Maingey (Suing on His Own Behalf and on Behalf of the Fransiscan of Our Lady of Good Counsel Sisters Registered Trustees, David Masika, Evergreen Crops Limited, Waridi Limited, Daniel Mutisya Ndonye and Valley Brook Capital Limited) v Hillman & 3 others (Environment & Land Case 113 of 2015) [2025] KEELC 685 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELC 685 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 113 OF 2015

A NYUKURI, J

FEBRUARY 19, 2025

BETWEEN

THOMAS MUMO MAINGEY (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE FRANSISCAN OF OUR LADY OF GOOD COUNSEL SISTERS REGISTERED TRUSTEES, DAVID MASIKA, EVERGREEN CROPS LIMITED, WARIDI LIMITED, DANIEL MUTISYA NDONYE AND VALLEY BROOK CAPITAL LIMITED) ..... PLAINTIFF

AND

SARAH NYIVA HILLMAN ..... 1ST DEFENDANT

PAULINE KAMBUA MAINGEY ..... 2ND DEFENDANT

WILLIAM DAHER ..... 3RD DEFENDANT

DIRECTOR OF SURVEYS ..... 4TH DEFENDANT

JUDGMENT

1. By a plaint dated 9th April 2015, Thomas Mumo Maingey on his own behalf and on behalf of six other plaintiffs sued the defendants and sought against them the following orders;

    a. Damages

    b. A declaration that the plaintiffs and all other proprietors of the adjacent properties are entitled to a right of way across the properties known as LR numbers 1338 / 91 1338 / 92 and 1338/93 using the road commonly known as 39 Quarry Road which is shown on the subdivision plan of 11 number 1338/ 4 / R with a broken line running across the properties marked thereon as

A, B, C, D & E for themselves, their servants, employees, agents and licensees on foot, motor vehicles and other conveyances at all times and for all purposes.

c. A declaration that the 1st to 3rd defendants are not entitled to place or build or cause to be placed or built anything upon the properties known as L.R Nos. 1338/91, 1338/92 and 1338/93 so as to close, block up or obstruct the road commonly known as 39 Quarry Road so as to restrict, prevent or otherwise interfere with the reasonable use thereof by the plaintiff and all other proprietors of the adjacent properties, their servants, employees, agents and licenses on foot, motor vehicles and other conveyances at all times and for all purposes.

d. An injunction restraining the 1st to 3rd defendants by themselves or their servants or agents or otherwise howsoever from placing or allowing to be placed on the road commonly known as 39 Quarry Road anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the Safeway by the plaintiff and all other proprietors of the adjacent properties their servants, employees, agents and licenses on foot, motor vehicles and other conveyances at all times and for all purposes and from doing any act whereby the plaintiff and all other proprietors of the adjacent properties may be hindered or obstructed and the free use of their properties.

e. An order directed to the 4th defendant to rectify the deed plan numbers 268859, 268857 and 268858 so as to indicate that the road which was approved by the Mavoko Municipal Council on 19 April 2006 as per the approved approval conditions for the subdivision of the property originally known as LR number 1338 / 4 runs parallel to the northern boundary of the 1st to 3rd defendants' properties known as LR numbers 1338 / 93, 1338 / 91 and 1338/ 92 respectively.

f. Such other or further remedy as this honorable court may deem just and fit to grant.

g. costs of this suit.

2. The plaintiff stated that he is a son and one of the administrators of the estate of the late Paul Maingi, while the 1st and 2nd defendants are daughters of the deceased and the 3rd defendant is the husband of the late Miriam Maingi an heir and beneficiary of his estate. He further stated that the late Paul Maingi acquired property originally known as L.R No. 1338/4 in 1970 with a road already in existence and traversing across the said property. According to the plaintiffs, since 1970's, the owners of the properties adjacent to the land owned by the plaintiff's father's estate, had a right of way across the estate property through the said road, which later came to be known as 39 Quarry Road , and that this road enabled them to access their properties from the Nairobi-Mombasa Road near the Athi River Bridge.

3. He maintained that he was appointed by the High Court as an executor of the will of his father on 22nd October 2003 and caused parcel No. 1338 / 4 / R to be subdivided into several plots in accordance with his father's testamentary wishes and submitted sub divisional plan dated 26th March 2006 for approval by Mavoko County Council. He stated that the road traversed across the properties which were subdivisions of the land owned by the late Paul Maingey which properties are parcel L.R. No. 1338/94 transferred to Andrew Kitili Maingey, L.R. No. 1338/93 transferred to the 1st defendant, L.R. No. 1338 /92 transferred to the 3rd defendant, L.R. No. 1338/91 transferred to the 2nd defendant and L.R. No. 1338/90 transferred to the plaintiff; with the road shown by a continuous broken line on the map shown in the subdivision plan.

4. The plaintiff emphasized that by his letter dated 26th March 2006 to the Mavoko County Council, he asked the Council to ensure that the public road shown on the dotted line on the subdivision plan

remains as a public road, to provide the beneficiaries of his late father's estate and owners of adjacent properties access to their properties. According to the plaintiff, Mavoko County Council approved the proposed subdivision of L.R. No. 1338 /4/R without any amendments or modification. He stated that he caused titles in respect of the subdivisions to be issued and transferred to the 1st to 3rd defendants in accordance with the wishes of the late Paul Maingey.

5. He complained that when the 4th defendant issued deed plans in respect to the 1st to 3rd defendants and the plaintiff's properties being L.R. No. 1338/93, 1338/91, 13384/92 and L.R. No. 1338/90, respectively, he did not indicate on the said properties' Deed Plan Nos. 268859, 268857, 268858 and 268867 respectively the access road which Mavoko Municipal Council approved on 19th April 2006, to run across the set properties. He maintained that being the owner of 1338/ 90 he enjoyed the right of way through the said public road. He further stated that Andrew Kitili Maingey his Co-executor of the will of the late Paul Maingey surrendered to Machakos County Government, free of charge, a road measuring approximately 15 metres which runs across his property known as L.R No. 1338 / 94 in accordance with the approved subdivision plan. He also stated that in the subdivision of his land L.R No. 1338/94 he surrendered a road measuring 15 metres free of charge to Machakos County Government in accordance with the approved subdivision plan. He stated that the road surrendered by Andrew Kitili and himself is a continuation of the road which cuts across the properties owned by the 1st to 3rd defendants and continues all the way to adjacent property known as L.R. 14750/5 belonging to David Masika who also had as of 7th October 1988 surrendered a 15 metre road shown in the Deed Plan No. 136224 to provide access to the hinterland.

6. The plaintiff maintained that the errors in the deed plans of the 1st to 3rd defendants can be corrected by the 4th defendant as mandated in the provisions of the *Survey Act*. The plaintiff stated that proper proprietors of adjacent properties including David Masika, Franciscans of Our Lady of Good Counsel Sisters Registered Trustees, Evergreen Crops Limited, Waridi Farm Limited, Danana Girls Secondary School and others to do not have any other way to access their properties other than by the road which cuts across the 1st to 3rd defendants' properties. He further stated that all those persons who acquired properties from the subdivision of L.R. No. 1338/90 have always openly enjoyed unhindered access to their properties through the road that cuts across the properties of the 1st to 3rd defendants and these persons include professor Francis Juma, Tutus Mwirigi, Patrick Githinji Mugambi, Valley Brook Capital Limited, Catherine Gichunge, Judith Ngirote, Gregory Kiluva, Daniel Karuga, himself and others.

7. The plaintiff stated that public resources have been used by the former Mavoko Municipal Council to maintain the disputed road and the same is now being maintained by Mavoko Sub County Government in conjunction with stakeholders from the area. That the plaintiff and all stakeholders from Mavoko subcounty including proprietors of adjacent properties have as a matter of necessity, a right of way on foot, motor vehicles and other conveyances using the road that cuts across the 1st1st to 3rd defendants' properties. He stated that despite using the disputed road as a public road for long, in 2012, the 1st defendant unlawfully purported to close the road leading to an uproar from stakeholders, necessitating the plaintiff and his Co-executor of to complain in their letter of 4th October 2012 to Mavoko subcounty, but that the latter wrongfully permitted the defendant to erect a barrier on the road and restrict the enjoyment of the right of way. He stated that when the 1st defendant started illegally charging members of the public fees to use the road, the plaintiff wrote a letter of 30th September 2014 complaining to Mavoko subcounty and sought for the defendant to remove the barrier and also wrote to the 4th defendant on 16th March 2015 asking for confirmation whether that road was a public road. He stated that on 18th March 2015 the 4th defendant informed the defendant that upon subdivision of the plaintiff's property, the plaintiff surrendered the road aforesaid through

the County Government free of charge as per the approval conditions for subdivision and a surrender Deed Plan was issued and that the said road was a public road.

8. His position was that the closure of the road will negatively impact the social cultural environment of Mavoko subcounty and restrict access to the hinterland because the road is one of the link roads to Kangundo road from Nairobi-Mombasa Highway. He also said stated that charitable works presently undertaken in the area by the Franciscan sisters will be hampered and provision of affordable housing will be stunted. Further that Evergreen and Waridi Farms horticulture and floriculture business will be adversely affected and that the large workforce deployed by various businesses in the area will not be able to earn a living as a result. He also pointed out that over 400 students who go to Danana Girls Secondary School would not be able to safely access their school if the road is closed.

9. The 1st to 3rd defendants filed their statement of defence dated 27th July 2015 which was amended on 8th February 2019 by filing a defence and counterclaim. The counter claim was raised as against the plaintiff, Franciscans of Our Lady of Good Counsel Sisters Registered Trustees, David Masika, Evergreen Crops Limited, Waridi Farm Limited, Daniel Mutisya Ndonye, Valley Brook Capital Limited, Titus Mwirigi, Safaricom Investments Cooperative Society Limited, Whistling Morans Limited and Kenya Urban Roads Authority who are all 11 defendants to the counterclaim.

10. The 1st to 3rd defendants denied the plaintiff's claim and stated that when the late Paul Maingey acquired parcel number L.R. No. 1338/4 in 1970, there was no public road on that property as per the Deep plan of the property registered as I.R 1275/ 1. They stated that when the late Paul Maingey acquired the property there were no neighbours at all and that he is the one who sold most of the land and in particular land to London Distillers Limited, Hillcrest and others. They stated that in the will of the late Paul Maingey of 16th October 1981, and the court order dated 22nd October 2003, there was no specific powers directing the executors to create a through road in the subdivision of the parcel owned by the estate. They averred that they were not consulted in relation to creating a road on their properties which is private property. They insisted that the proposed subdivision purporting to create Quarry Road 39 could not have been legal because it was an encroachment into private property which would result in indirect compulsory acquisition by the County Government of Machakos without prompt compensation to private owners thereof.

11. According to the 1st to 3rd defendants, the late Paul Maingey only allowed an access road from Nairobi-Mombasa Road up to the dead-end road terminating at the extreme border of the plot adjacent to L.R. No. 1338/94 belonging to Andrew Kitili Maingey. They insisted that the access road did not proceed up to parcel L.R. No. 1338/90. They stated that the plaintiffs have their own independent access roads all the way towards the river and that the neighbours are not land locked as they are served with a common 20 metre public access road situated along northwestern boundary as confirmed by survey Map Fr No. 371 and that 39 Quarry Road does not exist in the survey map but only exists as a private road .

12. She stated that on 16th March 2015, the 1st defendant wrote a letter to the 4th defendant requesting for confirmation of the disputed private road which was responded to on 18th March confirming that from their survey records there is no public road passing through the defendants' land and that those plots should be accessed along the northwestern boundaries. They stated that there is no way Mavoko Municipal Council could have delineated a public road out of private properties of the defendants. They denied the plaintiffs' allegation that the 4th defendant committed errors in the Deed Plans issued to the defendants They denied allegations that Andrew Kitili surrendered his land on subdivision and alleged that he created easement for his interests to serve the people he had sold land.

13. They stated that the plaintiff having sold part of his land to other persons, the purchasers are entitled to utilize the official 36 metre public road that links them to the interchange along the Nairobi-Mombasa Road, and that those persons cannot claim the use of the defendants' private lands out of convenience and necessity without demonstrating consent. They termed the plaintiffs' acts as malicious and unjustified and a breach of their constitutional rights to ownership of property.

14. According to the defendants, the road in question remains a private road which is why they installed a road barrier to control unlawful trespass thereon, because they must charge for the use of that road to maintain the road from wear and tear. They emphasized that Mavoko Municipal Council and alleged stakeholders cannot interfere with the defendants' private property.

15. They argued that it is trite law that a right of necessity does not obtain where the purported landlocked parties have an alternative access road and therefore all beneficiaries of the estate of Paul Maingey who are connected to the public road joining the interchange along Mombasa-Nairobi Road do not need to use the roads on the 1st to 3rd defendants land and the use of the same is unjustified and amounts to trespass.

16. By way of counterclaim, the 1st to 3rd defendants alleged that the 1st to 10th defendants to the counterclaim have been wrongfully entering and accessing the 1st to 3rd defendants' property by use of their private road which is referred to as 39 Quarry Road. They also complained that the Kenya Urban Roads Authority has been grading and expanding the road in issue without any rights and perpetuating and encouraging the 1st to 10th defendants' misconceived claim that the road is a public road. They stated that because of the acts of the defendants, they were unable to develop their properties including their hotel called Wattle Blossom Lodge which has been disrupted. They averred that the alleged public road divides the properties into two parts and therefore the lodge and the resorts would be disturbed and their economic viability reduced. They stated that they have suffered loss and damage as their property had been encroached upon and compulsorily acquired measuring 0.5277 hectares from L.R. No. 1338/91, 1338/92 and 1338/93. They also stated that they had suffered loss of income in the sum of Kshs. 379, 922, 400/=.

17. They therefore counterclaimed as follows;

    a. Kshs. 25,000,000 as at 5th September 2017 being damages for encroachment and compulsory acquisition of apportion measuring 0.52277 hectares (1.3 acres) from the counterclaim plaintiffs' properties L.R. No. 1338/91, L.R. No. 1338/92, L.R. No. 1338/93

    b. Kshs. 379,922,400/= as at 5th September 2017 being damages for loss of income and other disturbances on the counterclaim plaintiff business Wattle Blossom Lodge) as a result of the encroachment and compulsory acquisition of a portion measuring 0.52277 hectares (1.3 acres) from the counterclaim plaintiffs' properties L. R. No. 1338/91, L.R. No. 1338/ 92 and L.R. No. 13384/93.

    c. A permanent injunction restraining the 1st to 11th counterclaim defendants, their agents and or servants from interfering or using the road known as 39 Quarry Road and the suit properties.

    d. An order that the OCPD Athi River Police Station to enforce the permanent injunction aforementioned.

    e. Mesne profits and damages to be determined by the court

    f. Costs of this suit

    g. Interests thereon at court rates; and

h. Such other or further relief as this honorable court may deem fit.

18. The 4th defendant filed a defence dated 3 January 2019. He denied the plaintiff's claim and alleged being a stranger to the averments made in the plaint. He stated that if there was any road as alleged by the plaintiffs, then the same was not approved as a public road. He confirmed that that the plaintiffs applied for subdivision of L.R. No. 1338 / 4.

19. According to the 4th defendant, their records indicate that there is no surveyed road passing through the land owned by the 1st to 3rd defendants and that the three plots are accessed from a common road along their northwestern boundaries as confirmed from the survey plan FR No.371. He maintained that there was no provision of a road in the subdivision plan provided by the plaintiff and stated that the road known as 39 Quarry Road does not exist on the survey plan as per FR No. 15399 and FR No. 33763. He also stated that the road referred to by the plaintiffs is neither surveyed nor documented as an easement as per the survey plan of FR No. 337/63. He claimed that the allegations by the plaintiffs that the closure of the road will negatively impact the social cultural economic environment of Mavoko subcounty are false because there is a 30 Metre wide public road along the Northwestern boundary from Stage 39 Mombasa-Nairobi- Namanga Road Interchange giving access to the neighbouring parcels of land.

20. The 9th defendant Safaricom Investments Cooperative Society Limited filed an application dated 14th May 2020 seeking that the suit by way of counterclaim against them by the 1st to 3rd defendants be struck out. That application was allowed on 6th November 2020.

21. The suit proceeded by way of viva voce evidence. The plaintiffs presented 5 witnesses. The 1st to 3rd defendants presented three witnesses while the 4th defendant Presented one witness.

Plaintiffs' evidence

22. PW 1 was Thomas Maingey. He adopted the contents of his witness statement dated 26th October 2022 and produced the 44 documents attached to his list of documents dated even date. His testimony was that the 1st and 2nd defendants are his sisters while the third defendant is his brother-in-law. He stated that in 1970, his father the late Paul Maingey acquired what was then known as Wattle Blossom Farm which comprised of two properties being L.R Nos 1337 and 1338 from one James Alexander Sands. He stated that at that time, there was a road traversing across the property to the neighbouring farms. Further that along that road there were telephone and electricity transmission poles to their farms and their other farms as their house was connected to electricity and a telephone line. He stated that their family moved into their farm in 1971 and that he had lived on the farm with his father and he used the disputed access road which links to Mombasa Road.

23. According to PW1, prior to 1970, owners of adjacent properties to his late father's farm had the right of way across their father's property and that that road became known as 39 Quarry Road, which enables them to access their properties from Mombasa Road, near the old Athi River Bridge built in 1939 as there was a bus stage named stage 39. That the road led to stone quarries beyond his father's farm that is why it was named as 39 Quarry Road. He stated that he knew from his father that his father was required to retain that public access road to serve Munyeti Ranch, BAT Scheme, ADC Farm, KMC Ranch and others in the hinterland and that his father kept the commitment from the time of purchase until his demise in 1994. He stated that the road was continuous and in active use to the general public all this while.

24. He maintained that his father never blocked or restricted the use of the disputed road to anybody and that it was the defendant who started restricting the use of the road upon obtaining her title. He stated

that the 1st to 3rd defendants used the said 39 Quarry Road to access their properties, yet they restrict the use of the same road by the plaintiffs and the members of the general public. He stated that the entire road was under murram, tarmac and partly paved with cabro but only a stretch of about 300 metres traversing the properties of the defendants which has a rough stretch. According to him, the area of the road in the defendant's property is 0.41 acres out of the total land area of 32 acres, while the area of the road in the 2nd and 3rd defendants land is 0.358 acres from a total of 32.8 acres and 0.52 acres out of 33.7 acres respectively.

25. The witness stated that beyond the disputed stretch, is a 5-kilometer road paved with cabro going up the gates of Waridi Farm Limited and beyond that, the road is a rough road. He stated that the plaintiff and the members of the public continued to use the road by reason of the decision of the Court of Appeal rendered in civil appeal No. 323 of 2017 between the parties herein as the court granted the plaintiff an injunction restraining the 1st to 3rd defendants from ever restricting the use of the suit road pending the outcome of this suit. He stated that prior to this suit, the 1st to 3rd defendants had erected a toll station where they solicited money from road users on the excuse that the money was required to maintain the road and security in the area. According to him, the sums demanded by the 1st to 3rd defendants was arbitrary and the defendants did not account for the money at all. That upon resistance from some of the road users, they resorted to blocking the road until the sums demanded were paid which led the plaintiff to bring this suit. He stated that the road was being maintained by Mavoko Municipal Council and that as they were producing milk, meats and fresh produce including French beans on their farm, the milk was collected daily by vehicles from the KCC, while fresh produce was being collected by Horticulture Growers Cooperative Union and that those vehicles accessed those products using the same road.

26. He also testified that Munyeti Ranch which was their neighbor accessed the disputed road and was engaged in both livestock and fresh produce farming and the tracks from KCC used the same road to collect fresh produce from them. He also stated that BAT AND Numerical Machining Complex used the disputed road without restriction from Paul Maingey. Further that KMC used their farm as a holding yard to fatten and improve livestock before the slaughter and therefore they used the same road.

27. PW1 further averred that the Kenya army had training grounds beyond their farm where they held training camps most of the year and that when Paul Maingey's family moved to the farm in 1971, they found them there already and that they continued using training camps until recently. He also stated that there are active quarries beyond their farm which use that road. That the unspoken importance of that road was the role it played as a firebreak on the farm and therefore it was important to his father and the same was graded at all times. He stated that the road was repaired by Mavoko Municipal Council at the behest of their father and the neighbouring farms including Waridi and Kenya Flower Council.

28. The witness stated that in the 1980s Munyeti Ranch started selling part of their property and as a result David Masika bought title No. 14750/5 in 1988 while Sunrose Nurseries Limited bought a portion known as L.R. No. 24605/6 where they started farming activities and the two openly used the same road without any hindrance from their late father. He stated that David Masika on purchase of his land surrendered 15 metre wide road to allow continuation of 39 Quarry Road way back in 1999 when he bought his land.

29. It was his position that the public openly peacefully and as of right enjoyed the use of the disputed road prior to 1971 when his father purchased the farm and continued with the use thereof unhindered until the interruptions were made in 2013 by the 1st to 3rd defendants who sought to restrict the use of the road . According to PW1, the right acquired by the public to use the road cannot be found in the maps or deed plans as demanded by the defendants as it is a long-established right which cannot be defeated by the recent titles acquired and now held by the 1st to 3rd defendants.

30. He stated that the entire family including the defendants, used the disputed road to access their family house where the witness now stays upon the demise of his father whereof he was appointed as one of the executors of his estate in 1995 which was confirmed in 2003, and that in his capacity as such, he caused L.R. No. 1338/4 to be subdivided into several plots in accordance to their father's testamentary wishes. He stated that he organized his father's obligation to the public and particularly the road which remains a burden on the farm and applied for subdivision and provided for the road by a dotted line across the properties. That the proposed subdivision was duly approved subject to the road but in circumstances not known to him, the 4th defendant omitted the road on the deed plans released to him and that his brother Andrew Kitili and himself returned their respective titles and had the road excised therefrom. He maintained that the road serves the public including the 1st to 3rd defendants whose lands are sandwiched between his and Andrew Kitili's land. He insisted that all the three defendants herein used the disputed road to access their respective properties from Mombasa Road and the irony of it is that upon getting their respective titles, they turned around to block and cordon off the same road claiming it is for their private use to the exclusion of all others residing in the hinterland. He took the position that if the other persons who own the land adjoining the disputed road between Mombasa Road and the defendants' property were to behave like the defendants and block it, then the defendants would equally be unable to access their properties and it will result in anarchy and deny all others the right to access their properties.

31. He took the position that the defendants did not dispute that the disputed road existed on the farm since time immemorial, but that they simply claimed that the road is not on their deed plans. While conceding that the road is indeed not in the deep plans of the defendants' titles, he insisted that the omission by the 4th defendant to include that road does not take away their accrued right of way, as the defendants acquired their titles recently and that if that were to be allowed then the other owners of the land near Mombasa Road , would also erect barriers and charge toll fees.

32. Regarding the 1st to 3rd defendants allegations that the disputed road terminated before Andrew Kitili's land, he stated that that was not true since as that road could not terminate in Andrew's land and not cross into the adjacent property which belonged to the defendant. He further stated that the 1st defendant was silent and had not disclosed that she has the benefit of utilities running along the road including power, water and the internet and that the power lines continue beyond the property of the defendant and that she has blocked the other utilities including water and internet from laying pipes over her property to that of the plaintiff and therefore the defendant has deprived the entire community of access to piped water and the reliable internet connection as both water and internet connection terminate in her property which is a selfish restriction of the use of the public road .

33. He also faulted the defendant's allegation that when their father acquired the land, they had no neighbours at all as he stated that it's not possible for land that is demarcated with boundaries not to have neighbours and that he had given the names of the neighbours who were on the land in 1971. According to him, after submitting his proposed subdivisional plan dated 26th March 2006 for approval by Mavoko County Council the disputed road traversed LR1338/ 4 / R and was represented by a broken line in the subdivision plan which land was approved without variations by the town clerk Mavoko Municipality Council and the Commissioner of lands. He stated that although there is a provision of a road on the northwestern boundary of survey plan Fr No. 371, the same is to serve his stepbrothers who need to enter their properties and that that road was not intended or capable of replacing 39 Quarry Road as alleged by the defendants. He also stated that the claim was diversionary and a red herring. He also stated that the defendants themselves do not use that impassable road and they have forgotten that the public has spent considerable resources on the maintenance and improvement of the disputed road .

34. He further stated that the subdivision of L.R No. 1338/ 4 /R led to parcel number 1338/ 90, 91, 92, 93 and 94. He also stated that on 26th March 2006 he wrote to my Mavoko Municipal Council asking them to maintain the public road which was represented by a broken line in the subdivision plan to ensure that the beneficiaries of their father's estate and their neighbors enjoy access to their properties using the road . He stated that the Council approved the proposed subdivision on 19th April 2006 without amendments or modifications and titles were issued to the beneficiaries of the estate. According to him, the 4th defendant issued deed plan Nos. 268859, 26 88 57 and 268858 for parcel Nos 1338 / 93, 1338 /91 and 1338 / 92 belonging to the 1st, 2nd and 3rd defendants and omitted to indicate the road which was in the proposed subdivision plan. That when they learned that the road had been omitted both Andrew Kitili and the witness surrendered 15 metres from their portions to Machakos County Government in accordance with the subdivision plan so that they can provide for the road .

35. He also stated that David Masika on his parcel number 14750/5 surrendered 15 meters to allow the continuation of the road when he bought his land. He pointed out that apart from David M,asika there are other neighbours including Franciscans of Our Lady of Good counsel Sisters Registered Trustees, Evergreen Crops Limited, Waridi Farm Limited, Danana Girls Secondary School among others who used the road to access their properties. He also stated that when he subdivided his plot L.R No. 1338/90, he sold it to several persons including Professor Francis Doyle Juma, Titus Mwirigi, Patrick Mugambi, Valley Brook Capital Limited and others who openly enjoyed unhindered access to their properties through the disputed road .

36. According to him, the road suggested to be the alternative road is in a faraway place in a hilly and rocky place making it inconvenient and dangerous and that the 1st to 3rd defendants have never used that road . He insisted that the disputed road has been maintained by public resources by the former Mavoko Municipal Council, now subcounty government in conjunction with stakeholders from the area.

37. The witness complained that when the 1st to 3rd defendants obtained their titles in 2012, they blocked the road and began collecting money from members of the public by erecting a toll station thereon. He held the view that the issuance of titles to the defendants cannot override the prior accrued prescriptive right of way exercised by the public and that the defendants cannot obtain and have exclusive right to possession of the road by blocking road users.

38. He stated that when the 1st defendant began closing the road, the matter was raised at the National Land Commission and the Machakos Land Management Board visited abdicated their duty and unannounced visited the suit property while aboard the defendant's vehicle driven by her daughter which led to them make contradictory findings in their letters of 22nd January 2016, 5th May 2016, 30th June 2016 and on 16th August 2016. He stated that the said bodies had a duty to invite all residents and users of the disputed road to a formal meeting upon issuance of notice to obtain their views in respect to the same instead of coming to the scene unannounced in the company of the 1st and 3rd defendants. He stated that he complained against the NLC's letter of 5th may 2016 and instructed his advocate who complained over the same which led to them rescinding the said letter in a subsequent letter of 30th June 2016 where they stated that the defendants confirmed the existence of the road and stated that there was a survey plan FR No. 169/ 2/1 of February 1983 and that the topographical survey maps for Nairobi sheet No. 148 / 4 Edition No. 10 (1996) Mua hills sheet No. 149/ 3 Edition 7 of 1997 which captures the road in question which information the Commission was not aware of in its initial letter dated 5th may 2016. He stated that although in the letter of 30th June 2016 the NLC directed the 4th defendant to study the survey maps of the area from the 1970s up to date and conduct a resurvey of the affected road , the 4th defendant filed a report at the behest of the 1st to 3rd defendants without

including or making reference to the relevant maps, which report the witness disputed as being biased, incomplete and made solely in the favor of the 1st to 3rd defendants.

39. He claimed that the defendants cannot block a public road in use since time immemorial and ask the plaintiffs to access their properties using nonexistent roads which the defendants themselves have never used or intended to use. According to him, the NLC's letter of 30th June 2016 found that 39 Quarry Road remains a public road and is open to use and that that decision has not been overturned. He maintained that in his capacity as the administrator of the estate of the late Paul Maingey, he sought to subdivide the estate and indicated the existence of the disputed road which resulted in approval of the same and that that subdivision of the estate was a court process which the 1st to 3rd defendants consented to and cannot claim the benefit of the estate and not the burden of the road . He stated that the failure to include the road in the deed plans was only noticed upon issuance of the titles and that it appears the defendants interfered to prevent inclusion of the road in their deed plans. He insisted that even the 1st defendant's Yeyani Resort is accessed using the disputed road. He denied the 1st defendant's claim of loss in the hotel. According to him, the inconvenience to be suffered by their neighbours far outweigh the fanciful advantages sought to be gained by the defendants upon close of the road. According to him, the survey plan Fr 169 / 221 of February 1983 and the topographical survey maps for Nairobi sheet No. 148/ 4 Edition 10 (1996) and Mua hills sheet No. 149 / 3 Edition 7 of 1997 showed the existence of 39 Quarry Road on the ground.

40. Regarding the 1st to 3rd defendants counterclaim, the witness stated that no loss had been incurred by the said defendants on the basis that the defendants were not entitled to the sums sought for compulsory acquisition because the property is under the burden of an existing road. He further stated that the claim of Kshs. 379,922,400/= is outrageous and has not been substantiated. He stated that even the report from Royal valuers show that the disputed road is an enabler of the hotel. He sought for the dismissal of the counterclaim.

41. He produced 44 documents namely grant of title number I.R 1275 / 1; certificate of confirmation of grant; subdivision plan dated 26th March 2006; plaintiffs letter to Mavoko County Council dated 26th March 2006; certificates of title for IR 147305, IR 147303, IR 147,304 IR 121 688, IR 14629, IR 117016, I R 57867, IR 46534, IR 141426, IR 133207; subdivision plan for LR 133 8/ 90, letter by Jane Mwarigi to County Government of Machakos of 8th January 2015; letter by the plaintiff and Andrew Maingey to the Municipal Council of Mavoko dated 4th October 2012; bundle of photographs of amenities along 39 Quarry Road ; Letter by the plaintiff to Mavoko sub county administrator dated 30th September 2014; letter by Sara Nyiva Hillman to the 4th defendant dated 16th March 2015; letter by Director of surveys to the defendant dated 18th March 2015; report on stakeholders meeting; survey plan Fr 169 /21 dated February 1983; survey map for Nairobi sheet N0. 148 / 4 Edition 10 (1996), survey map for Mau hills sheet number 149/3 Edition 7 (1997); e-mail, by Andrew Cameron to Mavoko Municipal Council; letter by Jane Ngige to Mavoko Municipal Council; letter by Andrew Cameron to Mavoko Municipal Council; letter by C. Kiragu Chief Officer Department of Transport Machakos County; topographical illustration of 39 quarry Rd; Valuation review of the properties owned by the 1st to 3rd defendants of Royal Valuers; letters by NLC dated 22nd January 2016 and 5th may 2016; plaintiffs' counsel's letter to an NLC dated 2nd June 2016 and the response thereto two the NLC dated 30th June 2016 letter by Sarah Hillman to the Managing director pozzolana Ltd; letter by Sarah Hillman to Managing director Waridi farm limited; and six acknowledgement receipts by Manager Wattle Blossom lodge.

42. On cross examination he stated that he was an administrator together with Andrew Maingey although Andrew was not in the suit and concede that the Probate Court stated that he must handle the estate with the consent of his siblings. He further stated that there were no specific instructions in his father's

will showing that the road needed to be created on the property and that he had the power to subdivide the property. He stated that in his proposed subdivision, he had indicated that the road was to pass through the five parcels of land and stated that when Machakos Land Management Board visited the land, they did not request him for any documents and that they just went to confirm if there was a road on the ground. That he sold part of his land to Valley Brook Estate. He further stated that according to the letter from the Director of surveys, there was no access road on the deed plans which were issued by the Director of surveys and all the certificates of titles do not show any road in all the five deed plans because there was a mistake done by the Survey of Kenya as the proposed subdivision scheme submitted had a road but that due to this mistake, he executed a surrender to surrender part of his portion for the road .

43. He stated that his subdivision was done in 2010 while Andrew Kitili's subdivision was done in 2015 and that he surrendered land measuring 15 metres which is the same amount of land surrendered by his brother Andrew. He stated that his letter of 26th March 2006 stated that there was a 6 metre road between his land and his neighbors to enable their neighbours to access a river. He stated that he disputed the position taken by the NLC because the road in question was being used by the public even before his own father bought the land and that he only followed what his father was doing. He also stated that although the road in issue never existed in documents, the same is on the ground and that the only access to his father's house where the witness now lives is through that road .

44. Regarding the letter dated 4th October 2012 filed by the 1st to 3rd defendants, the witness in re-examination, stated that the same was signed by the administrators of his father's estate who indicated that they had no objection to the use of the road and so the same ought to be reopened as the defendant had barricaded it. He denied the allegation that he had no authority to subdivide his father's property and create a road on the same. He stated that the other road which is alleged to be an alternative road is so deplorable and that there was no report by the surveyor as directed by the Director of surveys as directed by the NLC. He stated that the other parts of the road are tarmacked and paved using cabros and that the only place that still remains rough is where the 1st to 3rd defendants land is as they objected to the pavement of the same. He also stated that as a family they had problems during the subdivision as his siblings went to court to remove him from being an executor of his father's will but they were unsuccessful and that there was an intervention by the Bishop of the Anglican church who helped them agree and prepare the plans that they submitted to Mavoko Municipal Council.

45. PW2 was David Wamba Masika who is a valuer and practicing as Lloyd Masika Limited. He adopted his witness statement dated 8th October 2015 as his evidence in chief. His evidence was that he was the owner of L.R. No. 14750/5 which he purchased in 1988 from Munyeti Ranch and has been staying there with his family since that time. He stated that his land measures 69 acres and is surrounded by other pieces of land belonging to Evergreen Crops Limited and Waridi Farm Limited, who he found having already settled there. He further averred that the only access road to his property was 39 Quarry Road which linked his property to Mombasa-Nairobi Road

46. It was his testimony that he found the disputed road in existence and use when he purchased his property which he understood to be a public road . That he had been using it and had never been asked or required to pay any monies for the use thereof until 2013. He stated that together with his neighbours, they have used the disputed property until 14th of January 2013 when the defendant claimed that a portion of the road is private to the extent that it crosses her land. It was his testimony that the disputed road has been maintained by Mavoko Municipal Council which is now Mavoko sub county and it has always been a planning requirement that any subdivision of land touching on the road must be surrendered for the road . He testified that the defendant upon claiming that the road was private road , erected a barrier and a toll station and demanded money from residents who were

using the road allegedly to account for maintenance fees. That this money has been paid by neighbours reluctantly to access their property without condoning the illegalities purely for purposes of ensuring that they access their homes and farms. He stated that he had since established that the defendant had no legal right to install any barriers and or toll stations and extort money from the users of the road .

47. It was his position that without that road, he could not access his home and the other road that the defendant claims should be used is very far from his home and goes through hilly and rocky areas that make it inconvenient and dangerous to use. He stated that whenever the defendant blocks the road he cannot access his home and even his neighbours who are the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees can also not access the road . He sought that the defendants be ordered to remove their barriers and guards from the disputed road so that he can be allowed to enjoy free access to the road . He stated that he was in support of the plaintiffs' suit. He stated that when he was subdividing his property he made provision for a road which was a condition by the approving authority and that since 1988 he has used the disputed road to access his property. He confirmed that he had never paid the defendants for use of the road because by the time they were asking for payment he had already sold his land. He sought to be allowed to continue to use the road.

48. In cross examination, he stated that at the time he purchased his land, the disputed road was in use and that from the survey plan it is shown as 39 Quarry Road , and that everyone was required at the point of subdivision to surrender land for the road . He insisted that he had acquired an easement on the road and that without that road his land would be landlocked as that is the road he has always been using although the same is not registered. He also stated that he had been requested by BAT to subdivide their land and upon subdivision, it was a requirement that there ought to be a continuation of the road and that even the neighbouring owner called Gallot was also required to surrender land for the road . He stated that there was no road on his western side of the land and that he still owns land in the area and accesses that land through the disputed road . He stated that he sold his land 15 years ago and has no alternative access to his land and that he has never seen a map showing 40 metre public road that is an alternative road on his side. According to him, the Government wanted to tarmac the road and it is only the 1st to 3rd defendants who have refused to surrender their parcels.

49. PW3 was Rehema Mutunga, a manager at Evergreen Crops Limited and one of the plaintiffs in this suit. She adopted her witness statement dated 9th June 2022 as her evidence in chief. Her testimony was that Evergreen Crops Limited was incorporated in 2010 and in 2011 it purchased property known as L.R. No. 24605/6 Athi River from Sunrose Nurseries, which vendor had been established in 1991 and had been using 39 Quarry Road to access their farm from 1991 until 2011 when they sold the land to Evergreen Crops Limited. She stated that her company had openly and without interruption used the disputed road since 2011 until 2015 when the defendants attempted to place barriers on the road . She stated that her company has employed many workers, approximately 6600 workers, who stay in Athi River town and who commute to the farm using the disputed road every day. Further that he company transports raw materials to the farm and produce therefrom including flowers, vegetables and herbs which require immediate access to international markets through the Jomo Kenyatta International Airport and that all along they have used the disputed road to access the airport. She further stated that at the moment Evergreen Company Limited had leased out the property to a tenant who will suffer hardship if the road in question is closed as their workers, customers and suppliers will not be able to access the farm and the airport and therefore there will be loss of revenue and closure of the farm operations. She stated that sometime in 2012 the defendant gave them notice that the disputed road was now a private road and closed it to their traffic and demanded Kshs. 30,000/= per month in order to allow their staff and vehicles to use the road . She stated that the closure of the road was to occasion financial ruin for their company and so to keep their business afloat but without condoning

the illegality, they reluctantly agreed to pay the defendant the sum of Kshs. 30,000/= per month as demanded.

50. She further stated that the 1st defendant also blocked the Convent of Franciscans of Our Lady of Good Counsel Sisters Registered Trustees from using the road and that they said persons approached them stating that they were trapped in the convent because they were unable to raise the money demanded by the defendant in order to use the road again. That the Evergreen Company reluctantly agreed to pay on their behalf as sum of Kshs. 5000/= per month to the 1st defendant purely out of empathy for the said Convent who are trapped. That she had in fact established the 1st defendant had no legal right to install the barriers and road toll stations and extort money from her company or the Convent. She insisted that without the disputed road their farm would be landlocked and they stood to close their business. She also confirmed that her neighbors and predecessors including Sunrose Nurseries had continuously and openly used the disputed road before 1970s and the plaintiffs had acquired a right of way over the suit property. She sought that the money collected from them by the defendant and money paid to the 1st defendant on behalf of Franciscans Of Our Lady Of Good Counsel Sisters Registered Trustees be refunded with interest and that the 1st defendant be ordered to remove her barriers and guards from 39 Quarry Road. She stated the losses the company incurred when the 1st defendant closes the road which include inability to deliver fresh produce to the airport, workers' inability to access the farm in good time thereby lowering productivity, suffering uncertainty owing to arbitrary closure of the road, suppliers of materials to the construction site being forced to pay Kshs. 3000/= per truck to gain access which cost is passed to them through increased pricing and that the 1st defendant has received Kshs. 3000/= per truck from over 560 trucks but the 1st defendant has fenced off the sides of the road reducing the width of the road from 15 meters to six meters making the road narrow and impassable during rainy seasons and causing their trucks to slip and get damaged by the fencing poles and that the local customers are reluctant to visit due to the inconvenience caused by the unreasonable restrictions of the 1st defendant.

51. On cross examination, she stated that she handles legal issues of the company and that the company conducted due diligence. That that the disputed road was in use that as the company's business had been frustrated that was the reason they paid to use the road to get their products to the airport although they are not supposed to pay to use the public road. She also informed court that that was a business decision. She stated that no receipts were issued. She also stated that the letter by the Director of surveys shows that there is no road on the land of the defendants which position was stated by the Machakos County Land Management Board. That they have acquired a right by way of easement and that she was not aware if that easement had been registered. That the letter by NLC of 30th June 2016 confirmed that there was a road in existence and that the NLC had become aware of three maps of 1983 and 1997 which led to the NLC withdrawing and revoking its earlier letter of 2015. She stated that she has never used the alleged alternative 40 metre public road that is referred to by the defendants and that she does not know where it is. She stated that the decision to pay for the road was due to the fact that the company dealt in fresh produce which ought to have been taken to the airport and closure of the road was frustrating them. Further that the decision to pay was a temporary measure.

52. PW 4 was Titus Mwirigi, a shareholder and Director of Valley Brook Capital Limited who had been sued as a defendant in the counter claim. He adopted his witness statement of 5th June 2015 as his evidence in chief. His testimony was that he purchased parcel L.R No. 1338/114 in 2010 and transferred the property to Valley Brook Capital Company Limited in 2011. That his company deals in real estate and property development and has put up Valley Brook Gardens which are residential houses on the said piece of land since 2012. That some of the houses are currently occupied by tenants. He maintained that at the time of the purchase, the company formed he has been using the 39 Quarry

Road which is the only access to the property. It was his testimony that the tenants of Valley Brook Gardens have children who go to school using the disputed road and they also have employees who commute from the neighbouring Athi River town on daily basis.

53. He testified that in 2015 the 1st defendant called him on his cell phone and demanded informed him that she was planning to close 39 Quarry Road with immediate effect and asked him to deliver a message to her brother Thomas Mangey who is the plaintiff herein, to the effect that she was also going to bar him and his family from using the access road over a dispute they had with the plaintiff. He stated that he informed the 1st defendant that she could not lawfully close the road and that he had survey plans that indicated the existence of 39 Quarry Road as a public Road. That she even picked the survey plan from him showing that that 39 Quarry Road ran beyond the 1st defendant's property. Further that the witnesses' visitors and prospective customers and tenants were made to pay a fee to access the road and that lories delivering construction materials to his property were charged Kshs. 3000/= per trip to use the road. Also that his visitors and tenants reluctantly and without condoning the legality paid the fee purely for convenience while he questioned the legality of the toll station, he said that he has not been paying any toll. He stated that he has since established that for over 50 years uninterruptedly a 39 Quarry Road has been used openly by the public and therefore the 1st defendant does not have a right to install barriers and road toll stations and extort money from him or his tenants or anybody else.

54. It was his testimony that without the road his tenants and other people would suffer as they will not be able to access the property and whenever she blocks the road his business is affected because prospective buyers and potential tenants are turned away and therefore declined to invest in his property due to the nuisance and inconvenience of having their movement restricted by the defendant since 2012. That they have been made to incur Kshs. 3000/= every time their track passes the road and that on average 20 tracks of material being sand, stones and cement have been passing on the road and that the 1st defendant's actions have compromised and restricted the sale of his houses to many interested parties. That although his houses had been ready for occupation since 2013, to date they have only sold three because other potential buyers have declined to buy citing the 1st defendant's barrier restricting the use of the road. It was his position that the 1st defendant has no lawful reason or justification to restrict the use of the road and prayed that the money collected from the tracks which are 220 trucks at Kshs. 3000/= which is a total sum of Kenya shillings 660,000 collected from the trucks be refunded. He sought for compensation of loss of Kshs. 70 million being the value of the investment put in constructing the houses that the company has been unable to sell on account of the unreasonable and unlawful actions of the 1st defendant.

55. On cross examination, he stated that the plaintiff showed him approved survey plans showing that there was an access road being 39 Quarry Road although it had no F R number. He maintained that he acquired his land before the plaintiff acquired the title and that his visitors are the ones who are asked to pay although they ought not pay any monies to the 1st defendant. He insisted that the disputed road was in place before the defendants obtained title and that the disputed road stretches from Mombasa Road to Kamulu. He conceded that there is a public road on the northwestern part of his parcel created after the suit had been filed. He argued that the survey plan by the Director of surveys was not in accordance with the proposed survey plan and that he ignored the approved proposed survey. Further that the defendants are also using the same road and that Andrew surrendered part of his portion for the road before he sold. He stated that the High Court ordered that the defendants ought to be consulted and that the defendants did not challenge the subdivision scheme that resulted in their title. He confirmed that there was no road in the deed plans of the parties' titles. He denied paying toll charges for the road and said that it was the drivers of lorries on the road that were asked to pay.

56. In re-examination, he maintained that it was the executors of the deceased estate that were the proponents of the subdivision scheme. He maintained that on the proposed subdivision scheme of 2006 the same was approved by Mavoko Municipal Council and the Commission of lands and on that proposal, there was a six-metre-wide road to access the river. He also stated that the plans provided for the disputed road which existed in Maingey's estate and beyond that estate. He further alleged that the executors requested for the road to be maintained and that request was accepted by both Mavoko Municipal Council and the Commission of lands. His view was that the deed plans by the defendants were not superior to the proposed subdivision by the plaintiffs because the director of surveys did not give an alternative proposal and therefore he must comply with the proposal and recall the defendants' titles and endorse the road.

57. PW5 was Magdalene Wambui Moya a registered valuer and Managing director of Royal valuers who prepared a valuation report, upon reviewing the defendants report. She made the report dated 17th May 2022. Her conclusion being that the net profit is calculated from net income after deducting operational cost and paying taxes. According to her, there is no satisfactory evidence that the plot owner had obtained finances for development or received any tangible commitment from a financial institution ready to offer development finance. She further stated that there was also nothing attached on the report regarding official licenses from Government authorities for such a project and there is no evidence informing the costs that generates the stated profit. Further that there was also no development and therefore she argued that there can be no profit from a development that does not exist. In conclusion, her evidence was that the calculated profits by the defendants in their report cannot be supported and therefore have no basis for any claim.

58. Regarding valuation of the land covering 39 Quarry Road, she gave an opinion that the road had already acquired an easement after operating for more than 20 years and therefore no value can be assigned to the claim for compulsory acquisition. She further stated that the current open market value of 39 Quarry Road over plots 1338/ 91, 1338/92 and 1338/93 is nil. She produced her report as an exhibit.

59. In cross- examination, she stated that 39 Quarry Road was an easement as per the *Limitation of Actions Act* and an easement may be acquired if land is used without interruption for 20 years. She also informed court that she was not aware if easements have conditions and that she had not demonstrated that the easement was registered. She maintained that her report was a peer review to the defendants' report and that there was no evidence of income to support development that the defendants had claimed as what they had was a proposed development. She added that she did a site visit and only saw a hotel on the land with no other developments. She insisted that she had not assigned a value to the road because it was public land and therefore there was no need for value and there can be no value put on public property as there is no value in favor of a private person. She stated that she had no document to show the disputed road was public land and that she visited the land and noted that the road had been there since the 1960's and had always been in use by lorries to get quarries from the quarry and so it had been acquired as a public status. she maintained that a private person cannot sell to the public that which belongs to the public. She stated that from the pictures of the road on record, they showed that there were even overhead power lines on the road and she could see that the road had acquired public easement rights.

60. In re-examination she stated that the development which is on the land of the 1st defendant being a Yeyani Resort was not of the magnitude by the defendants' valuer's value and the same was on plot number 1338/93. She stated that there were 12 cottages; 8 camping tents; a swimming pool; conference facility and a children's playground which was on parcel No. 1338/92. She pointed out that that was contrary to the defendant's valuation which stated that there were 32 block cottages with three rooms

each, managers quotas, gazebos, main kitchen, administrators block, staff quarters, elevated gazebos, entertainment room, swimming pool and parking yards. She stated that when she visited the resort, it was in operation. That marked the close of the plaintiff's case, albeit with a request which was allowed by court for PW1 to be recalled for purposes only of visiting the site.

1st to 3rd defendants' evidence

61. DW1 was Sarah Hilda Nyiva Hillman the 1st defendant. She stated that the 2nd defendant is her eldest sister and the 3rd defendant is her brother-in-law and his her late sister's husband. She stated that she resides in the United Kingdom and she has a Resort in Kenya called Yeyani Resort in Athi River. She adopted her witness statement dated 14th March 2022 as her evidence in chief. Her testimony was that the plaintiff is her elder brother and that her father died in 1994 having left a will. Also that the plaintiff and Andrew Maingey, her other brother were executors of the will. She produced documents attached to her list of documents dated 16th March 2022 which has 11 documents and the list of documents dated 3 October 2022 which has 10 documents.

62. Her testimony was that when her father they late Paul Maingey acquired parcel L.R. No. 1338/4 in 1970, there were no neighbours to that property at all and that he was the one who sold most of the land, including the land sold to London Distillers Limited, Pumwani Glass, Professor Juma, Hill Crest, Kasivo family and others. She stated that there is nowhere in the the deceased's will where the executors of the will were given specific powers to create a through road in the deceased's estate. She averred that according to the court order of 12th November 2003, the executors of the will were supposed to consult the 1st t0 3rd defendants at every stage of the succession and that the executors never raised the issue or consulted the defendants on creating a public road through their land. She maintained that the proposed subdivision which purported to create a road called 39 Quarry Road could not have been legal because it would have meant unlawful and procedural encroachment into private properties being L.R. Nos. 133 8 / 90 to 1338/94 and that that would be amount to compulsory acquisition by the County Government of Machakos without prompt compensation to private owners.

63. According to DW1, the late Paul Maingey only allowed the access road from Nairobi-Mombasa Road up to the dead end terminating at the extreme border of the plot adjacent to the one belonging to Andrew Kitili Maingey being L.R. No. 1338/ 94 and therefore the road between L.R. No. 1338/ 90 to 1338 / 94 did not exist as per the will of their late father and that can be deduced from the survey map dated 15th June 2006 which shows that there is no public road through the their private properties. She maintained that the plaintiffs caused subdivision of L.R. No. 1338/90 because he was selling his land and that the subdivision led to creation of an access road from the 20 meter stretch serving his interest and others and the survey map of the said parcel indicates about 14 subdivisions with their own independent 12 metre access road all the way to Athi River and that therefore the neighbourhood vicinity are not landlocked at all.

64. She maintained that all the beneficiaries of the properties known as L.R. No 1338/ 90-94 are well served with a common 40 metre public access road situated along the northwestern boundary as confirmed from the survey Map FR No. 371 and the disputed road does not exist in the said survey map but as a private but road. She stated that on 16th March 2015, she wrote a letter to the office of the Director of surveys requesting for confirmation of the disputed private road on plot numbers 133 8/ 90 to 94 respectively and the 4th defendant responded on 18th March 2015 confirming that in their records there is no public road and that the same was to be accessed from a common road along their northwestern boundaries. She also stated that Mavoko Municipal Council could not delineate an alleged public road out of private properties without the owner's consent and therefore unlawful subdivision plan to have the access road was irregularly, unprocedurally, unilaterally, illegally and inconsequentially approved.

She denied there being any errors in by the 4th defendant's issuance of their titles and stated that the deed plans showed that the road did not exist. She averred that the road created by Andrew Maingey and the plaintiff was an easement for their own interest and for the people they had sold land to and it was not by direction of the Mavoko Municipal Council. She maintained that there is an alternative 36 metre public road which connects to the interchange along Nairobi-Mombasa Road available for use by all the persons stated by the plaintiffs and therefore they have no right through the defendants' private properties. She stated that the plaintiffs and other persons cannot use their private property for the sake of convenience without the defendants' consent. Further that the plaintiff had occasionally hired motorcycle riders to intimidate her and vandalize her property to create fear in her.

65. The witness denied the plaintiffs' averment that the disputed road was being maintained by Mavoko Municipality and insisted that the same remains a private road which is why they installed a road barrier in 2012 to control the unlawful trespass into their land whenever the plaintiff and beneficiaries of this land used the road without the defendants' permission. She confirmed that she charged levies on heavy vehicles allegedly for purposes of maintaining the road from wear and tear and that this was done with their consent.

66. She took the position that a right of necessity does not obtain where the purported landlocked parties have an alternative access road and that therefore all beneficiaries of the state of the late Paul Maingey who are connected to the public road joining the interchange along Mombasa-Nairobi Road, have no rights of necessity. They stated that as the disputed road is a private road, they were entitled to protect their properties against trespass and that the duties of executors of the estate of her late father were terminated on the distribution of the estate of the deceased. She stated that they did not need permission of Mavoko subcounty or any other public authority on how to deal with their private property. Further that she agrees with the position taken by the 4th Defendant and the National Land Commission that the disputed road is not surveyed and that there is a common access road on the northwestern boundaries of the parties' properties.

67. She stated that she had documentary evidence from different Government agencies showing that there was no private road passing through the defendants' property which include the letter of 18th March 2015 from the Director of surveys; the letter dated 5th November 2015 from the county surveyor Machakos and the letter dated 18th March 2016 from Machakos County Land Management Board which all showed that there was no public road passing through the defendants' land, the letters dated 5th may 2016 and 16th August 2016 from the National Land Commission. She maintained that the 4th defendant's letter of 18th March 2015 settled the issue as to what is a public road and what is a private road and that the the disputed road is a private road. She stated that it's the defendants who are suffering from vandalism, exposure to insecurity and environmental vagaries through the unlawful use of their private road and police harassment at the plaintiffs' instance. She stated that the subdivision of 1338/90 created a 40-meter road which should be used as an alternative road which joins the 20 meter road leading to Nairobi-Mombasa Road.

68. The witness stated that the Kenya Urban Roads Authority has stated that it is in charge of urban roads had been grading and expanding the disputed road without any right and perpetuating the plaintiffs' misconceived claim that the road is a public road as a result of which the defendants have suffered loss and damage. She insisted that the plaintiffs' action amounted to compulsory acquisition of part of the defendants' land without complying with the procedures for compulsory acquisition of land as stated in law. She maintained that as a result of the disturbances she had suffered she was unable to develop her properties to the optimum and that her hotel business known as Wattle Blossom Lodge had been disrupted. She stated that the master plan for the development of the entire properties include construction of recreational dam, crocodile farm and a wild orphanage, mainly targeting domestic and

foreign tourists. That as the disputed road divides defendants' parcels into two, it has led to dust, heavy traffic and noise causing disturbance and reducing the lodge's marketability. She stated that she felt that her life was threatened and that of her daughter and therefore she was forced to have armed security to guard them as she had been harassed by Titus Mwirigi who was armed with a gun so as to force her to allow an illegal road to pass through her property. She therefore sought for the orders sought in her counterclaim.

69. She produced documents attached to her lists of documents dated 16th March 2022 and 31st October 2022. She produced letters dated 18th March 2016, 2nd June 2006 from Director of Surveys; Surveyor's report dated 5th November 2015; Letter dated 28th November 2015 from Subcounty Administrator Mavoko; Letters dated 17th December 2015 and 24th March 2015 from Tutus Mwirigi to Mavoko Subcounty Administrator; Letters dated 18th December 2015 and 28th November 2015 from Mavoko subcounty administrator; letters dated 5th May 2016 and 16th August 2016 from chairman NLC; survey plan for L.R Nos 1338/90, 91, 92 and 93; valuation report from Danco limited; court order dated 12th November 2003; certificate of confirmation; letters dated 26th March 2006 and 4th October 2012, 30th September 2014 from the plaintiff; letter dated 25th April 2006 from Andrew Kitili; letter dated 24th March 2015 from the estate's advocate and certificates of titles of the plaintiff and the 1st to 3rd defendants.

70. On cross examination, she stated that although they challenged the administration of the deceased's estate by the plaintiff, they were unsuccessful as the two administrators which had been sought to be removed were retained, but that the orders of court required that they be consulted. She stated that one of the properties to be distributed was a home that belonged to their father and they agreed as a family to distribute the property. She confirmed that the two executors prepared the subdivision plan, which was presented to Mavoko Municipality for approval. She confirmed that the letter presenting the sub divisional plans to Mavoko Municipality is dated 26th March 2006 and stated that their deed plans were issued in 2006 and dated 16th August 2006. She stated that her certificate of title was issued in 2014 and the same is dated 8th June 2013.

71. The witness confirmed that the plaintiff submitted documents that gave rise to their titles. She further confirmed that there is quarry road of six metres wide and that the family discussed the subdivision. She confirmed that the provision of the six-meter road was not in the deceased's will and that the said road was to be used by five family members. She also stated that all their plots extend up to the river and that they needed the six-metre road which was to serve their brothers. She stated that she placed a barrier on the disputed road in 2012 and at that time, she did not have title to her land. She referred to her letter which was written on her behalf by her Farm manager one Mr. Mwaura seeking 12,000/= from pozzolana Limited to maintain the road and provide security and confirmed that her Manager was paid the said amount by Pozzolana. She stated that the road is well maintained with security and that those who did not pay were not allowed to use the road. She stated that Waridi Farm used the road to take their flowers to the airport but that only during the rainy season.

72. She stated that she was not charging Titus Mwirigi or the Plaintiff for using the road. According to her, Titus Mwirigi was like family and that none of his family members was paying for the road. It was her testimony that drivers for the big trucks were the ones paying for the road for the maintenance of the road. She stated that her resort was built between 2011 to 2015, and that she has not completed the construction. She stated that she had opened her business in 2014 and that the lodge was partly on her land and partly on the 3rd defendant's land.

73. It was DW1's evidence that her hotel changed its name from Wattle Blossom Lodge to Yeyani Resort and that the same is registered as a business name which she owns. She stated that she does not have documents to show that she owned Yeyani Resort and that the resort was making losses.

74. According to her, to access her resort from Athi River, there were three different roads, but that at the moment, her guests were using the 39 Quarry Road. She stated that she used to attend Muthaiga primary school but that the road she used to school was not the disputed road. She stated that in her father's land there were many roads and that there was power connection at her parents' house. She confirmed that electricity and telephone poles were erected along the disputed road even before they moved into their parents' house in the 1970s. She stated that when they got onto the land they had no neighbours and that their land was over 1000 acres.

75. She confirmed that beyond her father's land there were Munyeti Ranch and BAT and other neighbours. She also stated that there were some quarries in the neighbourhood. She confirmed that on their farm they used to do agricultural activities where they produced milk and fresh produce, whereof KCC trucks and trucks for other different companies ferried milk and fresh produce, respectively from their farm using the disputed road. She denied knowledge of Numerical Machining Complex Company but stated that the same was beyond their land. She stated that vehicles used to pass through their land on different roads and that their father allowed them to pass there. According to her, she decided to build a resort before she was issued with title and that she placed a barrier on the road because she was building a resort and the barrier was meant to control traffic reduce the dust and for security purposes. It was her evidence that the reason she collected money was for maintenance of the road and for security.

76. She stated that she objected to the road being maintained by public resources because she had built the resort knowing that it will be expanded and having a road cutting through her land would affect her horses. She stated that at the point she put the barrier Waridi Farm had only been using that road during the rainy season and that it was convenient for Evergreen to use that road. Further that the road from Athi River is paved by individuals but it was only the section where the defendants' land was that had not been paved. She denied closing the road because of deriving profits. She stated that even after being compensated 25,000,000/=, the land should remain hers and that she had suffered loss of over Kshs. 379 million which she sought to be paid.

77. In re- examination, she stated that there was no reason to raise a dispute after the order was issued in 2003 and that she was satisfied by the subdivision plans. She also stated that the letter forwarding the plans to Mavoko Municipality was signed by one executor and that she was not consulted. According to her, on 24th March 2015, she wrote to her advocate contesting the deed plans and that the money paid by Waridi Flowers was to access her private road because the other road they had been using was impassable. She insisted that she did not want her road tarmacked because it was private property and her brothers surrendered their property to become public road. She denied the allegation that accessing Yeyani resort would require the use of the disputed road as there was a public road. She maintained that up to now the Government has not asked her to surrender her land and that there were other roads that could be used by their neighbors. She denied allegations that some of her neighbours were landlocked.

78. DW2 was Robert Nzioki, a land economist and valuer. He prepared a report dated 18th March 2016 which he produced in evidence. He stated that he had been requested by the Chairman Machakos County Land Management Board to visit the disputed road and find out what was happening and make a report regarding the same. He stated that the members of Machakos County Land Management Board, County surveyor and Planner together with himself went to the ground, were shown documents and he gave a conclusion and recommendations.

79. On cross examination, he stated that the Chairman County Land Management Board is an office in the National Land Commission and he is in charge of the County of Machakos. He averred that he was sent by the chairman of the National Land Commission (NLC) to visit the ground and he was not aware if survey was done as per the NLC's letter dated 30th June 2016. According to him, his decisions are overridden by the decision of the NLC's chairman. He alleged that he got to know the history of the dispute on the ground. He confirmed that the neighbors of the land where he visited included Masika, Waridi Flower farm, Evergreen and a Convent of Sisters. He further informed court that he did not summon those neighbours to the meeting as he only summoned the family of the late Paul Maingey. His testimony was that when he went to the site, he saw the original road. He denied visiting the land in the 1st defendant's car and stated that Andrew Kitili is the one who took them to the site. He also conceded that in his report, he indicated that Andrew Kitili was not at home but they only talked on the phone. He therefore denied the allegation that Andrew took him to the site.

80. It was also his testimony that he looked at the deed plans for the land in issue and did not look at the documents for the neighbouring properties. He denied disregarding the directions of the chairman of the NLC and stated that he was not a surveyor. That the NLC directed that some work be done by the director of surveys and that the County Land Management Board was dissolved in 2018 and therefore they did not comply with the directions of the NLC.

81. The witness stated that on the site he saw a physical road. That the Land Control Board was not under his docket and that he was familiar with subdivision process. He stated further that he saw the subdivision map but there was nothing showing 39 Quarry Road as an approved road. He stated that he saw the approved map before preparing his report as that map was with the surveyor. He confirmed that on the map he could see the road in a dotted line written "Road" and that in his assessment his board disregarded the map. He claimed to have advised the chairman of the NLC of what he found on the ground. He confirmed that the proposed subdivision scheme by the plaintiff was approved by the Land Control Board for subdivision and that he was aware of the letter dated 26th March 2006 written by the plaintiff. He denied being biased or concealing material facts from the chairman of the NLC. He stated that he found that the neighbours had access and they were not landlocked. According to him, even though the NLC wrote a letter of 16th August 20 16 he was not under duty to survey the property and therefore he denied disobeying the directions of the NLC.

82. DW3 was Daniel Makau, a land surveyor at Machakos County Survey office. He confirmed preparing a report dated 5th November 2015 which he produced in evidence.

83. On cross examination, he stated that there was no road passing through the suit properties and that the surveyed road ought to be surrendered as it has a deep plan. His further evidence was that his conclusions were passed based on survey plans and used the findings by the Director of surveys. He further stated that the 1st defendant wanted to confirm if there was an official road on the defendants' land. According to him, there was no dispute at the time he prepared his report and he thought it was just the 1st defendant who wanted to confirm if the three properties owned by the three defendants could be accessed. He stated that the 1st defendant had maps that is F.R 337/63 and FR 512/ 79 which maps were authenticated on 2nd July 2006.

84. He stated that there was no continuation of the road into the suit properties and confirmed that the subdivision plans by the plaintiff were approved in 2006 which plans show dotted line which indicating that there is a road. He also confirmed that the plaintiff's subdivision plan had been approved by the Commissioner of lands, Mavoko Municipal Council and the Physical Planner. He maintained that what was submitted to the Director of Surveys did not correspond with the approved plan but that he did not have another plan approved by the Commissioner of lands or Mavoko Municipal Council

and does not have an alternative map drawn by the planner. He stated that he never had opportunity to see the proposed subdivision before reaching his conclusion. He stated that he never visited the ground and that the Land Control Board does not approve maps for leaseholds and they do not do mutations. His evidence was that a proposed scheme is presented for approval in the department of survey, physical planning and department of lands who approve the same, then the departments give technical committees and the town clerk gives the formal final approval.

85. He conceded that the proposed subdivision would look like the proposal by the plaintiff at page 14 of his handle and stated that the clerk of the Municipal Council and also the Commissioner of lands finally endorses on the sketch. He conceded that he did not have the benefit of looking at the proposed subdivision scheme and that he did not notify the neighbours before visiting the ground as he went on the ground quietly and gave his report to the 1st defendant and did not know that the same was going to be used in court since the 1st defendant did not mention this dispute. He stated that as a surveyor, he was not able to determine if a road had been used since the 1960s and that the road starts from Mombasa Road up to the to the defendants' property. That there were electrical power line poles on the property and that when he was there he saw people using the road which included several cars, motorbikes and pedestrians. He also stated that he did not look at old maps. Having been shown topographical map sheets in the plaintiffs' bundle he conceded that the same captures the status of the ground and that the 1st defendant did not tell him that her property was at subdivision of a larger farm. He confirmed that the road in dispute starts from Mombasa Road runs across the suit property and goes beyond Munyeti Ranch.

86. In the examination he stated that the proposed subdivision circulated in the departments of Survey, Physical Planning and Lands and that the same is endorsed by the clerk of the local authority. He added that the final survey is done when the surveyor places beacons on the land and the beacon certificate is issued. He stated that he had not seen any beacons certificate According to him a road should have a width in the proposal and that the width of the road in the plaintiff's plan is not shown. He also stated that after the proposal a survey plan is prepared that is an FR which is authenticated by the Director of surveys and that the road on the plaintiffs document has no FR number. That marked the close of the 1st to 3rd defendants' case.

4th Defendant's evidence

87. DW4 was Priscilla Njeri, a principal surveyor working in the Ministry of lands and testifying on behalf of the 4th defendant. She stated that L.R No. 1338/ 4 was subdivided giving rise to 1338/87 up to 100. That the map sheet that she had produced from the director of surveys that is Fr 37/ 63 does not show a road traversing the 1st to 3rd defendants' land as an access road. She stated that there is a 20m road accessing all those parcels of land. She maintained that the map shows that there is no road. She produced that map as an exhibit. She referred to a letter dated 18th March 2015 by a surveyor called James Maliki on behalf of the Director of surveys who explained how subdivision was done and stated that there was no surveyed road passing through the suit properties as the three plots have common road from the northwestern boundaries and that there is another road 25 meters on the northern boundary which was surrendered to the County Government upon subdivision.

88. According to her, in the two the Survey plans number 337 / 63 and 512/79, there are roads of access on all the properties and there are no roads passing through the disputed plots. She referred to Fr 153/99 and stated that there is an access road which she produced as exhibits 5 and 6 on the list of documents dated 3 January 2019 as defense exhibit. The witness referred to the plaintiffs proposed subdivision and stated that the same gave rise to what the Director of surveys prepared. She further stated that there were notes to the effect that areas and distances are approximate and subject to actual ground survey.

According to her, the actual ground survey is what gave rise to the plans that she had presented as FR 337/63. She conceded that on the proposed plan, there was an indication of road shown as a dotted line passing through but that the same was not planned as no measurements were indicated. According to her, when the actual survey was carried out, the road was not surveyed as the same was not necessary. She maintained that the information provided by the plaintiff is what was used by the director of surveys and that their plans were final because they are the ones used to produce the titles and according to her when they combine the map FR337/ 63 and 512/ 79 the area is properly planned because there is a 20 metre road joining another road accessing the plots and every plot is properly accessed.

89. On cross examination, she stated that the three plots belonging to the defendants can be accessed by a public road and that no parcel is landlocked. According to her, where land is surveyed it is issued with an FR number and that from the plaintiff's proposed subdivision proposal the road is shown by a dotted line which has no measurements. According to her, an easement has to be consented to, by the owners of the land and can be registered and she stated that if the disputed road is blocked it is not true that the neighbors will have no access as they have 20m road which joins a 12 metre road which accesses the neighbouring land.

90. On further cross examination, the witness stated that she is a land surveyor currently attached to the office of the Cabinet Secretary for lands having been transferred from the office of the Director of surveys in August 2022. She stated that she had not been on the ground and does not know where stage 39 along Mombasa Road is and that she had never used the road from Namanga interchange to the suit property. She added that the road leading to the plaintiffs land L.R No. 1338/ 90 is 20 metre Road. Further that the subdivision that led to issuance of title 1338/ 87 to 100 was prepared by a planner called metro plan consultants and that according to that plan there is a 25 meter road which ends on LR No. 1338/94. She stated that the road ending at 1338/94 was already in existence before the subdivision and that there is a road heading towards the river. The witness further stated that the property being subdivided was LR 1338/ 4/ R and at that time the road pouring into that property was in existence and that the proposed subdivision intended to give rise to 15 parcels. She further stated that at the point of this subdivision there was a 20m Road coming into the upper side to the suit property pouring into another 12 metre road which is on the survey plan FR No. 512 / 79 which was in regard to subdivision of the property L.R1338/ 110. That the said subdivision was done in 2011 and that the 12 metre Road was created from the subdivision of LR No. 1338/ 90 in 2011 and that the owner of that property is Thomas Maingey the plaintiff in this case. Further that the subdivision by Thomas Maingey was within his land.

91. The witness conceded that the proposed subdivision plan by the plaintiff showed a dotted line indicating a road traversing and crossing the entire 5 parcels owned by the plaintiff's brother Andrew Kitili and the 1st to 3rd defendants. She stated that the plan required approval from Mavoko Municipal Council which approval was given on 19th April 2006 by the Council and the Commission of lands. She stated that the proposed subdivision is forwarded to her office by the Council with a form referred to as PPA2. and the that the Commission of Lands also sends a provisional letter for subdivision. She stated that there cannot be a letter from the proposer of the plan for subdivision to her office.

92. She further stated that the dotted line showing a road on the subdivision proposal by the plaintiff did not have measurement and the planning of the road was not done. She stated that she had not brought documents from Mavoko which she relied upon on the subdivision of the scheme to prepare the survey plans. She stated that the Direct of surveys does not go to the ground. According to her the people beyond the plants suit property had been taken care of by the 12 metre road from FR 512 / 79 which resulted from subdivision of LR1338/90 which property emanated from subdivision of earlier 1338/4/R and that between the two subdivisions there is a period of five years. She stated that in 2006

there had been no access to the neighbours of the suit property but as at the date she was testifying, the problem had been solved by the 12 metre road created from the subdivision of LR No. 1338/90. She stated that the alternative road had been graded the week before she gave her testimony in court and that she had not talked to the neighbors to know how they accessed their properties.

93. She informed court that she did not know whether resurvey had been done in accordance to the letter by NLC of 30th June 2016 as the same had not been brought to her attention. She also stated that if there is a gap in a proposed plan, an error can be corrected if it is brought to the attention of the Director of surveys. She stated that the road shown by the plaintiff is a dotted line and had no measurement and that the surveyor did not understand it but the plan showed that there was a road. According to her, the dotted line on the plaintiff's subdivision proposal does not communicate anything and that the plaintiff allowed the process to go very far and that if there is correction to be done, it will mean that there will be cancellation of titles for parcel numbers 1338/90 to 1338/94. She stated that the County Government imposed a condition for creation of a road on the owner of LR1338/ 90 and that therefore there is a road. She also stated that the road to the river has two dotted lines but the disputed road has one dotted line. She further stated that she had an option to ask for clarification from the proposer on what the dotted line meant and that they had no option to reject the proposed plan. She stated that they were bound by the approved subdivision from the County Government. She also stated that she only referred to the three plots as they were the disputed properties and confirmed that the proposed plan was approved. According to her, in planning, where there is a dotted line it does not mean there is a road. She stated that the plaintiffs surrendered a 12 metre road and his neighbours did not. She insisted that a road must have two parallel lines with dimension but the disputed road had only one line. That marked the close of the 4th defendant's case.

94. On 28th July 2022 this court visited the disputed land and observed that the earth road starting from Athi River Bridge near Crystal Rivers Mall on the Nairobi-Mombasa Road, which was graded with murram and having cabro pavements in some sections passed through the suit properties extending beyond the land owned by the parties herein. The court further observed that the road through the defendants' properties was continuous and there was no difference in the nature and width thereof noted. There were old electric power poles along the road and members of public were using the road by foot, motor vehicles and motor cycles. There was a freshly dug road next to Thomas Maingey's land. The impression the court made was that the road is an old road and may have been used for some time.

95. Parties filed submissions in support of their respective cases and on the record of the plaintiffs' two sets of submissions dated 31st August 2023 and the 6 February 2024; the 1st to 3rd defendants' submissions filed on 8th December 2023 and the 4th defendants submissions 18th December 2023.

Plaintiffs' submissions

96. Counsel for the plaintiffs submitted that this suit was brought under section 32 (2) of the *Limitation of Actions Act* and that the plaintiffs and the public have enjoyed the use of 39 Quarry Road. Crossing the suit properties peaceably and openly as of right and without interruption for more than 20 years and the right of such way is absolute and indefeasible. Counsel argued that the said rights runs with the land and attaches to the resulting subdivision including the suit properties which were inherited in 2012 by the 1st to 3rd defendants and they cannot inherit a better right to the land than the terms on which their late father held it. It was submitted for the plaintiffs that the disputed Road is marked yellow on the sketch map in the report by Royal Valuers produced by the plaintiffs and that there is undisputed historical evidence that farmers in the area produced milk, meat, chicken, eggs and fresh produce which was collected from the farms by the Kenya Cooperative Creameries, Kenya Horticultural Exporters, Makindu growers, Horticultural growers and other traders who exported the produce or sold it locally

and the vehicles that collected the produce from Wattle Blossom farm also collected from neighbouring farms including Munyeti farm, Waridi farm, Kenya meat Commission and others. That those vehicles used this same road openly continuously and without restriction.

97. It was argued for the plaintiffs that the right of way was threatened in April 2015 by the defendants who began erecting barriers on the road and levying toll charges which was illegal. Counsel submitted that there was overwhelming evidence that prior to 1970 there was in existence a road traversing Wattle Blossom Farm and beyond the neighbouring properties including Munyeti Ranch and other properties in the hinterland. Counsel submitted that this road became known as 39 quarry Road starting from the old Mombasa Road at the Bridge built in 1939 traversing the Wattle far blossom farm to Munyeti Ranch and passed the quarries terminating on Kangundo Road. Counsel argued s that the road has been maintained and improved over the years through public funds and contributions a fact that is admitted by the defendants and that the same the same is presently is partly murram, tarmacked and paved in cabro.

98. Counsel further submitted that the road in issue was the only road used by Paul Maingey and his family to access their home and that along the road that they are erected telephone and power lines to the interior including water pipes and Internet cables which terminate at the 1st to 3rd defendants' property. That the defendants have blocked the reach of the same to the neighboring properties. They further submitted that members of the public and neighbours have used the disputed road continuously without hindrance from Paul Maingey until his demise in 1994 and even his demise did not stop the use of the road as the family continued to use it until they 1st defendant's actions. Counsel argued that this road was included in the proposed subdivision by the plaintiff with a dotted line where the word "Road" was inscribed in the application to the Municipal Council of Mavoko which application was approved by the town clerk Mavoko Municipality and the Commission of lands on 19th April 2006.

99. Counsel argued that the plaintiff also wrote a letter in March 2006 emphasizing that there is a road traversing the property. It was the submission of the plaintiffs counsel that the said approval did not in itself give rise to new rights, but was a bold recognition of their accrued and existing rights of way over the larger property including the suit property and that the disputed road appears on the topographical survey plan for Nairobi sheet 184 / 4 Edition No. 10 of 1996 and Mua hills sheet 149/3 Edition 7 of 1997 which all capture Wattle Blossom Farm and the neighbouring Munyeti ranch with this road joining the two farms as the road is marked as all-weather road ground surface on coordinates 75° E and 41° N off Mombasa Road . Counsel further submitted that the road was also captured on coordinate 77° E, 44° N in the topographical map for Mua hills sheet No. 149/ 3 Edition 7 of 1997. Counsel argued that the topographical maps capture what was on the ground at the relevant time and confirmed the existence of the road over the suit property long before the defendants acquired their titles and therefore the proposed subdivision plan having been duly was supposed to be complied with by the 4th defendants who omitted the road by issuing deed plans that did not indicate the disputed road, without giving reasons for that omission.

100. According to counsel for the plaintiffs, whenever there was a subdivision, the practice was to surrender the road, and that that is why PW2 surrendered his portion in 1988, and PW3 also surrendered his portion. Counsel argued that the witnesses presented by the plaintiffs have occupied the suit property for more than 25 years.

101. Reliance was placed on section 30 of the repealed Registered *Land Act* and Section 28 (c) of the *Land Registration Act* No. 3 of 2012 and for the proposition that an easement being an overriding interest need not be registered or noted in the register for it to be enforced. The court was referred to the case of Kamau versus Kamau [1984] KLR 539 for the proposition that an overriding interest need not be registered in order to be valid. Counsel further submitted that an overriding interest cannot be taken

away for as long as the necessity subsists and that the plaintiffs maintain that they use they use and still need the road and the right will not be taken away by subdivision of LR1338/ 4 as the burden runs with the land

102. Counsel also referred to the case of James Ngugi Mbugua v Grace Wairimu Mwithiga High Court civil case number 1174 of 2002 eKLR for the proposition that where a claimant demonstrates using or crossing through the defendants land to the main road, they will have proved an overriding interest thereon that could not be taken away at the whim of the defendant as it subsists as long as the necessity for the easement exists.

103. On whether there arose an easement of necessity counsel submitted that before Mr. Maingey acquired the Wattle Blossom Farm in 1971, there had been an easement of necessity over the said farm to in favour of Munyeti ranch and other neighbours and that the right of way arose out of the need by Munyeti ranch to reach Mombasa road and that the right continues for those who have acquired subdivision thereof. Counsel submitted that DW1 evaded the question of whether the disputed road existed as of 1970 by stating that there were many roads that existed on the Maingey farm. Cousel argued that looking at the topographical survey of the farm in 1996 and 1997, there was one major Road starting from Mombasa Road which is the disputed road. Counsel argued that the plaintiffs having been purchasers and or beneficiaries of subdivision of Munyetti ranch or Wattle Blossom Farm, they are protected and enjoy a right of way over Wattle Blossom farm, from which the suit properties were subdivided.

104. Counsel observed that the 1st defendant admitted to having used the road to primary school in the 70s and admitted that guests to her hotel use the same road while she uses the same road to access her home but blocks her neighbours from crossing the stretch on her land. It was further submitted that when the 1st to 3rd defendants acquired their titles the plaintiffs' use of the road had exceeded 20 years and therefore their right had crystallized which right is absolute and indefensible, and the defendants cannot point the plaintiffs to another route as that would amount to taking away an accrued right.

105. On the defendants' objection to the plaintiffs' use of the road on grounds of inconvenience, counsel referred to the case of Sham Badgee v Fukker Chand Badgee (1866)6W. R. 222 and submitted that once a right of way has been acquired the servient owner cannot object to it on grounds of inconvenience nor can he put an end to the right by showing that there is another pathway that the dominant owner might use. Reliance was further placed on the case of Barclays Bank D.C.O. v Patel 1970 E.A 88 on page 93D-E for the proposition that an easement by way of necessity can arise by operation of law on the subdivision of the original farm into several plots.

106. Regarding the question of whether the disputed road is a private road, counsel submitted that the defendants indeed acknowledged that there is a road crossing their properties but denied that it is public and argue that the road is a private road. Counsel argued that under section 9 of the *Public Roads and Roads of Access Act* cap 399, a private road has a legal status and to construct a private road of access, leave is required under section 11. Counsel argued that the defendants had not shown that the road on their property meets the requirements of law to be called a private road and therefore even if the road were a private road it is burdened with the right of way already accrued to the plaintiffs.

107. As to whether the easement acquired is absolute and indefeasible, reliance was placed on section 32C of the *Limitation of Actions Act* on the case of Benina Ndugwa Kunyumu & 4 Others v National Land Commission [2015] e KLR for the proposition that the statutory period to acquire land by prescription as an easement is 20 years. Counsel argued that the Quarry Road has been in use since 1970 and continued uninterruptedly for a period of more than 20 years and that therefore the plaintiffs and the public have enjoyed peacefully and openly as of right without interruption use of the said road.

Counsel argued that by 2012 the plaintiffs right of way had become absolute and indefensible. The court was referred to the case of Welford v Graham [2017] UKUT 297 TCC for the proposition that to acquire the prescription to easement use of such land must be open, without force and without permission for a period of over 20 years. Counsel argued that an easement acquired under section 32 of the *Limitation of Actions Act*, comes into being by a judgment establishing the right to the easement which should be registered against the title but until then the registered proprietor holds the land in trust for the person who has acquired the easement.

108. Counsel therefore submitted that the omission by the 4th defendant not to include the 39 Quarry Road in the deed plans in regard to the approved subdivision plan amounted to negligence and dereliction of duty and therefore counsel urged the court to issue an order to direct the 4th defendant to correct the error it created.

109. On whether an alternative road to 39 Quarry Road would extinguish the plaintiffs' the right of to use that 39 Quarry Road, counsel submitted that there is no alternative road to that road and that even if one was to be created, the same would not extinguish the plaintiffs' right of the disputed road. Further reference was made to the case of Francis Simiyu Mukholosi v John Khaemba [2013] e KLR for the proposition that there being evidence that there is no other access road for the plaintiffs, the defendants had no reason to close the access road.

110. Regarding the amended defence and counterclaim, counsel submitted that the same should be dismissed as special damages must not only be pleaded but it must be strictly proven. In that regard counsel argued that there was no evidence by the 1st to 3rd defendants to support the huge figures claimed in the counterclaim and that the person who purported to have given the report was not called as a witness yet PW5 countered the said report. Counsel further argued that the road was shown not to interfere with the hotels located along it namely Yeyani resort and Whistling Moran amusement park. Further that the counter claimants did not adduce evidence of their relationship with the hotel hence they cannot bring this claim on behalf of a third party. Counsel argued that the counter claimants had not shown the nature or character of activities carried out in the hotel that would be incompatible with the right of the public to use the road and the circumstances that would lead to a loss in Wattle Blossom Hotel while other establishments Whistling Moran are safe and that there is no evidence of how the computation of loss was arrived at. In that regard, reliance was placed in the case of Hahn v Singh [1985] e KLR for the proposition that special damages must be specifically pleaded and strictly proven.

111. On whether the defendants should be compensated for the use of 39 quarry Road counsel submitted that the same road is not a private road that would need the defendants to maintain and to be compensated by others and that the road having been acquired by the plaintiff indefensibly and absolutely by operation of the law, the same is held in trust by the defendants. Counsel argued that there can be no compensation as the there is necessity for the plaintiffs to use the land and an easement for that reason.

112. On the question of damages to the plaintiffs the plaintiffs argued that they sought Kshs. 10 million of damages for loss and inconvenience they suffered caused by the 1st to 3rd defendants who restricted them from using the disputed road and reliance was placed on the case of Rhoda S. Kiilu v Jiangxi water and hydropower construction Kenya Ltd [2019] e KLR

1st to 3rd defendants' submissions

113. Counsel for the 1st to 3rd defendants submitted that there was no evidence on record showing that the plaintiff in this suit in filing this suit, was acting on behalf of his Co-executor Andrew Maingey as the latter took a different position from what is stated by the plaintiff in this case. Counsel further

submitted that prior to the contested subdivision and an attempt to create the disputed road, there was a court order dated 12th November 2003 regarding the executor's powers in winding up the affairs of their father's estate.

114. Reliance was placed on the case of Attorney General & Another v RahimKhan Afzal Khan Rahumkhan & 4 others [2019] e KLR for the argument that land disputes are emotive in Kenya, and therefore the court was implored to ensure a just and equitable resolution of this suit recognizing family, societal, cultural, human rights and economic ramifications tied to the outcome of this case.

115. It was submitted for the 1st to 3rd defendants that the order of the High Court dated 12th November 2003 required the executors of the estate of Maingey to consult the 1st to 3rd defendants at every stage of the succession process and therefore counsel submitted that any action undertaken in contempt of the court order of 12th November 2003 is null and void ab initio. Counsel contended that the purported subdivisions and creation of a road traversing the 1st to 3rd defendants' parcels of land was done in 2006 when the administrators' powers had lapsed and every beneficiary had acquired their share of the estate. Counsel argued that at no time did the plaintiff and the other executor consult or raised the issue of creating a public road traversing through the 1st to 3rd defendants' private properties which was null and void for contravening the aforesaid court order.

116. Counsel submitted that when the titles for the 1st to 3rd defendants were issued, no concerns were raised by the plaintiffs and that the proposed subdivision creating a road in the 1st to 3rd defendants' parcels done in 2006, was done in contempt of the order of 12th November 2003. Counsel relied on the provisions of the *Contempt of Court Act* No. 46 of 2016 and argued that where there is contempt, a person convicted of contempt ought to be jailed for six months or be imposed a fine of up to Kshs. 200,000 according. At this stage, I must point out that this court takes Judicial notice that the *Contempt of Court Act* No. 46 of 2016 was declared unconstitutional by the High Court on 9th November 2018 in the case of Kenya Human Rights Commission v Attorney General & Another [2018] e KLR, and therefore the same does not form part of the law in Kenya. Counsel also referred to Section 28 (1) (b) of the *Supreme Court Act* and argued that the same makes it an offence for a person to willfully and without lawful excuse disobey an order of the court and that that section allows this court to punish for contempt. Again, this court takes judicial notice that the *Supreme Court Act* defines court as the Supreme court and therefore section 28 of that Act applies to proceedings before the Supreme Court and not this court. This court has its own provisions on punishing disobedience of court orders and Contempt as provided for in section 29 of the *Environment and Land Court Act* of 2011 and the section 5 of the *Judicature Act*, with the later provision also being the basis upon which contempt proceedings may be brought in the High court.

117. Reference was made to the case of Attorney General v Times Newspaper limited [1974] A.C 273 among other decisions for the proposition that there is an element of public policy in punishing civil contempt as the administration of justice would be undermined if orders of the court are disregarded with impunity.

118. It was further submitted for the 1st to 3rd defendants that actions performed by one executor of the will in the absence and without permission of his co-executor are unlawful. Counsel submitted that the deceased only allowed access road from Nairobi-Mombasa Road up to the dead end terminating at the extreme border of the plot adjacent to the one belonging to Andrew Kitili Maingey's plot L.R. No. 1338/94, and that which the latter formally and legally surrendered to the Government as a public road. Counsel contested the plaintiffs' proposition that the disputed road traversed L. R. No. 1338/90 to 3384/94 on the basis that from the will of the deceased and the survey map of 15th June 2006, the disputed road did not exist. Reference was made to the case of Re Estate of Kamatu Mwanthi Kamatu

deceased [2020] e KLR for the proposition that where there are co-administrators, they must execute their duties in a joint capacity. The court was further referred to sections 45 and 83 (h) of the *Law of Succession Act* and in the case of Re Estate of Mohammed Makau (deceased) [2019] e KLR.

119. On whether the plaintiffs properties were landlocked counsel argued that the late Paul Maingey only allowed the road up to L.R. No. 1338/94 and that he surrendered a public Road measuring 40 feet and documented under survey plan F R No. 371 upon subdivision of L.R. No. 1338 /90 and that this road does not only serve the plaintiff but also serves the 1st to 3rd defendants and the neighbouring parcels. Counsel maintained that a public road traversing L.R No. 1338/ 90 to L.R No. 1338/ 94 does not exist as per the will of the late Paul meringue and from the map of 15th June 2006. Counsel also argued that the 4th defendant confirmed in their letters produced in court that the disputed road does not exist in the map and that the Municipal Council could not have delineated the disputed road out of private properties without the owners' consent. Council submitted that the alleged approval of 19th April 2006 by Mavoko Municipal Council if it exists, is irregular, unprocedural, unilateral, illegal and inconsequential.

120. It was argued for the 1st to 3rd defendants that as there was no provision a public road in the will of the deceased, therefore the 4th defendant did not commit any error in failing to create a road in the defendants properties. Counsel maintained that the creation of a road regarding 39 Quarry Road in the land of the plaintiffs and that of Andrew Kitili was to create easement for the buyers of their land and was not because the Council directed them, hence the plaintiffs cannot forcefully create a road to traverse the 1st to 3rd defendants' land.

121. Counsel argued that there is no relationship of a dominant and servient tenement between the plaintiffs' land and the defendants' land as their land as there is no connection between their land and the plaintiffs land in relation to the plaintiffs access to Mombasa Road. Further that the dotted lines showing a road on the subdivision plan were not drawn to scale as required in law and that road is neither surveyed .

122. The 1st to 3rd defendants' counsel relied on article 40 (3) of *the Constitution* of Kenya and sections 9 and 10 of the *Public Roads and Roads of Access Act* as well as section 98 of the *Land Registration Act* and argued that it is only the owner who grants easement over the land to the owner of another parcel the land and relied on the case of Ellenborough Park & Others v Madison & Another [1955] 3 ALL ER 667 on the principles concerning easement and argued that easements must not only be appurtenant to a dominant tenement but must also be connected with the normal enjoyment of the dominant tenement; that a right of easement was only provided where the same was reasonably necessary for the enjoyment of the tenement. Further reference was made to the case of Johnbosco Muindi & 5 Others v Stephen Katili & Another [2019] e KLR on the creation of a public access road under the *Public Roads and Roads of Access Act* and the provisions of section 98 of the *Land Registration Act*.

123. Counsel maintained that road known as 39 Quarry Road remains a private road and that is why the 1st to 3rd defendants installed a road barrier in 2012 to control the unlawful pass into the affected titles whenever the plaintiffs and the beneficiaries of the plaintiffs' land have used the road and that they were charged levies. Counsel argued that the right of necessity does not obtain where the purported landlocked parties have an alternative access road and therefore all beneficiaries of the state of the late Paul Maingey are well connected to public roads joining the interchange along Nairobi-Mombasa Road. Counsel submitted that the disputed road being a private road should be protected against trespass and wanton waste. Counsel also referred to the letters from the Director of surveys, Machakos County Land Management Board and the National Land Commission and argued that the same

demonstrate that there is no road traversing the defendants' land as there is an alternative road of 40 feet with joining the 20 metre road leading to the interchange along Mombasa-Nairobi Road.

124. On whether the court should grant an order of permanent injunction to restrict the plaintiffs from interfering or using the disputed road, counsel referred to the case of Giella v Cassman Brown 1973 E.A 358 and argued that the plaintiff must show prima facie case, irreparable loss and that the balance of convenience tilts in their favor. Counsel argued that the 1st to 3rd defendants had demonstrated a prima facie case by demonstrating that they have a right and a legitimate claim to utilize and own their parcels of land and that they have been constantly threatened by the plaintiffs and their officials and therefore they stand to suffer irreparable loss if the plaintiffs are not barred from encroaching on their land. They further relied on the case of Chebbi Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] e KLR and argued that the balance of convenience tilted in the defendants favour.

125. On the prayer for damages, counsel submitted that as a result of the plaintiffs' disturbances the 1st defendant had been unable to develop her property to the optimum and therefore she presented a valuation report showing that their property project had stalled because of the trespass. Counsel submitted that the 1st to 3rd defendants are entitled to the prayers sought in the counter claim and argued that they are also entitled to costs by virtue of section 27 of the *Civil Procedure Act*.

4th defendant's submissions

126. Counsel for the 4th defendant submitted that upon procuring the titles of the three properties, the plaintiff and his Co-executor did not complain when the deed plans were prepared but instead signed them and the same were procured. Counsel also argued that from the letter of 18th March 2016 from Machakos County Land Management Board, the Co-executor of the plaintiff's Andrew Kitili Maingey indicated that the late Paul Maingey never gave any road through their land for public use and that according to the records from various Government offices, there was no public road. That Andrew Kitili complained that he was not aware of the deed plans being issued. Counsel further submitted that from the evidence of the 1st to 3rd defendants, it is clear that the late Paul Maingey only allowed access road from Nairobi-Mombasa Road up to the end of the road joining the property owned by Andrew Kitili being LR number 1338 /94, which extended to the northern boundary of the plaintiff's land.

127. Further, it was submitted for the 4th defendant that from the evidence of the defendants the late Paul Maingey surrendered an alternative road on subdivision of L.R number 1338/90 which is now a public Road measuring 40 feet documented as FR No. 371 for use by the 1st to 3rd defendants and the owners of the neighbouring parcels and therefore essentially it means that there is access to the plaintiffs' land and that of their neighbours.

128. It was contended for the 4th defendant that according to the survey map dated 15th of June 2006 produced from the survey office, the alleged public road crossing crew LR 1338/ 92 to L.R No. 1338/94 does not exist as there is no public road traversing through the 1st to 3rd defendants' private properties. Counsel further submitted that the plaintiff subdivided his parcel LR No. 1338 / 90 which he sold and that there was an access Road created.

129. Counsel also submitted that from the evidence of the 4th defendant it is clear that according to the records in their custody, there is no public road traversing the 1st to 3rd defendants' parcels and that the same are to be accessed using a common road along their north western boundaries. Counsel argued that the order sought by the plaintiffs that the 4th defendant rectifies the deed plans of the defendants to indicate the road, does not hold any water and submitted further that Mavoko Municipal Council did not have the mandate to delineate the 39 Quarry Road out of private properties as the owners never consented to such subdivision to have an access road run through their private properties. Counsel also

submitted that the disputed road is a private road and the 1st to 3rd defendants are entitled to protect the same against unwarranted trespass and that was the basis of the documentation from the 4th defendant and the National Land Commission. Counsel referred to the 4th defendant's letter dated 18th March 2015 and argued that the same was a confirmation that there was no through road over the defendants' property and that there was no surveyed or approved public road passing through the said parcels as the same can be accessed through a common road along their northwestern boundaries as per the survey map FR No. 371.

130. Counsel contended that the plaintiffs have no power to surrender a private road belonging to the 1st to 3rd defendants to the County Government of Machakos. On the issue as to whether the court should grant a permanent injunction restraining the 1st defendant from placing restriction or interfering with the enjoyment of the road, counsel argued that that should not be granted and argued that it is trite law that in granting injunction the court should rely on the case of Giella v Cassman Brown (supra). Counsel referred to the case of Mrao v First American Bank of Kenya limited and 2 others [2003] KL R-125 on the description of what constitutes a prima facie case and argued that the same must be a genuine and arguable case. Counsel argued that 39 Quarry Road does not exist on the survey plan Fr 153/ 99 and Fr 337/ 63 and that the road referred to by the plaintiffs is neither surveyed nor documented as an easement as per the survey plan of FR337/ 63. Counsel refuted the plaintiffs' claims that the closure of that road will negatively impact the social cultural environment of Mavoko subcounty arguing that there is an alternative road.

131. In a rejoinder contained in the plaintiffs' further submissions, counsel argued that the 1st plaintiff did not bring this suit as the executor of the estate of his father the late Paul Maingey as the defendants have repeatedly suggested in their submissions. Further counsel argued that roads and actual subdivision of land were never provided for in written will of the deceased and nothing in the will can provide for or bar the existence of 39 Quarry Road. It was further contented for the plaintiffs that the court was invited to disregard all submissions that the plaintiff had no authority to provide for the road in the subdivision plans. Counsel submitted that the issue of the Co-executor does not arise.

132. It was further submitted that the court order of 12th November 2003 issued in the succession cause was irrelevant to the present proceedings as the same does not take away their accrued rights of the plaintiffs to use the road.

133. Regarding LR No. 1338/90 counsel submitted that the subdivision of the same was not done during the lifetime of the late Paul Maingey and the road of 40 feet wide excised as the evidence on record shows that the plaintiffs subdivided the estate and provided for the said road to serve those from another house of his father but does not serve the plaintiffs and those staying in the hinterland and that even the defendants themselves do not use that road to access their land or the hotel.

134. Counsel also submitted that the subdivision of the land by Andrew Maingey and the plaintiff of their own properties to provide for the road goes to show that they recognize the importance of the access road and willingly surrendered their respective properties to have the road.

135. Regarding section 32 of the *Limitation of Actions Act* counsel argued that that easement is not reserved for landlocked persons and argued that it is a right that accrue out of long use of the road peaceably and openly as of right and without interruption for 20 years and that the question of an alternative road is irrelevant, but stated that for avoidance of doubt there is no alternative road. Counsel maintained that the defendants only restricted the use of the road upon acquisition of their titles and that the road in dispute is not intended to serve LR number 1338/ 91 to 1338/93 but the larger community who do not own the said titles. Counsel pointed out that the road sought in the plaint is not on the deed plans

since it was left out by the 4th defendant and therefore necessitating this suit as that was a disregard of the subdivision proposal submitted to the 4th defendant.

136. Council argued that the defendants have not tabbled before this court any other application for subdivision submitted to Mavoko Municipal Council and that the plaintiffs' application presented before court and dated 26th March 2006 is the only one and that the same was approved without alteration. Further that there was no objection to the subdivision raised by any of the defendants not even the 4th defendant and no amendment having been done thereof.

137. Counsel took the view that the letters from the National Land Commission and the 4th defendant are not evidence contesting the long use of the road but merely pointing out that the road was left out of the deed plans by the 4th defendant who has not given a lawful explanation for the same.

138. Counsel argued that there was no intention to compulsorily acquire the road as the same was public road and that the authorities cited in that regard by the 1st to 3rd defendants counsel are irrelevant. It was further submitted that the disputed road has existed since time memorial and used by many including the defendants to access their properties. Counsel further argued that section 98 of the *Land Registration Act* was irrelevant to the present dispute as the plaintiffs did not need permission of the defendants to use the road which existed before they were issued titles. Counsel submitted that the existence of an alternative road does not defeat the easement under section 32 of the *Limitation of Actions Act*

Analysis and determination

139. The court has carefully considered the pleadings, evidence and submissions presented by the parties in this case. The court takes the view that although this dispute was convoluted, it raises only a single issue, that is; whether the plaintiffs have acquired an absolute and indefeasible easement by prescription, being the right of way, access and use of the road traversing parcels L.R Nos. 1338/91, 1338/92 and 1338/93 which road forms part of 39 Quarry Road, by demonstrating that they have enjoyed the same peaceably, openly and as of right and for uninterrupted period of 20 years.

140. Section 2 of the *Land Act* defines "Easement" as follows;

> " easement means a non-possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land, or to restrict the proprietor's use to a particular extent, and shall not include a profit."

141. Therefore, an easement is an interest in land by one land owner over the land of another allowing the former to use or control or restrict the use by the owner of the latter's land, but which interest does not confer possession or the power to alienate such land.

142. The Black's Law Dictionary, 11th Edition, defines "easement" as follows;

> An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it for a specific limited purpose. (such as to cross it for access to a public road). The land benefitting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve or sell the land. The primary recognized easements are (1) a right of way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that

would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate.

143. Where an owner of one parcel of land uses without possessing, another person's land peaceably and openly as of right, continuously and without interruption for a period of 20 years, a prescriptive easement arises.

144. Section 136 of the *Land Act* provides as follows;

> " Interpretation
>
> 1. In this Part unless the context otherwise requires—
>
> a. The land for the benefit of which any easement is created is referred to as the "dominant land" and the land of the person by whom an easement is created is referred to as "the servient land"; and
>
> b. An easement is, in relation to the dominant land referred to as "benefiting that land" and is, in relation to the servient land, referred to as "burdening that land';
>
> 2. Subject to the provisions of this Part, an easement shall be capable of existing only during the subsistence of the land or lease out of which they were created the subsistence of the land on lease of which they were created or in any other manner provided by any other legislation."

145. Therefore, existence of easements creates a benefit to the dominant land and a burden to the servient land. However, easements do not create rights for exclusive possession by the dominant land owner. An easement may be by prescription by effluxion of time as provided for in the *Limitation of Actions Act* or it may be by agreement between the owner of the dominant land and the owner of the servient land.

146. In the case of Kamau –Vs- Kamau (1984) KLR, the Court of Appeal stated as follows;

> " An easement is a convenience to be exercised by one landowner over the land of a neighbour without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation these tenements respectively come. So, also in equity, do restrictive covenants because they are in the nature of negative easements.
>
> A licence or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land. A licence not coupled with an interest in land is revocable unless the contract for it contains a term express or implied that it shall not be revoked. A right of way and a right to take water are affirmative easements for they authorise the commission of acts, which are injurious to another and can be the subject of an action if their enjoyment is obstructed.
>
> How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence personal to the licensor or licensee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties.

At equity, however, if there is an agreement (whether under seal or not) to grant an easement for valuable consideration equity considers it as granted as between the parties and persons taking with notice, and will either decree a legal grant or restrain a disturbance by injunction. Dalton v Angus (1881), 6 App Cas 765, 782."

147. In Re Ellenborough Park (1956) Ch 131 the Court set out 4 essential characteristics of an easement, namely;

a. There must be a dominant and servient tenement.

b. The right must benefit the dominant land.

c. There must be diversity of ownership or at least occupation.

d. The right must be capable of lying in grant.

148. Section 28 (c), (h) and (j) of the *Land Registration Act* recognizes easements as one of the overriding interests which registered land is subject to, and provides as follows;

Overriding interests

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

(c) rights of way, rights of water, and profits subsisting at the time of first registration under this Act.

(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."

(j) any other rights provided under any written law.

149. Therefore, where there exists an easement in the nature of a right of way over a person's land, despite having not been noted on the register, the same is an overriding interest over which the registered land is subject to.

150. An easement accruing by prescription is based on section 32 of the *Limitation of Actions Act* which provides as follows;

Means by which easements may be acquired

1. Where—

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

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

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

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

151. An easement ought to be distinguished from a public right of way, which although is also an analogous right, but which is a legal right of way created to allow national or County Government institutions or organizations to have a wayleave; or a right of way created for members of public as a communal right of way through privately owned land. As provided for in sections 143 to 148 of the *Land Act*, the public right of way accrues by order to that effect of the Cabinet Secretary in charge of lands, upon recommendation of the National Land Commission, after considering an application to that effect. This is done upon compensation by the state of the private land owner.

152. In the instant case, the plaintiffs' case is that before the late Paul Maingey purchased the parcel of land known as L.R No. 1338/4 in 1970, there was a road passing across that land starting from Nairobi-Mombasa Road at Athi River Bridge, which crossed that parcel and stretched beyond the neighbouring parcels including Munyeti Ranch up to Kangundo Road. They argued that it was only in 2012 that the 1st to 3rd defendants purported to restrict the use of the road by erecting barriers on it and levying toll charges allegedly for maintenance and security of the road which to the plaintiffs insist was unlawful on the basis that even before the 1st to 3rd defendants obtained their titles, the plaintiffs had already acquired prescriptive rights of easement to have a right of way across the suit properties in accordance to section 32 of the Law of Limitations Act.

153. In response, the 1st to 3rd defendants maintained that the disputed road is a private road and therefore the plaintiffs cannot lawfully use it without their consent. The basis for this argument is that the disputed road is not a surveyed road and not recognized as a public road by the department of lands including the Director of surveys who is the 4th defendant herein. They maintained that the disputed road is a private road and that there is no public road in their properties has been documented by the Director of surveys.

154. It is not in dispute that the 1st to 3rd defendants are the lawful owners of the parcels of land known as L.R Nos 1338/91 to 1338/93. Parties spent a great deal of time addressing the question as to whether the disputed road is a surveyed road.

155. In my view, the question of whether or not the plaintiffs have acquired an easements in regard to the suit road in accordance to section 32 of the *Limitation of Actions Act*, does not turn on questions as to whether the disputed road was surveyed by the 4th defendant or not and, whether the National Land Commission recognizes the road since an easement is an overriding interest on registered land, which is normally not reflected in the register and or in official survey records, but which accrues by dint of effluxion of time as per the provisions of the *Limitation of Actions Act*. While the issue as to whether the dotted line in the plaintiff's subdivision plan meant that there was a road or not and whether the 4th respondent was right in not including a road through the 1st to 3rd defendants' land in the final deed plans, the inclusion or failure to include the disputed road cannot of itself confer an easement under section 32 of the *Limitation of Actions Act*.

156. Section 107 of the *Evidence Act* places the burden of proof of a claim on the plaintiff and in this case, the plaintiffs were obligated to prove that a prescriptive easement had been created while the 1st to 3rd defendants were under duty to prove entitlement to compensation and injunction as sought in their counterclaim.

157. The plaintiffs having predicated their claim on section 32 of the Law of Limitations Act, they were duty bound to demonstrate that they have enjoyed a right of way through the 1st to 3rd defendants' properties, peaceably, openly and as of right for a continuous period of twenty years, without having been interrupted in any way in their alleged right of way.

158. The court has considered the documents produced by the parties. Prescriptive rights do not accrue from registration documents in respect of the disputed properties. They accrue from the long uninterrupted use as of right of another person's land, and in respect of an easement, the period is 20 years. While the 1st to 3rd defendants argued that their father had created a road in the suit property which joined the road from Nairobi-Mombasa Road up to a dead end before L.R. No. 133 8/94, they did not explain how and why the disputed road, was continuous, similar in size and apparent age traversing from Athi River Bridge on Nairobi-Mombasa Road across their parcels and beyond the parcels neighbouring former L.R 1338/4 including Munyeti Ranch and beyond. In addition, the 1st to 3rd defendants did not suggest to have been the ones who created the alleged private road, and although they denied the use of that road by the plaintiffs, they did not state who created the road. Having not been the ones who created the road, as at 2012, when they blocked the use of the same, it did not belong to them as they had no titles to the land in dispute and it is therefore clear that they found the road in existence when titles were issued in their names. I agree with the assertion by the plaintiffs that at the time the late Paul Maingey purchased the land herein in 1970, the disputed road was in existence and was being used as a right of way by the owners of neighbouring parcels. This position was corroborated by the evidence of PW2 who purchased his land in 1988 and has since been using the disputed road. The evidence of PW3 whose predecessor in title had been using the disputed road before they purchased their land and continued to use the disputed road to access Nairobi Mombasa Road. PW1 being one of the family members of the defendants just like any other family member was using the disputed road. In my view, the evidence that the plaintiffs had been using the disputed road to access their properties way before the 1st to 3rd defendants obtained registration of their properties in their names, was not shaken or rebutted in any way. It is clear to me that the defendants' claim of the disputed road as their exclusive private road is based on no other reason but that the certificates of titles where the road is located are registered in their names.

159. I have considered the topographical maps of 1983 and 1996. in 1997 and it is clear that the disputed road was in existence as at 1983. When this court visited the said road on 28th July 2023, which visit is documented and makes part of the court record, it noted that the same is an old earth road and along that road there are old electric power lines poles. The road was in use by members of the public who used the same on foot, by motor vehicles and motorcycles. Looking at the road, the court formed the opinion that the same was not a new road and on both ends of the 1st to 3rd defendants' parcels, there was continuity and uniformity of the road in terms of width, nature and apparent age. It was also clear from the evidence on both sides that the late Paul Maingey used the same road to access his house which was on the land later known as LR No. 1338/90 given to Thomas Maingey the plaintiff herein and therefore the evidence of DW1 that the road from Mombasa road came all the way to a dead end in what is now registered as L.R. 1338/94 cannot be correct, because parcel 1338/90 is on the far end and can only be accessed from Nairobi-Mombasa Road by crossing the 1st to 3rd defendant parcels. I do not accept as true the defendants' evidence that there was a dead end before the home of late Paul Maingey could be accessed. In addition, the evidence of DW1 that there were no neighbours near LR No. 1338/4 is not true because there is Munyeti Ranch and Waridi Flower Farms and others. The question of consent does not arise as the plaintiffs' rights had accrued long before the 1st to 3rd defendants obtained titles. In any event, under section 32, the uninterrupted use of a roadway should be as of right, openly, peaceably and without permission and or consent of the title holder. I therefore

agree with the plaintiffs' position that the disputed road existed before the late Paul Maingey purchased the suit property in 1970 and therefore in 2015 when this case was filed, the plaintiffs had used the disputed road for over 45 years, which is a period beyond the prescribed statutory period of 20 years. The easement having crystalized way before the registration of the suit property in the names of the 1st to 3rd defendants, their registration did not interfere with the burden borne by their land and the plaintiffs' right to enjoy the right of way and access thereon.

160. The 1st to 3rd defendants' argument that their land was compulsorily acquired is untenable as compulsory acquisition as per Article 40 of *the Constitution* as read with part VIII (sections 107 to 133) of the *Land Act*, is the preserve of the state as compulsory acquisition can only be done for public purposes and private individuals like the plaintiffs herein have no power in law to compulsorily acquire land belonging to another person. The statement by the defendant that the Machakos County Government had compulsorily acquired the suit property was neither here nor there as the latter are not parties herein and neither the evidence or the import of the pleadings pointed towards such proposition and therefore that argument has no basis. As the plaintiffs have acquired the disputed road by prescription, the question of compensation does not arise.

161. Section 38 (3) of the Limitations of Actions Act gives a right to any person entitled to an easement under section 32 thereof to apply to this court to vest the easement in them and states as follows;

> " A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before."

162. As the plaintiffs herein have demonstrated using the disputed road described as 39 Quarry Road for a period of over 20 years, I find and hold that their interest of easement has accrued and the same is protected in law. Whether or not the disputed road is indicated on the 1st to 3rd defendants' deed plans and whether or not it was provided for in the proposed subdivision of the estate of Paul Maingey is immaterial as the right sought is a statutory right and an overriding interest acquired by prescription and need not be registered or documented to be upheld.

163. The argument by the 1st to 3rd defendants that the plaintiffs cannot be entitled to the right of way in the suit property because the road was not included in the will of the late Paul Maingey, is rejected by this court since the exclusion of the road in the deceased's will, is immaterial in so far as the plaintiffs' claim for easement is concerned because the plaintiffs' claim is not a claim within the probate and administration proceedings of the late Paul Maingey.

164. The 1st to 3rd defendant further argued that the plaintiff had an alternative road and raised the question of easement by necessity. Parties herein spent a great deal of time in their evidence and submissions on the question as to whether the plaintiffs had alternative road apart from the disputed road and whether the plaintiffs had proved that their parcels of land were landlocked. It is instructive that easements are created in several ways including by prescription, express grant or reservation; by implied necessity or by estoppel. An easement by necessity is different form an easement by prescription. In this case, the plaintiffs' claim is predicated on easement by prescription. In easements by prescription, a claimant must demonstrate that their use of the roadway is as of right, adverse, open, with the knowledge and without permission of the owner and for a continuous period of 20 years. On the other hand, easement by necessity arises out of practical necessity. It is a right that allows one person to access another person's property so as to be able to enjoy their own property. An easement by necessity would arise for instance when a larger parcel of land is partitioned leaving one parcel landlocked, necessitating the owner of the

landlocked parcel to cross his or her neighbour's land to access the nearest highway. (See Palmer v R.A Yancy Lumber Corporation, 294 Va. 140 (2017)). Therefore, to establish an easement by necessity, a claimant must demonstrate;

a. That the dominant and servient estates were previously by the same person.

b. The easement is reasonably necessary for use of the dominant estate

c. That the dominant estate was rendered landlocked upon partition of the land

d. That there is currently no other way of entry and exit other than across the servient estate.

165. Therefore, the question of effluxion of time does not arise in easements by necessity as the same are neither based on effluxion of time nor claimed under the provisions of the *Limitation of Actions Act*. Having said that, and having considered the plaintiffs' claim as pleaded in their plaint, it is clear to me that the plaintiffs' claim is based solely on section 32 of the *Limitation of Actions Act*, which is a claim for easement by prescription based on adverse use of the suit property for a right of way for a continuous period of 20 years. Therefore, it is my finding that the plaintiffs' claim is not based on easement by necessity and hence whether or not there is an alternative road for the plaintiffs' use is immaterial in the circumstances of this case.

166. In addition, parties presented evidence and argued on whether or not the disputed road was a public road. Section 2 of the *Public Roads and Roads of Access Act* define a public road as follows;

Public road" means—

a. Any road which the public had a right to use immediately before the commencement of this Act;

b. All proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;

c. All roads and thoroughfares hereafter reserved for public use;

167. Article 62 (h) defines public land to include all roads and thoroughfares provided for by an Act of parliament. Therefore, a public road forms part of public land and the same is a road that members of public have a right to use.

168. As the disputed road is on private property the same is not on public land and therefore the same is not a public road. Therefore, parties' evidence, arguments and submissions on the question as to whether the disputed road is a public road are irrelevant for purposes of this judgment, on the basis that the plaintiffs' claim is that the 1st to 3rd defendants' suit properties are the servient estate, while the plaintiffs' parcels are the dominant estate. Simply put, the real question herein it is a question of the relationship between the plaintiffs' land vis a vis the defendants' land. Therefore, creation of an easement does not create public rights. It creates private rights in favour of the owner of the servient tenement.

169. Having considered the totality of the evidence herein, it is clear that the plaintiffs own parcels of land neighbouring the 1st to 3rd defendants' land and they have been in an open, visible, peaceable use, as of right, of the road traversing through the 1st to 3rd defendants' land for purposes of accessing their land and for the benefit of their land. Therefore, this court finds that the plaintiffs have demonstrated that they have peaceably, openly and as of right, used and accessed 39 quarry Road, traversing through parcel L.R Nos. 1338/91, 1338/92, 1338/93 belonging to the 1st, 2nd and 3rd defendants for a period of

over 20 years and therefore they have enjoyed an absolute and indefeasible easement which right they are entitled to and should be protected by this court.

170. In the premises the 4th defendant should amend the deed plans for the 1st, 2nd and 3rd defendants to reflect the disputed road. Although the plaintiffs sought for orders that the 4th defendant be directed to rectify the deed plans for the parcels owned by the 1st to 3rd defendants "so as to indicate that the road should which was approved by Mavoko Municipal Council on 19th April 2006 as per the approved conditions for the subdivision of the property originally known as L.R. No. 1338/4/R", from the evidence adduced including the proposed subdivision map by the plaintiff and the evidence of the 4th Defendant, the Director of Surveys, is clear to me that the subdivision plan had a dotted line representing the disputed road, which did not indicate the dimensions of the road, yet the road on the ground as seen by the court and as appears from the valuers' reports herein has precise dimensions, the dotted line is not information capable of execution by the 4th defendant. The road in issue has clear and precise dimensions both in length and width in so far as the 1st to 3rd defendants properties are concerned and therefore, it will not serve the interests of justice to grant the plaintiffs' prayer above in the terms sought, as the issue is not whether or not the 4th defendant erred in not indicating the road on the 1st to 3rd defendants' deed plans but whether the plaintiffs have acquired easement in regard to the suit properties only in regard to the road as it is on the ground. In the premises, this court will grant the easement in accordance to the dimensions of the road as it is on the ground.

171. Regarding the plaintiff's claim for damages, it is trite that damages should not only be pleaded, but they must also be strictly proved. The plaintiffs did not state in their pleadings the basis, nature or purpose of damages sought. They have only pleaded and claimed for damages. In the premises I find and hold that they failed to prove the loss suffered for them to be entitled to damages and the claim for damages is rejected.

172. I have considered the 1st to 3rd defendants' counterclaim in which they seek to be compensated for the use of the disputed road as well as an order of injunction. As what is sought by the plaintiff is a right accrued under prescriptive easement and not public right of way or for an order of entry, there can be no order for compensation to the defendants. The 1st to 3rd defendants' rights in regard to the land forming part of the road were extinguished even before they obtained title in the suit property, the defendants having inherited parcels that had already been burdened by easement as an overriding interest, the 1st to 3rd defendants cannot be entitled to compensation. And as stated earlier in this judgment, the question of compulsory acquisition does not arise as compulsory acquisition of private property is a function of the state and can only be done for public purposes and not private individuals like the plaintiffs herein. Since the plaintiffs right of easement has accrued by prescription, the 1st to 3rd defendants have no rights over the portion of land where the plaintiffs have acquired easement and therefore they cannot be entitled to compensation when they have no rights over the same. On that basis, the 1st to 3rd defendants' claim for compulsory acquisition, compensation for damages and injunction has no basis and is rejected. Therefore, as the plaintiff's right of easement has accrued, the defendants claim for compensation for use of the disputed road cannot lie.

173. In the result, I find and hold that the 1st to 3rd defendants have failed to prove entitlement to their counterclaim. I therefore dismiss the 1st to 3rd defendants' counterclaim. I find and hold that the plaintiffs have proved their claim on the required standard and consequently, I allow the plaintiffs' claim as follows;

    a. A declaration is hereby made that the plaintiffs and all other proprietors of the adjacent properties are entitled to a right of way across the properties known as L.R. Nos. 1338 / 91 1338 / 92 and 1338/93 using the road commonly known as 39 Quarry Road which is shown

on the subdivision plan of 11 number 1338/ 4 / R with a broken line running across the properties marked thereon as A, B, C, D, & E for themselves, their servants, employees, agents and licensees on foot, motor vehicles and other conveyances at all times and for all purposes.

b. A declaration is hereby made that the 1st to 3rd defendants are not entitled to place or build or cause to be placed or built anything upon the properties known as L.R Nos. 1338 / 91, 1338/92 and 1338/93 so as to close, block up or obstruct the road commonly known as 39 Quarry Road so as to restrict, prevent or otherwise interfere with the reasonable use thereof by the plaintiffs and all other proprietors of the adjacent properties, their servants, employees, agents and licenses on foot, motor vehicles and other conveyances at all times and for all purposes.

c. An injunction is hereby issued restraining the 1st to 3rd defendants by themselves or their servants or agents or otherwise howsoever from placing or allowing to be placed on the road commonly known as 39 Quarry Road anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the Safeway by the plaintiff and all other proprietors of the adjacent properties their servants, employees, agents and licenses on foot, motor vehicles and other conveyances at all times and for all purposes and from doing any act whereby the plaintiff and all other proprietors of the adjacent properties may be hindered or obstructed and the free use of their properties.

d. An order is hereby directed at the 4th defendant to delineate the disputed road in respect of L.R. Nos 1338/91; 1338/92 and 1338/93 and to amend the deed plan Numbers 268859, 268857 and 268858 so as to indicate the road which is already on the said three properties and being part of the road otherwise known as 39 Quarry Road traversing from Athi River Bridge on the Nairobi-Mombasa Road, running parallel to the northern boundary of the 1st to 3rd defendants' properties known as L.R numbers 1338 / 93, 1338 / 91 and 1338/ 92 respectively.

174. As the parties in this case are related and or are neighbours, I make no order as to costs.

175. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 19TH DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Ojiambo and Dr. Omondi for the plaintiffs

Ms. Kibare for the 1st to 3rd defendants

No appearance for the 4th defendant

Court Assistant: M. Nguyai