus - Boswell (1990) 3 All ER 303", where it observed thus:-

> "No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the ex parte order and may mark its displeasure, refuse the Plaintiff further inter-partes rellef. even though the circumstances would otherwise justify the grant of such relief."

109. The Learned Counsel submitted that the Plaintiff quite mischievously and with the intent of seeking sympathy from court to obtaining the orders now granted, failed to inform court, which information should have been put across, the court would probably bot have issued any orders. For instance that:

    a. There is a dispute in the Plaintiff's Company between the shareholders thereof being 50% owned by Mr. Jahangir Kasmali Tejani and his son, Faraaz Jahangir Tejani and as to 50%owned by African Marine Technologies Limited by which Mr. Bob Weyn and Fernando Marques are the principal shareholders.

    b. No meetings have been held or resolution passed by Belport Limited to bring these proceedings due to the shareholding dispute.

    c. There was on going mediation talks with the view of resolving the shareholders' dispute amicably and that it was agreed that no precipitate action would be taken by either party to avoid jeopardizing the settlement discussions between the parties.

110. According to the Learned Counsel, the Honourable Court would note that this was what the Defendant did when it filed the Civil case ELC (Mombasa) No. 217 of 2021 and elected to defer service of the Summons and Other Pleadings in order to allow the parties negotiate a settlement without any distractions.The court further on the gravity of non - disclosure cited the case of:- "Bahadurali Ebrahim Shamji – Versus - Al Noor Jamal & 2 Others, Civil Appeal No. 210 of 1997" where the Court of Appeal stated that:-

> " There is a compelling duty on the Applicant "to make a full and fair disclosure of all material facts."

111. From the foregoing cited authorities and submissions, it was quite evident that the Plaintiff clearly had an intent of obtaining orders from this Honourable Court deceitfully and should now shoulder the consequences of such dishonesty and proceeded to abuse the said orders quite harshly against the Defendant. May the application be dismissed with costs to the Defendant. According to the Learned Counsel, without prejudice to the submissions above, it was also noteworthy that an injunction being a discretionary remedy, could only be granted on the basis of evidence andsound legal principles. Had the Plaintiff discharged this burden to warrant this Honourable Court's discretion? The answer was not in the affirmative guided by the principles for the grant of temporary injunctions as were well set out in the celebrated case of "Giella – Versus - Cassman Brown (Supra)" -see Plaintiffs submissions at Pages 8 & 9 -and contrary to the submissions by the Plaintiff at Paragraphs 20- 32, the Plaintiff's claim never met the threshold to even scratch the discretion of this Honorable Court.

112. On whether the Plaintiff/Applicant had shown a prima facie case with a probability of success, the Learned Counsel submitted that the Plaintiff as submitted above and in the Civil Case ELC (Mombasa) No. 217 of 2021 had failed to demonstrate with precision in its application that it had or made out a prima facie case against the Defendant and had indeed established one to warrant this

Honourable Court to exercise its discretion and issue injunctive orders against the Defendant. The Defendant having obtained the temporary orders from this court, proceeded to lock the access gates on the public road serving the Defendant's Properties known as MN/V/2739 and MN/V/1899 contrary to the orders of the court which did not authorize closure of the public road.

113. The Plaintiffs actions in themselves were unlawful and constituted an illegal blocking of a public access road. Since their unwarranted illegal and unlawful actions, the Defendant's business was not only been halted for that day and period as no trucks or other vehicles could leave or access its premises but also its employees who were at work were wrongfully detained and/or imprisoned against their will and were unable to leave the Defendant's premise to go home. It took the intervention of the police to have the Defendant's employees freed from their wrongful and unlawful confinement under the guise of this Honourable Court's orders.

114. This clearly went to show that the Plaintiff was only bent on frustrating the Defendant and running away from the shareholding dispute between the parties and would go at any costs even if it was to abuse the process of this Honourable Court including, as observed in the pleadings filed, the blocking of the Defendant's only one access to its premises and wrongfully and unlawfully detaining or holding the Defendant's staff under the guise of these proceedings which. Contrary to the submissions by the Plaintiff, it was actually the Plaintiff who was out to frustrate the Defendant's usage of its own property as could be observed in annexure marked as “BW - 2” of the Defendant's affidavit in support of its application 24th March, 2022 seeking the variation of the orders of this court and restraining of the Plaintiff.

115. On whether the Plaintiff would suffer irreparable injury/loss that could not be compensated by an award of damages if the application was not allowed. The Learned Counsel submitted that on this tenet of law that the Plaintiff had failed to demonstrate the kind of loss he/she would suffer if the order of injunction was not given. The case of:- “Pius Kipchirchir & the Almed Cases” relied upon by the Plaintiff could not come to its aid in the circumstances. It was trite law that an applicant seeking for an order for injunction must establish that he/she "might otherwise" suffer irreparable injury which could not be adequately remedied by damages in the absence of an injunction. The Plaintiff had not passed this threshold as it had not only failed to demonstrate that it had a prima face case but also failed to demonstrate the nature and extent of any injury or at all but only made speculations.

116. The Plaintiff was fully and had always known of the existence and usage of the public road that served the Defendant’s Properties. It being the only access to the Defendant's Properties from the Makupa Causeway. This had always been the position and order of business between the parties over the years until when the Plaintiff decided to steal a match in the middle of the shareholding negotiations. In any event, and having used the road for a substantial period, it was the Defendant's humble submissions that it had over the years developed an overriding interest under the provisions of Section 28 (c) of The *Land Registration Act* 2012.Effectively, the Learned Counsel submitted that it was actually the Plaintiff who was a trespasser on the suit property given the documents and position as presented by the Defendant and the Plaintiffs own admission confirming this. May this Honourable Court find that there was no wrong doing by the Defendants and that the Plaintiff could not acquire any rights capable of protection by this Honourable Court. May the application be dismissed with costs to the Defendant as the balance of convenience favors the Defendant by court not allowing the application the Plaintiff but that of the Defendant having failed to establish a prima facie case.

117. It was the submissions of the Learned Counsel that the balance of convenience lied with the Defendant, for simple reasons that the Plaintiff having failed to establish a prima facie in the circumstances, the Interest of justice and the rule of law shall be well reserved and protected only by allowing the

Defendant's application to enable parties had a level playing field upon which to ventilate their issues before court for determination.

118. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factory Company Limited (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"

119. Therefore, it was the Learned Counsel's submission that the balance of convenience tilted to its favor in the circumstances and urged Honourable Court to look at the greater harm that would be occasioned to it if it was unable to access its properties and conduct business as it had always done so. It therefore stood to suffer a greater loss if this Honourable Court never allowed its application vis-a-vie that of the Plaintiff. The result was that the balance of convenience favours the Defendant more in this case than the Plaintiff. May this Honourable Court proceed to grant the orders prayed for in the orders prayed for in the Defendant's application and proceed to fix the main suits for hearing on a priority basis.

120. Further the Learned Counsel submitted that this Honourable Court had a greater duty to ensure that it maintained the integrity of the system of administration of justice and ensure that justice is not only done but is seen ho be done by, amongst other measures, protecting property owners from illegal and unlawful actions perpetuated for ulterior and extraneous considerations as observed in the actions of the Plaintiff herein.Under the provisions of Order 40 rule 7 of the Civil Procedure Rules, 2010 this court had the power to discharge, vary, or set aside an orders issued for injunction upon an application being made as was the case here with the Defendant. The Learned Counsel urged the Honourable Court to look at the case of "Tate Access Floor – Versus – Boswell (Supra)", wherein the court held at page 316 thus:-

> "No rule is better established and far more important than the rule (the golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the court will discharge the ex parte order and may mark its displeasure, refuse the Plaintiff further Inter - Partes relief even though the circumstances would otherwise justify the grant of such relief." (Emphasis added)

121. In conclusion, the Learned Counsel urged the Honourable Court to allow the Defendant's application as prayed.

IX. Analysis & Determination.

122. I have carefully read and considered the pleadings herein by the Applicants and the Respondents in both cases, the comprehensive written submissions, cited myriad of authorities, the relevant provisions

of *the Constitution* of Kenya, 2010 and statures. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has condensed the subject matter into four (4) salient issues for its determination. These are:-

a. Whether the Plaintiff in both ELC Case No. 217 of 2021 and ELC No. 29 of 2022 have made out a case for the grant of temporary injunctive orders under Order 40 Rule 1 (a), 3, and 9, of the Civil Procedure Rules, 2010 and whether the Notice of Motion applications dated 27th October, 2021 and the one dated 15th March, 2022 are merited

b. Whether this Honourable Court will be pleased to set aside orders issued on 16th March, 2022 in accordance to Order 40 Rule 7 of the Civil Procedure Rules, 2010 and subsequently whether the Notice of Motion application dated 24th March is merited.

c. Whether the Defendant's directors in ELC No. 29 of 2022 Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn &Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited, be all, or either of them as determined by the Court, committed to prison for a maximum period of six(6) months for contempt of court as per the Notice of Motion application dated 4th April, 2022.

d. Who will bear the Costs of Notices of Motion application dated 27th October, 2021, 15th March, 2022, 24th March, 2022 and 4th April, 2022.

Issue No. a). Whether the Plaintiff in both ELC Case No. 217 of 2021 and ELC No. 29 of 2022 have made out a case for the grant of temporary injunctive orders under Order 40 Rule 1 (a), 3, and 9, of the Civil Procedure Rules, 2010 and whether the Notice of Motion applications dated 27th October, 2021 and the one dated 15th March, 2022 are merited

123. To begin with, the Honourable Court deciphers that the main substratum in these interlocutory applications are three – fold being on granting of injunctive orders; setting aside and/or varying Court orders and contempt of Court orders. The Honourable Court will endeavor to deal on the legal aspects of each of these issues and then apply them to the facts of the instant case. As indicated above, the Honourable Court will rely on the contents of the site visit report conducted on 6th May, 2022 thereof.

The Site Visit Report

Republic of Kenya

In the Environment and Land Court

At Mombasa

ELC Case No. 217 of 2021 & 029 Of 2022

Belport Limited ....plaintiff

- Versus -

Gateway Marine Services Limited ....defendant

A Report from a Site Visit ("locus In Quo") At Kibarani

ARea Along the Makupa Main-kibarani - Airport Road

Mombasa on 6th May, 2022 at 12.25 P.M.

i. Court:-

(a) Justice Hon. Justice L.L. Naikuni, Environment & Land Court No.3.

(b) M/s. Yumna Hassan, Court Assistant.

ii. Legal Representation

(a) The Plaintiffs in ELC No. 029 of 2022 & Defendants in ELC. No. 217 of 2022.

(a) Mr. Khalid Salim, Advocate.

(b) Mr. Mohamed Osman - Representative of the Plaintiff.

(c) Mr. Hamza Mohdhar -A Security Officer for the Plaintiff.

(d) Mr. Mwini Mwendwa-A Land Surveyor for the Plaintiff.

(b) The Defendant in the ELC No. 217 of 2022 and the Plaintiffs in ELC No. 217 of

(a) Mr. Daniel Ondego, Advocate holding brief for Mr. Sanjeev Khaghram Advocate.

(b) Mr. Bob Weyn- The C.E.O. Gateway Services & M.D. Bell Court.

(c) Mr. Hugh Walters-The General Manager Gateway Marine Limited.

iii. Security Operatives-(Police Officers from Central Police Station (Mombasa).

(a) Sergeant Mr. Joseph Mulinge.

(b) Police Constable-Mr. Henry Karichu.

(c) Police Constable - Mr. Johnson Masaka.

(d) Police Constable - Mr. Joseph Chacha.

iv. The Purpose

The Honorable Court explained to the parties present the purpose for the site visit. It was stated that pursuant to a court directive made on 21.4.2022, by consensus of the parties, it was agreed that Site Visit be conducted. It was noted that Court is empowered at any stage to inspect the property or thus concerning which a question may arise - in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

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

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, to wit:- 40 (10) (1) "The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

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

Ideally the site visit - the Locus in quo was with a view of gathering further evidence on the access road to the suit land to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred due to the likely hood of being abused particularly through Social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

v. The Procedure

The procedure upon which the site visit was to be conducted was explained to the team present. The team commenced by critically studying all the mapping documents pertaining the land with the assistance of both the Advocates for the Plaintiff and Defendant herein.

The team was then led by the Land Surveyor by moving around within and without the suit land. In the process, the team identified the planted beacons and access the access roads. The following documents were utilized as a guide

(a) A copy of the title deeds.

(b) A Part Development Plan for the public road.

(c) A Map sheet for the Changamwe area.

vi. Observations

a. It was noted that the suit property comprised of three (3) parcels of land. These were i). Land Reference No. Mombasa Mainland/2529 for and occupied by the Plaintiff and ii). The Land Reference Numbers Mombasa Mainland/1788 and 1899 both for and being utilized by the Defendant.

b. We leant that all these parcels were one portion. Eventually, it got sub - divided into two portions.

c. The properties were well fenced off with one main gate and another mini gate. The main gate was on full time basis manned by three (3) hired private security guards from a security Company.

d. There existed a common well done Cabro works to details of 12meters wide road and of approximately 55 metres long from the main gate to the compound. The gate was next to the main Makupa road.

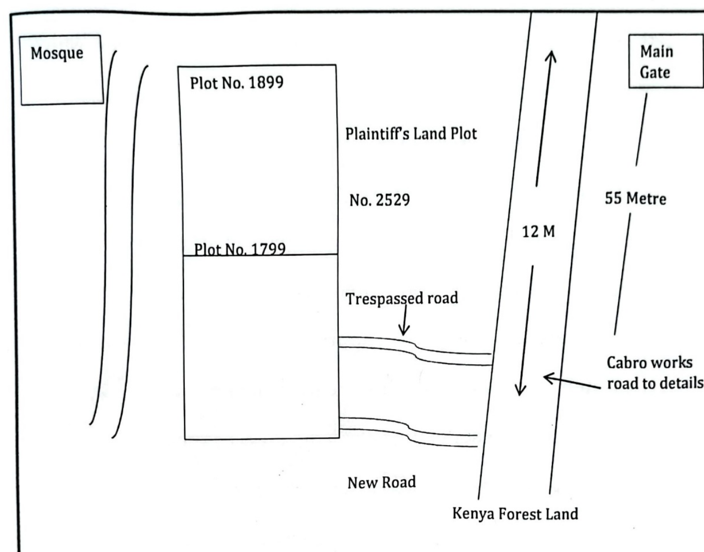
e. We noted that the place was exposed to security risk-several cases of arson and deaths were reported to have taken place in the recent past.

f. The main issue was having an independent access road from the Main Makupa-Kibarani Airport road to the suit land. The Defendant informed the team they had never had their own access road to their two plots. He held that this information was already at the Land Registry as a way leave. The team learnt that the main road, though served the two parcels for the time being it was not the formal access road for the second Plot. It was purely based on a gentleman agreement arrived at about 9years ago. It was not written/or documented. The C.E.O. admitted there might have been some trespass. There was great and urgent need for the second Plot to attain its access road to and from the Main Makupa- Airport road to the said Plot.

g. Based on information by the CEO, the Defendant had made an arrangement with the Kenya Forest department who owned the land on the lower side to allow the Defendants develop a new access road from the lower side. Indeed, the team noted that there was on

h. going construction works of a new road to Plot No.1788. The team learnt, that upon its completion, the Defendant would be moving their containers. Nonetheless, the team noted that the Plot Numbers 1788 and 1899 would still not be having any independent access road.

i. The team was informed and was able to observe for itself that the Plaintiff had not been utilizing their portion of Land. Perhaps, the team felt was the reason that might have led the Defendants wanting to utilize it. At least the area was quite secure.



vi. The Proposed Access Road To Plot Numbers 1788 and 1899.

The team then proceeded to see the area which was earmarked and shown from the area map to the official availed map for the access road leading to and from the Main Makupa - Kibarani & Airport road to the two Plots No. 1788 and 1899 respectively. It was on the rear side of the suit land. One has to first get outside the fenced compound and approach it from the main road. The proposed access road commences approximately 300 Metres from the Makupa-Kibarani & Airport main Road. The team took note of the following.

a) The marram (rough) road was not fully utilized. It was very narrow.

b) There was likelihood of wanton encroachment on the access road. Apparently, there were several permanent structures including a Mosque - approximately 75 metres and the existence of a livestock farm rearing almost twenty (20) Friesian dairy cattle on some part of the said access road.

c) We were informed that this area was known for being a hide out for serious crime persons and therefore such a highly security risky place.

d) In order to regain the access road, it would mean conducting an intensive Land Surveying exercise in order to determine the extent of encroachment. This would be followed by an exercise of eviction of these persons and demolishing the said illegal structures. These may call for a separate cause of action. We anticipated it would lead to a prolonged legal tussle which may not be peaceful at all.

e) It may be impractical for any heavy trucks to pass through or negotiate or maneuver through the access road as it stands now unless after a lot of intensive and high standardized Civil engineering and public road works is undertaken on it.

f) Clearly, the problem has escalated due to breakdown and lack of proper communication by the parties.

vii. Directions and Decision Made

In order to ameliorate the problem, it was felt that certain steps needed to be undertaken by the parties. The Court directed that:

a. And as agreed that the Court would only conduct a peripheral observations and

b. examination of the facts from a face value on the aspect of trespass as it awaits the alleged for detailed report from the Plaintiff and Defendants surveyor.

c. The two (2) surveyors for the Plaintiffs and Defendants to undertake an elaborate surveying exercise together on 17th May,2022 and each to prepare their independent land survey report to be presented to both parties and filed in Court.

viii. Conclusion and Recommendation

d. After the field assessment, the following were recommended:-

a. That the two surveyors to conduct a land surveying exercise on 17th May,2022 and prepare a report.

b. That the Plaintiffs and Defendants to work on smooth administrative method to both have smooth access to their premises without having any hindrances at the main gate. They should consider sharing security costs.

c. That parties were encouraged to attempt and explore an out of court negotiation in order to resolve the matter of access and allegation of trespass on to the Plaintiff's Plot amicably.

e. If there was a possibility of the Plaintiff selling the land to the Defendants, the better and that would resolve the matter once and for all.

f. The site visit ended at 1.50 P.M. with a word of prayer.

....

Hon.justice L. L. Naikuni

Enviromnent and land Court At

Mombasa

16th May,2022

124. Under this Sub – heading, the application by the Plaintiff/Applicant is whether or not to grant both interim and mandatory injunctive orders against the Defendants/Respondents herein. The said

application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which 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.

125. The principles applicable in an application for an injunction were laid out in the celebrated case of "Giella – Versus - Cassman Brown & Co Limited (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."

126. 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".

127. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in "MRAO Limited – Versus - First American Bank of Kenya Ltd (Supra). The Applicant averred that in 217 of 2021, the Plaintiff herein occupies the properties known as MN/V/1788 and MN/V/1893 at Kibarani, Makupa Causeway ['the Plaintiffs Properties]. The 4th Defendant herein, Belport Limited ['Belport'] is a quasi-partnership Company owned as to 50% by the Third Defendant, Jahangir Kasamali Tejani and his Son Faraaz Jahangir Tejani and 50% by himself and his Partner,

Fernando Marques through African Marine Technologies Limited. The Deponen is the Managing Director of Belport whereas the 3rd Defendant is its Non-Executive Director.

128. Belport was the proprietor of MN/V/1792 which was subdivided and a road [public road] excised therefor which was demarcated as MN/V/1792/2. This public road serves the properties known as MN/V/1788 and MN/V/1893 occupied by the Plaintiff, this being the only access to these properties from the Makupa Causeway.d. Belport is also the proprietor of the property known as MN/V/2436 that abuts the aforestated public road and the property adjourning to it namely MN/V/2385. The parties have in the past shared a fairly cordial relationship and given the 50:50structure of Belport, it was agreed that both quasi - partners would utilize the Belport properties in the same proportion for their own use.

129. Unfortunately a dispute has arisen amongst the quasi-partners and the 3rd Defendant in wrongful usurpation and abuse of powers, has sought to unlawfully takeover possession of the Belport properties last week and, in the process, has also trespassed onto the Plaintiff's properties. In addition to this and in complete disregard of the fact that the Plaintiff's properties are served by a public road, the 3rd Defendant, together with the 1st and 2nd Defendants who are neither employees of Belport nor have any instructions from it, have encroached onto the said public road and blocked the Plaintiffs access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it. On the morning of Thursday 21st October 2021, they managed to seek the assistance of the Police in having the barriers erected removed and the blocked access to the Plaintiffs property cleared. He understand and verily believed that the 1st Defendant, at 13.09Hrs, then went to Mikindani Police Station and alleged that he is the General Manager of Belport and reported that whilst he was in custody of the Police, three men allegedly broke the main gate Belport's main gate and stole the same.

130. The gate being referred to in this report is the unlawful barrier that the 1st Defendant had erected on the public access road abutting Belport's property and serving the Plaintiffs properties. The 1st Defendant has never been appointed as General Manager of Belport nor has he nor the 2nd Defendant been engaged in any capacity whatsoever to act on behalf of Belport. Yesterday (25th October, 2021) the 1st, 2nd and 3rd Defendants have engaged a Security Company, Farsight Security and who have placed two guards at the top yard who have refused to take any instructions from him or any of his agents acting on behalf of Belport and the 1st to 3rd Defendants have blocked the entrance gate serving the Plaintiff's properties yet again hindering its free and uninterrupted use of the public road serving its properties and access thereto.

131. On the other hand the 4th Defendant in ELC Case No. 217 of 2021 through its director FARAAZ TEJANI, responded to the application through a 19th paragraphed replying affidavit dated 27th February, 2022 where he averred that the Application by the Plaintiff is without any merit, or basis and is a blatant attempt by the Plaintiffs officers to trespass on to the Defendant's parcel of land and interfere with our quiet possession and enjoyment of the same. The 4th Defendant, Belport Limited is the legal proprietor of all that parcel of land known as Land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa.

132. The Plaintiffs is the owner of all that parcel of land known as MN/V/1788 and MN/V/1893 which lie adjacent to the Defendant's plot being land Reference No. 2529 Section IV Mainland North and Land Reference No. 2385 (Section V Mainland North). Contrary to the Plaintiff's assertions, there is no access road that has been hived off from any of the 4th Defendant's parcels of land, more particularly Land Reference No 2529(Ong No.1792/2), for purpose of accessing the Plaintiffs parcel of land but

it is instead the Plaintiffs officials who have with deliberate malice trespassed and encroached onto the 4th Defendant's parcel of land under the guise that there is an access road.

133. The access road stated in the Plaintiffs application was created to create an access to L.R No. 7 Section IV Mainland North (owned by Chesterton Limited) which lies to the North of LR No. 2529. Sometimes in the year 2016, they retained the service of B.C Mwanyungu, Licensed Surveyor who conducted a survey on the boundaries of LR Nos. 1792 and 2385 Section V Mainland North. He prepared a report wherein he concluded that the activities of the Plaintiff employees and officials had resulted in their illegal encroachment onto our parcel of land. (He annexed and produced as evidence a copy of the survey report marked as "FT – 1").

134. In addition to the survey of 2016, a further survey done in March 2021 by Ms. Coast Survey clearly depicted an encroachment by the Plaintiff vide the murram access road that it had created over our parcel of land. (He annexed and produced as evidence a copy of the survey report marked as FT2). Another survey conducted on 8th July 2022 by Edward Kiguru Land Surveyors confirmed the position that access road referred to by the Plaintiff had encroached onto our parcel of land (He annexed and produced as evidence a copy of the survey report marked as "FT- 3"). The Plaintiffs parcel of land has their own access points at the front of the said parcels and as such there is no reason at all for them to trespass onto the 4th Defendant's property. These access points can be seen from Plaintiffs bundle of documents. (He annexed and produced as evidence a copy of Mapsheet for the Area from the Survey Department at Bima Towers Mombasa marked as "FT – 4").

135. In the application dated 15th March, 2022 in ELC No. 29 of 2022, the Applicant averred that the Plaintiff remains the registered and beneficial owner of Land Reference No 2529(Orig No. 1792/2)Section V Mainland North CR No 65940 and Land Reference No.2385(Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa. He annexed and produced Certificate of Titles for LR 2529 & 2385 Section V Mainland North marked as "FT 4" & "FT – 5" respectively). The Defendant/ Respondent is the registered and beneficial owner of Property Title No 1899 Section V Mainland North and Land Reference No. 1788 Section V Mainland North also situate in Mombasa.

136. I wish to be guided by the case of "Mbuthia – Versus - Jimba credit Corporation Limited 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 parties cases."

137. Similarly, in the case of "Edwin Kamau Muniu – Versus- Barclays Bank of Kenya Limited" 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."

138. In the present case, there are two conflicting interests by the Plaintiffs/Applicant in both ELC (Mombasa) No. 217 of 2021 and ELC (Mombasa) No. 29 of 2022 and the Defendants/Respondents. I have gone through the annexures by the Plaintiff/Applicant and I am of the opinion that regarding this first condition, both the Plaintiff/Applicant has established that he is the lawful registered Proprietor of the Suit Property which in my opinion established that the Plaintiff has a right that may be infringed if the orders sought are not granted. In these circumstances, I strongly find and hold that the Plaintiff/ Applicant has established that he has "a prima facie" case with a probability of success.

139. With regard 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."

140. On the issue whether the Applicant would suffer irreparable harm which could not be adequately compensated by an award of damages. Principally, the Applicant must demonstrate that it was a harm that cannot be quantified in monetary terms or cannot be cured. In the instant case, the Plaintiff/ Applicant had to demonstrated that irreparable injury would be occasioned to him if an order of temporary injunction is not granted. The judicial decision of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR" 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."

141. Quite clearly, in the instant case, the Plaintiff in ELC No. 217 of 2021 herein occupies the properties known as MN/V/1788 and MN/V/1893 at Kibarani, Makupa Causeway. The deponent and his partner own 50% on the 4th Defendant (Plaintiff in ELC No. 29 of 2022). In considering an application for interlocutory orders, the court is called upon to take into consideration such issues as inter alia whether an undertaking for damages has been issued. It is the Plaintiff/Applicant's submission that none had been issued, as such, in the absence of interlocutory orders, the Applicant, stands to suffer irreparable injury not capable of redemption by way of an award of damages. Therefore, the Plaintiff/ Applicant has not satisfied the second condition as laid down in "Giella's case".

142. Thirdly, the Plaintiff/Applicant has to demonstrate that the balance of convenience tilts in his favour. In the case of "Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)" 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".

143. In the case of "Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Ltd & 2 others (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."

144. In this instant case, the Plaintiff/Applicant's claim that the parties have in the past shared a fairly cordial relationship and given the 50:50 structure of Belport, it was agreed that both quasi - partners would utilize the Belport properties in the same proportion for their own use. Unfortunately, a dispute has arisen amongst the quasi-partners and the Third Defendant in wrongful usurpation and abuse of powers, has sought to unlawfully takeover possession of the Belport properties last week and, in the process, has also trespassed onto the Plaintiff's properties. In addition to this and in complete disregard of the fact that the Plaintiff's properties are served by a public road, the Third Defendant, together with the 1st and 2nd Defendants who are neither employees of Belport nor have any instructions from it, have encroached onto the said public road and blocked the Plaintiffs access to its properties by erecting barriers on the public access road and preventing the Plaintiff from using it.

145. 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."

146. According to the Plaintiff/Applicant there isa high likelihood that in the absence of the injunctive orders, the Defendants/Respondents may proceed to further alienate the suit properties thereby making the Plaintiff/Applicant's claim over the suit properties a mere academic exercise. Thus, I am convinced that the balance of convenience lies with the Plaintiff/Applicant in this case as he is the legal and beneficial proprietor of the suit property.

147. Be that as it may, 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. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the ownership of the suit property by the Plaintiff/Applicant.

148. In saying so, I wish to refer to 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…"

149. I am convinced that if orders of temporary injunction are not granted in this suit, the properties in dispute might be in danger of being dealt in the manner set out in the application and apprehended by the Plaintiff/Applicant. From the facts herein, the Plaintiff/Applicant has been in occupation of the suit land from time memorial until they were forcefully evicted by the Defendants/Respondents. It follows that the Plaintiff has a prima facie evidence and legal inclination to the suit property. In view of the foregoing, I find that the suit property is at risk of being wasted. Therefore this Honourable court orders that the status quo of the suit property in the course of the hearing and determination of this suit.

150. Being that there were two applications filed seeking the same prayers, this Honourable Court grants the Notice of Motion application with the extend that these are preservatory orders on the suit property therefore the applications dated 27th October, 2021 and 15th March, 2024 are found to have merit only to the preservation of the suit property.

> ISSUE No. b). Whether this Honourable Court will be pleased to set aside orders issued on 16th March, 2022 in accordance to Order 40 Rule 7 of the Civil Procedure Rules, 2010 and subsequently whether the Notice of Motion application dated 24th March is merited

151. The jurisdiction of the court to set aside an order of injunction is set outlined under Order 40 Rule 7 Civil Procedure Rules, 2010 which provides as follows:

> " Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

152. I am of the view that the conditions for the grant of an interlocutory injunction are now well settled as stated in the cases of:- "Giella – Versus - Cassman Brown (Supra)", "Mrao – Versus - First American Bank of Kenya Ltd (Supra)", and "American Cynamid co – Versus - Ethicon Ltd (Supra)". The principles are: (a) an applicant must show a prima facie case with a probability of success (b) In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages. (c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience.

153. These principles have stood the test of time as good law applicable in our jurisprudence on interlocutory injunctions. I see no reason why they should not apply to the present application. The plaintiff's earlier application under certificate of urgency and subsequent interim orders were issued against the defendant in ELC (Mombasa) No. 29 of 2022. According to Defendant in ELC (Mombasa) No. 29 of 2022, the Plaintiff had not served upon the Defendant the pleadings nor the order of this Honourable Court as it is required to do in law. There is a dispute in the Plaintiff's Company between the shareholders thereof being 50% owned by Mr. Jahangir Kasmali Tejani and his son, Faraaz Jahangir Tejani and as to 50% owned by African Marine Technologies Limited by which Mr. Bob

Weyn and Fernando Marques are the principal shareholders. Unfortunately, a dispute arose amongst the shareholders of Belport and Jahangir Kasamali Tejani and Faraaz Jahangir Tejani, in wrongful usurpation and abuse of powers, sought to unlawfully takeover possession of the Belport Properties sometime in October 2021 and, in the process, trespassed onto the Defendant's Properties (which are occupied by the Defendant). In addition to this, and in complete disregard of the fact that the Defendant's Properties are served by a public road, Jahangir Kasamali Tejani and Faraaz Jahangir Tejani together with Mohamed Osman Yakub and Altaf Mohamed Hussein, who are neither employees of Belport nor have any instructions from it, encroached onto the said public road and blocked the Defendant's access to its Properties by erecting barriers on the public access road and preventing the Defendant from using it. Noting that the access is a public access available to the public and all users.

154. On Thursday 21st October 2021, the Defendant managed to seek the assistance of the Police in having to clear the barriers erected removed blocking the access to the Defendant's Properties. Mohamed Osman Yakub, then went to Mikindani Police Station and alleged that he was the General Manager of Belport and reported that whilst he was in custody of the Police, three men allegedly broke the main gate Belport's main gate and stole the same. The said Mohamed Osman Yakub has never been appointed a General Manager of Belport nor its employee nor has he ever been connected with it. The gate being referred to above was an unlawful barrier that Mohamed Osman Yakub had erected on the public access road abutting Belport's property and serving the Defendant's properties.

155. The law on setting aside of ex parte orders is found under the provision Order 12, Rule 7 of the Civil Procedure Rules, 2010 which provides thus:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

156. This provision is amplified by the the provision of Order 51, Rule 15 which provides that the court may set aside an order made ex parte. Bearing in mind that the Application dated 15th March, 2022 was duly served upon the Respondent and on 16th March, 2022 the Court issued interim orders to maintain the status quo. Upon knowledge of the ex parte order, the Applicant filed the instant application seeking to have the orders issued on 16th March, 2022. In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. (See – "Philip Ongom, Capt – Versus - Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003)").

157. In the instant case, the Applicant herein was properly served with the application dated 15th March, 2022 on 22nd March, 202 and the hearing of the application was set thereof. In the case of "Ongom – Versus - Owota (supra)" the Court stated thus:

> " ....However, what constitutes "sufficient cause", to prevent a Defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

158. Additionally, in the case of "The Registered Trustees of the Archdiocese of Dar es Salaam – Versus - The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006", the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

> " It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however, that the words should receive a liberal construction in order to advance

substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant."

159. The right to be heard is a well-protected right in our Constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the strike of a pen, where sufficient cause has been shown. (See – "Richard Ncharpi Leiyagu – Versus - Independent Electoral Boundaries Commission & 2 Others Civil Appeal No. 18 of 2013 [2013] eKLR"). This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice. (See – "Wachira Karani – Versus - Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR". This application through has been overtaken by events being that I have already granted the prayers for interlocutory injunction.

Issue No. c). Whether the Defendant's directors in ELC No. 29 of 2022 Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn &Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited, be all, or either of them as determined by the Court, committed to prison for a maximum period of six(6) months for contempt of court as per the Notice of Motion application dated 4th April, 2022

160. As stated above, one of the other Substratum in this proceedings herein is one on Contempt of Court from an alleged breach and gross violation of the Court orders. It has been stated on umpteenth times that Court orders are sacrosanct. They are not a formality nor cosmetic. They have to be obeyed however erroneous they maybe. The only remedy available is for an aggrieved party to revert back to Court seeking for either review or variation or setting aside or discharge of the said orders depending on the prevailing circumstance and surrounding facts and inferences. The consequences of disobedience of Court order is extremely serious as it borders on criminality capable of one forfeiting their fundamental rights and freedoms enshrined in the Bill of Rights under *the Constitution*.

161. The Black's Law Dictionary 11th Edition, defines contempt as:-

> " The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it punishable by fine or imprisonment".

162. At some initial point, the legal framework that governed contempt of court was the *Contempt of Court Act* until it's nullification in the case of:- "Kenya *Human Rights Commission – Versus - Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017*". However, the court in the case of:- "Samuel M. N. Mweru & Others – Versus - National Land Commission & 2 others [2020] eKLR" while discussing the legal framework on contempt of court stated as follows:-

> " The applicable law as regards contempt of court existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in Christine Wangari Gachege – Versus - Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of Judgment, order or undertakings, was applied by virtue of Section 5 (1) of the *Judicature Act* which provided that:
>
> > "The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of

Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."

This section was repealed by Section 38 of the *Contempt of Court Act* of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal Section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under Section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules."

163. As restated in the above case law, the law then applicable in contempt of court proceedings is Section 5(1) of the *Judicature Act* which mandates that the court relies on the applicable law in England at the time the alleged contempt is committed. In the case of "Samuel M. N. Mweru (Supra) the Court dealing with an application for contempt of court based on disobeyed of a court order stated:

> " An application under Rule 81.4 "(breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon".

164. I reiterate that a claim on contempt of court is a grave issue that the court treats with a lot of seriousness as it goes to the core of undermining the authority of the court. It is a fundamental principle of law that court orders are meant to be obeyed to the letter as they are not issued in vain. Failure to obey court orders would then result in contempt of court.

165. The importance of obedience of court orders was restated in the case of "Econet Wireless Kenya Limited (Supra) where the court cited with approval the case of "Gulabchand Popatlal Shah & Another Civil Application No. 39 of 1990", (unreported). The Court of Appeal held, inter alia,

> " ...... It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors ......"

166. Fundamentally, courts need to ascertain whether the applicant herein has met the basic elements set out to prove a case for contempt of court. In the case of "Katsuri Limited – Versus - Kapurchand Depar Shah [2016] eKLR" as relied upon by the Respondents, the court stated that:

> " The applicant must prove to the required standard (in civil contempt cases which is higher than in criminal cases) that:-
>
> (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
>
> (b) the defendant had knowledge of or proper notice of the terms of the order;
>
> (c) the defendant has acted in breach of the terms of the order; and

(d) the Defendant's conduct was deliberate."

167. I will therefore be analyzing each element as set out above and in close application to the instant case. In so doing I will be looking at the court order issued by the court. The provision of Section 29 of the Environment and Land Court is clear to the effect that:-

> " Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both

168. It is an established principle of law as was held in the case of "Kristen Carla Burchell – Versus - Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005" in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondents, (iii). Failure by the Respondent to comply with the terms of the order.

169. From the sworn affidavits, annexure's, submissions by the respective parties' Counsels on record, the applicable law and the decided cases, the following issues stand out for determination:-

   i. Whether there was a valid Court order issued by this Court on the 16th March, 2022 by this Honourable Court

   ii. Whether the Respondents herein were served with or was aware of the orders made on 16th March, 2022.

   iii. Whether the order as sought and extracted was clear and unambiguous

   iv. Whether the Respondents are guilty of contempt of Court order herein issued.

170. In the instant case, from the very onset and without mincing words, the Honourable Court out rightly states that it is not at all persuaded that there is any Contempt of Court committed by the Respondents as alleged by the Applicants for the following reasons:- Firstly, I hold that it is clear that the order issued by the court was clear and unambiguous. It was addressed to the Respondents, hence binding upon them. The Applicant's case is that an order was made on the 16th March, 2022 by this Honourable Court where it opined itself as follows:-

   a. That pending the hearing and determination of this application inter parties, a temporary injunction be and is hereby issued restraining, barring, stopping and or preventing the Defendant, its Directors, agents, assigns, workers, representatives and demolishing, blocking, trespassing, and constructing, erecting, renovating and or in any manner interfering with any and or both of Plaintiffs parcel of land known as Land Reference No 2529(Orig No. 1792/2) Section V Mainland North CR No 65940 and Land Reference No.2385 (Orig No.1900/1) Section V Mainland North CR No.41347 situate in Mombasa

   b. That the Notice of Motion dated 15th March 2022 be served for inter parties hearing on 6th April 2022 before ELC No.3

171. Secondly, on the alleged contemnors ought to have knowledge of or proper notice of the terms of the order. The Respondents had no knowledge of the court order as they were not in attendance when the ruling was delivered on 16th March, 2022. I find that as a general rule, no order of Court requiring a person to do or to abstain from doing any act may be enforced (by committing him/her for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question, or that the person had the knowledge of an order which supersedes personal

service. There has been no proof that the said order was delivered to the Respondents or that service was effected of the order.

172. In the old celebrated case of "Exparte Langely 1879, 13 Ch D/10 (CA)" Thesiger L.J stated at P. 119 as follows:-

> " ....the question in each case, and depending upon the particular circumstances of each case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in
>
> fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."

173. Thirdly, the allegations blatantly meted out by the Applicant to the effect that the Respondents have willfully disobeyed these orders and even went ahead to vandalize the suit property after the Honourable Court gave its orders on 16th March, 2022 have not been proved whatsoever. Further, that accusation that the Respondents willfully acted in contempt by not obeying this Court orders as this Honorable Court had made clear orders in terms of handling of the suit property remain as mere unproved assertions. Additionally, the Honourable Court fully concurs with the submissions made out by the Learned Counsel for the Respondents to the effect.

174. Fourthly, the Court fully concurs with the submissions rightfully made out on the proper legal position by the Learned Counsel for the Respondent to wit that:-

    a. The Honourable Court granted orders on 16th March, 2022 arising from the Notice of Motion application dated 15th March, 2022 where the Honourable Court granted interim orders of status quo on the suit property.

175. To this end, therefore, the Honourable Court is not satisfied that the Applicant has proved its case for contempt of Court orders by this Honourable Court given on 16th March, 2022 against the Respondents. On the 3rd issue for determination as to whether the order as sought and extracted was clear and unambiguous, I find that pursuant to the issuance of the order for parties as herein above captioned, the said order was clear. Clearly from this Court's ruling on 16th March, 2022 there was nothing ambiguous or unclear that was not stated and the parties were not all present in Court. The Applicant has argued that the Respondents had gone contrary to the orders of the Court. The Court of Appeal in "Shimmers Plaza Limited – Versus - National Bank of Kenya Limited [2015] eKLR" emphasized that:-

> " It is important however, that the Court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty."

176. As stated above, contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. In the end, it is the finding of this Honourable Court that the Applicant had not proved to the required standard that the Respondents as cited were in brazen disobedience of the Court orders issued by this Honourable Court on 16th March, 2022. I therefore find the Notice of Motion application dated 4th April, 2022 to lack merit and thus it is hereby dismissed with costs in the cause.

Issue No. d). Who will bear the Costs of Notices of Motion application dated 27th October, 2021, 15th March, 2022, 24th March, 2022 and 4th April, 2022.

177. It is now well established that the issue of Costs are at the discretion of the Court. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

178. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows;-

> " (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

179. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

180. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

181. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of"- "Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR" the court noted that;

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

182. In this case, taking that the matter is still on going, as this Honourable Court has opined above, costs of the four application will be in the cause.

X. Conclusion & Disposition

183. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather complex interlocutory applications, this court arrives at the following decision and makes the order below in this omnibus ruling thus:-

a. That the Notice of Motion application by the Plaintiff in ELC No. 217 of 2021 be and is hereby found to have merit and is allowed in its entirety.

b. That the Notice of Motion application dated 15th March, 2022 by the Plaintiff in ELC No. 29 of 2022 be and is hereby allowed in its entirety.

c. That the Notice of Motion application dated 24th March, 2022 by the Defendant in ELC No. 29 of 2022 be and is hereby found to lack merit and is disallowed in its entirety

d. That the Notice of Motion application dated 4th April, 2022 by the Plaintiff in ELC No. 29 of 2022 be and is hereby found to lack merit and is hereby disallowed in its entirety.

e. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant a temporary injunction restraining, barring, stopping and or preventing the parties, its Directors, agents, assigns, workers, representatives and demolishing, blocking, and constructing, erecting, renovating ad or in any manner interfering with any and or both of Plaintiffs parcel of land known as Land Reference No 2529 (Orig No.1792/2) Section V Mainland North CR No 65940and Land Reference No. 2385 (Orig No.1900/1) Section V Mainland North CR No. 41347 situate in Mombasa.

f. That the Defendants in ELC No. 217 of 20 be restrained whether by themselves or their servants or agents from illegally and unlawfully blocking the Plaintiff's access to its property or in interfering in any manner whatsoever with its business activities and/or creating a nuisance by blocking access to the Plaintiff's property pending the hearing and determination of this suit.

g. That this Honourable Court hereby does not find the Defendant's Director, Bob Edward Lisa Weyn, Yannick Robert Louis Aiglee Weyn, Fernando De Oliveira and John Sanga the General Manager of Senaca E.A Limited respectively being in contempt of Court Orders given on 6th March, 2023 as the Applicant has not proved to this Honourable Court that the order dated 30th March, 2023.

h. That for expediency sake, the case to be heard on 17th October, 2024. There shall be mention on 16th July, 2024 for purposes of conducting intensive Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.

i. That in the meantime parties are encouraged to continue exploring and engaging in the already initiated out of Court negotiation in tandem with the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Sections 20 (1) and (2) of the *Environment and Land Court Act*, No. 19 of 2011 with a view of arriving at an amicable solution and/or consent to the scathing and disputed matter.

j. That the costs of the Notices of Motion applications dated 27th October, 2021, 15th March, 2022, 24th March, 2022 and 4th April, 2022 to be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 14TH DAY O MAY 2024.

....

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. M/s. Essejee Advocate holding brief for Mr. Khagram Advocate for the Plaintiff in ELC. No. 217 of 2021 and the Defendant in ELC No. 29 of 2022.

c. M/s. Amina Advocate holding brief for Mr. Khalid Salim Advocate for the Plaintiff in ELC. No. 29 of 2022 and the Defendant in ELC No. 29 of 2021