



**Registered Trustees of Hindu Union v mombasa Water Supply & Sanitation Limited & another (Environment & Land Case 131 of 2022)
[2024] KEELC 13483 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 131 OF 2022
LL NAIKUNI, J
NOVEMBER 18, 2024**

BETWEEN

THE REGISTERED TRUSTEES OF HINDU UNION PLAINTIFF

AND

MOMBASA WATER SUPPLY & SANITATION LIMITED 1ST DEFENDANT

MACINERY COSTRUCTION LIMITED 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Motion application dated 9th November, 2022 by the Registered Trustees of Hindu Union, the Plaintiff/ Applicant herein. It was brought under the provisions of Order 40 and 51 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* 21 Laws of Kenya and all other enabling Laws of the Land.
2. Upon service of the application to the 1st and 2nd Defendants/Respondents, opposed it through their respective Replying Affidavits sworn on 21st November, 2022 and 7th December, 2022 respectively. Subsequently, the Plaintiff/ Applicant with the leave of Court responded to the 1st Defendant/Respondent's replying affidavit through a supplementary affidavit sworn on 2nd December, 2022. Further the 1st Defendant/Respondent filed a further responses to the Plaintiff/ Applicant's supplementary affidavit sworn on 7th December, 2022 thereof.
3. It is instructive to note that upon the request by the parties, on 16th June, 2023 the Honourable Court through its Deputy Registrar conducted a site visit ("Locus in Quo"). Subsequently, a report was prepared and its attached in this ruling for ease of reference. Further, the same will be of great value during the trial and in the long run while making the final decision of this matter.



II. The Plaintiff/Applicant's case

4. The Plaintiff/Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to issue Orders of Temporary Injunctions restraining the Defendants, either by themselves, servants, agents, employees and/or any person working under their authority from further encroaching and/or trespassing onto Plaintiff's suit Plot No. MOMBASA/BLOCK X/393 and from are continuing with illegal constructions and/or erections of building or dealing with the said Plot in any manner whatsoever pending hearing and determination of this suit.
 - d. That costs of this Application be provided.
5. The application was premised on the grounds, testimonial facts and the averments made out under the 14 Paragraphed annexed affidavit of MR. RATILAL SHAH a Member of the Plaintiff/ Applicant's board of trustees herein. The Applicant averred that:
 - a. Sometime in August 2022 he visited the Plaintiff who was located at Buxton, Sheikh Abdullah Road within Mombasa County. He annexed in the affidavit and marked as 'RS - 2' was a copy of the Certificate of Title Deed and Certificate of Lease for the Plaintiff's plots hosting the Hindu Crematorium.
 - b. He however noticed that the boundary wall of the premises had been demolished and some illegal constructions were ongoing by several handmen who had been deployed on the ground.
 - c. He therefore sought to speak to the foreman who during his interrogation confirmed to him that the constructors were employees of Adequate Machinery Construction Limited and that they had been instructed by the Mombasa Water Supply & Sanitation Company Limited.
 - d. He then requested him to supply him with a letter of authorization from the Hindu Union to Mombasa Water Supply & Sanitation Limited but he confirmed that he had none. He therefore informed him that these activities amounted to encroachment and trespass and urged him to instruct his men to stop the construction. He however stated that he was just an employee and could not stop the construction unless his boss informed him to do so. He however instructed his men to continue with constructions illegally.
 - e. The trustees of the Hindu Union, had severally requested the constructors to stop their developments in vain. The Defendants had caused excessive malicious damage to the property walls and the surface considering that they had dug onto the ground to erect structures thus changing the ground from its original state.
 - f. The trustees of Hindu Union instructed Pimatech Land Surveyors to confirm whether the actual occupation by the Defendants was within the boundaries of the Plaintiffs plot and a conclusive report was done confirming the encroachment by the Plaintiffs. He annexed in the affidavit and marked as 'RS-3' was a copy of the survey Report.
 - g. The Plaintiff had not issued any prior Consent to the Defendants to enter into the suit plots for any purpose whatsoever and in that regard the continued activities and illegal continued construction has subject the Plaintiff to loss, suffering and grave damage.



- h. Owing to the intensive damage caused by the Defendants and by their failure to stop the construction and/or any dealing, the Plaintiff now sought for the Honourable Court's intervention to stop the Defendants from extending the illegal works and further encroachment onto the Plaintiff's premises.
 - i. He annexed herewith photographs showing the damage and loss that had been caused by the Defendants for the Court's perusal.
- j. It was only in the interest of justice and fairness that he urged the Honourable Court to grant the prayers sought in his application.

III. The 1st Defendant/Respondent's response

- 6. The 1st Respondent's opposed the application through an 18 Paragraphed Replying Affidavit sworn on 21st November, 2022 and filed on 24th November, 2022 by ABDIRAHIM FARAH, the Managing Director of the 1st Defendant. He averred as follows:
 - a. One Rantilal Shah who purported to swear the supporting affidavit on behalf of Plaintiff, failed to attach the copy of authority to swear from the Plaintiff's Board of Trustees. Therefore his evidence was inadmissible as hearsay.
 - b. Be that as it may, the donor – funded WSDP Contract for “Improvement of storm water outlets and combined sewer overflowed in Mombasa Island – (KE MOWAS CO – 16772 – CW)”, had a commencement date in May 2021.
 - c. One of the projects under the WSDP was the improvement of the twelve (12) existing storm water outlets - one (1) of them being the area outside the perimeter wall of Mombasa/Block X/393, also known as “Buxton outlet/site”.
 - d. The Buxton outlet was in between Mandizini Slum and the Hindu Crematorium, and the project's main aim was pre - treatment of wastewater through screening and grit removal into the Indian Ocean via the existing storm water outlets located outside the perimeter wall of the Crematorium, hence reducing pollution of marine environment. See Annexure marked as “MM - 1”- the Design Review Report - Buxton Outfall Site, especially the photographs on pages 1, 2, and 3.
 - e. Upon perusal of the Certificate of land ownership presented by Rantilal Shah in paragraph 2, and the Topo cadastral Survey on Parcel Mombasa/Block X/179 contained in the copy of the Survey Report (RS-3) in paragraph 8 demonstrate as follows:-
 - i. Certificate of Title Deed (Mombasa/Block X/179) is an absolutely owned property in land in favour of the Plaintiff/Applicant. He hastened to add, considering the Survey Report allegedly commissioned by the Plaintiff/Applicant demonstrated neither Plaintiff/Applicant nor Rantilal Shah had not proven any threats to the parcel Mombasa/ Block X/179 that would lead to the losses and damage to the Hindu Crematorium as alleged.
 - ii. The Environmental & Social Impact Assessment (ESIA) Project Report for Improving the Existing Storm Water Outlets, Outfall and Combined Sewer Overflows in Mombasa Island, with respect to the Hindu Crematorium /burial site notes that: -
 - a. In addition, the Buxton Outlet was located near a Hindu burial site however no graves would be affected by the project



- b. Noise and vibration generated during construction by heavy construction machinery, such as excavators, bulldozers, concrete mixers, and transportation vehicles could affect sensitive receptors such as the Hindu burial site at the Buxton Outlet.
- c. Some of the project sites were located within various homes to several cultural sites, in addition, the Buxton site was located near a Hindu burial site. Although none of these cultural sites would be affected.
- iii. The Buxton site where the improvement of storm water outlets and sewer outfalls were located was outside parcel Mombasa/Block X/179 and parcel Mombasa/Block X/393 as demonstrated in the following: -
- f. Upon perusal of the Certificate of land ownership presented by Rantilal Shah in paragraph 2, and the Topocadastral Survey on Parcel Mombasa/Block X/393 contained in the copy of the Survey Report (marked as “RS – 3”) in paragraph 8 demonstrated as follows:-
 - i. The contention in this suit was with regards to Mombasa/Block X/393, which Rantilal Shah admitted was a leasehold from the County Government of Mombasa (the successor in title) of the defunct Municipal Council.
 - ii. At page 2 of the Survey Report, the Applicant admitted that there was the “new development being erected by the County Government (of Mombasa) allegedly (ostensibly) against the wishes of the “registered proprietor” (and was) on the area of the property that was left outside by the perimeter wall (emphasis)”, and that Plaintiff/ Applicant had constructed a perimeter wall up to the wayleave for storm water drains exist (fact).
 - iii. Currently the twin lines of the storm water being rehabilitated had always existed at the site since the colonial era, with the County Government of Mombasa regularly operating and maintain the same infrastructure, a fact which the Management of Hindu Crematorium has never objected to.
 - iv. The National Environmental Management Authority (NEMA) has issued licenses for the project. Annexure marked as “MM - 2” being NEMA Licenses.
- g. Before the rehabilitation works for the storm water drains at the Buxton site involvement of stakeholders likely to be affected by the project was done. He was made aware by the 2nd Respondent that Rantilal Shah had a verbal agreement on access to the construction site through Mombasa/Block X/393, which Rantilal Shah now denied. The Hindu Crematorium officials have always supported the project, to the extent that the Contractor/ 2nd Respondent was aided by being given access and storage of building materials through the Crematorium site for safe keeping considering the proximate slum area. Annexure marked as “MM-3” - Letter requesting access dated 27th September 2022 and forwarded by the 2nd Respondent.
- h. In response to the contents of paragraphs 4, 5, and 6 of the Supporting Affidavit, there was neither any notice that had ever been served on the 1st Respondent nor was there evidence of such requests to stop the development attached to the affidavit.
- i. Rantilal Shah, without authority of the Plaintiff/Applicant, was clearly employing the use of jargon and other strong words such as “letter of authorization from the Hindu Union”, “encroachment and trespass”, “excessive malicious damage” without any proof at all in order



to scandalize and sensationalize an otherwise immaculate public works whose main aim was, among others, to protect the property of the Plaintiff/Applicant from the ravaging storm waters.

- j. He reiterated the contents of paragraph 3 of this Replying Affidavit in response to paragraphs 6 and 7 of Rantilal Shah's Affidavit.
- k. While it was within the ambit of Rantilal Shah to give "verbal instructions" to a private land surveyor to assess the boundaries of a public land leased to a private legal person, by virtue of the land being owned by the County Government of Mombasa, it would be just and fair for the Plaintiff/Applicant to seek an independent survey, redress and opinion from the authorized. County Surveyor to establish any encroachment or otherwise (an allegation prominently appearing in Rantilal Shah's Affidavit but not a shred of evidence was provided) before litigation.
- l. "Consent" contained in paragraph 9 of Rantilal Shah's Affidavit was not known in law and it had not been demonstrated by the Plaintiff/Applicant that it was a necessity for purposes of accessing wayleaves for storm water outfalls located outside the perimeter wall of the Mombasa/Block X/393.
- m. Neither Rantilal Shah, nor the Plaintiff/Applicant had demonstrated or proven illegality, damage to property or any other adverse action associated with the implementation of the WSDP project activities currently ongoing at the site.
- n. The dispute herein was between Rantilal Shah and the 2nd Respondent, the latter of whom the 1st Respondent had contracted to execute the project works. From the attached layout drawings and setting out data adopted for the permanent works at the site, Annexure marked as "MM – 1", the works must be confined to the space within the existing headwall and as such, to the best of our knowledge no permanent works have encroached onto a private property/land.
- o. The Plaintiff/Applicant's Application dated 9th November, 2022 was not merited at all and it will be in the best interest of justice if it was dismissed with costs, and/or have the matter directed for alternative dispute resolution (ADR) as this was a dispute that can/should be resolved by the parties engaging more, and in good faith.

IV. The 2nd Defendant/ Respondent's response

- 7. The 2nd Respondent's opposed the application through a 28 paragraphed Replying Affidavit not dated but filed on 6th December, 2022 by ANWAR ALI MOHAMED, a director of the 2nd Defendant/ Respondent herein who averred as follows: -
 - i. In response to the contents of paragraphs 2, 3 4 & 5 of the Supporting Affidavit, the averments therein were a concealment of material facts by Mr. Rantilal Shah because;
 - a. The project had been going on from the beginning of the year 2022;
 - b. The Defendants sought the permission of the Plaintiff before embarking on the project vide letter dated 14th February 2022 (He annexed and mark as "AM – 1" was a copy of the letter dated 1st February 2022 seeking temporary access through the Plaintiff's property to the project site behind the Plaintiff's boundary wall;
 - c. It could not be true that Mr. Rantilal Shah only found out about the constructions in August 2022 as he claimed;



- d. It could not also be true that despite the Plaintiff receiving the 2nd Defendant's letter dated 14th February 2022, and not objecting to granting access, Mr. Ratilal Shah talks of the project as "...some illegal constructions...".
- ii. In response to paragraph 6 of the Supporting Affidavit, at no point have the Plaintiff, through its trustees requested the contractors to stop the ongoing constructions. No such evidence has been availed.
- iii. The above notwithstanding, Defendants had not done anything on the affected property without notifying the Plaintiff.
- iv. In response to paragraph 7 of the Supporting Affidavit, the nature of the project involved digging a foundation that was necessary to erecting a strong durable structure.
- v. Further to the above, the only section that the excavation had been done was outside the Plaintiff's perimeter wall.
- vi. A section of the Plaintiff's wall had been demolished to enable the Defendant gain access to the site located on the other side of the perimeter wall.
- vii. In good faith, the Defendants had engaged the services of a security personnel round the clock to ensure not only the construction site but also the affected section of the Plaintiff's property was secured at all times.
- viii. The Defendants were willing, able and indeed plan to reconstitute and restore the affected sections of the Plaintiff's property as a result of the ongoing construction, to its original state once the project was completed.
- ix. Due to the ongoing construction, and with prior notification of the Plaintiff, a temporary structure that houses the building material has been erected on a small section of the Plaintiff property.
- x. In response to the contents of Paragraph 8 of the Supporting Affidavit, with specific reference to the survey report dated 24th September 2022, the same was inconclusive and misleading because: -
- a. It failed to indicate that the construction site fell outside the Plaintiff's perimeter wall;
- b. The report purported to decide the issue of encroachment in total disregard of the consent sought by the Defendants and conceded by the Plaintiff and conduct of parties involved in relation to the ongoing construction which have been going on since the beginning of this year;
- c. It failed to indicate that the only structure erected on the Plaintiff's property was temporary in nature used to house the building material; and
- d. It failed to indicate that the affected area was manned by security personnel.
- xi. Any claim for encroachment by the Plaintiff would only be in relation to the access to the construction site and the temporary structure placed on MOMBASA/BLOCK X/393 to house the construction material which in any event, the Defendants had duly notified and sought consent of the Plaintiff prior to embarking on the construction site.
- xii. The Plaintiff had no prima facie case against the Defendants.



- xiii. The ongoing construction was to the best interests of the public, with the Plaintiff also standing to be direct beneficiaries of the same.
- xiv. Prior to embarking on the project, an Environment Impact Assessment exercise was conducted wherein the views of the public were considered. The Plaintiff was involved.
- xv. Each passing day that the project never proceeded, huge losses were incurred by the Defendant who was contracted to conduct the project to its conclusion.
- xvi. From the foregoing the balance of convenience tilted towards discharging the interim orders granted and allowing the Defendants to proceed with the construction as scheduled.
- xvii. The losses and damages complained of by the Plaintiff could be provided for therefore the question of irreparable damage and harm did not arise.
- xviii. In specific response to paragraph 5 of the Supplementary Affidavit sworn 2nd December 2022, the contention in this suit by the Plaintiff was not on the ownership of the parcel of land MOMBASA/BLOCK X/393 but rather it was the attempted movement of the boundary of the subject parcel of land based on the report of a private surveyor.
- xix. The boundary of MOMBASA/BLOCK X/393 was signified by the existence of a perimeter wall and therefore the contention by the private surveyor verbally instructed by Rantilal Shah, that “the development though built outside perimeter wall (sic) was within parcel MOMBASA/BLOCK X/393” was not factual and was a legally void observation.
- xx. In response to the contents of Paragraphs 7, 8, 9 and 10 of the Supplementary Affidavit, the Environmental & Social Impact Assessment Project Report for Improving the Existing Storm Water Outlets in Mombasa Island was in the public domain posted on the Company’s website. (He annexed and marked as “AM – 2” was a copy of the Design Review Report- Buxton Outfall Site dated November 2021 prepared by the WSDP Project’s Supervising Consultant).
- xxi. In response to paragraphs 11, 12, 13, 14, 15 and 21 that the purported relocation/ establishment of boundaries of MOMBASA/BLOCK X/393 was illegal, and in doing so, the private surveyor has usurped the powers of the Registrar as provided under the provision of Sections 16, 17, 18, 19 & 20 of the Land Registration Act and the Honourable Court should not entertain this suit which ought to be struck out.
- xxii. In response to paragraphs 16, 17, 18 and 19 of the Supplementary Affidavit, he reiterated the contents of paragraph 16 of the 1st Defendant’s Replying Affidavit sworn on 21st November 2022.
- xxiii. In response to paragraph 20 of the supplementary affidavit, the project that Rantilal Shah was opposed to a project being undertaken in good faith along the riparian reserve to rehabilitate and not new developments to deal with the flooding water on the tarmac road along Buxton area, an issue which was public knowledge and within his knowledge.
- xxiv. The Plaintiff/Applicant intention in this suit was not to seek any justice but rather to be seen to have stolen a march against the Defendants (the Government indirectly averred in paragraphs 24 and 25 of the Supplementary Affidavit) as the prayers sought in the Plaintiff’s Complaint is not to stop the storm drains rehabilitation project, but rather to have the 2nd Defendant denied access to the project site and secure place for storage of construction materials by Rantilal Shah as they had verbally agreed.



xxv. He reiterated the contents of paragraphs 17 and 18 of the 1st Defendant's Replying Affidavit.

xxvi. He prayed that the application dated 9th November, 2022 be dismissed with costs.

V. The Supplementary Affidavit of the Plaintiff

8. In response to the 1st Defendant/Respondent's Replying Affidavit dated 2nd December, 2022 the Plaintiff through RATILAL SHAH, the Trustee of the Plaintiff/Applicant swore a 27th paragraphed supplementary affidavit where he averred that: -

- a. He swore the affidavit with the Authority and on behalf of the trustees of the Hindu Union herein.
- b. The 1st Defendant's Replying Affidavit was bad in law noting that the deponent had not attached any resolution by the 2nd Defendant Company authorizing him to swear the Affidavit on its behalf. As such, the Replying Affidavit was incurably defective and hence prayed that the same be struck out forthwith.
- c. Throughout its Affidavit, the 1st Defendant admitted that indeed the Plaintiff was the rightful registered and beneficial owner of Plot No. Mombasa Block X/393 and Mombasa Block X/179 as pleaded and as confirmed by the Survey Report dated 24th September, 2022 marked as 'RS - 3' of his Supporting Affidavit. It was therefore an admission of fact that the Defendants were not the legal proprietors of the suit plot hence had no legal right to trespass onto the Plaintiff's plot without consent and/or authority of the Plaintiff.
- d. In response to Paragraph 3 of the Replying Affidavit, the Authority to swear Affidavits had been issued to him accordingly and at all material times to these proceedings, the same had been annexed as 'RS - 1A' to his supporting Affidavit dated 9th November, 2022. In the unlikely event that the 1st Defendant's copy has none, he hereby annexed a copy thereof for its records and perusal.
- e. In response to paragraphs 4, 5 and 6 of the Replying Affidavit, the first Defendant had failed to place any material in court to establish the existence of any Donor Funded WSDP contract or a duly compiled report which proposed the project under WSDP and further proposal that the improvements should be done on the Plaintiff's plots summarily without its consent. Further, the 1st Defendant had failed to disclose by whose instructions and authority they encroached into the Plaintiff's plot to commence the exercise other than displaying a blanket program that is only known to itself.
- f. Further to paragraph 7 above and without prejudice to the foregoing, the 1st Defendant had failed to demonstrate by way of attachment any such written Notice that was issued to the Plaintiff in May, 2021 notifying the Plaintiff of the said project and any request made thereof for entry into the suit's plots for the said purpose.
- g. In response to Paragraph 7(a) of the 1st Defendant's Replying Affidavit, they reiterated the contents of his paragraphs 2 and 3 of the supporting Affidavit dated 9th November, 2022 and re-emphasize that the Defendants had encroached onto the suit Plot No. MOMBASA/BLOCK X/393 as per the Survey Report attached to his supporting Affidavit and marked as 'RS - 3' and were putting up structures illegally onto the Plaintiff's plot, a fact which the 1st Defendant had not disputed.



- h. In further response to Paragraph 7 of the Replying Affidavit, the 1st Defendant by its own admission at paragraph 7 b(ii) conceded that its activities would pose a danger to the users and/or receptors of the Crematorium due to the noise and vibration generated by heavy construction machinery and that the same could affect the sensitive receptors such as the Hindu Burial site at the Buxton Outlet.
- i. In response to Paragraph 7c they maintained that the activities of the Defendants were within the Plaintiff's suit plot parcel no. Mombasa/Block X/393 as per the survey report which explained the 1st Defendant's letters dated 4th October, 2022 and 27th September, respectively marked as 'MM - 3' and attached by the 1st Defendant that confirmed that the project was within the suit premises.
- j. In response to paragraph 8 they admitted that the suit plot no. Mombasa/Block X/393 was a Leasehold. However, be it as it may, Section 24 (b) of the Land Registration Act provides that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- k. As further by his Advocates on record, Section 23 1(b) of the Land Act, 2012 in respect to leaseholds, stated that the grantee or lessee, paying the rent and fulfilling the conditions of the grant or lease, was entitled to quiet possession and enjoyment of the premises without interruption by the grantor or lessor or any person claiming under the grantor or lessor, except so far as the laws for the time being in force may permit and shall be in terms of section 26(1) of the Land Registration Act entitled to the protection of the law.
- l. Article 40-2a and 40(3) protected every person right to property in particular that no person could be deprived of property of any description or of any interest and that in the event the property was to be acquired or used for public use, the same must be in accordance with the Constitution of Kenya, 2010.
- m. In response to paragraph 9 of the Replying Affidavit, no evidence has been tendered by the Defendants establishing any Notice issued to the Plaintiffs since May, 2021 or the mode of such communication thereof pursuant to Section 95 of the County Government Act prior to the commencement of the project as deposed at -Paragraph 4 of the Replying Affidavit or at any time therein or at all. The Defendant had only attached a letter dated 27th September, 2022 issued as an afterthought upon the Plaintiff raising complaint over illegal entries, encroachment and subsequent works and the said letter only of clarifies the purpose of the project after the Defendants were requested to stop the encroachment.
- n. In response to Paragraph 10, the 1st Defendant's own annexure marked as 'MM - 3' being a letter dated 4th October, 2022 from the 2nd Respondent to the Hindu Crematorium confirmed that the Plaintiff raised concerns and complaints as soon as it the Trustees noted the ongoing illegal works which were being done without notice. No letter seeking authorization prior to the ongoing works had been attached to prove any prior notice or any due procedure followed before the Defendant's encroached into the Plaintiff's property. As such the Defendant's position was neither here nor there in as far as the procedure to enter into a leasehold property was concerned.
- o. All the letters annexed by the Defendant were not addressed to the Plaintiff who was the rightful owner of the land the Hindu Crematorium was equal to addressing a letter to a



Cemetery, logically speaking, which was not a juristic person. Ideally, the Defendants failed to conduct due diligence so as to confirm who the rightful owner of the suit plot had been at all material times before they commenced it's works.

- p. In the response to Paragraph 12 of the Replying Affidavit, the 1st Defendant had not unequivocally denied that due to its works, it demolished the Plaintiff's walls thus maliciously damaging it and that the construction had interfered with the state of the ground thus excessively ruined its original state. Moreover, the Defendant had put up both temporary and permanent structures which had occupied a substantial large space of the suit plot and the said structures were currently being occupied by other third parties who were unknown to the Plaintiff. As such, the Defendants had invaded the Plaintiff's privacy and infringed the Plaintiff's inherent and fundamental rights to privacy and their dignity.
- q. Further to the foregoing, due to the demolished wall, the Plaintiff had been exposed to insecurity from strangers, animals, rodents and unsuspecting third parties including thieves who may enter the premises as there was no longer a wall protecting the Crematorium from outside forces, which then puts the property of the Plaintiffs and the remains of the deceased persons stored therein in danger of being interfered with, stolen or vandalized.
- r. In response to Paragraph 13 of the suit plot and pursuant to Section 26 (1) of the [Land Registration Act](#), the Plaintiff was the rightful owner of the suit plot entitled to fundamental proprietary rights which ought to be protected. As such, the survey was rightfully done vide the Plaintiff's instructions. However, since the Defendants insisted that the Plaintiff's plot was a public land, nothing had been placed before court to confirm that the County Government has reallocated itself the suit plot so as to have free and uninterrupted access or that Article 40 3(b) was complied with in any event for compulsory acquisition of the land for government purposes.
- s. In further response to Paragraph 13 of the Replying Affidavit, it was clear that the survey report was addressed to the Plaintiff and not to himself as an individual and he put the 1st Defendant to strict proof thereof.
- t. In response to paragraph 14, they maintained that the Plaintiff being the proprietor of the suit plots was entitled to be notified formally prior to any encroachment by a 3rd Party and was.
- u. also entitled to issue its consent to any person who intends to construct anything on its property prior to any entry. Further, the 1st Defendant if at all was employed by the County Government had not proved compliance with the provision of Section 95 of the County Government Act and the other laws which had invoked in the foregoing paragraphs.
- v. In response to Paragraph 15 of the 1st Defendant's Replying Affidavit, the Plaintiff had demonstrated "prima facie case" with high probabilities of success. The Plaintiff had also demonstrated that the damage and loss caused by the Defendants could not be compensated by any award of damages noting that the 1st Defendant was hellbent to continue infringing the Plaintiff's proprietary rights and to proceed with the permanent illegal constructions to the latter irrespective of what damage or loss the Plaintiff would continue to suffer.
- w. In response to paragraph 16, the Plaintiff was not privy to any agreement entered between the 1st and 2nd Defendants. Moreover, the 1st Defendant having shifted liability to the 2nd Defendant confirmed that there was a high probability that the 2nd Defendant had entered into the Plaintiffs property and has built permanent structures thereon.



- x. In response to Paragraph 17, they prayed that the Court herein do find that the 1st Defendant had approached this Honourable Court with unclean hands and was guilty of misuse of power, being in high authority, to undermine and disregard the Plaintiff's proprietary rights. Further, they prayed that the prayer for ADR mechanism be disregarded at this stage as the damage caused already was vast and disregarding this suit would contravene the provision of Article 40 3 (b) of *the Constitution* of Kenya, 2010 that allowed any person who had an interest in or right over property an exclusive right of access to a court of law.
- y. In view of the foregoing, he made the affidavit in support of the Plaintiff's Application dated 9th November, 2022 and pray that in the interest of justice and fairness, the same be allowed as prayed.

VI. The 1st Defendant/ Respondent's response

- 9. In Response to the Plaintiffs/Applicant's Supplementary Affidavit dated 2nd December 2022, the 1st Defendant filed a 6 Paragraphed Replying Affidavit sworn by MUNYI MUGO, the Legal Manager of the Company, conversant with the rehabilitation project at Buxton Stormwater Outfalls, which the Plaintiff/Applicant had taken issue with on 7th December, 2022. He averred that: -
 - a. He swore the affidavit with the authority of the Board of Directors of the Company (he annexed as "MM - 1") and swore that the authority to swear by the Managing Director in his Replying Affidavit dated 21st November 2022 was inadvertently omitted. Therefore, in response to paragraph 4 of the Supplementary Affidavit, he annexed marked as "AF - 1" being the authorization under the seal of the Company to do so. The MD was also the principal spokesperson of the Company as per his letter of appointment as Managing Director.
 - b. In response to paragraphs 5 of the Supplementary Affidavit, the contention in this suit by the Plaintiff/Applicant was not on ownership of the parcel of land Mombasa/Block X/393, but rather it was the attempted illegal movement of the boundary of the subject parcel land based on the report of a private surveyor.
 - c. The private person in the form of Rantilal Shah is an inaccessible person, and all efforts to bring him to a table of negotiation has failed as he neither pick calls from the 2nd Defendant, hence 'deliberately' frustrating and / or avoiding ADR and dialogue.

VII. Submissions

- 10. On 9th July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 9th November, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on Notice by Court accordingly. Eventually, it was delivered on 18th November, 2024 thereof.

A. The Written Submissions of 1st Defendant/Respondent

- 11. On 8th December, 2022 the 1st Defendant/Respondent through the Law firm of Munyi Mugo Advocates filed their submissions dated 7th December, 2022. The Learned Counsel submitted that Chapter III, Part I, Sections 59, 60 and 61 of the *Evidence Act*, Cap 80 Laws of Kenya related to facts requiring no proof. The International Development Association (IDA) Act, Cap 465 Laws of Kenya, is an Act to provide for acceptance by Kenya of an international agreement for the establishment and operation of an International Development Association (IDA) and to provide for matters related thereto.



12. The Learned Counsel submitted that on 21st June 2017, IDA and the Republic of Kenya entered a Financing Agreement (Credit No. 6030-KE) to finance a project for the rehabilitation and expansion of urban water supply and sanitation services in the Coastal Region, including Mombasa. The Project Appraisal Document (PAD207) uploaded on the World Bank website, noted that four (4) sub-projects were identified for immediate urgent works, and item(c) was the improvement of existing stormwater outlets, outfall, and combined sewer overflows in Mombasa Island. All WSDP Project documents, including the above, were published on Development Projects: Water and Sanitation Development Project-P156634 (worldbank.org). The Learned Counsel averred that the Honourable Court took judicial notice of these documents.
13. Under the WSDP, the 1st Respondent was the employer, and the 2nd Defendant was the contractor for the “improvement and rehabilitation of storm water outfalls in Mombasa Island”. The contract was signed towards end of 2019 and the 2nd Defendant handed the site, where the and Defendant was to decide for implementing the intended worked. The Construction – Environment & Social Management & Monitoring Plan (C-ESMP) by the and Defendant covering the twelve (12) sites earmarked for ‘stormwater rehabilitation’ including the Buxton Stormwater outfall had been in the public domain and posted on the Company’s website since 2019.
14. The C-ESMP was intended to compliment the project Environmental and Social Impact Assessment (ESIA) report and ensure that commitments made to minimize project anticipated and emerging Environmental and Social Impacts were upheld throughout the construction period. The Learned Counsel contended that the 2nd Defendant approached the 1st Defendant, on the issue of access to the Buxton site. The 1st Defendant authored a letter dated 27th September 2022, requesting for access to the Buxton site. This letter was forwarded by the 2nd Defendant to the Management of Hindu Crematorium and acknowledged/received on 7th October, 2022.
15. The Learned Counsel further argued that a key statement in the said letter which was marked as “MM – 3” attached to the Replying Affidavit of Abdirahim Farah, the Managing Director stated as follows “one of the storm water outlets serving the county is situated at the edge of your property. For ease of transportation of material to the site, we would like you to offer temporary access to the 2nd Defendant during the project construction period”.
16. The Learned Counsel asserted that the upshot of the above was that:-
 - a. The Buxton site was handed over to the and Defendant long before the alleged authorized representative of the Applicant allegedly strolled the Crematorium.
 - b. It was, and it is, the responsibility of the and Defendant to execute the implementation of the project with minimum interruptions to the neighboring stakeholders such as the Plaintiff/Applicant but sought the latter’s co-operation.
 - c. If at all the 2nd Defendant had commenced works at the Buxton site, then there was nothing illegal about the works.
 - d. From the forwarding letter by the 2nd Defendant dated 7th October 2022, annexure marked as “MM – 3” of MD’s Replying Affidavit, it appeared being a request for access had been sought from the Plaintiff/Applicant way back on 14th February 2022.
 - e. There had been some significant level of reluctance by the Plaintiff/Applicant to co - operate with the 2nd Defendant in providing the much-needed access



17. On submissions on the project Project Site & the Encroachment of the Riparian Reserve by the Plaintiff/Applicant through re-establishment of boundary of Parcel (Msa/Block X/393), the Learned Counsel referred the Honourable Court to the case of:- “Nairobi Petition No. 61 of 2018, Milimani Splendour Management Limited – Versus - NEMA & 4 Others” had observed at Paragraphs 47 and 48 as follows: -
- “In defining the riparian reserve, all these pieces of legislation did not take into consideration the land between the high and low watermarks in *the Constitution* (2010)...the Court agrees with the Petitioner that there are conflicting legal provisions on the measurement of the riparian reserves in Kenya and there is need for Parliament to harmonize the different laws to guide the surveyors in determining the boundaries of privately held land that is adjacent towater bodies.
18. According to the Learned Counsel, the project site was on a riparian reserve as it the land adjacent to the Indian Ocean at Buxton. The Learned Counsel submitted that the Plaintiffs/Applicant’s own private surveyor had admitted at page 2 that 2nd Defendant works (what he called “new development”) ... (was) built outside the original perimeter wall. By the mere fact that the Plaintiff’s/Applicant’s private surveyor had re - established the boundary at the riparian reserve, the purported relocation /re-establishment of boundaries of parcel no. Msa/Block X/393 was illegal, and in doing so, the private surveyor had usurped the powers of the Registrar as provided under the provision of Sections 16, 17, 18, 19 and 20 of the *Land Registration Act*, and the Honourable Court should not entertain this suit, and should be struck out.
19. What this signified was that the argument in this matter was not ownership of parcel Msa/Block X/393, which was not disputed, but rather a covert attempt by the Plaintiff/Applicant to encroach on the riparian reserve. The Learned Counsel opined that the County Surveyor or Registrar of Lands should be enjoined to establish the boundaries. The Learned Counsel therefore submitted that: -
- i. The purpose of the survey report vide verbal instructions by the Plaintiff/Applicant was to “illegally re-locate / re-establish the boundaries of parcel of Msa/Block X/393 to include part, or all, of the riparian reserve at Buxton.
 - ii. The exclusion of the Registrar and other interested parties as provided in the *Land Registration Act* was intentional on the part of the Plaintiff/Applicant, no wonder there was no record of written instructions to the private surveyor.
 - iii. The subtle issue of access to the site had been ongoing since February 2022 as evidenced in the letter by the 2nd Defendant dated 7th October 2022.
20. The Learned Counsel averred that if there was any act by the and Defendant that amounted to encroachment of Msa/Block X/393, they further submitted that in their honest belief, it was not intentional, but may have been a well-orchestrated plan by the Plaintiff/Applicant to, ‘initially’, feign “authority to access the project site” awaiting any act that they could use as a smokescreen to the eventual plan to extend the boundary.
21. On the issue of if the Plaintiff/Applicant is entitled to the reliefs sought, the Learned Counsel submitted that this was a dispute that smirked of an attempt to scandalize a noble project, yet while all persons were turned to that direction, the real intention was to expand the boundary of parcel Msa/Block X/393 This was because, the Certificate of Lease of Msa/Block X/393, though granted from 1st January 1939 for 99 years, there remained only about 17 years, for the said property to effectively



and legally revert to the County Government of Mombasa and the Plaintiff/Applicant would lose ownership.

22. The Learned Counsel submitted that while it was within the Plaintiff's /Applicant's realm and consciousness to be shrewd and insidious in attempting to protect their interests in future, doing so at the expense of legal persons who was keen on delivering their mandate and dragging them to court, completely refusing alternative dispute resolution, they further submitted that the Plaintiff/Applicant had not come to come with clean hands.
23. The Plaintiff/Applicant was not seeking damages” but rather “an order for vacant possession’ fortified with “an order for permanent injunction”, whose effect may outlast any of the parties herein if granted. The Learned Counsel submitted that at this craftiness by the Plaintiff/Applicant should be nipped at the bud. The Plaintiff/Applicant had not established any cause of action against the 1st Defendant, none whatsoever. In conclusion, the application dated 9th November 2022 should be dismissed with costs to the 1st Defendant, for there has not been established any wrongdoing on its part, at all.

B. The skeletal written submissions by the 2nd Defendant/ Respondent

24. On 8th December, 2022 the 2nd Defendant through the Law firm of Messrs. Muthee Kihiko & Associates LLP Advocates filed their skeletal written submissions dated the same day. Mr. Gathu Advocate submitted that there were the 2nd Respondent's submissions in respect of the Plaintiff's Application dated 9th November 2022 seeking to injunct the Respondents from encroaching and/trespassing onto the Plaintiff's suit MOMBASA/BLOCK X/393 from continuing with illegal construction and/or erections of the building or dealing with the plot in an any manner whatsoever. The 2nd Defendant had opposed the instant application vide a Replying Affidavit sworn by Anwar Mohamed and filed on 6th December 2022.
25. The 1st Defendant similarly opposed the said Application vide its Replying Affidavit sworn by Abdirahim Farah and filed on 24th November 2022. The Plaintiff in response, filed a supplementary affidavit sworn by Rantilal Shah on 2nd December 2022. They had identified five issues for determination by this Court to wit;
 - a. Whether the dispute concerned the ownership of the suit property;
 - b. Whether the Plaintiff had established a prima facie case with a probability of success
 - c. Whether the Plaintiff had proved that he stood to suffer irreparable losses that could not be compensated by damages;
 - d. In whose favour did the balance of convenience tilt?
 - e. Who bore the costs of the Application
26. On the issue of whether the dispute concerned the ownership of the suit property. The Learned Counsel stated that from the outset, it was important to point out that the 2nd Defendant never laid claim to the Plaintiff's property. They also wished to submit that it was not conceivable that the Defendants have been using the Plaintiff's property to access the construction site for several months without the Plaintiff being aware of the activities thereon. The project was not covert.
27. On the issue of whether the Plaintiff had established a prima facie case with a probability of success, the 2nd Defendant annexed letters that point at a pre-existing consultative relationship between parties. From the letters, it was discernible that the Defendants indeed notified and sought the indulgence of the Plaintiff to access the construction site. The Learned Counsel submitted that doctrine of equitable



- estoppel and more specifically from the conduct of allowing the usage of the section of its property to aid the project, the Plaintiff was prevented from now coming to say that no authorization was sought.
28. To buttress on this point, they relied on the case of “Carol Construction Engineers Limited & Another – Versus - National Bank of Kenya [2020] eKLR” wherein the Court stated that: -
- the doctrine of equitable estoppel prevents a party from acting inconsistently with a promise the party has made if that promise or representation had the effect of inducing another party to reasonably rely on it to that other party's detriment.”
29. On whether the Plaintiff had proved that he stood to suffer irreparable losses that could not be compensated by damages. The Learned Counsel submitted that only a small section of the suit property had been affected, that is; the demolished section of the Plaintiff's perimeter wall. The demolition had been necessitated to enable the Defendants access the construction site. The project was being carried out outside the Plaintiff's perimeter wall and not inside. There was no evidence to show that the affected area had been irreparably destroyed or altered by the ongoing construction.
30. The 2nd Defendant had set up security at the construction site. Not a single incidence of trespass by third parties onto the Plaintiff's property other than the authorized access by the 2nd Defendant's workers and agents who had only done so for the sole purpose of accessing the construction site. Therefore, the Learned Counsel argued that at this stage, nothing had been shown by the Plaintiff that it stood to suffer or it had indeed suffered irreparably. The plan was there to reconstitute the suit property to its original condition once the project was completed.
31. In whose favour did the balance of convenience tilt on. The Learned Counsel opined that the project had far reaching benefits not only to the immediate neighbors but to road users of the Buxton-Marikiti road. The project was meant to repair the storm water passage to not only curb flooding on the said road but also to ensure conservation of the ocean and aquatic environment through treatment of the storm water before release into the ocean.
32. According to the Learned Counsel, it was worth noting that this was not a new project. Rather it was an improvement of a pre - existing drainage system. It would be more equitable to let the 2nd Defendant complete the project and thereafter, reconstitute the small section of the Plaintiff's property that had been affected by the ongoing project. Suffice it to add, that there were massive financial repercussions to be suffered by the 2nd Defendant who had been contracted to conduct and oversee the project. Each passing day that the project was halted translated to losses further compounded by imminent danger of breach of contract by the 2nd Defendant. The 2nd Defendant stood to suffer more than the Plaintiff whose remedy lied in restitution its affected section of the suit property.
33. In conclusion, the Learned Counsel submitted that the Application had been brought to court a little too hastily when a simple sit-down amongst parties would have sufficed to deal with all arising issues. They felt that this was a matter that can be settled outside court and urged the court to direct as such.

VIII. Analysis and Determination

34. I have carefully read and considered the pleadings herein and the written submissions, the myriad of authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
35. In order to arrive at an informed, reasonable and Equitable decision, the Honorable Court has framed the following three (3) issues for determination. These are:-
- a. What are the laid - down legal threshold for granting temporary injunctive orders?



- b. Whether the Notice of Motion dated 9th November, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.
- c. Who will bear the Costs of Notice of Motion application 9th November, 2022.

Issue No. a). What are the laid - down legal threshold for granting temporary injunctive orders?

36. Under this sub – title, the main issue here is whether the Plaintiffs are entitled to be granted the relief of an interlocutory injunction. The application herein is premised under the provision of Order 40 Rule 1 of the Civil Procedure Rules 2010 amongst the provisions of the law. Which provides as follows: -

Order 40, Rule 1

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

- a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

37. Fundamentally, the principles applicable in an application for an injunction were laid out in the celebrated case of “Giella – Versus - Cassman Brown & Co Limited (1973) EA 358”, where it was stated: -

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

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

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Limited - Versus - Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.



The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between”.

39. In dealing with the first condition of prima facie case, the Honorable Court guided by the definition melted down in the famous case “MRAO Limited – Versus - First American Bank of Kenya Limited & 2 others (2003) KLR 125” of: -,

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

ISSUE No. b). Whether the Notice of Motion dated 9th November, 2022 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010.

40. As indicated, the Honourable Court by the consensus of the parties, on 16th June, 2023 conducted a site visit (“locus in Quo”) in their presence and prepared a report. Below is the said report re – produced verbatim for ease of reference.

Site visit report

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC CASE NO. E131 OF 2022

THE REGISTERED TRUSTEES OF HINDU UNION.....PLAINTIFF

- VERSUS -

1. MOMBASA WATER SUPPLY & SANITATION LTD

2. ADEQUATE MACHINERY CONSTRUCTION LTD...
.....DEFENDANTS

SITE VISIT REPORT HELD ON 16TH JUNE, 2023 AT THE BUXTON
CREMATORIUM NEAR BUXTON POINT - MOMBASA AT 11.00 AM

I. QUORUM

A. COURT

1. Hon. J. M. Nyariki - Deputy Registrar
2. Zainab Khalid - Court Assistant
3. Mwanaidi Chidzuga - Assistant to the Deputy Registrar.

B. THE REPRESENTATION AND PARTIES PRESENT

Ms. Cynthia Ombat – advocate for the Plaintiff,

2. Mr. Ratilal Shah – Trustee for the Plaintiff.



3. Mr. Daniel Kombe - advocate for the 1st Defendant,
4. Mr. Titus Mutugi – advocate for the 2nd Defendant and
5. Mr. Munene Joshua – Government Surveyor.

II. PRELIMINARIES

At the site with the parties to the suit were James Gitonga a surveyor who works for Pima Tech Land Surveyors and Engineer Omollo who is in charge of the project on the suit property. The counsel to the Plaintiff highlighted the issue to be addressed was whether there is encroachment into the Plaintiff's boundary of the suit property where the county Government has put up a structure. The Court proceeded to a construction site on the suit property where parties were guided by court to pinpoint the contested issues.

III. COMMENTS AND OBSERVATIONS

A. Ms Ombat:- The Defendants had encroached into the Plaintiff's land by constructing right into the Plaintiff's perimeter wall. (She pointed out where the Plaintiff beacons were located but that the Defendants had interfered with the perimeter wall). The property starts at least six meters from the built perimeter wall as the Plaintiff had earlier left a that portion that it owned outside the perimeter wall. The area beyond the wall is still our property thus the Defendants encroached into our property.

B. Mr. Kombe:- There is a challenge accessing the site because of the informal settlement around the area hence the need to access the Plaintiff's property. We made a request to the Plaintiff to have a temporary structure built in the site for starters. We proceeded to construct right after the Plaintiff's perimeter wall because we had observed that the wall was in line with the surveyors' beacons.

C. Mr. Mutugi: The construction was necessitated to aid in channeling sewerage water into the sea.

D. Government surveyor Mr. Munene: We are present with the private surveyors but we have not carried the equipment needed to conduct the survey.

E. Advocates on record: - The Surveyors can proceed to conduct a joint survey of the site on 19th June, 2023 and come up with a detailed report of their findings.

Court: -

The Joint report by the surveyors to be presented before the Deputy Registrar in Court on 23rd June, 2023 stating whether the Defendants have encroached on the Plaintiff's property. The parties should try to resolve the matter amicably.

IV. PICTURES CAPTURED AT THE SITE

- a. The Hon. Deputy Registrar and the parties converging at the site





b. Photographs of the site





c. The construction on the site







The site visit was concluded at 1:15 P.M.

.....
HON. J. M. NYARIKI (DEPUTY REGISTRAR)
ENVIRONMENT AND LAND COURT
MOMBASA

41. As the Court previously observed in this ruling, the Applicant in the affidavit supporting the Application avers sometimes in August 2022 he visited the Plaintiff's Plaintiff and located at Buxton, Sheikh Abdullah Road within Mombasa County. He however noticed that the boundary wall of the premises had been demolished and some illegal constructions were ongoing by several handmen who had been deployed on the ground.
42. Therefore, he sought to speak to the foreman who during his interrogation confirmed to him that the constructors were employees of Adequate Machinery Construction Limited and that they had been instructed by the Mombasa Water Supply & Sanitation Company Limited. He then requested him to supply him with a letter of authorization from the Hindu Union to Mombasa Water Supply & Sanitation Limited but he confirmed that he had none. He therefore informed him that their activities amounted to encroachment and trespass and urged him to instruct his men to stop the construction. He however stated that he was just an employee and could not stop the construction unless his boss informs him to do so by himself. He however instructed his men to continue with constructions illegally.
43. They, the trustees of the Hindu Union, had severally requested the constructors to stop their developments in vain. The Defendants had caused excessive malicious damage to the property walls and the surface considering that they have dug onto the ground to erect structures thus changing the ground from its original state. The trustees of Hindu Union instructed Pimatech Land Surveyors to



confirm whether the actual occupation by the Defendants was within the boundaries of the Plaintiffs plot and a conclusive report was done confirming the encroachment by the Plaintiffs.

44. The 1st Defendant on the other hand argued that one Rantilal Shah who purported to swear the supporting affidavit on behalf of Plaintiff and failed to attach the copy of authority to swear from the Plaintiff's Board of Trustees, therefore his evidence is inadmissible as hearsay. Be that as it may, the donor – funded WSDP Contract for “Improvement of storm water outlets and combined sewer overflowed in Mombasa Island – (KE MOWAS CO – 16772 – CW)”, had a commencement date in May 2021.
45. One of the projects under the WSDP was the improvement of the twelve (12) existing storm water outlets - one (1) of them being the area outside the perimeter wall of Mombasa/Block X/393, also known as “Buxton outlet /site”. The Buxton outlet was in between Mandizini Slum and the Hindu Crematorium, and the project's main aim is pre-treatment of wastewater through screening and grit removal into the Indian Ocean via the existing storm water outlets located outside the perimeter wall of the Crematorium, hence reducing pollution of marine environment. See Annexure marked as “MM - 1” - the Design Review Report - Buxton Outfall Site, especially photos on pages 1, 2, and 3.
46. Upon perusal of the Certificate of land ownership presented by Rantilal Shah in paragraph 2, and the Topo cadastral Survey on Parcel Mombasa/Block X/179 contained in the copy of the Survey Report (RS-3) in paragraph 8 demonstrate as follows:-
 - a. Certificate of Title Deed (Mombasa/Block X/179) is an absolutely owned property in land in favour of the Plaintiff/Applicant. He hastened to add, considering the Survey Report allegedly commissioned by the Plaintiff/Applicant demonstrates neither Plaintiff/Applicant nor Rantilal Shah has not proven any threats to the parcel Mombasa/ Block X/179 that will lead to the losses and damage to the Hindu Crematorium as alleged.
 - b. The Environmental & Social Impact Assessment (ESIA) Project Report for Improving the Existing Storm Water Outlets, Outfall and Combined Sewer Overflows in Mombasa Island, with respect to the Hindu Crematorium /burial site notes that:-
 - i. In addition, the Buxton Outlet is located near a Hindu burial site however no graves will be affected by the project
 - ii. Noise and vibration generated during construction by heavy construction machinery, such as excavators, bulldozers, concrete mixers, and transportation vehicles could affect sensitive receptors such as the Hindu burial site at the Buxton Outlet.
 - iii. Some of the project sites are located within various home to several cultural sites, in addition, the Buxton site is located near a Hindu burial site. Although none of these cultural sites will be affected.
47. The Buxton site where the improvement of storm water outlets and sewer outfalls were located is outside parcel Mombasa/Block X/179 and parcel Mombasa/Block X/393 as demonstrated. The contention in this suit was with regards to Mombasa/Block X/393, which Rantilal Shah admitted was a leasehold from the County Government of Mombasa (the successor in title) of the defunct Municipal Council. Currently the twin lines of the storm water being rehabilitated have always existed at the site since the colonial era, with the County Government of Mombasa regularly operating and maintain the same infrastructure, a fact which the Management of Hindu Crematorium has never objected to.
48. The National Environmental Management Authority (NEMA) has issued licenses for the project. Before the rehabilitation works for the storm water drains at the Buxton site involvement of



stakeholders likely to be affected by the project was done. He was made aware by the 2nd Respondent that Rantilal Shah had a verbal agreement on access to the construction site through Mombasa/Block X/393, which Rantilal Shah now denied. The Hindu Crematorium officials have always supported the project, to the extent that the Contractor/ 2nd Respondent was aided by being given access and storage of building materials through the Crematorium site for safe keeping considering the proximate slum area.

49. In the case of “Mbuthia – Versus - Jimba Credit Corporation Limited 988 KLR 1”, the court held that:-

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

50. Similarly, in the case of “Edwin Kamau Muniu – Versus - Barclays Bank of Kenya Limited” the court held that:-

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

51. In the present case, the Defendants/Respondents by their action, have threatened to continue with the continued threats to evict the Plaintiffs out of the suit property. Regarding this first condition though, the Plaintiffs/ Applicants have demonstrated a prima facie case with a probability of success at the trial as enunciated in the case of “Giella -Versus - Cassman Brown & Co. Ltd (Supra)”.

52. The court has further considered the evidence on record against the second principle for the grant of an injunction, that is, whether the Plaintiffs/ Applicants might suffer irreparable injury which cannot be adequately compensated by an award of monetary damages. With regards to the second limb of the Court of Appeal in “Nguruman Limited (supra)”, held that,

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

53. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by an award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured. It is not hidden that the Applicants’ property is at risk and being that they live in the suit property they will suffer risk if they are evicted by the Defendants/ Respondents if the Court does not intervene. The Plaintiffs/ Applicants has to demonstrate that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The



judicial decision of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (2018) eKLR” provides an explanation for what is meant by irreparable injury and it states;

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

54. Quite clearly, the Applicants would not be able to be compensated through damages as it has shown the court that its rights to the suit property as a legal proprietor and that the Respondents ought to be stopped until such a time the acquire the affected portion(s) in a procedural manner. The Applicants have therefore satisfied the second condition as laid down in “Giella’s case”.

55. Thirdly, the Applicants have to demonstrate that the balance of convenience tilts in their favour. In the case of “Pius Kipchirchir Kogo – Versus - Frank Kimeli Tenai (Supra)” which defined the concept of balance of convenience as:

“The meaning of balance of convenience will favour of the Plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer.

In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting”.

56. In the case of “Paul Gitonga Wanjau – Versus - Gathuthis Tea Factor Company Limited & 2 others (2016) eKLR”, the court dealing with the issue of balance of convenience expressed itself thus:-

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



57. The balance of convenience tilts in the favour of the Applicants. The decision of “Amir Suleiman – Versus - Amboseli Resort Limited [2004] eKLR” where the learned judge offered further elaboration on what is meant by “balance of convenience” and stated; -

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

58. Bearing this in mind, I am convinced that there is a lower risk in granting orders of temporary injunction than not granting them, as I wait to hear the suit on its merits. This is especially so because I have not had opportunity to interrogate all the documents that might be relevant in providing a history and/or chronology of events leading to the claim of the Applicants and it will be in the interest of both the Applicants and the Respondents that the suit property is preserved until the hearing and determination of the suit.

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

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

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

ISSUE No. c). Who will bear the Costs of Notice of Motion application 9th November, 2022.

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

62. I have well stated in previous precedence and most especially in “Sagalla Lodge Limited – Versus - Samwuel Mazera Mwamunga & another (Suing as the Executors of Eliud Timothy Mwamunga – Deceased) [2022] eKLR”, that:

“

“58. The Black Law Dictionary defines “Cost” to means, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.



The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. From this provision of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in this case is that the Notice of Motion application dated 7th December, 2021 by the Plaintiff has succeeded and hence they are entitled to costs of the application and that of the Defendants dated 21st December, 2021.”

63. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, the Honourable Court elects to have the costs to be in the cause

IX. Conclusion and Disposition

64. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the Plaintiff/ Applicant has a case against the Defendants/ Respondents.
65. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 9th November be and is hereby found to have merit thus allowed.
 - b. That an order of Temporary injunction do issue restraining the Defendants, either by themselves, servants, agents, employees and/or any person working under their authority from further encroaching and/or trespassing onto Plaintiff’s suit Plot No. MOMBASA/BLOCK X/393 and from are continuing with illegal constructions and/or erections of building or dealing with the said Plot in any manner whatsoever pending hearing and determination of this suit.
 - c. That for expediency sake, the matter to be heard on 16th December, 2024. There shall be a mention on 3rd December, 2024 for purposes of conducting a Pre – Trial Conference trial pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010
 - d. That the cost of the Notice of Motion application dated 9th November, 2020 shall be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS18THDAY OFNOVEMBER.....2024.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

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



- b. Mr. Mutwiri Advocate holding brief for M/s. Ombat Advocate for the for the Plaintiff/Applicant.
- c. No appearance for the Defendants/Respondents

