



**Anyango (Suing as the Legal Representative of the Estate of John
Douglos Omondi) v Thuku (Environment & Land Case 143 of 2021)
[2023] KEELC 15871 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 143 OF 2021
LL NAIKUNI, J
FEBRUARY 16, 2023**

BETWEEN

**RUTH LINET ANYANGO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN DOUGLOUS OMONDI) PLAINTIFF**

AND

MERCY WANJIRU THUKU DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment herein is one that pertains to the Suit instituted by M/s. Ruth Linet Anyango, the Plaintiff herein against Mercy Wanjiru Thuku the Defendant. Both of them are neighbors. On 26th July, 2021 the Plaintiff filed a Plaint and obtained Summons upon service of the Summons on 8th October, 2021, the Defendant filed a Statement of Defence and Counterclaim. Pursuant to the full compliance with the Provision of Order 11 of the Civil Procedure Rules, 2010, on 14th October, 2022 the Suit was fixed for full trial.

It is imperative to note that, on 4th March, 2022, the Honorable Court conducted a site visit (“Locus in quo) in the presence of all the Parties. Its report is attached herein as part of this Judgement. Both the Plaintiff and the Defendant summoned their Witnesses who tendered both documentary and oral evidence.

II. The Plaintiff’s Case

2. Based on the filed Plaint, the Plaintiff averred that at all material times to this suit the Plaintiff was a widow of John Douglas Omondi (hereinafter called “The Deceased”), who was the registered and/ or lawful owner of property known as Sub-division No. 9958/2/MN (Original no. 9617/12/ Section/



Mainland North) while the Defendant was the registered and/or legal owner to Sub-division No. 9961/1/MN (Original No. 9617/12 Section Mainland North).

3. The Plaintiff pleaded that sometimes in February 2021, the Defendant began construction works on her property which neighbors that of the Plaintiff's property. As a result, the construction works, the Defendant encroached on to the Plaintiff's property and destroyed the Perimeter wall and the electric fence belonging to the Plaintiff exposing the Plaintiff and her family to security risks.

The said construction had caused a nuisance and annoyance to her. Further, there had been construction materials and/or debris and dust were being deposited on the Plaintiff's property obstructing its entrance. The Plaintiff further held that the Defendant had encroached on the access road leading to the Suit Property. She Pleaded that as a result of the illegal and unlawful actions of the Defendant the Plaintiff and her family had been deprived off their right to quiet possession and peaceful use and enjoyment of the Suit Property and have suffered irreparable loss and damage as provided for under Paragraphs 13 and 14 of the Plaintiff.

From the foregoing the Plaintiff sought for the following orders: -

- a. An order of Permanent Injunction do issue restraining the Defendant or her authorized Agents, Servants, Workmen, Employees or any other persons whomsoever and whatsoever from trespassing on the property known as Sub-division No. 9958/1/MN and continuing with the ongoing construction on the property known as Sub-division No. 9961/1/MN (Original Number 9617/12 Section Mainland North).
 - b. An Order directing and/or compelling the Defendant to demolish any illegal structures erected by the Defendant on the perimeter wall of the Plaintiff's Suit Property which separated the two (2) parcels of land.
 - c. An Order directing the Defendant to demolish all the structures encroaching on the Plaintiff's Property and the road reserve which prevents free access ingress and egress to the Plaintiff's Suit Property and further Orders compelling the Defendant to put up barriers and/or hoards on the construction site.
 - d. General damages for trespass on property.
 - e. Special damages of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-)
 - f. Punitive / exemplary
 - g. Costs and interests on (d) and (f) above at Court rates.
4. On 8th June, 2022 the Plaintiff summoned one Witnesses –PW-1 who testified as follows:-

Examination in Chief of PW - 1 by Mr. Nyamboye Advocate

PW – called Ruth Linet Anyango was sworn and testified in English language. She was a holder of the national Identity Card bearing numbers No. 9119889. Her date of birth was on 16th June, 1965. She was the Plaintiff herein. She sued Mercy Wanjiru, the Defendant herein. She recorded her statement which was filled on 26th July, 2021 and filed a List of documents of six (6) documents dated even date. The documents were produced and marked as Plaintiff Exhibits Numbers 1 to 6. PW – 1 informed Court that she was married to her late husband, the late John Douglas Omondi. She applied and up took the Limited Grants Letters of Administration issued on 12th April, 2021.

5. She informed Court that the suit property was registered in the names of her husband. It is all that parcel of land known as Land Reference No. Sub - Division No. 9958/1/MN. The property is at



Shanzu area of the County of Mombasa. The original Certificate of Title was charged with a financial institution - the Kenya Commercial Bank. However, there was a Discharge of Charge awaiting to be registered upon obtaining the full Grant Letters of Administration. The Plaintiff's property was adjacent to that of the Defendant.

PW – 1 stated that she sued the Defendant as she built a fence by superimposing it on her fence. The PW -1 stated that, in so doing, the Defendant broke her electric razor fence as all the debris from the construction fell on her land. She held that she came to court to restrain the Defendant from causing any further nuisance onto her land and family.

Her testimony was that before coming to Court. She instructed her Advocate to issue a demand letter dated 7th April, 2021. Through her Advocate, the Defendant responded. Despite of this, she continued causing the nuisance and trespassing onto the PW – 1's land. She came to Court seeking and was granted temporary injunction orders. She still had the interim orders in place.

6. At the same time, she received a letter from National Construction Authority dated 30th March, 2021. They told the Defendant to open up the Compound and to repair the perimeter wall/fence before continuing with the construction. But she declined to do so. Referred to the set of photographs showing the nature of the destruction of the wall. She confirmed knowing them. She informed Court that she had children. She had obtained the Certificate of Death of her husband upon his death.
7. PW – 1 stated that after the Court conducted the Site Visit on 4th March, 2022, the Defendant accepted to put up a hood on the wall and iron sheet blocking her bedroom. However, the nails used and the safety net were torn and worn out. They were not able to protect the nuisance from taking place. It was not adequate.

The PW – 1 testified that, from the Defendant's filed defence, she denied having trespassed onto the Plaintiff's land. But according to PW – 1 the Defendant's workers were regularly seen walking on top of the perimeter wall. According to her that amounted to act of trespass.

8. PW – 1 observed that the Defendant filed a Counter - Claim seeking for orders to restrain the Plaintiff from preventing stopping the construction from going on. But PW – 1 averred that it was not her who stopped the construction from continuing but the Court that granted the injunction orders. Hence, PW – 1 argued that the demand to be paid general damages by the Plaintiff for a sum of Kenya Shillings Ten Million Four Twenty-Four Hundred (Kshs. 10,424,000/=) was unfounded.
9. PW – 1 urged Court to stop the construction until the Defendant fully complied with the required environment and laid down requirements. She sought to be protected us from the dusts, the debris and other nuisance. She sought to be granted the costs of the suit and general damages from the trespass. She wished the Defendant could put up a high Iron sheet from down up.

Cross Examination of PW – 1 by Mr. Kihiko Advocate

10. PW – 1 was referred to Paragraph 9 of her statement. She stated that the workers had been trespassing into her land. They were exposing her family and herself to security risks. She had no evidence as she never took any photographs of these acts. She was referred to the contents of Paragraph 10 of her statement. She indicated she was still receiving debris from the construction works. She emphasized that it was Court that stopped the construction. She averred that there were no debris at the moment as the construction had stopped. She informed Court that there were iron sheet put but it still never improved the nuisance. The hoard never covered the whole area as it should have been expected.
11. She was referred to the contents of Paragraph 11 of her statement. She stated that the Defendant had also encroached on the access road leading to the exit road. The exit road was provided for in the area



plan. She admitted that the issues raised under Paragraph 13 of her statement had been dealt with. However, she was of the view that the construction would deprive her privacy. The residents to occupy these structure would be seeing her compound. She admitted never having commissioned a Surveyor to identify the beacons. She informed Court that the Defendant had placed the pillars on her wall and which went close to her land. She had touched into her property – the perimeter wall.

Re - Examination of PW-1 Mr. Nyamboye Advocate.

12. PW – 1 held that it was a fact that the Defendant had destroyed her electric razor wire. She would not know whether the debris would continue falling into her compound once the construction resumed. She was sure that once the construction went to high heights, her fundamental rights would be infringed and violated. Her privacy would be interfered with. It would make her property a slum.

III. The Defendant's Case

13. On 8th October, 2021, the Defendant filed Statement of Defence and Counterclaim. Based on the filed Pleadings, she admitted being the legal owner to property known as Land Reference Number Sub - division No. 9961/2/1/MN (Original No. 9617/12 Section/Mainland North) and that she had commenced construction works thereon after obtaining the relevant approvals and following the due process.

The Defendant denied she encroached on the Plaintiff's property and maintained that the construction was well within boundaries of her property in line with the Survey Report and the Approval Building Plans. The Defendant denied ever encroaching on the access road leading to the Suit Property and hence obstructing the entrance and exits points. She maintained that the ongoing construction on her property were legal and in adherence with pre-approved plans and protocols. She denied causing any nuisance, peaceful, quiet possession, loss and damages to the Plaintiff.

14. On the Counterclaim, the Defendant reiterated the averments made under Paragraphs 1 to 18 of the Defence and held that due to the instant of the Plaintiff the construction had been stopped vide a Court Order and as a result she had incurred immense loss and damages on man hours, materials on site, work to be redone, remedial works security and loss of revenue.

In total she stated having lost approximately - Kenya Shillings Ten Million Four Hundred and Twenty-Four and Seventy (Kshs. 10,424,070/-). She prayed for Plaintiff's case to be dismissed and Judgment entered against the Plaintiff as prayed in the Counterclaim.

15. On 14th October, 2022, the Defendant summoned two (2) witnesses DW-1 and DW-2 who testified as follow: -

Examination in Chief of DW – 1 by Mr. Kihiko Advocate

16. DW – 1 was sworn and testified in English language. She is called Mercy Wanjiru Thuku. She was a holder of the national Identity Card bearing numbers 22885139. She was a business lady. She was the Defendant in this case. She recorded her witness statement on 7th October, 2021 and filed a List of documents – Marked as Defendant's Exhibit numbers 1 to 8" which she wished to rely on as her evidence.
17. She undertook the construction onto the property known as Sub -division No. 9961/1/MN. She applied for the Change of User from residential to Multi dwelling development. She obtained all the approvals for the construction from the relevant statutory agencies including the National Construction Authority (N.C.A), the national Environment & Management Authority (NEMA) and the County Government of Mombasa. She had all the required documents. This included a Survey



report. She informed Court that all this time she had been operating on her property. DW – 1 denied that she had encroached onto the Plaintiff's property. She stressed that all this time, she had been adhering with the provisions of the law.

18. DW – 1 stated that her construction had been stopped through a Court order sought by the Plaintiff. As a result, she had incurred substantial damages and losses in terms of the hours lost, material, workers wages. She had incurred damage amount to Kenya Shilling Ten Million Four Hundred thousand (Kshs. 10,400,000/=). She informed Court that she had engaged an expert who did the computation and tabulation of the losses incurred. To support this, there was a Bill of Quality and Surveyor's Report.

DW – 1 urged Court to allow her to continue with the construction works. She prayed for this to be dismissed with costs and the Counter - Claim allowed.

Cross Examination of DW – 1 Mr. Nyamboye Advocate.

19. DW – 1 stated that she had never talked to the Plaintiff. They met only once though they were neighbors. She had built her wall from beacon to beacon. She informed Court that the pillars on the perimeter wall fell on her side. She admitted that in the process of constructing her wall the electric wire got destroyed but not all the wall. It was not true that the debris fell across onto her compound. She admitted it being true that by the time of commencing the construction, she had not put up the Iron Sheet hoard though the net was there. She did put these measures two weeks ago. She obtained the approvals from the various statutory bodies e.g. National Construction Authority (NCA), the national Environment & Management Authority (NEMA) and County Government of Mombasa before she commenced the actual construction. The person who prepared the brief report for the Change of Users was Mr. R. A.M.S Saleh, a Physical Planner Referred to under Paragraph 5 on Page 13 of the Survey Report and Plan. This was about for her building and not the surroundings. Its part of her land. There was no exits and entry access road.
20. She agreed that the advise was that the proponent of the proposed Change of User would ensure that the intended use was not injurious to the neighboring plots in the form of noise or any other pollution as may arise as a result of its use. She denied having encroached onto the Plaintiff's land. The electric wire fell having been caused by the workers. The falling debris would be doing so onto the hanging hoards. He never destroyed the wall but the electric wall. It was the Court that ordered the stoppage of the construction works but through the Plaintiff. She denied having been exposing the Plaintiff to any danger. She remembered the Court advising them to sit and attempt to arrive at an amicable solution to the issue. She informed Court that the construction had stopped. It was a fact that the N.C.A. advised them that they restore the electric wire and which she obliged before the construction resumed.

Re - Examination of DW – 1 by Mr. Kihiko Advocate.

21. DW – 1 confirmed receiving and obeying the Court order. She indicated that the Plaintiff had never been co - operative on these matters. They had written to her using her letter head to know the extent of the damages but she refused even to receive the letter. Her workers would have to go through her compound to rectify the damages. DW – 1 stated that the Plaintiff was the author of the Court case and hence the stoppage of the construction of the building. She held that it was the Plaintiff who solely responsible for the stoppage of the construction of the building.

Examination in Chief of DW – 2 by Mr. D. Kihiko Advocate.

22. DW – 2 was sworn and testified in English language. His name is Mr. James Gitonga Mureithi. He was a Land Surveyor. He practiced under Land Surveyor's firm of B.M Mwanyungu Land Surveyors. He was a graduate from Technical University. He had 15 years experience. Initially, he worked with Mr. Edward



Kiguru Surveyors and now Mr. Mwanyungu. He was aware of this civil case - ELC. 143/2021. He prepared the Surveyor's Report dated 23rd April, 2021. He produced it and relied on it as his evidence. They were engaged by M/s. Merch Thuku, the Defendant herein to carry out a survey exercise onto all that parcel of land known as Plot No. MN/1/1961 derived from the Survey Plan F/R No. 310/44. He indicated that they would normally request for a copy of the title deed and which she provided. It showed that she was the registered owner of the Plot. He used the Photo stat to assist them in knowing the distances needed. They were able to locate all the beacons. There was a perimeter wall. They were to pick any structure and identify any encroachment on the suit land. They never found any encroachment at all.

23. The main purpose of the Survey exercise was to:-

- a. Re locate and establish all the boundary beacons on the Plot;
- b. Check on if there was any encroachment;
- c. Capture the extent of the building and ascertain if it caused any encroachment to other property.

They had to look for the reference points map and the beacons and the distances on the map and they were in conformity. From Survey Plan/Folio Reference (FR) – were able to see there were two beacons at the entrance there were three (3) beacons.

In conclusion, his finding was that there was no encroachment as per Topographical drawing specifically:-

- a. The development was within the property MN/I/1961 within the perimeter wall.
- b. All the beacons were established in their places.

On the issue of the alleged access road, he stated that it terminates at the gate of the suit property. There was no through way as per the FR.

Cross Examination of DW - 2 by Mr. Nyamboye Advocate

24. DW – 2 visited the site himself. The Survey report was signed by Mr. Mwanyungu. As surveyor, he knew and understood know the term “Trespass”. It meant having an entrance into another person's land without the consent of the owner. It does not matter to what extent the trespass happened. He confirmed that beacons were built on the perimeter wall. Further, he noted that the electric wire was on the perimeter wall. He never notices that the electric wire was interfered. There was construction going on. The building was at 1.5 Metre High. He did not see the hoard. He surveyed the Plot. No. MN 9961/1/MN. The Plot measures 0.11 HA. He drew the sketch plan which was attached to the report.

25. He never saw the road that would extend from one end to the other. The building would not obstruct any road. One must make an end at the entrance of Plot No. MN/9961 and to do a turn. There was neither a breakthrough nor a road reserve. He stated that an encroachment was where one did cause any development onto someone else place. He could not comment on the debris. He was referred to Clause 5 of the Physical Planners Report dated August, 2019 but he had no comment to make.

Re – Examination of DW – 2 by Mr. Kihiko Advocate.

26. DW – 2 visited the site. He re – affirmed that the Surveyors report was signed by Mr. Mwanyungu. He was assigned to him. From the survey, he did not establish any trespass. He confirmed that the pillars were touching the wall. The pillars were on the inner side of the Plot No. MN/I/9961. There was no through way road.



Examination in Chief of DW – 3 by Mr. D. Kihiko Advocate

27. DW – 3 was sworn and testified in English language. He is called Mr. Athanese Mwamba Mwambari. He was a Quality Surveyor of 7 years experience. He was in Court in his capacity as an expert to tender his testimony in the Civil case ELC No. 143 of 2021. He prepared a Bill of Quantity Report dated 24th May, 2022 which he relied on for his evidence. He produced and marked it as Defendant Exhibit – 4. Following the directions of this Honorable Court after the site visit, he was directed to comply. He read and fully understood the Site Visit Report prepared by Court.
28. From the report, he picked out four (4) items for the compliance. These were:-
- a. Fixing of the net screens to guard against falling objects and dust. He confirmed that these were done.
 - b. Fixing the iron sheet – hoard to guard against falling objects. This was done upto the 2nd Floor.
 - c. Construction of the perimeter wall on the side of the Defendant to completely separate the two plots.
 - d. The team committed to remedy the electric fence upon completion of the construction.
 - e. How the Defendant intended to dispose off rain water. The building was designed to have a flat roof and thus rain water would be collected and channeled through water outlets and down pipes encased in columns and directed to soakage pits already installed in the site. There should be no overflows on the side of the Plaintiff's compound.

This was a compliance report. He observed that the Defendant was committed to maintain peace and sustain good neighborhood. He also filed a financial claim after carrying out the financial assessment. He based it on the Seven (7) grounds:-

- a. Material on the ground.
- b. Works completed but had to be re – done again.
- c. The work force.
- d. Remedial works.
- e. Security.
- f. Loss of revenue.

The Financial report was filed on 6th October, 2021

Cross Examination of DW - 2 by Mr. Nyamboye Advocate.

29. Before the court ordered there had not been any hoard, iron sheet. However, they were there now on the side of the Defendants' side. They fixed the net screens, the hoarding and iron sheet were there now. The hoarding was on the 2nd Floor, and its inclined on the angle but it's on the Defendant's property. There were not there before. But the Defendant had complied with the order of the Court. He saw the pillars on the wall. They were not on the side of the Defendants property. There was a damage of the electric fence. It was admitted and that there would be repaired.



Re – Examination of DW – 2 by Mr. Kihiko Advocate

30. When he went there, there was net screen on the site of the Defendant’s side. They reinforced it and the iron sheet were inclined net on a vertical way in order to take care of falling particles. The rain water from the flat roof and the drainage was in place. The boundary lied side by side.

IV. Submissions_

31. Upon the closure of both the case for the Plaintiff and the Defendant herein, they were directed to file their Written Submissions on the stipulated timeframe. Pursuant to that the Court which thanked the Counsels in the manner on which they diligently, devotedly and dedicatedly tackled their tasks; Court reserved a date being 13th February, 2023 when to deliver the Judgement by Microsoft Teams Virtual means.

A. Written Submissions by the Plaintiff

32. On 14th December, 2022, the Learned Counsel for the Plaintiff the Law Firm of Messrs. Mbuni Nyamboye & Co. Advocates filed their Written Submissions dated even date.

Mr. Nyambuye Advocate commenced the Submissions by providing the background to this matter leading to institution of the Suit by the Plaintiff. Fundamentally, the Counsel submitted on three (3) broad grounds: -

Firstly, he held that the Plaintiff had established a case for trespass committed by the Defendant onto the Plaintiff’s land. He held that the Defendant did that by covering the perimeter wall put up by the Plaintiff’s late husband thereby destroying the electric fence. He referred to the photographs produced as documentary evidence which revealed that the ongoing construction interfered with the Plaintiff’s proprietary rights.

33. To support his case, the Tort case referred to the famous and celebrated English case of “Rylands – Versus- Fletcher (1868) LR 3 HL 330” where the Court held: -

“..... A person who for his own purposes brings on his land and collects and keep there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damages which is the Natural consequences of its escape.....”

He argued that the doctrine of strict liability applied to the present case. He asserted that the debris was falling off from the Defendant’s parcel of land onto the Plaintiff’s compound causing destructions.

He cited the case of:- “Stella Awinja Muka & Another –Versus- AG, HCCC No. 915 of 1988” where a building block fell and killed her due to the negligence of the construction not placing hordes or taking any protective measures whilst at the construction site.

Further, the Defendant’s acts of trespassing was causing nuisance to the Plaintiff and her family. These included depositing construction materials and debris onto the Plaintiff’s compound. The walls of the house for the Plaintiff had been damaged as a result.

He argued that the Plaintiff was forced to use electric throughout in order to keep away the cement and dust emanating from the activities going on from the Defendant’s parcel of land. These had exposed her and her family.

34. The Defendant had used beacon to beacon on her plot to construct the pillars against the Plaintiff’s perimeter wall to support her compound. This was done without the Plaintiff’s consent.



The Counsel argued that the Plaintiff having proved that the Defendant had trespassed and caused nuisance to the Plaintiff's parcel, it followed that the Plaintiff was entitled to the award of damages without necessarily tabling proof of damages. To buttress on that point he cited the case of:- "John Nduba –Versus- Director of Surveys and Another (2022) eKLR" where the Court referred to the Provisions of Section 3 (1) of the Trespass Act Cap 294 and "Clerk & Lindsell on Torts 17th page 1354 Paragraph 24", "Park Towers Ltd –Versus- John Mithama Njika & 7 others (2014) eKLR" and "Duncun Nderitu Ndegwa –Versus- KPLC Ltd & Another (2013) eKLR"

35. From the above, the Counsel held that the Plaintiff had tendered evidence indicating she had on a balance of probability proved that the Defendant had trespassed and thus she was entitled to Permanent Injunction as held in the case of:- "Kenya Power & Lighting Co. Limited –Versus - Sheriff Molana Habib (2018) eKLR". On the aspect of Permanent Injunction perpetual injunction granted by Court upon merit of case after evidence in support of and against the claim has been tendered and one which fully determines the right of the Parties before the Court.

Further, the Counsel argued that the Defendant had not only encroached onto the Plaintiff's suit property but had also interfered with the access road leading to the suit property thereby obstructing its entrance and exit points. According to him, the road reserve prevented free access ingress and egress to the Plaintiff's suit property and other road users.

The Counsel submitted as to what damages the Plaintiff was entitled to for trespass and the issue that arises is the measure of it. This is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less. To support his point the Counsel cited the cases of:- "Rhoda S. Kiilu –Versus- Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR" and "Philip Ayaya Aluchio –Versus- Crispinus Ngayo [2014] eKLR"

Taking that in this case the Plaintiff never provided the value of the property trespassed apart from the excavated murrum but also since the trespass began in September, 2019 when the Defendant started the construction development works the trespass had continued annually to-date owing to the actions of the Defendant, the Plaintiff has suffered loss and damages whereby he estimated at a sum of Kenya Shillings One Million (Kshs. 1,000,000.00) annually as adequate compensation.

The Counsel also urged Court to grant costs of the Suit to the Plaintiff taking that the Plaintiff made efforts to amicably settle the matter but all in vain.

36. As regards whether the Counterclaim for damages of Kenya Shillings Ten Million Four Hundred and Twenty Four and Seventy (Kshs. 10,424,070/-) by the Defendant on allegation of loss and damages caused to her by the delay and the stoppage of the construction at the behest of the Plaintiff filing the Suit. The Counsel argued that upon the Plaintiff detecting the wrongs caused, she wrote a demand letter asking the Defendant to right her wrongs but she persisted on the illegal actions. This compelled the Plaintiff to institute the Suit. The Defendant now seeks to benefit from her wrongs despite being on the wrong side of the law. He averred that the Court should not allow the same. He cited the legal maxim "Ex Turpi Causa non oritur action" No legal remedy or benefit can flow from an illegal act.
37. The Counsel's contention the Temporary Injunction orders issued by court in favour of the Plaintiff restraining the Defendant from trespassing on the Plaintiff's land and continuing with the ongoing construction were based on sound evidence. It was evident there existed nuisance as a result of the construction. The Defendant came to Court with unclean hands and should not be allowed to benefit from her wrongs. The Counsel urged Court to dismiss the Counterclaim with Costs.



B. The Written Submissions by the Defendants

38. On 28th January, 2023, the Learned Counsel for the Defendant the law firm of Messrs. Muthee kihiko and Associates filed their written submissions dated 18th January, 2023. Mr. Kihiko Advocate commenced his submissions by providing a brief introduction to the matter from the filing of the suit by the Plaintiff the relief sought to the Defence and Counter Claim filed by the Defendant and the prayers for special damages sought being losses suffered as a result of the interruption by the Plaintiff in delaying the Defendant from causing further development on her suit property. According to the Counsel, the facts of the case were that the Plaintiff was a legal representation to one John Douglas Omondi who is the registered and beneficial owner to all that property known as Sub-division 9958/1/MN – whereas the Defendant was the registered and beneficial owner of property No. 9961/I/MN which both are adjacent to each other. The Plaintiff averred that the Defendant encroached on the property while constructing on its property and further encroached on the access road leading to her property – denying her ingress and egress out of her property. She held that the ongoing construction was illegal and it denied her and her family privacy and peaceful enjoyment of their premises and as such she sought permanent injunction against the construction. She further complained of dust debris from the construction site being deposited on her premises this causing her what she termed as nuisance and annoyance.
39. On her part the Defendant denied the allegations raised by the Plaintiff. She maintained that the said construction was well within the boundaries of her property as per the survey report, map and approved building plans. She refuted having encroached the Plaintiff's land not any piece of land outside the boundaries of her property. She further maintained that the construction undertaken was legal and unstrict adherence to plans approved by the County Government of Mombasa and compliance with other statutory requirements. She raised a Counter Claim against the Plaintiff to wit that as a result of the interference by the Plaintiff through various government agencies and subsequently the court order the Defendant suffered loss and damages suffered as a result of this interference.
40. The Counsel observed that on 4th March, 2022 the court conducted a Site Visit (“Locus in quo) in the presence of both parties. Court made several recommendations to the parties in an attempt of driving parties towards reaching settlement in this matter. Subsequently, this process culminated to filing and adoption of a consent order dated 27th October, 2022. As per the terms of the consent parties confirmed compliance in terms of the guidelines and recommendations made by the court in its Site visit report. These guidelines included the provisions of safety materials e.g. drainage systems from rain water pacing of net guard/iron sheet and to restore the electric wire after the construction was complete to its logical conclusion to its original position. In essence both parties confirmed that the Defendant had taken steps in mitigating any nuisance that may have existed to the satisfaction of the Plaintiff. further the Defendant undertook to prevent any further nuisance construction.
41. The Counsel therefore held that the issue of nuisance had already been dealt with and determined between the parties. Despite of this the Counsel submitted that there a few other issues which ought to be addressed for the court's determination. These were:-
42. Firstly, on whether the Defendant had encroached or trespassed on the Plaintiff's land and encroached on the road leading to the Plaintiff's land and he answered in the negative. He refuted this had happened and argued that the Plaintiff had failed to provide any evidence to support that allegation as required by law Section 107 of the *Evidence Act* Cap 80. From the survey and map report produced by the Land Surveyor revealed that the development lied well within the Defendant's plot and there was no encroachment into neighboring plots. He argued that the Land Surveyor's report was never



- contravened. On this point he relied on the decision of “Josephat Mbumga –Versus- Silas Mwito Mugwika (2022) eKLR and Kenya Power & Lighting Co. Ltd. – Versus- Sheriff Molana Habib (2018) eKLR .
43. Secondly, the Counsel’s contention was that the Defendant was entitled to construct on her land. The Counsel opined that the main contention by the Plaintiff was that she wanted the entire development stopped for reason it was a construction of a storey building next to her house which was a private mansion.
44. He discerns this from the Plaintiff’s prayer seeking “Permanent Injunction against the construction being undertaken by the Defendant on her own piece of land”. He further held that the Defendant in her testimony informed court that this had not been the first time the Plaintiff had complaint to various other government agencies with intentions to stop the construction. He averred that this was an abuse of the due process taking that the Defendant had fully complied with all statutory and administrative requirements to develop her piece of land. The Defendant produced all the relevant documents for developing multiple dwelling houses on the property.
45. There were PPA-2 from the County Government of Mombasa, a letter dated 30th September, 2019 from the Regional Surveyor Office, letter dated 1st October, 2019 from the department of Physical Planning, Ministry of Land and Physical Planning approvals from NEMA and the National Construction Authority (NCA) hence the Defendant was within her proprietary rights in developing he property on her land. The Counsel argued that the Plaintiff never gave any reason or tangible evidence of any negative that the said development would have on her property.
46. Thirdly, the Counsel oppose that the Plaintiff was entitled to the prayers sought in the Plaint. She had failed to discharge her burdens of proof for the orders sought of a permanent injunction to restrain the Defendant from exercising her proprietary rights over her registered property. Further, the Plaintiff failed to challenge nor controvert the evidence Land Surveyor Report and map produced by the Land surveyor summoned by the Defendant in court indicating that there was no encroachment.
47. The Counsel argued the special damage for Kenya Shillings Three Hundred (Kshs. 300,000/=) by the Plaintiff was untenable as special damages must not only be pleaded but specifically proved. This had not been done by the Plaintiff. To buttress on that point, he cited the cases of ”Jane Wangithi Muriithi – Versus- County Government of Kirinyaga (2020) eKLR and Patcliffe –Versus- Evans (1892) 2QB 524. Besides, the Defendant already undertook to restore the electric wire to its original position after the construction as per the guidelines of the court during the site visit and which was confirmed by parties through the filed consent. Hence the Plaintiff was not entitled to special damages.
48. Fourthly, the Counsel submitted that the Defendant was entitled to damages and loss suffered due to the interference and stopping the development caused by the Plaintiff from the complainant lodged to various Government authorities and the temporary injunction orders obtained from court.
49. From a report by a Quantity surveyor stated the Defendant would suffer a loss and Kenya Shilling Ten Million Four Twenty Four Thousand and Seventy (Kshs. 10,424,070.00) if the construction never proceeds on by 31st September, 2021. This report was produced to court by DW-3. The Plaintiff never challenged this report not call its own witness to controvert this. The Counsel held that the damages suffered by a Defendant as a result of interlocutory injunction order by a court was well articulated in



the Court of Appeal Case of “Chatur Radio Services –Versus- Pronogram Ltd. (1994) eKLR where the Court held:-

“The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the argument of Counsel and injunction is granted on an interlocutory application which ought not to have been granted, then the Defendant is entitled to some remedy in damages, thus the Defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of that injunction, which is the preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances an undertaking as to damages is required when an interlocutory injunction is granted in order that the court granting such injunction may be able to do justice if the injunction was wrongly granted”.

50. Although court never required the Plaintiff to provide an undertaking of damage while granting the interlocutory injunction, the court still retained the inherent jurisdiction to do justice as between parties where interlocutory injunction orders were wrongly issued. He held the Plaintiff misrepresented facts to court to wit the Defendant had encroached on the Plaintiff's land and blocked the access road and which court relied on to grant the orders.
51. He argued that had the Plaintiff restricted herself only to the issues of nuisance, the court may not have granted the injunction orders as there are issues which can adequately be compensated by way of damages. Thus the Plaintiff should be held liable by paying the Defendant a sum of Kshs. 10,424,030/=
52. Finally, the Counsel averred that the Defendant was entitled to costs of the suit and the prayers sought from the Counter Claim.

V. Analysis and Determination

53. I have keenly taken into account all the filed pleadings by the Plaintiff and Defendant being the Plaintiff, Defence and Counterclaim, the adduced documentary and oral evidence by all the summoned Witnesses, the written Submission and cited authorities, the Relevant Provisions of *the Constitution* of Kenya, 2010 and Statutes.

For the Court to reach an informed, reasonable, just, fair and equitable determination it has framed the following four (4) salient issues. These are: -

- a. Whether the Suit instituted by the Plaintiff against the Defendant and the Counter - Claim lodged by the Defendant against the Plaintiff have any merit whatsoever.
- b. Whether there exists any road reserve within the suit land area for the use by other road Users.
- c. Whether the Parties herein are entitled to the relief sought.
- d. Who will bear the costs of the Suit.

Issue No. (a) Whether the Suit instituted by the Plaintiff against the Defendant and the Counterclaim lodged by the Defendant against the Plaintiff have any merit whatsoever.

Brief facts

54. Before proceeding on with the analysis of the issue under this sub - heading, the Honorable Court feels it imperative to extrapolate on the brief facts of the case. From the filed pleadings the Plaintiff



and the Defendants own adjoining plots and hence in essence are neighbours. The Plaintiff was a widow of John Douglas Omondi (hereinafter called “The Deceased”), who was the registered and/ or lawful owner of property known as Sub - division No. 9958/2/MN (Original no. 9617/12/ Section/ Mainland North) while the Defendant was the registered and/or legal owner to Sub-division No. 9961/1/MN (Original No. 9617/12 Section Mainland North).

55. Sometimes in February 2021, the Defendant began construction works on her property. As a result, the construction works, it was alleged the Defendant encroached on to the Plaintiff’s property and destroyed the Perimeter wall and the electric fence belonging to the Plaintiff exposing the Plaintiff and her family to security risks. The said construction had caused a nuisance and annoyance to her. Further, there had been construction materials and/or debris and dust were being deposited on the Plaintiff’s property obstructing its entrance. The Plaintiff further held that the Defendant had encroached on the access road leading to the Suit Property. She pleaded that as a result of the illegal and unlawful actions of the Defendant the Plaintiff and her family had been deprived off their right to quiet possession and peaceful use and enjoyment of the Suit Property and have suffered irreparable loss and damage. From the foregoing the Plaintiff filed this suit and sought orders as set out in the Plaint.
56. On the other hand, on 8th October, 2021, the Defendant filed Statement of Defence and Counterclaim. She confirmed as the legal owner to her afore - stated property commenced construction works thereon after obtaining the relevant approvals and following the due process. She denied any acts of encroachment on the Plaintiff’s property as the construction was well within boundaries of her property in line with the Survey Report and the Approval Building Plans. She also denied ever encroaching on the access road leading to the Suit Property and hence obstructing the entrance and exits points. She maintained that the ongoing construction on her property were legal and in adherence with pre-approved plans and protocols. She denied causing any nuisance, peaceful, quiet possession, loss and damages to the Plaintiff. From the Counterclaim, she held that due to the instant stoppage of construction by the Plaintiff vide a Court Order, she had incurred immense loss and damages on man hours, materials on site, work to be redone, remedial works security and loss of revenue. In total she claimed a loss lost approximately being a sum of Kenya Shillings Ten Million Four Hundred and Twenty Four and Seventy (Kshs. 10,424,070/-). She prayed for Plaintiff’s case to be dismissed and Judgment entered against the Plaintiff as prayed in the Counterclaim. On request by parties, the Court conducted a Site Visit. That is adequate on the facts.
57. Now turning to the issue of analysis under this sub - heading, the ownership of the Suit Property for the Plaintiff and the Defendant who are neighbors at Shanzu area is not in dispute. The Plaintiff and the Defendant are separated by a common perimeter wall with strong four (4) pillars put up from beacon to beacon. It is evident that the Plaintiff has been leaving on her maisonette with her family for a while. Sometimes in February 2019, the Defendant who has an adjacent plot commenced the construction of her plot. According to her architectural plan and design which were produced in Court, she was undertaking a four (4) storey residential floors with some apartments or units within it. According to her and the evidence adduced, prior to undertaking the construction she obtained all the Pre-requisite approvals from the relevant statutes authorities. She produced copies of approvals from the County Government of Mombasa, National Environment and Management Authorities (NEMA), National Construction Authority (NCA). The main bore of contention is that upon the commencement of the construction of the development works onto a compound, it is averred that Plaintiff noted that there were numerous nuisances meted into her compound and hence her peace, quiet possession and enjoyment adversely interfered with. From the Pleadings and evidence adduced, the nuisances included dust from cement, debris falling off her perimeter wall electric wire got broken and heaps of wastes dumped onto both her compound and entrance blocking her smooth entry to her compound. She held that even the access road to the other connecting roads was blocked. She held her wall was being



used as the Defendant never made any effort to construct her own wall. Instead, she placed four (4) strong pillars- beacon to beacon onto her own wall.

58. The Plaintiff hold that she was never consulted for her consent. It's her contention therefore that this were tantamount acts of illegality and trespass onto her parcel of land. Be that as it may, on noting the wrongs meted out by the Defendant, she instructed her Advocate on record to issue demand letter and attempt exploring an amicable out of Court negotiation on at least for the Defendant to consider undertaking safety measures but all these efforts were in vain. It's for this circumstances that necessitated the Plaintiff to institute the Suit and was able to obtain Temporary Injunction orders on 24th January, 2022 in essence, it meant the stoppage of the construction works until the Suit was heard and determined. Likewise the Honorable Court in the process of hearing the interlocutory application on 4th March, 2021 felt it needful and with the concurrence of the Parties to conduct a site visit (Locus in quo) in the presence of all the parties. The site visit report is hereby reproduced verbatim for ease of reference.

The site visit report

Republic of Kenya

In the Environmental and Land Court

At Mombasa

ELC Case Number 143 Of 2021

Ruth Linet Anyango..... .plaintiff

Versus -

Mercy Wanjiru Thuku..... Defendant

The Site Visit Report

I. Introduction.

1. On 4th March, 2022 at 4.30 p.m, the site visit took place at a place called Shanzu Water (Kwa Maji) took place. It is approximately two (2) Kilometers from the Malindi-Mombasa Highway. There is a 6 meter road which seem to hit a dead end meaning no access across as it had been intended. This was pursuant to a court ruling delivered on 24th January, 2022 and a court order made under the provision of Order 18 Rule 11 of the Civil Procedure Rules 2010.

A. Present.

A. Court:-

- i. Hon. Justice L.L. Naikuni ELC. No. 3 Mombasa
- ii. M/s. Yumna Hassan – Court Assistant
- iii. Mr. John Mwaniki – Driver/Assistant

B. The Plaintiffs

- i. Mr. Charles Ohoro Nyambiye –Advocate for the Plaintiff
- ii. M/s. Ruth Linet Anyango Omondi – The Plaintiff.
- iii. Mr. Francis Okello – Son to the Plaintiff.



iv. M/s. Cynthia Omondi – daughter to the Plaintiff.

v. Mr. George Kawanda Omwanda – Driver.

C. The Defendants.

i. Mr. Daniel Kihiko, Advocate for the Defendant.

ii. M/s. Mercy Wanjera Wanjiku Thuku – The Defendant.

iii. M/s. Anastasia Wambui Thuku – Mother to the Defendant.

iv. Mr. Harrison Thuku – Father to the Defendant.

v. Mr. Ian Kinuthia – Brother to the Defendant.

vi. Mr. Mwangi Kiambo – Assistant to the Advocate for the Defendant.

II. The Purpose for the Site Visit

The purpose of the site visit was explained. It was stated that pursuant to a court directive made on 1st March, 2022 and in view of the numerous activities reported to be taking place on the suit property particularly the ongoing constructions it became imperative to conduct the site visit. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

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

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, to wit:-

40 (10) (1) “The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated issue of the alleged constructions and the nuisances caused by it to the Plaintiff's compound onto the suit land to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.



Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

III. The Procedure

It was explained that the team would commence by fully guided by the maps available or any other available information and experts around. The team would then move from one plot to the other in sequential manner. The said maps are attached hereof for ease of reference.

At each plot, the team led by court would primarily be verifying, examining and inspecting the following parameters.

- a. The acreage and size of the plot and the surroundings.
- b. Any existing development in form of structures.
- c. The occupying land owners and their contacts.
- d. The existence of any new constructions and development and when it was commenced and estimated completion period.
- e. Any other observation that may be of value to the evidence and the ongoing constructions.

V. The site visit per se

- I. The Plaintiff's parcel. There existed a one story mansionette of 4 Bedroom, a well-kept compound with neatly cut grass and cabro works to detail. There was a small one car garage and a guards shelter. There was wooden 3 dogs kennel. The compound measures approximately $\frac{1}{4}$ of an acre, it is valued approximately at Kenya Shillings Sixty Million (Kshs. 60,000,000) on both the house and the land on it.

The Dispute. There is a 6 feet high, (1.8 meters) and 45 Meters Long perimeter wall, with 7 pillars/columns in between, on top of the wall there is 1 metre high electric wire fence with 8 wires placed on horizontal basis running across the whole wall. The electric wire is now no live. The wall has peeled off cream and orange/pillars paint as a result of wear and tear, and weather conditions with time. The electric wire is broken off as a result of the construction works from the Defendant's compound. There was evidence of the security safety measures placed – 7 meters high green net all the way through following the court order. There was some protruding building timber poles and posts into the Plaintiff's compound. The wall was constructed by the Plaintiff. There were evidence of some debris falling off from the Defendant's compound into the Plaintiff and rapture and slight damage onto the house walls for the plaintiff. She indicated her house had darkened and she was compelled to use



fan through out to keep the cement and dust away. It was a major nuisance to her and her family she observed.

- II. The Defendant's Compound is exactly adjacent to the Plaintiff. There is a bill Board at the entrance with writing Proposed Residential Development on Plot No. 9661 of 5 plots and 25 units of four bedroom and a parking bay, a lift and underground water tanks. The construction for the project had been still under process until it was temporarily stopped by a Court Order. The whole project plus land was valued at Kenya Shillings One Hundred and Fifty Million (Kshs. 150,000,000/=). The Defendant is the proprietor to this parcel of land and the project under construction. It is on a ¼ acres. The site supervisor Mr. Francis Kariuki she informed court that she was in full compliance of all the prerequisite requirements for such a construction project – NEMA, National Construction Authority (NCA) physical Planning, Public Health and County Government of Mombasa approvals, consents and Licences/ Permits as required by law. The court was able to identify the beacons but with great difficulties as they are not well marked. The Defendant and on her own admissions stated to have used the beacon to beacon on her plot to construct the 7 story pillars against the plaintiff's perimeter wall to support her compound. She never put up any wall on her site, she stated she never saw any need of constructing another wall on her site. It was not clear whether this was done with the consent of the Plaintiff. Court avoided making that inquiry at this stage leaving it for full trial by the parties. The wall to wall across the compound is 20.2 meters long. There is no gap for breath in between the two plots.

In summary the dispute on the suit land pertains to:-

- (a) Encroachment.
- (b) Nuisance caused.
- (c) Trespass.

The Solution:- Court attempted to mediate an out of court settlement under Article 159 (2) (c) of Constitution of Kenya. Although the parties still had a hardline stone but the following were agreed upon.

- a. That there should be included goodwill, peace and tranquility for the sake of sustaining good neighborhood.
- b. Each party to recognize the right to private property under Article 40 (1) of Constitution but to also be fully in compliance of the Environmental Public Health, Physical Planning and construction Rules and regulations at all times. There must be full compliance of these relations and Rules.



- c. The Defendant is willing and ready to continue providing safety measures e.g. drainage systems from the rain water – placing the net guard/iron sheet all way through, restore the electric wire after the construction is complete to the original position, raising the wall high in order to separate the two plots permanently.
- d. That the parties to record consent to this effect to be adopted by court as its orders
- e. That the matter to be mention on 5th May, 2022 for progress, compliance and further orders. The full hearing still subsist for 7th July, 2022.

The site visit ended at 5.30 p.m. with a word of prayers.

This Site Visit Report Is Made At Mombasa And Dated This.....
14th ...of....march, 2022

Hon. Justice Mr. L.l Naikuni, Environment & Land Court At
Mombasa

56. Based on the Pleadings, the evidence adduced and the contents of the site report there is no doubt that when the Defendant undertook the Construction she obtained all the pre-requisite approvals from the relevant authorities. However, it is abundantly evident that she overlooked undertaking and/or adhering with all the basic public health, construction and Environmental Safety Measures and standards as required by law. Further, she failed to observe the principles of necessity of her neighbors and their peace and enjoyment. She assumed the fact that she had the right to private property under Article 40 (1), (2), (3), (4), (5) and(6) of *the Constitution* of Kenya, the approvals and the resources that was adequate. For instance, she never observed that the Plaintiff equally was entitled to the same fundamental rights to private property and her environmental rights and safety to clean health and environment were assured and safeguarded under the provision of Article 42, 69 and 70 of *the Constitution* of Kenya, 2010. She avoided placing a hoard, high enough and protective kits to avoid debris flying across to the Plaintiff's compound. It was confirmed that the compound by the Plaintiff was full of debris, dust from the cement and forcing her to be using electric fan throughout the day and night to fight off the dust.
57. I dare say that the Defendant was never humble nor having any courtesy. She became blinded to anything else within her way but too ambitious to see to the success of her development. She went ahead on the utilizing the perimeter wall belonging to her neighbour without bothering to consult or seek the consent of the owner to the property. She cause wanton nuisances onto the Plaintiff's compound through wastes and dust. Further, the electric wire on her perimeter wall was damaged extremely to a point of not functioning at all. The Plaintiff and her family never enjoyed peace any more. These were acts of conceit of the highest order. As good neighbours, these acts were unacceptable.
58. The Court finds it callous and insensitive that after subjecting the Plaintiff to all these damages and atrocities, the Defendant through her Counter Claim still wants to be compensated a total sum of Kenya Shillings Ten Million Four Hundred and Twenty Four and Seventy Kshs. 10, 24, 070.0).



The Court sees no justification for it at all as the Court order was granted purely to preserve the environmental situation awaiting hearing of the main suit. In any case, from the site visit and the Defendant and her witnesses conceding was evident enough that the Defendant had no proper claim against the Plaintiff. Indeed, all this led to a Consent being recorded and adopted as a Court order and which facilitated the resumption of the construction works. Thus, in all fairness, the Counter Claim must fail on arrival. If anything is to go by, it is the Plaintiff who ought to be paid general damages for the nuisances caused and not the vice versa.

Issue No. b). Whether there exists any road reserve within the suit land area for the use by other road Users.

59. Under this sub – heading, from the filed pleadings by the Plaintiff particularly the averments made under Paragraph 9 and prayers iii). of the filed Plaintiff, the evidence adduced, the observation from the Site Visit by Court and the submission by parties herein there seem to be some hanging fruits which the Court need not overlook. This is the issue of access road and reserve road. It should not be treated casually nor cosmetically.

Paragraph 9 and Prayer (iii) of the Plaintiff states:

“The Plaintiff states that, the Defendant has also encroached on access road leading to the suit property thereby obstructing its entrance and exit points.....an order directing the Defendant to demolish all the structures encroaching on the Plaintiff’s property and the road reserve which prevents free access ingress and egress to the Plaintiff’s suit property

60. My understanding of the Plaintiff’s allegation was that the Defendant had not only encroached onto the Plaintiff’s suit property but had also interfered with the access road leading to the suit property thereby obstructing its entrance and exit points. According to him, the road reserve prevented free access ingress and egress to the Plaintiff’s suit property and other road users. The Court felt handicapped to sufficiently deal on this rather serious allegation. There was no adequate or useful information on the issue of the road reserve or access road provided from evidence adduced and to the allegation that the development by the Defendant blocked the Plaintiff or other road users from access there properties. Indeed, the Defendant Witness DW - 2 placed great premium into the extract from Paragraph 5 of his report entitled “Planning Consideration and Justification” which held thus:-

“The site has good wide access (sic) being served by a wide access road. As per the planning regulations the road will be adequate for the entry and exit of vehicles into the proposed development, The development on the site leaving adequate set backs for ease of circulation the developers intends (sic) to leave about 60% of the Plot coverage for greenery and circulation. The development will also ensure that appropriate parking, is included in the site.....”

61. My quick reading from this part of the report, the Witness a private Physical Planner engaged by the Defendant concentrated more on justifying the existence of the development being undertaken by the Defendant than providing Court with guidance existing problem on the road access. Indeed, from Courts observation during the site visit and the evidence by the DW – 2 the Land Surveyor in his evidence was candid enough and made some attempts by stating that there was no throughway road connecting the access road from the main Mombasa - Malindi main tarmac road and the other road through the estate. He indicated that one would have to do a turn on reaching the gate for the Defendant’s property on Plot No. MN/I/9961.



62. Due to this inadequacy on the existence of the access or road reserve, and not to be seen to be procrastinating on the matter, I strongly hold there will be great need to cause further interrogation on the allegation to be undertaken by the Coast Regional Surveyor, Mombasa, the Kenya Rural Roads Board (KURA), the Physical Planning department and the County Government of Mombasa and prepare their joint report to be filed in Court through a Miscellaneous application by the parties herein taking that this Court will have become “functus officio” on this proceedings immediately for further direction.
63. Clearly, the Defendant has no independent and separate wall. She relies on the perimeter wall for the Plaintiff. She has only erected four (4) strong pillars onto the wall.
64. For these reasons, I fully concur with the Counsel for the Plaintiff and the principles in the cited authorities of “Stella Muka; Ryland –Versus - Fetcher NLC (Supra) to the effect that in the instant case there has been tortious wrongs committed by the Defendant and which tantamount to acts of nuisance onto the Plaintiff, her family and property and therefore the Defendant must be held liable for that. By arriving at this conclusion, the Honorable Court is further guided by the elaborate Site Visit conducted, the evidence adduced in Court by the Plaintiff, the Defendant herself as DW - 1, DW – 2, DW – 3 and DW – 4 who apparently corroborated on this aspect. The fact that the parties on 27th October, 2022 the parties were able to record and file a Consent on 3rd November, 2022 following the guidance by this Court to explore the provision of Article 159 (2) (c) of *the Constitution* of Kenya to attempt an out of Court negotiation to arrest the nuisance and in order to allow the construction resume, supports this assertion by Court. Indeed, the Consent was adopted as Court order on 22nd November, 2022 in the meantime while awaiting hearing and final determination of the suit.

Issue No. (b) Whether the Parties herein are entitled to the relief sought.

65. As indicated above, the Plaintiff has not been able to demonstrate that under the Provision of Section 3 of the *Trespass Act* and Articles 42, 60 and 68 of *the Constitution* of Kenya 2021, there was a breach of the environment by the Defendant. As a matter of principle, all parties undertaking such development projects have to fully and strictly comply with the basic requirement as demanded under the Environmental laws and regulations – EMCA, Public Health, Physical Planning, County Government regulations and the National Constructions rules and regulations among others.

Undoubtedly, the Defendant from the empirical evidence adduced herein fully complied with the statutory requirements. The only short coming and this was stated clearly from the oral evidence and the observation from the site visit by Court, there was grotesque failure on the enforcement, implementation and adherence with the required conditions. As a result, this acts of omission and commission led to wanton nuisances being created and destruction of property belonging to the Plaintiff. In the course of the construction of her development project, she outrightly failed, neglected and refused to ensure that there were safety measures placed before she undertook the construction works. From this negligence, it cost her to have the construction project stopped by a Court order as it was critical that the situation be ameliorated before it got worse. That is the legal mandate and the purpose of the existence of this Court.

66. As regards, the claim made out under the filed Counterclaim, for the alleged loses and damages incurred from the stoppage of the works in terms of the machineries on ground, labour force, works already undertaken and now wearing out, the finances delay and so forth, I fully concur with the Counsel for the Plaintiff on the legal maxim “Ex Turpi Causa non oritur action” that it’s the Defendant who committed the wrong in the first place and should not be made to benefit from the said wrong. Two



wrongs do not make a right. For these reasons therefore, the Counterclaim fails to succeed for lack of merit whatsoever.

67. Luckily, based on the guidance by the Court and in the interest of justice, while awaiting a full trial, the parties entered into the afore stated consent which was adopted as a Court Order. Upon the Defendant complying with the safety measures the construction resumed.
68. On the allegations perpetrated by the Plaintiff to the effect that there was a road reserve and that this Construction development ;as stated out under the pleadings filed by the Plaintiff, I feel from the Site Visit conducted by Court and the evidence adduced by the witnesses summoned by both the Plaintiff and the Defendant, there was nothing materially tangible nor useful that that Court would rely on to arrive at an informed, reasonable and fair decision with regard to the existence of the access road or a road reserve connecting it to the next main entrance allowing the Plaintiff and other road users access to their properties.
69. Be that as it may, this case though instituted as an ordinary one but its one that raises certain fundamental issues as enshrined under the Bill of Rights of *the Constitution* of Kenya, 2010. I discern that the Plaintiff and the Defendant being neighbours and owners of adjacent plots, there will be need for both of them to recognize that and respect the fact that they all have proprietary rights to their private properties which are well protected under the Provision of Article 40 (1), (2), (3), (4), (5) and (6) of *the Constitution* of Kenya. Additionally, they have at all times uphold and sustain high standards of environmental management and conservation in order to attain a clean and health environment based on the provision of Article 42, 69 and 70 of *the Constitution* of Kenya.

As emphasized herein, there will be need for the Plaintiff and the Defendant to maintain peace and tranquility. They will have to sustain good neighborhood at all costs for the rest of their living together in this area.

Issue No. (c) Who will bear the costs of the Suit.

70. It is now well established that the issue of Costs is at the discretion of the Court (See “Shah – Versus – Mbogo case.....”). Costs means any award that is granted to a party after the conclusion of a legal action, process and proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, 2010 provides that costs follow the event. By event here as has been agreed from myriad of the Courts decisions and precedents it is the result (or outcome) of the said legal action, process and proceedings.
71. In the instant case, while the Plaintiff has been successful in establishing her case while the Counter Claim filed by the Defendant has failed for the elaborate reasons presented in this Judgement. For that reason, therefore, the Plaintiff is entitled to costs of both the suit and for defending the failed Counter Claim to be borne by the Defendant herein.

VI. Conclusion And Disposition

72. In the final analysis, having conducted such an indepth analysis to the framed issues, the Honorable Court is fully satisfied that the Plaintiff has proved her case on the balance of preponderance of probability and thus is entitled to the reliefs sought. For avoidance of doubt, the Court makes the following orders: -
 - a. That Judgment be and is hereby entered in favour of the Plaintiff with Costs subject to the terms and conditions stipulated herein below.



- b. That an order of this Court be and is hereby made that the Counter Claim instituted by the Defendant against the Plaintiff be and is hereby dismissed with Costs.
- c. That an order be and is hereby made that there has been nuisance, negligence and disturbances of the Plaintiff's premises by the Defendant.
- d. That an order be and is hereby made that there has been no encroachment and/or trespass by the Defendant onto the Plaintiff parcel of land as strictly defined by Law whatsoever.
- e. That an order of Permanent Injunction made in favour of the Plaintiff restraining the Defendant, her Agents, Servants and Assigns, from causing any interference, entering, trespassing onto the Plaintiff's parcel of land known as Land Reference No. Sub-division No. 9958/2/MN (Original no. 9617/12/ Section/ Mainland North).
- f. That an order be and is hereby made for the Defendant to ensure that there has been placed the following safety measures onto the site are undertaken within the next thirty (30) days from the date of this Judgement before any continuity of the construction works: -
 - i. Placing of safety hoods and other measures to prevent any environmental the nuisances from occurring.
 - ii. Replacement of the razor electric wires fence belonging to the Plaintiff.
 - iii. Full compliance of all the terms and recommendations of this Court made in its Site Visit report dated 14th March, 2022 and the Consent order by the parties adopted on 22nd November, 2011.
- g. That an order be and is hereby made that the Defendant to erect her own perimeter wall without interfering with the one for the Plaintiff within the next thirty (30) days from the date of the delivery of this Judgement.
- h. That an order of this Court be and is hereby made directing the Coast Regional Surveyor, Mombasa, the Kenya Urban & Rural Authority (KURA) and the Land Registrar, Mombasa within the next thirty (30) days to undertake an intensive survey exercise to ascertain whether there exists a road reserve within this area and whether there is there exists anything that prevents free access ingress and egress to the Plaintiff's suit property and other road users and thereafter furnish this Court with a brief report to that effect.
- i. That the Plaintiff be granted general and exemplary damages a sum of Kenya Shillings Three hundred and Fifty Thousand (Kshs. 350,000/-).
- j. That upon fulfilment of all these pre – conditions, the Defendant be at liberty to proceed on with the constructions of her property in accordance with the approvals granted by the various relevant and statutory agencies and/or authorities hereof.
- k. That the Cost of the Suit to be borne by the Defendant.

It is so ordered accordingly

JUDGMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 16TH DAY OF FEBRUARY, 2023.

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT



MOMBASA

In the Presence of:-

- a. M/s Yumnah, the Court Assistant;
- b. Mr. Nyamboye Advocate for the Plaintiff; and
- c. Mr. Ndege Advocate holding brief for Mr. Daniel Kihiko Advocate for the Defendant;

