Kental Enterprises Ltd v Attorney General & 4 others (Petition 2 of 2019) [2025] KEELC 1470 (KLR) (24 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1470 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION 2 OF 2019

JO MBOYA, J

MARCH 24, 2025

IN THE MATTER OF ARTICLES 10, 23, 40. 47, 60 (1) (B) & 64 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 40, 47 AND 60 (1) (B) OF THECONSTITUTION OF KENYA

BETWEEN

KENTAL ENTERPRISES LTD ..... PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

WATER RESOURCE MANAGEMENT AUTHORITY ..... 3RD RESPONDENT

NATIONAL YOUTH SERVICE ..... 4TH RESPONDENT

THE NAIROBI CITY COUNTY ..... 5TH RESPONDENT

Court awards Kshs. 2,013,500,000 as compensation for the demolition of property without due process

The petitioner challenged demolition of its buildings, alleging violation of its constitutional rights. The court held that the demolition did not follow due process, as no valid enforcement notice mandated removal, and the alleged riparian encroachment was undetermined by competent authorities. The petitioner's title was unimpugned and enjoyed constitutional protection. Declaring the demolition unlawful, the court awarded Kshs. 2,013,500,000 in compensation, Kshs. 50,000,000 exemplary damages, interest, and costs, and absolved the petitioner from rent, rates, and taxes post-demolition.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to property – claim that buildings had been erected on a road reserve and riparian land - what was the procedure to be followed before the demolition of property alleged to have been constructed on a road reserve – Constitution of Kenya, articles 40, 47 and 50.*

Civil Practice and Procedure *– doctrine of exhaustion – applicability of the doctrine of exhaustion - whether the doctrine of exhaustion was applicable where an enforcement notice which underpinned the invocation of the doctrine had ceased to exist.*

Devolution *– county governments – functions of county governments – determination of riparian zones/ reserves - whether county governments had the mandate to determine the extent of the riparian zone/reserve.*

Brief facts

The petitioner sought declarations and compensation arising from the demolition on August 10, 2018 of the buildings situated on the suit properties. The petitioner alleged violation of its constitutional rights, breach of legitimate expectation, and contravention of the Land Act. It sought declarations absolving it from paying rent, rates, and taxes after the demolition, compensation of Kshs. 2,010,732,036 or, in the alternative, Kshs. 2,315,500,000 plus interest, exemplary damages, and findings that certain public officers were unfit to hold office.

The petitioner's case was that the suit properties were lawfully acquired and developed with requisite approvals from the defunct Commissioner of Lands and the Nairobi City Council. It claimed compliance with all legal requirements, payment of rates, possession of an environmental impact assessment licence, and approval for canalization works. The petitioner contended the demolition was undertaken without due process, no valid enforcement notice from the 2nd respondent, the National Environmental Management Authority (NEMA) or the 3rd respondent, the Water Resources Authority (WRA) (formerly Water Resource Management Authority (WRMA)), and caused loss of property and business income.

The respondents filed replying affidavits asserting that the properties encroached on riparian land, which was public land not available for alienation. They maintained that no part development plan existed to validate allocation, and approvals granted were subject to compliance with planning and environmental laws. The respondents claimed the demolition was part of enforcement against illegal structures, and that statutory notices had been issued.

Issues

i. Whether the doctrine of exhaustion was applicable where an enforcement notice which underpinned the invocation of the doctrine had ceased to exist.
ii. What was the procedure to be followed before the demolition of property alleged to have been constructed on a road reserve.
iii. Whether county governments had the mandate to determine the extent of the riparian zone/reserve.

Held

1. Upon issuance of the enforcement notice, the petitioner duly responded to the issues that had been raised by the 5th respondent, Nairobi City County Government. In any event, the question of undertaking alterations and additions to the existing building ceased to be an issue. That was because at the foot of the letter dated July 6, 2018, the alleged alterations and additions to the existing building was no longer highlighted.
2. The letter dated July 6, 2018 came up with new issues, which did not constitute part of the enforcement notice dated May 23, 2018. Furthermore, the letter under reference also captured the issue of encroachment into the riparian reserve and thereafter indicated that the structure encroaching onto the riparian reserve ought to be removed/demolished subject to the determination of the riparian reserve by NEMA and WARMA.

3. The petition was filed long after the building on the suit properties was demolished and thereafter ceased to exist. Furthermore, the demolition complained of took place on the August 10, 2018 whereas the petition was filed in court on the January 22, 2019.
4. The issues raised at the foot of the petition were constitutional in nature and fell outside the ambit, purview and mandate of the liaison committee. The issues under reference could therefore not have been canvassed and or ventilated before the liaison committee or at all.
5. The petitioner, who had raised a plethora of constitutional issues, was at liberty to and within his fundamental rights to approach the Environment and Land Court with a view to vindicating his proprietary rights in respect of the suit properties. The enforcement notice dated the May 23, 2018 ceased to exist taking into account the contents of the letter dated July 6, 2018. For good measure, the contents of the letter under reference, alluded to the determination of the riparian reserve (if any) by the 2nd and 3rd respondents. Any further action (if any) could only ensure upon the determination of the scope of the riparian reserve by NEMA and WARMA and not otherwise. The doctrine of exhaustion had exceptions and a party, the petitioner not excepted (subject to proof) could approach a court of law without necessity of filing the dispute before the statutorily provided forum.
6. The petition was not defeated by the doctrine of exhaustion. By the time the petition was being filed, the enforcement notice which underpinned the invocation of the doctrine of exhaustion, had ceased to exist insofar as the building in question had been demolished and hence it would have been an exercise in futility to purport to approach the Liason Committee.
7. The petitioner was a purchaser of the suit properties and not a direct allottee thereof. To the extent that the petitioner's titles to the suit properties had neither been impugned nor invalidated, the petitioner was entitled to partake of and to benefit from the rights flowing from ownership of the suit properties
8. Unlawful acquisition referred to in article 40(6) of the Constitution must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession.
9. The 1st and 4th respondents contended that what comprised the suit properties was a road reserve and that because same was a road reserve the land in question could not have been sub-divided culminating into the suit properties. However, they did not file any cross petition for purposes of determination by the court as pertained to whether or not the suit properties fell on a road reserve. Furthermore, and even assuming that the contention under reference was correct the 1st and 4th respondents neither issued nor served any notice(s) upon the petitioner in that respect either in accordance with the provision(s) of article 47 of the Constitution or at all.
10. Parties were bound by their pleadings. The 1st and 4th respondents were bound by their replying affidavit and wherein the issue that the suit properties fell on a road reserve was neither raised nor canvassed. From the testimony of RW2, the suit properties did not fall on a road reserve.
11. The petitioner was issued with a certificate of title (lease) over and in respect of the suit property. The certificate of lease under reference had not been impugned; quashed and/or rescinded. The certificate(s) of title/lease held by the petitioner were deemed to be *prima facie* evidence of title until and unless the same had been impeached in accordance with the due process of the law; thus far the certificate(s) of title remained *in situ*. The petitioner had legitimate right(s) to and in respect of the suit properties.
12. The petitioner was issued with certificate of title to and in respect of the suit properties by the designated State departments. The certificate(s) of titles which were issued in respect of the suit properties had neither been impugned nor invalidated in accordance with the law. For as long as the certificate(s) of titles remained *in situ*, the petitioner was entitled to the constitutional protection espoused vide article 40(3) as read together with article 60(1)(b) of the Constitution, which underpinned the security of land rights including title to land.

13. The offensive demolition was undertaken with the involvement, participation and blessings of the respondents save for the 4th respondent (National Youth Service). The impugned action could not have been undertaken without regard to the due process of the law. Due process of the law envisaged that before any adverse action or decision was taken against a citizen, the petitioner not excepted, such citizen was entitled to due notice. Moreover, the petitioner was also entitled to partake of and benefit from the right to fair hearing as enshrined in article 50 of the Constitution. No adverse decision could have been made against the petitioner and/or its properties without having been afforded the right to be heard.
14. The petitioner was entitled to the right to fair administrative action, in accordance with the provisions of article 47 of the Constitution. In that regard, no adverse action could be taken without compliance with article 47 as read together with the provisions of the Fair Administration Action Act. The only notice (enforcement notice) which was issued to the petitioner was the one dated May 23, 2018. The impugned enforcement notice did not call upon the petitioner to demolish the building that was standing on the suit properties. Besides, the 5th respondent did not indicate that in the event of default, any demolition would be carried out and/or undertaken.
15. The enforcement notice had been substantially negated by the 5th respondent's own letter dated July 6, 2018 and in respect of which the 5th respondent changed tune from what was hitherto conveyed vide the enforcement notice. At the foot of the letter dated July 6, 2018 the 5th respondent was highlighting encroachment into the riparian reserve and calling upon the petitioner to demolish the part of the building encroaching onto the riparian reserve subject to determination by NEMA and WARMA.
16. The offensive demolition could not be undertaken on the basis of the enforcement notice issued on the May 23, 2018. The enforcement notice did not relate to the demolition of the building on the suit property and thus same could not be relied upon to support the unconstitutional and barbaric demolition. On the contrary, the enforcement notice issued on May 23, 2018 only called upon the petitioner to stop what was alleged to be illegal alterations and additions to the existing building and not otherwise. Further and in any event, the alterations, additions and renovations that were being undertaken by the petitioner were duly approved by the 5th respondent in terms of the approved building plan(s), which were forwarded to the same. Even taking into account the allegations that were captured at the foot of the enforcement notice, the same were made for convenience and were thus built on quick- sand.
17. The contention that the building on the suit property encroached onto the riparian zone was captured at the foot of the letter dated July 6, 2018 by the 5th respondent. However, the only statutory body mandated to determine the extent of the riparian zone/reserve was the WRA. The 3rd respondent had neither issued nor served any enforcement notice. Furthermore, the 3rd respondent had neither visited the suit properties nor demarcated the extent of the riparian reserve/zone. The WRA had not undertaken the marking of the extent of riparian reserve or zone by the time the building on the suit property was demolished. The allegations being thrown across the board by the respondents fell within what was commonly referenced as the kicks of a dying horse.
18. None of the allegations was ever forwarded to the petitioner before the offensive demolition. Instructively, if the allegations were credible and plausible, then the respondents ought to have complied with the provisions of articles 10(2), 27(1) and (2), 47 and 50 of the Constitution. Having not complied with the constitutional imperatives, the rights and fundamental freedoms of the petitioner were violated, breached and infringed upon without due regard to the law. The actions complained of were indeed arbitrary, whimsical, callous, barbaric and oppressive. Such action, nay omission(s) must not be allowed to rear its ugly head under the current constitutional dispensation. The petitioner was denied and deprived of the due process of the law and the constitutional right of fair protection and benefit under the law.

19. The 15% disturbance allowance was an item that was only provided for under the repealed Land Acquisition Act. The 15% disturbance allowance was only claimable and payable where the designated property was the subject of compulsory acquisition in accordance with the provisions of the repealed Land Acquisition Act and pursuant to section(s) 109 to 113 of the Land Act.
20. The element of 15% statutory disturbance allowance, which had been captured in the valuation report was neither claimable nor payable in the instant circumstances. For good measure, the instant dispute did not concern compulsory acquisition of the suit properties as known to law or at all. In any event, there was nothing known as constructive compulsory acquisition. On the other hand, the report contained the aspect of the current market value of the suit properties. In any event, the market values highlighted had not been controverted by any other expert evidence (valuation report). In the absence of a contrary valuation report, the values that had been highlighted by PW7 sufficed. The respondents did not procure and/or obtain any contrary valuation report. The valuation report tendered by PW7 spoke to the market values of the suit properties.
21. According to the testimony of PW6, exhibit P38 was never signed nor authenticated. In that regard, the document (financial report) under reference was devoid of probative value and hence could not underpin the claim for Kshs.114, 000, 000 which was claimed on account of loss of business. At any rate, the petitioner did not plead the claim for loss of business (income).
22. The manner in which the offensive demolition was carried out and undertaken befit an award of exemplary damages. Perpetrators of the offensive demolitions were State agents, organs and/or departments, who ought to have known better. Moreover, the offensive activities were being carried out and undertaken on the face of article(s) 1 and 10 of the Constitution which commanded the State, the State organs and all persons to adhere to and comply with the Constitution. The petitioner was entitled to an award of exemplary damages.

Petition partly allowed.

Orders

i. *A declaration was issued that the demolition of the petitioner's property situated on the suit properties constituted a violation, by the State, of its legitimate expectation and constitutional rights as guaranteed under article 10 of the Constitution of Kenya.*
ii. *A declaration was issued that the petitioners rights to acquire and own property without arbitrarily being deprived of the same as guaranteed by article 40 of the Constitution of Kenya was violated by the State following the demolition of the building that was erected on the suit properties on August 10, 2018.*
iii. *A declaration was issued that the demolition of the petitioner's property situated on the suit properties was undertaken without due process and therefore violated the petitioner's constitutional rights as guaranteed under article 47 of the Constitution of Kenya.*
iv. *A declaration was granted that the petitioner was not responsible for paying any land rent, rates and any taxes from the date of demolition of the suit properties.*
v. *A declaration was issued that the respondents, their respective agents, servants and or employees and the Government of Kenya, had arbitrarily and compulsorily deprived the petitioner of its properties and buildings built thereon.*
vi. *Judgment was entered for the petitioner, against the 1st, 2nd, 3rd and 5th respondents, either jointly and /or severally in the sum of Kshs. 2,013,500,000 only being compensation for the values of the suit properties.*
vii. *Exemplary damages were awarded in the sum of Kshs. 50, 000, 000 only.*
viii. *Subject to receipt of the compensation in term(s) of clause vi above, the petitioner shall surrender the certificate(s) of title to the Chief Land Registrar for purposes of cancellation to avoid unjust enrichment.*
ix. *The award in terms of vi shall attract interests at court rates 14% per annum w.e.f the January 22, 2019 (date of filing of petition).*
x. *The award in terms of clause vii shall attract interests at court rates 14% per annum w.e.f the date of judgment.*

xi. *Costs of the suit were awarded to the petitioner as against the 1st, 2nd, 3rd and 5th respondents, jointly and/or severally.*

xii. *The costs in terms of clause xi shall be agreed upon and in default to be taxed in the conventional manner.*

xiii. *Any other relief(s) not expressly granted were denied.*

Citations

Cases

Kenya

1. *Arnacherry Limited v Attorney General* Petition 248 of 2013; [2014] KEHC 8304 (KLR) - (Explained)
2. *Attorney General v Zinj Limited* Petition 1 of 2020; [2021] KESC 23 (KLR) - (Followed)
3. *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* Petition 15 of 2020; [2023] KESC 14 (KLR) - (Followed)
4. *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* Civil Appeal 17 & 18 of 2015 (Consolidated); [2015] KECA 397 (KLR) - (Explained)
5. *Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "Kenyac") & another* Appeal 80 of 2017; [2022] KECA 870 (KLR) - (Followed)
6. *Embakasi Properties Limited & Safe Cargo Limited v Commissioner of Lands & Attorney General* Civil Appeal 276 of 2008; [2019] KECA 1001 (KLR) - (Explained)
7. *Githinji, Elizabeth Wambui & 29 others v Kenya Urban Roads Authority [KURA]* Civil Appeal 156 & 160 of 2013; [2019] KECA 706 (KLR) - (Explained)
8. *Independent Electoral and Boundaries Commission & another v Mule & 3 others* Civil Appeal 219 of 2013 ; [2014] KECA 890 (KLR) - (Followed)
9. *Kental Enterprises Limited v Attorney General & another* HCC [ELC] Case No 105 of 2010 - (Followed)
10. *Kenya Power & Lighting Company Ltd v Ringera & 2 others* Civil Appeal E247 & E248 of 2020 (Consolidated); [2022] KECA 104 (KLR) - (Followed)
11. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR)
12. *Kuria Greens Limited v Registrar of Titles & another* Petition 107 of 2010; [2011] KEHC 4290 (KLR) - (Explained)
13. *Mbogori, Godfrey Julius Ndumba & another Ltd v Nairobi City County* Civil Appeal 55 of 2012; [2018] KECA 702 (KLR) - (Explained)
14. *Mohansons (Kenya) Limited v Registrar of Titles, Mary Murtazza Ondatto & Attorney General* Petition 103 of 2012; [2017] KEELC 2730 (KLR) - (Explained)
15. *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* Petition E007 of 2023; [2023] KESC 113 (KLR) - (Explained)
16. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* Presidential Election Petition 1 of 2017; [2017] KESC 42 (KLR) - (Followed)
17. *Power Technique Limited v Attorney General & 2 others* Petition 178 of 2011; [2012] KEHC 5390 (KLR) - (Followed)
18. *Ramogi, William Odhiambo & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018; [2020] KEHC 10266 (KLR) - (Explained)
19. *Shollei & another v Judicial Service Commission & another* Petition 34 of 2014; [2018] KESC 42 (KLR) - (Explained)
20. *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others* Civil Appeal E330 of 2020; [2024] KECA 1102 (KLR) - (Followed)

21. *Wanjohi, Isaac Gathungu & another v Attorney General & 6 others* Petition 154 of 2011; [2012] KEHC 5200 (KLR) - (Explained)
22. *Whitehorse Investments Ltd v Nairobi City County* Civil Appeal 1 of 2019; [2019] KECA 102 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 10, 27, 40, 47, 50; Chapter 6- (Interpreted)
2. Energy Act (cap 314) In general - (Cited)
3. Evidence Act (cap 80) sections 107, 108, 109 - (Interpreted)
4. Fair Administrative Action Act (cap 7L) In general - (Cited)
5. Land Acquisition Act (repealed) (cap 295) In general - (Cited)
6. Land Act (cap 280) sections 109, 113 (Interpreted)
7. Physical Planning Act (repealed) (cap 286) - (Interpreted)
8. Water Act (cap 372) In general - (Cited)

Advocates

None mentioned

JUDGMENT

Introduction and Background:

1. the petitioner approached the court vide Petition dated the January 11, 2019; and wherein the petitioner sought for various relief[s]. The Petition was subsequently amended and thereafter further amended culminating into the Further amended Petition dated the March 15, 2022; and wherein the petitioner herein has sought a plethora of reliefs.

2. The relief[s] sought at the foot of the Further amended Petition are as hereunder;

    i. A Declaration that the demolition of the petitioners property situated on LR No 209/11307 and LR No 209/11308 constituted a violation, by the State, of its Legitimate Expectation and Constitutional Rights as guaranteed under article 10 of the *Constitution* of Kenya.

    ii. Declaration that the petitioners rights to acquire and own property without arbitrarily being deprived of the same as guaranteed by article 40 of the *Constitution* of Kenya was violated by the State following the demolition of the building that was erected on LR No 209/11307 and LR No 209/11308 on 10th August 2018.

    iii. A Declaration that the demolition of the petitioners property situated on LR No 209/11307 and LR No 209/11308 was undertaken without due process and therefore violated the petitioners Constitutional Rights as guaranteed under article 47 of the *Constitution* of Kenya.

    iv. A Declaration that the respondents contravened Sections 152A to 152G of the *Land Act*, 2012; and are wholly responsible for all the losses and damages occasioned to the petitioner's tenants in the suit premises LR No 209/11307 and LR No 209/11308.

    v. A Declaration that the petitioner is not responsible for paying any land rent, rates and any taxes from the date of demolition of the properties LR No 209/11307, LR No 209/11308 and LR No 209/12289.

vi. A Declaration that the respondents, their respective agents, servants and or employees and the Government of Kenya, have arbitrarily and compulsorily deprived the petitioner of its properties and buildings built thereon on LR No 209/11307, LR No 209/11308 and LR No 209/12829 Westlands Nairobi.

vii. Judgment be and is hereby entered for the petitioner, against the respondents, either jointly and /or severally in the sum of Kenya Shillings 2,010,732,036 as set out in paragraph 16 of this amended petition

viii. Alternatively to (vii) above, Judgment in favour of the petitioners against the respondents for the sum of Kshs 2,315,500,000 Only, plus interest at court rates from the August 10, 2018.

ix. Exemplary damages.

x. A Declaration that all the Principal Officer[s] of the respondents who gave instructions for the demolition orders breached their obligations under chapter 6 of the *Constitution* and are unfit to hold public office.

xi. Such further orders as the court may deem just and expedient be issued.

xii. Costs of the suit.

xiii. Interest[s] on the sum claimed herein at court rates from August 10, 2018(date of demolition) until payment in full.

3. Upon being served with the original Petition, the 1st and 4th respondents filed a replying affidavit sworn on the September 9, 2019. For coherence, the replying affidavit on behalf of the 1st and 4th respondent was sworn by one, namely; Edwin Munoko Wafula and to which the deponent annexed assorted documents.

4. Additionally, the 1st and 4th respondents, who are represented by the Honourable Attorney General also filed witness statement[s] by Timothy Wayaiwa Mwangi and Wilfred Muchai, respectively. Furthermore, the 1st and 4th respondents also filed a List and bundle of documents dated July 12, 2022.

5. The 2nd respondent filed a replying affidavit sworn by one Zephania Owuor Ouma. Same was sworn on the February 14, 2020.

6. The 3rd respondent filed a replying affidavit sworn by John M Kinyanjui and same was sworn on the 5 September 2022. Suffice it to state that the replying affidavit under reference contained several annexures.

7. The 5th respondent filed a replying affidavit sworn by Wilfred Wanyonyi Masinde on the 27 July 2022. Similarly, the replying affidavit contains various annexures including a copy of the enforcement notice dated the 23 May 2018; and which was addressed to the petitioner herein.

8. the petitioner filed additional documents including the witness statements of Bimal Shah, Satish Shah, Suleiman A Harunani and James Muthama, respectively. Suffice it to state that the totality of the documents and witness statement[s] filed by the Parties shall be reverted to in due course.

9. The subject Petition came up for directions on various dates resting with the 14 July 2022; when the parties confirmed that same had duly filed and exchanged their respective responses and documents. Furthermore, the parties agreed that the Petition shall proceed *vide* viva voce evidence.

10. Arising from the foregoing, the court proceeded to and indeed directed that the instant Petition shall be canvassed by way of *viva voce* evidence and thereafter the court issued date[s] for hearing of the Petition.

Evidence by the Parties':

a. Petitioner's case

11. the petitioner's case is anchored on the evidence of seven [7] witness namely; Bimal S Shah, Satish Shah, Suleiman Abdul Shakur Arunani, Isaac Ganthangu Wanjoi, David Gathegu Mwaniki, Mohammed Asif Chaudhry and James Muthama Musau. Same testified as PW1, PW2, PW3, PW4, PW5, PW6 and PW7, respectively.

12. It was the testimony of Bimal Shah [PW1] that same is a director of the petitioner herein. Furthermore, the witness averred that by virtue of being a director of the petitioner company same [witness] is therefore conversant with and knowledgeable of the facts of the instant matter.

13. Moreover, the witness averred that same has since recorded and filed a witness statement dated the 15 march 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief. The witness statement under reference was thereafter adopted and constituted as the evidence in chief of the witness.

14. Additionally, the witness adverted to the supporting affidavit sworn in support of the Petition. Thereafter the witness also sought to adopt and rely on the contents of the supporting affidavit as his further evidence in chief. Instructively, the supporting affidavit was duly constituted as further evidence in chief of the witness.

15. Furthermore, the witness referenced the List and Bundle of documents dated the 15 March 2022, and thereafter sought to produce various documents as exhibits on behalf of the petitioner. Nevertheless, the production of diverse document[s] was objected to by learned counsel for the respondents.

16. Arising from the objection taken by the learned counsel for the respondents, documents numbers 5, 7, 15, 16, 20, 22, 23, 25, 26, 27, 28, 30, 31 and 32, respectively were marked for identification insofar as same were expert documents and thus could only be produced by their makers.

17. On the other hand, the rest of the documents at the foot of the list and bundle of documents dated the 15th March 2022 were duly tendered and admitted as exhibits P1, P2, P3, P4, P8, P10,P11, P12, P13, P14, P17, P18, P19, P21, P24 and P29, respectively.

18. The witness further referenced the list and bundle of documents dated the 6 June 2022 containing 9 documents and which documents the witness sought to rely on. Suffice it to state that the witness implored the court to mark the documents for identification [MFI] pending production by their respective makers. To this end, the documents at the foot of the list dated the 6 June 2022 were duly marked as MFI 33 to 41, respectively.

19. the petitioner also referenced a Supplementary List and Bundle of document dated the 31 October 2022 containing four [4] documents and which documents were marked for production as MFI 42 to 45, respectively.

20. Other than the foregoing, the witness adverted to the Further amended Petition dated the 15 march 2022; and whose contents the witness sought to adopt and rely on. Furthermore, the witness invited the court to grant the reliefs sought thereunder.

21. On cross examination by learned counsel for the 1st and 4th respondents, the witness averred that the Petition beforehand has been filed by the petitioner. In addition, the witness averred that the petitioner generated resolutions authorizing the filing of the Petition. Nevertheless, the witness admitted that the resolutions by the petitioner have not been filed before the court.

22. It was the further testimony of the witness that the Petition herein touches on and concerns three [3] properties, namely; LR No 209/11307, LR No 209/11308 and LR No 209/12829, respectively.

23. Besides, the witness averred that LR No 209/11307 was purchased from Africana Apartment Limited.

24. It was the further testimony of the witness that same was not a director of Africana Apartment Ltd. Nevertheless, the witness added that his father [now deceased] was a director of Africana Apartment Ltd.

25. The witness further testified that same did not play any role in the purchase and/or acquisition of LR No 209/12829. However, the witness confirmed that the said property was also purchased by the petitioner.

26. Whilst still under cross examination, the witness averred that the first time same [witness] was informed that the land was riparian land was in the year 2009. Furthermore, the witness averred that information alluding to the land forming part of riparian land/reserve was relayed vide a notice from the office of the Commissioner of Land [now defunct].

27. However, the witness added that the petitioner herein challenged the legality of the notice from the commissioner of land vide suit filed in court.

28. It was the testimony of the witness that the suit properties were developed with the approval of the Commissioner of Lands [now defunct]. In this regard, the witness referenced the approvals contained at the foot of pages 701 to 706 of the List and Bundle of documents dated the 6 June 2022.

29. Moreover, the witness testified that the petitioner has been paying rates and rents to the relevant authorities. In any event, the witness averred that same has tendered and produced before the court evidence confirming payment[s] of rates and rents.

30. The witness further averred to an Enforcement notice which was issued and served upon the petitioner. In this regard, the witness testified that the Enforcement notice was issued by the 5th respondent, namely; the City County Government of Nairobi.

31. It was the further testimony of the witness that the Enforcement notice has never been challenged to date.

32. On cross examination by learned counsel for the 2nd respondent, the witness averred that the suit properties which underpin the instant Petition are adjacent to one another. Furthermore, the witness averred that the petitioner submitted the application for approval for various purposes.

33. It was the further testimony of the witness that the petitioner similarly submitted an application for approval for canalization of the river. In particular, the witness averred that the application was submitted in the name of the petitioner.

34. The witness further testified that the petitioner was duly issued with the Environmental Impact Assessment [EIA] licence. Nevertheless, the witness added that the licence contained various conditions, which were to be complied with by the petitioner in the course of undertaking the canalization.

35. Whilst under further cross examination, the witness averred that the building on the suit properties was subsequently demolished on the 10 August 2018. Furthermore, the witness averred that the 2nd respondent did not issue any Enforcement notice to the petitioner.

36. It was the further testimony of the witness that there was no challenge to the Environmental Impact Assessment licence [EIA] which was issued by the 2nd respondent, namely; National Environmental Management Authority [NEMA].

37. On cross examination by learned counsel for the 3rd respondent, the witness averred that the petitioner is claiming the sum of Kes 878, 828, 400.00 only on account of the costs of restoration of the building. However, the witness admitted that the building in question was erected/ constructed in 1994/1995.

38. Whilst still under cross examination, the witness averred that same [Witness] is not aware whether there was an approval to construct the building from the Commissioner of land [now defunct].

39. The witness further testified that the building in question was a commercial building. Nevertheless, the witness added that by the time the petitioner acquired the suit properties two [2] of the properties were already developed.

40. It was the testimony of the witness that LR No 209/11307 was purchased for Kes 12, 000, 000 only, while LR No 209/s purchased for the sum of Kes 260, 000, 000/ only.

41. Whilst still under cross examination, the witness averred that the petitioner herein sought for approval to expand the Box Culvert. Moreover, the witness stated that the application for approval was made to the 5th respondent herein [Nairobi City County Government]. Nevertheless, the witness averred that the proposed expansion of the box culvert was not undertaken.

42. On further cross examination by learned counsel for the 3rd respondent, the witness averred that the building on the suit properties was demolished before the proposed/ approved expansion of the box culvert was undertaken.

43. It was the testimony of the witness that the petitioner has approached the court with a view to seeking compensation for the lose of land as well as loss of business/ income.

44. On cross examination by learned counsel for the 5th respondent, the witness averred that the properties were developed by the time the petitioner bought/acquired same. Furthermore, the witness added that the buildings must have been constructed with the approval of the City Council of Nairobi [now defunct].

45. It was the further testimony of the witness that the petitioner herein was served with an Enforcement Notice. In addition, the witness averred that upon receipt of the Enforcement notice, the petitioner wrote back to the 5th respondent.

46. Additionally, it was the testimony of the witness that the Letter by and on behalf of the Petition dated the 29 May 2018 was duly received and acknowledged by the 5th respondent. Besides, the witness averred that the 5th respondent thereafter wrote back acknowledging the petitioner's response to the Enforcement notice.

47. Whilst still under cross examination, the witness averred that the petitioner did not challenge the Enforcement notice. In particular, the witness averred that the petitioner did not file any complaint or Appeal with the Liaison Committee.

48. The second witness who testified on behalf of the petitioner was Satish Shah. Same testified as PW2.

49. It was the testimony of the witness [PW2] that same is Architect by profession. Furthermore, the witness averred that same is conversant with the facts of this matter.

50. It was the further testimony of the witness that same has since recorded and filed a witness statement dated the 6th June 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state, that the witness statement dated the 6th June 2022 was duly admitted and constituted as the evidence in chief of the witness.

51. Moreover, the witness [PW2] also referenced the further witness statement dated the 28 October 2022 and which statement the witness sought to adopt and rely on as his further evidence in chief. Instructively, the further witness statement was duly adopted and constituted as the evidence in chief of the witness.

52. Other than the foregoing, the witness adverted to various documents, namely; documents numbers 1, 2, 3, 4, 5; 7, 26, 27, 36, 40, 42, 43, 44 and 45 respectively and which documents the witness sought to tender and produce as exhibit[s] before the court. There being no objection, the various documents were duly tendered and admitted as exhibits on behalf of the petitioner.

53. On cross examination, by learned counsel for the 1st and 4th respondents, the witness testified that same is an architect by profession. Furthermore, the witness averred that same qualified in the year 1976.

54. It was the further testimony of the witness that same was appointed by M/s Mangoose Ltd to prepare the drawings in respect of the suit property. In particular, the witness averred that the building on the suit property was indeed designed by himself.

55. Upon being referred to the Survey Plan [F/R] filed by the Honourable Attorney General on behalf of the 1st and 4th respondents, the witness averred that same was able to see the suit property on the survey plan. Furthermore, the witness averred that the building was standing on LR No 1870/1/476. Besides, the witness testified that the plot in question had an original number, namely, 1870/213/2.

56. Whilst under cross examination, the witness averred that same prepared the building plans [Drawings] according to the title that were given to him. Moreover, the witness testified that prior to the constructions there was a requirement for the developer to submit the plans to the commissioner of lands. Nevertheless, the witness averred that same [witness] did not submit the plans to the commissioner of lands.

57. It was the further testimony of the witness that same however submitted the plans to the planning authority, namely, the City Council of Nairobi [now defunct].

58. On further cross examination, the witness averred that the building which was hitherto standing on the suit properties was demolished. However, the witness added that same could not confirm the person who demolished the building in question.

59. It was the further testimony of the witness that the 5th respondent herein served an Enforcement notice. Furthermore, the witness averred that the notice in question required the petitioner to submit the approved building plans to the 5th respondent. To this end, the witness testified that the petitioner duly complied with the demand at the foot of the Enforcement notice.

60. It was the testimony of the witness that the petitioner forwarded the approved building plans to the Director of Physical Planning, Nairobi city County Government.

61. Whilst still under cross examination, the witness averred that same was equally aware of a previous Enforcement notice which had been issued. In any event, the witness clarified that the Enforcement notice was in respect of an alleged encroachment onto a road reserve. Nevertheless, the witness added that same was not aware whether the building in question had encroached onto any road reserve.

62. On further cross examination by Learned counsel or the 1st and 4th respondents, the witness averred that no building was erected/constructed on the canalized stream. Furthermore, the witness averred that the canalized stream had no development thereon.

63. On cross examination by Learned counsel for the 3rd respondent, the witness averred that same is aware of the contents of the Letter at page 706 of the petitioner's bundle of documents. Furthermore, the witness averred that the Letter in question was addressed to him [Witness] in person.

64. It was the further testimony of the witness that upon receipt of the Letter under reference, same [witness] went to the City Council of Nairobi and talked to the designated officer.

65. Whilst still under cross examination, the witness averred that same is not aware whether the petitioner herein challenged the contents of the Letter dated the 6th July 2018.

66. It was the further testimony of the witness that the renovation[s] which were being undertaken in the buildings standing on the suit properties were duly approved by the City Council of Nairobi [now defunct]. To this end, the witness referenced the documents at page 713 in the petitioner's bundle of documents. In any event, the witness testified that the internal renovations were completed.

67. Moreover, it was the testimony of the witness that the building which was constructed on the suit properties was approximately 5 meters from the canalized stream.

68. On cross examination by Learned counsel for the 5th respondent, the witness averred that same is the one who developed the building plans [Drawings] and thereafter submitted same for approval by the City Council of Nairobi [now defunct].

69. In addition, the witness averred that the document at page 708 of the petitioner's bundle of documents show that the canalized stream is at the side of the Building Plan [Drawings].

70. Upon being referred to the document at page 740 of the petitioner's List and Bundle of documents, the witness stated that the document in question is the Enforcement notice. Furthermore, the witness averred that the Enforcement notice was never revoked.

71. It was the further testimony of the witness that same [witness] is no aware whether the petitioner herein ever approached the 2nd and 3rd respondents to determine the riparian reserve/Land or at all.

72. The 3rd witness who testified on behalf of the petitioner was Suleiman A. Harunani. Same testified as PW3.

73. It was the testimony of the witness [PW3] that same is a licensed; registered and practising surveyor and thus authorized to undertake survey works. Furthermore, the witness averred that same is conversant with the facts of this case.

74. The witness further stated that same has since recorded a witness statement dated the 15 May 2023 and which witness statement the witness [PW3] sought to adopt and rely on as his evidence in chief. In this regard, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

75. The witness also adverted to the List and Bundle of documents dated the 15 march 2023; and thereafter referenced three [3] documents which had hitherto been marked for identification as PMFI 31 and 36, respectively.

76. In addition, the witness sought to tender and produce the documents under reference. In this regard, the said documents were tendered and admitted as exhibit[s] P31 and P36, respectively.

77. It was the further testimony of the witness that same has also availed to the court two [2] sets of Certificate[s] of good standing issued by the Institution of Surveyors of Kenya [ISK]. In this regard, the witness tendered and produced same [certificates of good standing] as exhibits P42 and 43, respectively]

78. On cross examination by learned counsel for the 1st and 4th respondents, the witness averred that same received instructions immediately after the demolition of the building.

79. The witness further averred that the instructions were formal and in writing. Nevertheless, the witness added that same has not produced a copy of the Letter of instruction.

80. It was the further testimony of the witness that the instructions given were to ascertain whether River Kibarage was indeed a river or a stream. Furthermore, the witness averred that the instructions also touched on ascertainment/discernment of the extent of the riparian reserve or otherwise.

81. Whilst under further cross examination, the witness averred that same procured several maps/ Survey Plan[s] from the Directorate of survey and thereafter referenced the maps in an endeavour to ascertain the extent [if any] of the riparian reserve.

82. It was the further testimony of the witness that same did not carryout any physical survey. In any event, the witness added that there was no need for him to carry out a physical survey.

83. The witness further testified that the various maps and survey plans which same relied on have been tendered and produced before the court. Nevertheless, upon being referred to Cadastral Plan Number 72/95 contained at page 3 of the 1st respondent's bundle, the witness averred that same relates to a sub-division of the land shown therein.

84. Moreover, the witness averred that the land which was the subject of sub-division vide Survey Plan [F/R] number 72/95 is LR No 1870/1/10/3. In addition, the witness averred that the Cadastral Plan also reference a canalized stream.

85. It was the further testimony of the witness that the cadastral Clan is a reflection of the Deed Plan. In addition, the witness averred that the Deed Plan should not necessarily agree with the Cadastral Plan.

86. Whilst still under cross examination, the witness testified that the Director of Survey has a discretion in terms of the preparation of the Deed Plan. Upon being referred to Deed Plan number 60044 contained in the Honourable Attorney General's bundles of document, the witness averred that the document in question shows the shaded/coloured portion. Furthermore, the witness averred that the shaded/coloured portion relates to the same portion of the suit property.

87. It was the further testimony of the witness that the shaded/coloured area relates to three [3] pieces of land for purposes of surrender for roads.

88. On further cross examination, the witness averred that the shaded/coloured portions were for the purposes of the road. Upon being referred to the Surrender Plan and Deed Plan Number 60044, the witness averred that the date shown at the foot of the Plan is 11 August 1988.

89. Additionally, the witness averred that the Cadastral Plan references the sub-division of LR No 1870/1/213. To this end, the witness stated that the parcel that was the subject of the subdivision of the portion that had been surrendered for the road. Furthermore, the witness averred that it is the portion in question that gave rise to LR No 1870/1/13/1.

90. Upon being referred to cadastral plan before the court, the witness averred that same relates to LR No 209/12829. In any event, the witness averred that LR No 209/12829 is related to the suit property to the extent that the same are in the same locality/area.

91. Whilst still under cross examination, the witness averred that Cadastral Plan number 188/13 relates to L.R No's 209/12828 and L.R No 209/12829, respectively. In addition, the witness averred that the cadastral plan under reference relates to the portion that was surrendered for the road.

92. On cross examination by Learned counsel for the 2nd respondent, the witness averred that same received instructions from the petitioner shortly after the demolition of the buildings on the suit property. However, the witness could not ascertain/confirm the exact date when instructions were given.

93. The witness further testified that upon receipt of the instructions, same [Witness] undertook the designated assignment and thereafter prepared a report. To this end, the witness has referenced the Report dated the 22nd November 2021.

94. It was the further testimony of the witness [PW3] that same visited the locus in quo prior to and before the preparation of the report. Moreover, the witness averred that the contents of the report are clear and same have alluded to the position of the canalized stream.

95. On cross examination by Learned counsel for the 3rd respondent, the witness averred that same has been a licensed and practising surveyor for more than 43 years. In addition, the witness averred that same had interacted with the suit properties earlier on. To this end, the witness stated that same interacted with the suit properties around the year 1982.

96. It was the further testimony of the witness that the stream in question has been in existence and hence same is not a recent development.

97. It was the further testimony of the witness that the shaded/ coloured portions on the Cadastral Plan relate[s] to a road reserve. Furthermore, the witness averred that the parcel before the court relates to the portion that was reserved for a road. In any event, the witness averred that same has not come across any Part Development Plan [PDP] setting aside the portion in question for private use/alienation.

98. Whilst still under cross examination, the witness averred that same has perused various Survey Plans and documents at the Directorate of survey, but same has never come across any surrender documents in respect of the portion that was previously reserved as a road.

99. It was the further testimony of the witness that even where land is reserved has a road reserve, such land can be allocated. However, the witness clarified that the Government would be obliged to declassified the land and thereafter a Part Development Plan [PDP] would be prepared.

100. In addition, the witness averred that it is upon the preparation and circulation of the Part Development Plan [PDP] that the Commissioner of land [now defunct] would be at liberty to issue a Letter of allotment.

101. It was the further testimony of the witness that same was present when the demolition was undertaken. Furthermore, the witness averred that same received information that the demolition in question was done and undertaken by the City County Government of Nairobi.

102. Moreover, the witness testified that same is conversant with the area. The witness further averred that the area is prone to floods. The witness added that the cause of the floods is as a result of the poor culvert installed by the City County of Nairobi and poor drainage system.

103. On cross examination by Learned counsel for the 5th respondent, the witness averred that there was a stream in the area around the year 1982. In addition, the witness averred that same was informed that the petitioner sought for and obtained permission to construct on the stream.

104. Whilst under further cross examination, the witness averred that the offensive demolition was done by the County Government of Nairobi. Furthermore, the witness added that the County Government officer[s] were present when the demolition was being done.

105. On re-examination, the witness averred that cadastral plan number 72/95 is connected to the suit properties. Furthermore, the witness added that the cadastral plan in question is dated 20 July 1955.

106. Besides, the witness averred that the cadastral plan is connected and related to cadastral plan number 56/3. The said cadastral plan shows that the property in question has been subdivided into three portions.

107. Whilst still under re-examination, the witness averred that cadastral plan number 56/3 does not show surrender of the property as a road.

108. Upon being referred to cadastral plan number 72/19, the witness averred that same shows sub-division into smaller portions. In addition, the witness averred that the smaller portions are eight [8] in number.

109. It was the further testimony of the witness that cadastral plan number 190/94 is dated 11 August 1988. Furthermore, the witness averred that the suit properties are captured by and discernable from the said cadastral plan. The witness added that the cadastral plan number 190/94 also contains other details relating to the history of the plot.

110. Whilst still under re-examination, the witness averred that cadastral plan number 288/183 is also related to the suit properties. In particular, the witness averred that the suit properties are alluded to as abbuttals.

111. It was the further testimony of the witness that the sub-division contained at the foot of FR No 7295 was done on the 9 July 1955. In addition, the witness averred that the road reserve was created after the subdivision.

112. Additionally, it was the testimony of the witness that FR No 72/95 relates to the subdivision of LR No 1870/10. Furthermore, the witness referenced Cadastral Plan number 288/3 and thereafter stated that the same serves the purpose of sub-division.

113. Upon being referred to Cadastral Plan 190/44 [document number 7 in the Honorable Attorney General's bundle] the witness averred that the said Cadastral Plan relates to two [2] plots.

114. Finally, the witness testified that there was a road reserve which was allocated by the Government. The road reserve was created first and thereafter allocated by the Government.

115. The fourth witness who testified on behalf of the petitioner was Isaac Gathangu Wanjohi. Same testified as PW4.

116. It was the testimony of the witness that same is conversant with the facts of this matter. Furthermore, the witness avers that same has since recorded a Witness statement dated the 6 June 2022; and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

117. Additionally, the witness averred that same has since alluded to various documents at the foot of the witness statement. In this regard, the witness sought to tender and produce the documents as exhibits before the court.

118. Though the request by the witness to produce the documents as exhibits before the court was objected to, the court rendered and delivered a ruling; and thereafter the documents were tendered and admitted as exhibits P22, 33, 34 and 39, respectively.

119. On cross examination by learned counsel for the 1st and 4th respondents, the witness averred that same requested for and perused various documents at the department of survey; city county government of Nairobi and the land registry, respectively. Nevertheless, the witness clarified that the request was not reduced into writing.

120. Upon being referred to exhibit P22, the witness averred that same is a report prepared by himself.

121. It was the further testimony of the witness that same worked with the city county council as an engineer up to and including the year 1978. However, the witness averred that same was not involved in the approval of the building plans in question.

122. Moreover, the witness testified that the building in question was constructed and completed in the year 1986. In any event, the witness averred that by that time same had already retired.

123. It was the further testimony of the witness that the land in question had been developed long before same was purchased by the petitioner herein. In particular, the witness averred that the land in question was developed much earlier.

124. On cross examination by Learned counsel for the 2nd respondent, the witness averred that same was an Engineer and that same was instructed in this matter by the petitioner.

125. Furthermore, the witness averred that upon receipt of the instructions same [Witness] undertook the assignment and prepared a report. In addition, the witness averred that the report in question has since been tendered and produced before the court.

126. It was the further testimony of the witness that in the course of preparing his report same perused various documents at the Directorate of Survey/ Offices of the Chief Land Registrar. However, the witness clarified that same did not peruse any document at National Environmental Management Authority.

127. On cross examination by Learned counsel for the 3rd respondent, the witness averred that his report at page 7 relates to the special conditions which were attached to the certificate of lease. In particular, the witness clarified that the developments on the suit properties could not be undertaken without the approval of commissioner of land. Furthermore, the witness averred that the special condition[s] indicate that the approval was to be granted by the commissioner of lands[now defunct].

128. Whilst still under cross examination, the witness averred that same did not peruse the parcel file in respect of the suit properties.

129. On further cross examination, the witness averred that the stream in question was already canalized by the year 1990's. nevertheless, the witness testified that no one can own a stream. Furthermore, the witness averred that a stream is a public utility/asset and same belongs to the public.

130. It was the further testimony of the witness that the riparian reserve in question belonged to the petitioner. To this end, the witness added that the petitioner had the authority to use the riparian land.

Nevertheless, the witness averred that same did not ascertain the exact dimension of the riparian land [reserve].

131. Whilst still under cross examination and upon being referred to paragraph 12 of his Witness Statement, the witness averred that the stream was already canalized. However, the witness averred that same was unable to confirm when the stream was canalized.

132. It was the further testimony of the witness that the stream was canalized before the allotment. In addition, the witness averred that same saw an approval for re-canalization of the river. For good measure, the witness testified that the approval in question was issued by the City Council of Nairobi [now defunct].

133. When pressed further, the witness averred that the approval for re-canalization of the river was approval number CU796.

134. On further cross examination, the witness averred that the question of riparian reserve [Land] has been in existence since the days of the *Water Act* 1948. In this regard, the witness averred that riparian reserve/ Land is statutorily protected.

135. Whilst still under cross examination, the witness averred that the area where the suit property is situated is prone to floods. In particular, the witness averred that there were floods in the year 2016.

136. Furthermore, the witness averred that the canalization in question was intended to mitigate flooding. However, the witness added that the re-canalization did not happen.

137. On cross examination by learned counsel for the 5th respondent, the witness averred that though same worked with the City Council of Nairobi [now defunct] same did not participate in the approval of the building plans/ Drawing[s]. Nevertheless, the witness averred that the Building plans were duly approved.

138. Moreover, the witness testified that the developer duly complied with the terms of the approved plans.

139. Whilst still under cross examination, it was the testimony of the witness that the building of the suit property did not encroach onto the riparian land. For coherence, the witness reiterated that there was no encroachment onto the riparian reserve.

140. It was the further testimony of the witness that same was retained and instructed to prepare an Environment Impact Assessment [EIA] report. In particular, the witness testified that the preparation of the report was intended to address the recuring floods in the area.

141. While still under cross examination, the witness averred that the stream/river in question passes through the suit properties. In any event and upon being referred to page 254 of the petitioners bundle of documents, the witness testified that there was a time that several walls were knocked down because of the recurring floods.

142. On re-examination by learned counsel for the petitioner, the witness averred that same was instructed and retained to procure an EIA licence. To this end, the Witness averred that same proceeded to and undertook the assignment culminating into the issuance of the approval from NEMA. In addition, the witness averred that the approval from NEMA has been placed before the court.

143. Upon being referred to the document at page 338 of the petitioners bundle of documents, the witness averred that same is the Environmental Impact Assessment report which was duly presented to NEMA prior to issuance of the EIA licence.

144. On the other hand, it was the testimony of the witness that the certificate[s] of title that were issued to the petitioner contained special condition[s]. In particular, the witness referenced clause 7 of the certificate of title which indicated that any development on the suit properties required the approval of the commissioner of lands.

145. Moreover, the witness averred that the approvals were duly procured and obtained. It was the further testimony of the witness that the approvals would be procured from the city council of Nairobi who would thereafter escalate the approvals to the commissioner of land.

146. On further re-examination, the witness averred that the developer in respect of the suit properties duly complied with the building plans which were approved by the City Council of Nairobi [now defunct]. At any rate, the witness added that it was upon compliance with the building plans that the City Council of Nairobi proceeded to and issued the certificate of occupation.

147. Whilst under further re-examination, the witness added that the issuance of the certificate of occupation is tantamount to compliance with the terms of the approved Building plans.

148. The 5th witness who testified on behalf of the petitioner was David Gathegu Mwaniki. Same testified as PW5.

149. It was the testimony of the witness that same is a Quantity Surveyor. Furthermore, the witness averred that same recorded and filed a witness statement dated the 6 June 2022; and which witness statement the witness sought to adopt and rely on. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

150. Additionally, the witness referenced a report dated the 2nd June 2022 and which report the witness sought to tender and produce before the court. In this regard, the report under reference was produced and admitted as exhibit P-37.

151. On cross examination by learned counsel for the 1st and 4th respondents, the witness averred that same is duly qualified as a Quantity Surveyor [QS]. Furthermore, the witness testified that same was instructed by architect Satish Shah to inspect the suit property and thereafter to prepare a report. In this regard, the witness averred that he proceeded to and prepared a report dated the 2 June 2022.

152. It was the further testimony of the witness that in the course of preparing the report, same perused various documents including the original drawings in respect of the building which was demolished.

153. The witness further averred that same perused the documents at the offices of the architect.

154. It was the further testimony of the witness that the final building should ordinarily replicate the building plans. However, the witness clarified that there are instances where the final building is at variance with the drawings.

155. It was the further testimony of the witness that after concluding the assignment, same ascertained the costs of reinstatement of the building. To this end, the witness averred that same arrived at the figure of Kes 875, 868, 395 only.

156. Upon being referred to paragraph 7 of the witness statement, the witness averred that same had occasion to peruse the bill of quantity [BQ]. However, when pressed further, the witness averred that he was not availed the bill of quantity [BQ] by architect Satish Shah.

157. Whilst still under cross examination, the witness averred that the figure for reinstatement of the building of Kes.878, 828, 400/= only was arrived at long after the building has been demolished.

158. On cross examination by learned counsel for the 2nd respondent, the witness averred that same was instructed around May 2022. Furthermore, the witness averred that his instructions were formal and vide a letter. Nevertheless, the witness submitted that same has not availed a copy of the Letter of Instruction[s] before the court.

159. Moreover, the witness testified that the figure highlighted at the foot of the report was arrived at on the basis on the drawings that were availed unto him.

160. On cross examination by Learned counsel for the 3rd respondent, the witness averred that same visited the suit properties long after the demolition had been done. In any event, the witness clarified that same was not availed the Bill of Quantities.

161. Whilst under cross examination, the witness testified that same was provided with the approved building plans/drawings. Furthermore, the witness testified that same was able to utilize the building plans for purposes of arriving at the value for reinstatement of the building.

162. It was the further testimony of the witness that in the course of construction, contractors rely on the approved building plans and not the bill of quantities. In any event, it was averred that the bill of quantities is ordinarily used to ascertain/confirm the costs of the work done.

163. The witness further averred that same saw the canalized stream which is situate on a portion of the suit properties. In fact, the witness added that the canalized stream is still in existence.

164. On cross examination by learned counsel for the 5th respondent, the witness averred that same used and deployed the floor area method to arrive at the estimate before the court. However, the witness added that there are other methods that can also be relied upon to arrive at the value of reinstatement.

165. It was the further testimony of the witness that some of the methods would have yielded accurate result[s] than the floor area method. It was the further testimony of the witness that same did not visit the suit property prior to the demolition. However, the witness clarified that same visited the suit property after the demolition. In this regard, the witness averred that same is therefore conversant with the suit property.

166. Whilst still under cross examination, the witness averred that the floor area method that was deployed took into account the basement area. In any event, the witness added that the report before the court was prepared by himself.

167. Next was Mohamed Asif Chaudhry. Same testified as PW6.

168. It was the testimony of the witness that same is a Professional Accountant currently working with PKF-Consultant[s]. Furthermore, the witness averred that same is conversant with the facts of the Case.

169. It was the further testimony of the witness that same has since recorded a witness statement dated the 6 June 2022. To this end, the Witness sought to adopt and rely on the witness statement under reference.

170. Instructively, the witness statement dated the 6 June 2022 was thereafter adopted and constituted as the evidence in chief of the witness.

171. Additionally, the witness referenced a report prepared by himself and which was discovered as document number 29 and 30. In this regard, the witness thereafter sought to tender the document[s] before hand as exhibits. There being no objection, the documents were tendered and admitted as exhibits 29 and 38, respectively.

172. On cross examination by Learned counsel for the 1st and 4th respondent[s], the witness averred that same is a qualified accountant. Moreover, the witness averred that same qualified in the year 2002.

173. Whilst under further cross examination, the witness averred that same works with PKF- Consulting. Furthermore, the witness averred that PKF Consulting was retained to undertake financial audit as pertains to the affairs of the petitioner herein relative to the suit property which was demolished.

174. Besides, same proceeded to and averred that the report prepared by himself on behalf PKF-Consultants has been tendered and produced before the court.

175. While under further cross examination, the witness averred that same has however not availed to the court the Statements of accounts of the petitioner. For good measure, the witness averred that same has not annexed the audited Statements of accounts.

176. The witness further admitted that in the absence of the audited accounts, it is not easy to determine the extent of the tax that was being paid by the petitioner.

177. It was the further testimony of the witness that the Mall in question was fully occupied. Furthermore, the witness averred that the computation and the amounts that have been arrived at were derived from the information received from the management of the petitioner. Moreover, the witness added that the figures arrived at have been duly explained at the foot of the report.

178. It was the further testimony of the witness that some of the figure[s] alluded to in the report are based on projections.

179. On further cross examination, the witness averred that same has not annexed the supporting documents to the report before the court. Nevertheless, the witness averred that it is not the practice of professional[s] to annex the supporting documents and workings to their report.

180. Additionally, the witness averred that same returned a figure of Kes.114, 000, 000/= Only as the loss of business. In arriving at the said figure, the witness averred that same applied his professional mind, experience and Judgment.

181. Whilst under further cross examination, the witness averred that the projection as to rental income would be affected by other factors including covid -19.

182. On cross examination by learned counsel for the 2nd respondent, the witness averred that same is a Qualified/ Chartered Accountant. Furthermore, the witness averred that same is an employee of PKF -Kenya. However, the witness stated that the report beforehand is shown to have been prepared by PKF- Consultant.

183. It was the evidence of the witness that it is PKF Consultant who had an agreement with the petitioner. Nevertheless, the witness averred that same did not execute the said agreement.

184. It was the further testimony of the witness that same [Witness] prepared the report before the court after reviewing various documents in the custody of the petitioner. Nevertheless, the witness averred that same did not engage the tenants who were in the suit premises.

185. It was the further testimony of the witness that the occupancy of the Mall on the suit premises would vary from time to time. Nevertheless, the witness added that same arrived at the figure[s] after exercising professional Judgment and taking into account the documents availed by the petitioner.

186. On cross examination by Learned counsel for the 3rd respondent, the Witness averred that the report that same has tendered and produced before the court is not signed by anybody. Furthermore, the witness has averred that the report has also not been signed by himself.

187. Whilst still under cross examination, the witness averred that the only document which has been signed is the Letter attached to the Report.

188. It was the further testimony of the witness that after the preparation of the report, same was forwarded to the petitioner on the 18 may 2020. Nevertheless, the witness testified that whilst preparing the report same, did not take into account the consequences of Covid-19.

189. On further cross examination, the witness averred that Nakumatt Supermarket was not in operation by 2021. It was the further testimony of the witness that same [Witness] looked at the historical account[s] of the petitioner and that same was helpful in determining the loss suffered by the petitioner.

190. On cross examination by learned counsel for the 5th respondent, the witness averred that the report which was prepared by him and which has since been produced before the court took into account the reasonable and expected expenses. To this end, the witness referenced the contents of the report.

191. In addition, the witness averred that the report, beforehand was prepared in the year 2018. However, the witness testified that the report was forwarded in the year 2022. Further and in any event, the witness testified that the report has set out the projection[s] on account of rental income.

192. The next witness who testified on behalf of the petitioner is James Mark Muthama Musau. Same testified as PW7.

193. It was the testimony of the witness that same is a licensed; registered and practising valuer. Furthermore, the witness averred that same is conversant with the facts of this matter. It was the further testimony of the witness that same was instructed by the petitioner herein to undertake inspection of the suit property and thereafter to prepare a valuation Report. To this end, the witness averred that same indeed complied with the terms of the instruction[s] and thereafter proceeded to and prepared a report.

194. Moreover, the witness averred that same has since recorded a witness statement dated the 6 June 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief. In this regard, the witness statement under reference was duly admitted and adopted as the evidence in chief of the witness.

195. Additionally, the witness sought to tender and produce before the court the valuation report which same [Witness] had prepared. To this end, the valuation report was duly tendered and produced in Court as an Exhibit.

196. On cross examination by Learned counsel for the 1st and 4th respondent[s], the witness averred that same was instructed sometimes in August 2018. The witness stated that same [Witness] was first instructed verbally and that the instructions were thereafter followed with a written letter.

197. It was the further testimony of the witness that the purpose of valuation was for compensation. In any event, the witness averred that prior to preparing the valuation report same [Witness] visited the locus in quo and inspected the building.

198. Nevertheless, the witness averred that by the time he [Witness] visited the suit properties, the building had already been demolished.

199. The witness further testified that same referenced the approved building plans and thereafter arrived at the values which have been captured at the foot of the Valuation report.

200. On further cross examination by Learned counsel for the 1st and 4th respondents, the witness averred that in the course of preparing the valuation report, same [witness] gathered that the building on the suit properties had been demolished on the basis of an order from the Multi agency Sectoral task committee. Nevertheless, the witness clarified that he was not a member of the said committee.

201. Whilst still under cross examination, the witness averred that at the time of undertaking the valuation, L.R No's 209/11307 and 209/11308 were charged to Gurdian Bank Ltd. However, the witness confirmed that the third property was not charged.

202. It was the further testimony of the witness that the charging of the properties did not affect and/ or impact on the value[s] of the properties.

203. While still under further cross examination, the witness averred that same used and deployed the income approach to ascertain/confirm the values. Furthermore, the witness averred that valuation is based on the existence of a valid title. Nevertheless, the witness stated that where the title is vitiated by illegality, the illegality would impact on the valuation.

204. It was the further testimony of the witness that same has indicated the market values of the property in question. The witness averred that the values are contained at the foot of the valuation report.

205. It was the further testimony of the witness that the building in question was located in the area that is zoned for commercial purposes. Furthermore, the witness added that the properties were zoned and designated for commercial use. In addition, the witness testified that the nature of the user of the building would impact on the value of the property.

206. On further cross examination by Learned counsel for the 1st and 4th respondents, the witness averred that after reviewing the approved building plan[s] and taking into account the various factors, same returned the value of Kes 2, 010, 000, 000 only.

207. Nevertheless, the witness averred that the value of Kes 2, 010, 000, 000 only is not on the valuation report that same has tendered and produced before the court.

208. On cross examination by Learned counsel for the 3rd respondent, the witness averred that by the time same undertook the valuation, the building on the suit property had been demolished. Nevertheless, the witness [PW7] confirmed that the report before the court relates to the value of property.

209. Moreover, it was the testimony of the Witness that the valuation report includes the value of the land and the building thereof. However, the witness clarified that the time of undertaking the valuation the building was not there.

210. Referred to page 654 of the petitioner's bundle of documents, the witness averred that same is the Valuation Report which relates to the value of the land inclusive of the building that was thereunder.

211. Whilst still under cross examination, the witness averred that the valuation report adopted, applied and deployed the income approach.

212. It was the further testimony of the witness that same has included a figure for disturbance allowance because what transpired was akin to forceful eviction of the petitioner.

213. Additionally, the witness averred that same was aware that the title in question had been revoked before. However, the witness clarified that the revocation of the title had been rescinded by a court.

214. It was the further testimony of the witness that same has alluded to renovations that were being taken by the petitioner. In this regard, the witness averred that same came across the approved Building plans that authorized the alteration/renovations.

215. Furthermore, it was the testimony of the witness that same has spoken to a figure, of kes.2, 010, 000, 000 at the foot of his witness statement. However, the witness averred that the said figure is different from the figure captured vide the valuation report.

216. On cross examination by Learned counsel for the 5th respondent, the witness averred that the dispute before the court relates to claim for compensation for the value of the suit property. However, the witness averred that same is not aware whether the suit property fell on a road reserve or riparian area.

217. On further cross examination, the witness averred that same adopted and deployed an income approach. Nevertheless, the witness conceded that the income approach is speculative insofar as the same is based on assumption.

218. It was the further testimony of the witness that the valuation report can be impacted upon by various factors and change on the economic trends. The witness further testified valuation in question was undertaken before the Covid-19 pandemic.

219. Whilst under further cross examination, the witness averred that same has tendered and produced the valuation report before the court. However, the witness clarified that same has however not availed the supporting documents that were deployed in arriving at the values contained at the foot of the report.

220. With the foregoing testimony, the petitioner's case was duly closed.

1st and 4th Respondents' Case:

221. The 1st and 4th respondents' case is anchored on the evidence of two [2] witness, namely; Timothy Wayaiwa Mwangi and Wilfred Kabue Muchae. Same testified as RW1 and RW2, respectively.

222. It was the testimony of RW1 [witness] that same is an employee of the Ministry of Lands, Physical Planning, Public works, Housing and Urban Development. Furthermore, the witness averred that same is currently the Deputy Director of Physical Planning. In this regard, the witness averred that same is conversant with the facts of the instant matter.

223. Furthermore, the witness averred that same has since recorded a witness statement dated the 7 July 2022; and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement was duly admitted as the evidence in chief of the witness.

224. Moreover, the witness referenced the List and Bundle of documents dated the 12 July 2022; and thereafter same sought to tender and produce documents numbers 23, to 32 at the foot of the said List of Document[s].There being no objection to production to the said documents, same was tendered and produced as D23 to 32 on behalf of the 1st and 4th respondents.

225. On cross examination by Learned counsel for the 3rd respondent. The witness averred that at the foot of paragraph 15 of his witness statement, same has referenced that no Part Development Plan [PDP] was ever prepared by the Director of Physical Planning. Furthermore, the witness averred that in the absence of a Part Development Plan [PDP] no land and/or plot could be allocated.

226. Whilst under further cross examination, the witness averred that no Part Development Polan [PDP] has ever been issued over and in respect of the suit plot.

227. It was the further testimony of the witness that the team from the Physical Planning Department visited the suit property and thereafter returned a report that confirmed that the building on the suit property had encroached onto the riparian area [reserve].

228. In any event, the witness averred that the riparian area/reserve is Public Land and hence not available for alienation/allocation.

229. On further cross examination, the witness averred that the riparian reserve is a matter that has been observed from time immemorial. Moreover, the witness averred that the preservation of the riparian reserve/ Land is an important aspect of physical planning.

230. On cross examination by learned counsel for the 5th respondent, the witness averred that same has tendered and produced a copy of the handbook pertaining to Physical Planning. The handbook was tendered and produced as exhibit D- 27.

231. It was the further testimony of the witness that the handbook which has been tendered and produced has provided for the appointment of the Area Control Officers. In particular, the witness averred that the Controlled Officers were to liaise with the Local Authority and the Provincial Administration Department.

232. It was the further testimony of the witness [RW1] that there was a Control Officer in charge of Nairobi city.

233. On cross examination by the Learned Counsel for the Second Defendant he witness averred that the role of approvals for development was the function of the City council of Nairobi[now defunct]. Furthermore, the witness averred that the role of the Ministry was to give and formulate policy.

234. It was the further testimony of the witness that the Directorate of Physical Planning would ordinarily be consulted by the Local Authority before approval of a Development a plan. Nevertheless, the witness added that the petitioner herein would not be consulted.

235. Upon being referred to exhibit[s] P42, 43, 44 and 45 respectively, the witness averred that the documents in question is the Memorandum from the City Planning and Architecture Department. In addition, the witness averred that the Memorandum was communicating the approval for the building.

236. It was the further evidence of the witness that the Memorandum confirms the approval of the Building Plan[s] subject to certain conditions. The witness further added that the conditions were duly articulated at the foot of the Memorandum.

237. Whilst still under cross examination, the witness averred that the approval was copied to the Commissioner of land [now defunct] and to Kenya Railways Corporation. To this end, the witness confirmed that the Memorandum in question authenticate[s] that there was approval of the Development.

238. It was the further testimony of the witness that the approval in question was within the mandate and jurisdiction of the Local authority.

239. On further cross examination, the witness averred that a Certificate of occupation was also issued by the City Council of Nairobi. To this end, the witness testified that a certificate of occupation would only issue once the building is complete.

240. Whilst still under cross examination, the witness averred that same was not a member of the multi-Agency sectoral committee. Furthermore, the witness added that same was not aware of the date/

time when the committee was formulated. Nevertheless, the witness confirmed that the demolition in question was undertaken by the Multi-Agency Sectoral Committee.

241. It was the further testimony of the witness that same [Witness] has seen the report generated by the Multi- Agency Sectoral Committee. Nevertheless, the witness clarified that same has not brought the report before the court.

242. It was the further testimony of the witness that same is not aware whether the owner of the suit property was consulted prior to and before the preparation of the report.

243. Moreover, the witness averred that the team [Multi-Agency Sectoral Committee] is the one that undertook the measurements. In addition, the witness testified that it was confirmed that there was an encroachment into the riparian land/ reserve.

244. On further cross examination, the witness averred that the building on the suit property was a massive building. For good measure, the witness testified that the building was a Mall.

245. It was the further testimony of the witness that canalization of rivers is not illegal. For good measure, the witness added that rivers can be canalized for various purposes including for purposes of controlling floods. Nevertheless, the witness averred that canalization of a river is a development and to this end, same requires an approval.

246. Whilst still under cross examination, the witness averred that same has never come across the Part Development Plan [PDP] in respect of the suit property. However, the witness averred that same has seen a copy of the Letter of allotment in respect of LR No 1870/1/475 – Nairobi.

247. It was the further testimony of the witness that the City Council of Nairobi [now defunct] had previously issued an Enforcement notice. In this regard, the witness averred that the Enforcement notice contended that the suit property had encroached to Mwanzi road. However, it was clarified that the Enforcement notice was subsequently withdrawn.

248. Upon being referred to the replying affidavit by Zephania Ouma sworn on 14 February 2020, the witness conceded that the replying affidavit contains various annexures. Furthermore, the witness averred that annexure number Seven [7] attached thereto is a copy of the letter dated the 12 July 2020.

249. It was the further testimony of the witness that the letter in question came from the Water Resource Authority [WRA].In addition, the witness confirmed that the letter in question is an approval for the expansion of the Box -culvert.

250. On further cross examination, the witness averred that the petitioner indeed procured and obtained the approval for the expansion of the Box- culvert.

251. The witness further testified that the Ministry was involved in the determination of the extent of the encroachment. In particular, the witness averred that the Ministry was only engaged for purposes of determining the encroachment. However, the witness added that same is not aware whether the petitioner was involved.

252. Additionally, the witness averred that the report captured the encroachment onto the riparian reserve. The encroachment was ascertained by a team from the Ministry of Land. The report confirmed inter-alia that the encroachment onto the riparian reserve was by 10 meters.

253. Whilst still under cross examination, the witness averred that same is aware of an Enforcement notice that was issued. However, the witness clarified that the Enforcement Notice does not relate to the question of encroachment onto the riparian reserve.

254. It was however, the testimony of the witness [RW1] that it is the said notice of Enforcement that was relied upon to demolish the structure/ Building on the suit property.

255. The next witness who testified on behalf of the 1st and 4th respondents is Wilfred Muchai Kabue. Same testified as RW2.

256. It was the testimony of the witness that same is an employee of the Ministry of Lands, Public works, Housing and Urban Development. In addition, the witness averred that same works with/under the Directorate of survey.

257. It was the further testimony of the witness [RW2] that in respect of the instant matter, same has recorded a witness statement dated the 12 July 2022; and which witness statement the witness sought to adopt and rely on as his evidence in chief. In this regard, the witness statement was adopted and constituted as the evidence in chief of the witness.

258. Moreover, the witness referenced the List and Bundle of documents dated the 12 July 2022; and thereafter sought to tender and produce documents number[s] 1 to 22 listed thereunder. There being no objection to the production of the said documents, same were tendered and admitted as Exhibits D1 to 22 on behalf of the 1st and 4th Resspondents.

259. The witness further referenced the List and bundle of documents dated the 15 July 2022; and thereafter sought to tender and produce the documents thereunder. Suffice it to state that the documents at the foot of the List dated 15 July 2022; were duly produced and admitted as Exhibits D34 to 38, respectively on behalf of the 1st and 4th respondents.

260. On cross examination by Learned counsel for the 3rd respondent, the witness averred that what constitutes the suit plots was initially reserved for a road. The witness averred that the reservation was vide Survey Plan FR No. 56/39 of 1949. To this end, the witness referenced exhibit D9.

261. It was the further testimony of the witness that a land which has been reserved as a road can be converted for private use. However, the witness added that there is a process that must be followed including gazettement, inviting objections and thereafter the issuance of approvals. Nevertheless, the witness averred that before a road reserve is converted from public purpose to private use, there would have to a document to confirm the requisite approval.

262. It was the further testimony of the witness that the reservation of the suit plots as road reserves was duly documented. On the other hand, the witness averred that the conversion from public use was never gazetted. For good measure, the witness stated that the witness has never come across such records at the Directorate of survey.

263. On cross examination by learned counsel for the petitioner, the witness averred that the suit properties was reserved as a road reserve. Furthermore, the witness stated that the land in question had a canalized stream.

264. It was the further testimony of the witness that a Cadastral Plan would show what is a road and what is a plot. The cadastral plan which I have produced shows a ring road. Furthermore, the witness stated that the cadastral plan in question also shows the plot[s].

265. Whilst under further cross examination, the witness averred that the road in question has been titled as a Ring road.

266. It was the further testimony of the witness that the suit property was sub-divided from LR No 1870/1/10/1. Furthermore, the witness averred that the plot in question was clearly marked.

267. The witness further testified that the road was also marked. In this regard, the witness averred that LR No 1870/1/10/1 was not an earmarked road.

268. Additionally, it was the testimony of the witness that the suit plot arose from the sub-division of LR No 1870/1/10/1. Besides, the witness averred that the said plot is surrounded by two [2] roads. However, the witness clarified that the said plot was not on a road.

269. Upon being referred to FR No. 72/95 dated 20 July 1955, the witness averred that the said FR captures and reflects the suit plots. In particular, the witness avers that the original number is shown as 1870/1/10/3. Furthermore, the witness averred that the property has three components and that same is defined by beacons.

270. Whilst under further cross examination, the witness testified that LR No 1870/1/213 was however reserved for a road. Furthermore, the witness averred that the FR in question captures the road.

271. On further cross examination, the witness averred that FR No 72/95 shows the existence of the suit plots.

272. Regarding the document at page 43 of the petitioners bundle of documents, the witness averred that the document in question is a Letter from the Town Clerk of the City Council of Nairobi[now defunct]. In addition, the witness posited that the letter in question make[s] reference to the suit properties.

273. Moreover, the witness testified that the Letter confirms that there was no encroachment onto Mwanzi Road.

274. Referred to the document at page 44 of the petitioner's bundle of document, the witness confirmed that the document in question is a Letter from the Town Clerk Nairobi city council. Furthermore, the Witness testified that Letter sought to inform the petitioner of the withdrawal of the Enforcement notice.

275. Whilst still under cross examination, the witness referenced Cadastral Plan number 72/95 and thereafter confirmed that the Cadastral Plan references various plot[s]. Furthermore, the witness added that the Cadastral Plan under reference was issued and certified by the Director of Survey.

276. It was the further testimony of the witness [RW2] that the Survey Plan [FR] in question also shows the position of the canalized stream.

277. Additionally, the witness testified that the Survey Plan [FR] in question, namely; FR 72/95 is the one that culminated into the preparation of the Deed Plan. In addition, it was posited that the Suit plots are [were] properly planned.

278. Moreover, the witness averred that the plot[s] appear in the survey record[s].

279. Whilst still under further cross examination, the witness averred that the Planning authority shares their records with the Ministry of Land. To this end, the witness adverted to the Scheme Plan and stated that the said Scheme Plan references two [2] plots. In addition, the witness clarified that the two [2] plots are the suit properties.

280. The witness further testified that the sub-division of the suit properties is captured in the approved sub-division plan. Besides, the witness averred that same has also tendered and adduced the letter of allotment in respect of the suit property. In any event, it was clarified that the Letters of allotment were in respect of the plots that were already been surveyed.

281. On further cross examination, the witness averred that the allotment in respect of the suit properties was proper. Furthermore, the witness added that the allotment was done properly because same has tendered the various records confirming the process of allotment.

282. It was the further testimony of the witness that the survey record[s] before the court are valid. In any event, the witness added that if there is any error in respect of the survey record[s], the Directorate of Survey would recall the improper survey record. However, the witness confirmed that the survey record[s] pertaining to the suit plots have never been recalled or revoked. For good measure, the witness affirmed that the survey record are still intact.

283. On the other hand, it was the testimony of the witness that same has never come across any letter written by the Directorate of survey to the petitioner intimating that the suit properties are situated on a road reserve.

284. On re-examination, the witness averred that the portion that was hitherto LR No 1870/1/10/R is now what constitutes the suit properties. Furthermore, the witness averred that same has brought before the court the cadastral plan that was registered 1988.

285. Whilst still under re-examination, the witness averred that the Cadastral Plan before the court shows the original LR No 1870/1/213. In any event, the witness added that the Cadastral Plan before the court is part of the record obtaining at the office of the Directorate of Survey.

286. It was the further evidence of the witness that the Director of survey has never recalled and/or rescinded the survey maps [FR] which show the existence of the suit plot[s]. Furthermore, the witness added that the survey maps [FR in question] confirm that the suit plots are not on the road reserve.

287. Furthermore, the witness averred that the preparation of the survey maps/FR's is the responsibility of the Director of survey and not the petitioner herein or any other citizen.

288. Finally, the witness averred that if there is an error in the survey maps, the error and the attendant responsibility would fall at the door step[s] of the Directorate of survey.

289. With the foregoing testimony, the case for the 1st and 4th respondents was closed.

The 2nd Respondent's Case:

290. The 2nd respondent's case is anchored on the evidence of one witness, namely; Zephania Ouma Owuor. Same testified RW4.

291. It was the evidence of the witness that same is an employee of National Environmental Management Authority [NEMA]. Furthermore, the witness averred that same is currently in charge of compliance.

292. Additionally, the witness testified that by virtue of his portfolio same is conversant with the facts of this case. Besides, the witness averred that same has since sworn a replying affidavit dated the 14 February 2020; and which replying affidavit the witness sought to adopt and rely on as his evidence in chief.

293. To this end, the replying affidavit under reference was adopted and constituted as the evidence in chief of the witness [RW4].

294. It was the further testimony of the witness that same has also annexed various documents to the affidavit and which document[s] the Witness sought to tender and produce before the court. There being no objection to the said document[s] being produced, same were duly admitted and constituted as exhibits 1 to 4 on behalf of the 2nd respondent.

295. On cross examination by Learned counsel for the 1st and 4th respondent[s], the witness averred that the 2nd respondent was not responsible for the demolition of the building of the suit properties. Furthermore, the witness testified that the building on the suit properties was concluded sometime[s] in 1993/1994 well before NEMA was operationalized.

296. On cross examination, by Learned counsel for the 3rd respondent, the witness averred that NEMA indeed issued an EIA Licence to the petitioner to facilitate the expansion the Box-culvert. To this end, the witness referenced the licence issued in 2017.

297. Whilst still under cross examination, the witness averred that even though NEMA issued the License, same [Witness] is not aware whether the project was undertaken.

298. It was the further testimony of the witness that the license which was issued by NEMA contained various conditions which the petitioner was called upon to comply with.

299. It was the further testimony of the witness that NEMA subsequently wrote a notice/letter dated the 6 August 2018. However, the witness clarified that the purpose of the notice was more of a reminder that any building on the riparian reserve would be illegal.

300. On cross examination by learned counsel for the 5th respondent, the witness averred that the Letter dated the 6 July 2018; was generated by the Nairobi County Government. Furthermore, the witness averred that the letter under reference was not addressed to the 2nd respondent.

301. It was the further testimony of the witness that the project pertaining to the re-canalization of the river would require the preparation of an Environmental Impact Assessment [EIA] report.

302. On cross examination by learned counsel for the petitioner, the witness averred that the petitioner indeed sought for the approval for the expansion of the Box-culvert. In addition, the witness averred that the application was duly approved and a licence was issued by NEMA. To this end, the witness referenced the EIA licence dated the 25 September 2017.

303. Whilst still under cross examination, the witness averred that the License issued on the 25 September 2017 was a proposed canalization of river Kibarage for capacity enhancement and storm water drainage. For coherence, the witness reiterated that the license was for water course canalization.

304. It was the further testimony of the witness that same is aware that the building on the suit properties was demolished. However, the witness stated that same was not aware of the reason why the building was demolished.

305. Moreover, it was the testimony of the witness that there was a task force that was dealing with the demolition. Furthermore, the witness averred that NEMA was a member of the task force/committee which dealt with the demolition.

306. Be that as it may, the witness clarified that the involvement of NEMA [National Environmental Management Authority] was an advisory one.

307. With the foregoing evidence, the 2nd respondent's case was closed.

The 3rd Respondent's Case:

308. The 3rd respondent's case is premised on the evidence of one witness, namely; John Nganga Kinyanjui. Same testified as RW3.

309. It was the testimony of the witness that same is an employee of the Water Resource Authority. In particular, the witness confirmed that same is in charge of Water Resources Assessment and Monitoring. Furthermore, the witness averred that same is conversant with the facts of this matter. In this regard, the witness stated that same has since sworn a replying affidavit dated the 5 September 2022; and which replying affidavit the witness sought to adopt and constitute as his evidence in chief.

310. Suffice it to state that the replying affidavit was duly constituted as the evidence in chief of the witness.

311. It was the further testimony of the witness that the 3rd respondent herein was not involved in the dispute herein. Nevertheless, the witness averred that same is aware that the 3rd respondent wrote a Letter but whose terms were never complied with.

312. On cross examination by Learned counsel for the 1st and 4th respondents, the witness averred that he [Witness] was aware of the Multi-Agency Sectoral Committee [MASCC]. However, the witness averred that he did not serve in the said Committee.

313. It was the further testimony of the witness that same was not involved in the pegging and marking of the riparian reserve. In any event, the witness averred that same is not a qualified surveyor.

314. It was the further testimony of the witness that the 3rd respondent sought to undertake the measurements of the riparian reserve. However, the witness stated that the 3rd respondent was not involved in the demolition.

315. On cross examination by learned counsel for the 2nd respondent, the witness averred that same is not aware whether the 3rd respondent wrote to the 2nd respondent in a bid to procure and obtain a licence. Nevertheless, the witness averred that same is aware that the petitioner obtained an EIA license from the 2nd respondent.

316. On cross examination by Learned counsel for the petitioner, the witness averred that same did not visit the suit property before preparing the replying affidavit before the court. Furthermore, the witness added that same has not visited the suit property [Locus in Quo] to date.

317. It was the testimony of the witness that same prepared the replying affidavit on the basis of the brief received from the Megional manager for Nairobi.

318. On further cross examination, the witness averred that same is aware that the 3rd respondent was a member of Multi-Agency sectoral agency committee. Furthermore, the witness averred that same is aware of the mandate of the said committee.

319. It was the further testimony of the witness that same is conversant with the recommendation[s] of the Multi Agency sectoral committee.

320. On further cross examination, the witness averred that there were irregularities as pertains to the project on behalf of the petitioner. Nevertheless, the witness conceded that same has not tendered and/or produced any report to that effect before the court.

321. It was the further testimony of the witness that same went to the site [Locus] to measure the riparian reserve. However, the witness averred that no report was prepared by the 3rd respondent.

322. On further cross examination, the witness averred that the petitioner herein applied for approval for expansion of the Box- culvert [recanalization of the river]. In addition, the witness confirmed that the approval was indeed granted.

323. On the other hand, the witness averred that same has since come across the Enforcement notice that was issued by the 5th respondent. To this end, the witness referenced the Enforcement notice dated the 23 may 2018. However, the witness averred that the Enforcement notice concerned illegal adjustment[s] to the building and not encroachment onto the riparian reserve.

324. It was the further testimony of the witness that the Water Resources Authority has never raised any formal complaint with the petitioner as pertains to encroachment onto the riparian reserve. Furthermore, the witness averred that the 3rd respondent has never issued any Enforcement Notice.

325. Other than the foregoing, the witness averred that the 3rd respondent has also never raised any informal complaint or at all, with the petitioner.

326. On re-examination, the witness [RW3] testified that the marking of the riparian reserve is the mandate of the Water Resource Authority. That the marking of the riparian had not been done.

327. Upon being referred to the Enforcement Notice at page 696 of the petitioner's bundle, the witness averred that the Enforcement notice was issued by the Nairobi City County Government. For good measure, the witness averred that the 3rd respondent has never issued any Enforcement notice.

328. With the foregoing testimony, the 3rd respondent's case duly closed.

The 5th Respondent's Case:

329. The 5th respondent's case is premised on the evidence of one witness, namely; Wilfred Wanyonyi Masinde. Same testified as RW5.

330. It was the testimony of the witness that same is an employee of Nairobi City County Government. Furthermore, the witness averred that same is currently the Deputy Director in the Directorate in Planning; Compliance and Enforcement.

331. It was the further testimony of the witness that by virtue of his office, same is tasked to perform various duties including inspecting developments within the City county of Nairobi.

332. Additionally, the witness averred that same swore a replying affidavit dated the 27 July 2022; and which replying affidavit the witness sought to adopt and rely on as his evidence in chief. To this end, the replying affidavit was admitted and constituted as the evidence in chief of the witness.

333. Moreover, the witness averred that the various documents that same has annexed to the replying affidavit and same sought to produce same before the court. In this regard, the various documents including the Enforcement notice dated the 23 may 2018; and the Letter dated 6 July 2018, were duly admitted as exhibits.

334. On cross examination by Learned counsel for the 1st and 4th respondents, the witness [RW5] averred that same did not participate in the approval of the building plans for the building on the suit property. Furthermore, the witness averred that the petitioner herein did not comply with the terms of the approval.

335. Whilst under further cross examination, the witness averred that same has referenced some inspection that was carried out over and in respect of various buildings. In particular, the witness alluded to the inspection in respect of the suit property.

336. It was the further testimony of the witness that the Nairobi city County Government issued an Enforcement Notice dated the 23rd May 2018. Furthermore, the witness averred that the enforcement notice was never challenged.

337. Referred to paragraph 16 of the replying affidavit, the witness averred that Nairobi County Government did not authorize the demolition of the building. Furthermore, the witness averred that the City County Government of Nairobi did not remove the building.

338. On the contrary, the witness averred that the building may [sic] have been removed by the owner, namely; the Petition.

339. It was the further testimony of the Witness that the petitioner herein did not submit their approved building plans. Nevertheless, and upon being pressed further the witness averred that same is no aware whether that the petitioner submitted the building plans for approval.

340. On cross examination by Learned counsel for the 2nd respondent, the witness averred that Nairobi city County Government had a problem with canalization of river Kibarage. To this end, the witness averred that the County Government of Nairobi indeed notified that the petitioner vide the Enforcement Notice.

341. Whilst still under cross examination, the witness averred that the Enforcement Notice was touching both on the building and on the riparian reserve.

342. On further cross examination, the witness averred that same has never examined/perused the replying affidavit filed by the 2nd respondent. In this regard, the witness averred that same is not aware whether the 2nd respondent issued a licence to the petitioner for canalization of the river.

343. On cross examination by Learned counsel for the 3rd respondent, the witness averred that the Enforcement notice dated the 23 May 2018 was served on the petitioner. In addition, the witness averred that the Enforcement Notice was served in his presence.

344. It was the further testimony of the witness that same had gone to the building for purposes of inspection and in the process discovered that the alterations were not being done in accordance with the approvals.

345. On cross examination by learned counsel for the petitioner, the witness averred that same was present when the Enforcement notice was served. For good measure, the witness reiterated that the enforcement notice was served in his presence.

346. It was the further testimony of the witness that the complaints raised by the County Government of Nairobi were clearly shown in the body of the Enforcement Notice. In any event, the Witness averred that the petitioner herein had undertaken the construction of the building without complying with the approval.

347. It was the further testimony of the witness that the complains were about illegal alterations onto the building. Moreover, the witness stated that the Enforcement notice did not allude to any complaints touching on the riparian reserve.

348. On further cross examination, the witness averred that the petitioner was instructed to stop construction forthwith and to submit the building plans to the County Government of Nairobi.

349. Upon being shown/referred to the document at page 130 of the petitioners bundle of document, the witness stated that the document in question was a letter from the petitioner. Furthermore, the witness averred that the Letter in question was forwarding the approved building plans to the Director of Planning Nairobi City County Government.

350. Nevertheless, it was the testimony of the witness that same [witness] did not see the approval plans for the building.

351. Referred to the document at page 829 of the petitioner's bundle of documents, the witness averred that the document in question is an approved building plan. Furthermore, the witness averred that the building plan was approved on some date. However, the witness posited that the date of approval is not clear.

352. It was the further evidence of the witness that the building plan in question related to LR No 209/11308. In any event, the Witness confirmed that the document in question [building plan] was duly approved by the City Council of Nairobi.

353. On further cross examination, the witness averred that the building in question was demolished in the year 2018. In any event, the witness averred that the building was constructed on a river.

354. Referred to the document at page 828 of the petitioner's of documents, the witness averred that the document in question is the Certificate of occupation. The witness further added that the Certificate of occupation was never withdrawn by the City County Government.

355. Whilst still under cross examination, the witness averred that the City County Government of Nairobi also did not withdraw the approved building plans. For good measure, the witness averred that the approved building plans remain in existence.

356. Referred to the document at page 713 of the petitioner's bundle of document, the witness averred that the said document was a Letter authorizing the petitioner to undertake renovation[s] in the Supermarket. Furthermore, the witness confirmed that there were approval[s] by the County Government of Nairobi.

357. It was the further testimony of the witness that the building plans were duly approved. In addition, and upon referred to page 728 of the petitioner's bundle, the witness conceded that the County Government of Nairobi approved the alterations on the building.

358. On being referred to document on page 738 of the petitioner's bundle of document[s], the witness confirmed that same related to the proposed renovation[s] on LR No, 209/11308.

359. Moreover, the witness averred that the documents under reference bears the approval of the County Government of Nairobi. The witness further added that the approval is shown to have been issued on the 18 May 2017.

360. On the other hand, the witness averred that the Enforcement Notice was issued on the 23 May 2018. In addition, the witness averred that the Enforcement Notice related to illegal alterations on the building without approval.

361. Finally, the witness averred that the County Government of Nairobi did not demolish the building. On the contrary, the witness averred that the County Government of Nairobi served the Enforcement notice.

362. In any event, the witness averred that same does not have any document from the Nairobi Regeneration Committee that authorized the removal of the building.

363. On re-examination, the witness averred that Nairobi city county Government issued the Enforcement notice. Furthermore, the Witness averred that the Notice indicated that any aggrieved person was at liberty to challenge the Enforcement notice *vide* an appeal to the liaison committee.

364. It was the further testimony of the witness that the terms of the Enforcement notice are to the effect that the owner of the building is obligated to remove the building and in default, the City County Government can do so albeit at the cost/expense of the Owner of the Building.

365. Nevertheless, the witness averred that in the event of removal by the City County Government, a process and/or procedure would have to be followed.

366. It was the further testimony of the witness that canalization of the river is not illegal. However, the witness reiterated that canalization must be approved.

367. It was the further testimony of the witness that the approvals at page 725 of the petitioner's bundle of documents relates to alteration on the building. However, the witness averred that the approval did not relate to extension of the building onto the riparian reserve.

368. Finally, the witness averred that the City County Government of Nairobi did not withdraw the Certificate of occupation or at all.

369. With the foregoing evidence, the 5th respondent's case was closed.

Parties' Submissions:

370. Following the close of the hearing, the advocates for the parties sought to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions by the respective parties.

371. the petitioner filed three [3] sets of written submissions, namely, the submissions dated the 4 November 2024, the 15 January 2025; and the written submissions dated the 17 March 2025, respectively.

372. Vide the three [3] sets of written submissions, the petitioner has highlighted and then canvassed Eight [8] salient issued for consideration by the court. The issues raised and canvassed by the petitioner are namely; whether the petitioner was required to exhaust the internal remedies by appealing to the liaison committee of the Nairobi city county government before filing of the petition; whether there was any defect in the petitioner's title to and in respect of the suit properties; whether the issuance and service of the Enforcement notice and the subsequent demolition of the petitioners premises constituted a violation of the petitioner's fundamental rights and freedoms; whether the demolition of the petitioner's properties and the consequential eviction was unconstitutional and in breach of the provisions of the *land Act*; whether the petitioner's rights of ownership of the suit property has been breached and/or violated; and what remedies [if any] ought to be granted.

373. The 1st and 4th respondents filed written submissions [sic] dated 30 January, 2025, but lodged/ filed in Court on the 7 March 2025, and wherein the Honourable Attorney general has highlighted five [5] salient issues, namely; whether the Petition beforehand is barred by the doctrine of exhaustion and constitutional avoidance; whether the suit properties fell on a road reserve and were thus public land; whether the petitioner has proved his claims [if any] as against the 1st and 4th respondents and whether the petitioner is entitled to any recompense or otherwise.

374. The 2nd respondent herein filed written submissions dated the 27 December 2024; and wherein same 2nd respondent] has highlighted three [3] pertinent issues, namely; whether the mandate of the 2nd respondent was exercised judiciously; whether the 2nd respondent is liable for the damage[s] to the petitioner's properties; and whether the petitioner is entitled to the special and exemplary damages sought vide the Further amended Petition or otherwise.

375. The 3rd respondent filed written submissions dated the 16 December 2024; and wherein same has canvassed three [3] salient issues. The issues highlighted at the foot of the written submissions on behalf of the 3rd respondent are, namely; whether the suit properties fall within public land to wit a riparian reserve and whether the same could be lawfully allocated to private individual without a PDP; whether

the petitioner has proved his case against the 3rd respondent or otherwise; and whether the petitioner is entitled to Special damages of Kes 2, 010, 732, 036 Only; or any other relief or at all.

376. The 5th respondent filed written submissions dated the 16 December 2024; and wherein same has distilled Eight [8] issued for consideration. The issues highlighted on behalf of the 5th respondent are whether the petitioner ought to have exhausted the available statutory remedies before filing the Petition; whether the 5th respondent demolished the petitioners property; whether the petitioner constructed the building on a riparian reserve; whether the petitioner's legitimate expectation and the right to fair administrative action was violated; whether the private individual/group rights of the petitioner override public policy; whether the petitioner is entitled to any remedy to the alleged violation of its rights by the so called multi-sectoral agency consultancy agency; and whether the petitioner is entitled to the reliefs sought or otherwise.

377. The submissions filed by and on behalf of the parties [details in terms of the preceding paragraphs], form part of the record of the court. Furthermore, the court has examined and perused the written submissions filed on behalf of the respective parties.

378. Even though the court has neither rehashed nor reproduced the written submissions, it is pertinent to underscore that the submissions under reference and the various case laws cited thereunder have been duly considered and taken into account.

379. Finally, it would be remiss of me not to acknowledge the elaborate and comprehensive submissions that have been filed by and on behalf of the parties. For good measure, the submissions that have been filed run into thousand of pages; and it would not have been possible to reproduce same in the body of this Judgment.

380. Nevertheless, this court is indebted to the advocates for the respective parties for the erudite and incisive submission[s] pertaining to each of the issues that were canvassed.

381. Suffice it to state that the extent of research and the quality of submissions placed before this court is truly refreshing and commendable.

Issues for Determination:

382. Having reviewed the pleadings filed by and on behalf of the parties; the evidence tendered [both oral and documentary] and having taken into account the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the dispute beforehand turns on four [4] key issues, namely;

    i. Whether the Petition beforehand is barred by the doctrine of exhaustion and constitutional avoidance or otherwise.

    ii. Whether the petitioner was the lawful and registered proprietor of the suit properties and thus entitled to the protection under the *Constitution* and statute.

    iii. Whether the petitioner's fundamental rights and freedoms as pertains to the suit properties were violated, breached and/or infringed upon by the respondents or otherwise.

    iv. What reliefs, [if any] ought to be granted.

Analysis and Determination

Issue Number 1

Whether the Petition beforehand is barred by the doctrine of exhaustion and constitutional avoidance or otherwise.

383. Learned counsel for the 5th respondent has submitted that the petitioner herein was issued and served with an Enforcement Notice dated the 23 May 2018; by the 5th respondent. Furthermore, it has been contended that the Enforcement Notice clearly stated the reason[s] and the grounds underpinning same.

384. For ease of appreciation, it is imperative to reproduce the contents of the said Enforcement notice which underpins the submissions by Learned counsel for the 5th respondent.

385. Same are reproduced as hereunder;

> Description of Development
>
> Illegal alterations and additions to existing building without statutory inspection, without approved structural plans from Nairobi County Government

386. The Enforcement Notice thereafter indicated that the addressee of the notice, namely, the petitioner/ developer was to do the following;Stop further development forthwith.Submit structural drawings to Nairobi County Government and report within 7 days.

387. The Enforcement Notice under reference was duly received and acknowledged by the petitioner. Suffice it to posit that the petitioner instructed its consulting engineers, namely, Vex Engineers to respond to the notice. To this end, M/s Vex Engineers generated the Letter dated the 29 may 2018; and which was addressed to the Director of Pity planning of the City County Government of Nairobi.

388. The contents of the Letter under reference are germane and paramount.

389. Same are reproduced as hereunder;

> Re: proposed renovations on plot LR 209/11308, ring road- Parklands,nairobi, Kental Enterprises LTD.
>
> Structural Engineers Report.
>
> This is to notify you that Vex Engineers are the Civil and Structural Engineers for the above project Engineers have been carrying out routine site inspections at various stages of works for compliance integrity of the construction works. The works are being carried out as per the duly approved structural drawings [copies available on site]. The construction materials being used on site are within the tec material specifications as instructed by the engineers. We hereby certify that the structural works are erected soundly.
>
> Yours faithfully
>
> Eng B Osumba.
>
> For Director.

390. Notably, upon receipt of the response from the petitioner in answer to the allegations at the foot of the Enforcement Notice, the 5th respondent generated the Letter dated 6 July 2018. Instructively, the letter under reference was addressed to the petitioner's architects, namely; Satish Shah [PW2].

391. The contents of the Letter dated the 6 July 2018; are also pertinent. To this end, it suffices to reproduce same for ease of reference.

392. The contents of the letter are reproduced as hereunder;

Satish $hah (Arch)

PO.Box 14468-00800

Nairobi.

Rei Building Structure and Related Development On Plot LR No 309/13c8 -Mwanzi Road,westland S

Your letter ref SS/UC/209/11308/12 dated 30 May 2018 and another by M/S Vex Engineers ref VE/SER/CSC/018/01 dated 29th May 2018 subsequent to our Notice S/No 6244 dated 23 May 2018.

After perusing the documents and the approvals relating to the subject plot, I wish to draw your attention to some key pertinent issues arising thereof, which include, but not limited to:-

i. The approvals of the Building structure vide pian Reg No CU 796 dated 6th June 1994 which show apparent misrepresentation of the actual location of the stream compared.

ii. The beacons of the plot as per the Survey Plan which show that the plot crosses over the with the Survey Plan, thereby leading to the siting of the building on top of the stream steam thus making the stream part of the plot, as a result negating riparian-reserve along the stream

ii. The Survey Plan dated 8th August 1988 indicates that the stream was canalized yet we have established that the Structural and Civil drawings for the canalization vide approval.

v. Lack of evidence to prove statutory inspections of the works by the then Nairobi City Ref NCC/TRAN/2805/SMM/VNM were done 22 years later ie 30 September 2016 Commission.

vi. Lack of proof for Occupation Certificate for the building structure.

Therefore, compliance with the Enforcement Notice is obligatory, including demolition of the part of the building structure encroaching into the riparian reserve as would be determined by National Environmental Management Authority (NEMA) or Water Resource Management Authority (WARMA).

Oblige.

Chief Officer-urban Plan Ning

393. It is evident that upon issuance of the Enforcement notice, the petitioner herein duly responded to the issues that had been raised by the 5th respondent. In any event, it appears that the question of undertaking alterations and additions to the existing building ceased to be an issue.

394. I say ceased to be an issue because at the foot of the letter dated 6 July 2018 [sic] the alleged alterations and additions to the existing building was no longer highlighted.

395. Be that as it may, the letter dated 6 July 2018 came up with new issues, which did not constitute part of the Enforcement notice dated the 23 May 2018. Furthermore, the letter under reference also captured the issue of encroachment into the riparian reserve and thereafter indicated that the structure

encroaching onto the riparian reserve ought to be removed/demolished subject to the determination of the riparian reserve by National Environmental management Authority [NEMA] and Water Resources Management Authority [WARMA].

396. The foregoing correspondence founds the basis for the submissions that the petitioner herein ought to have challenged the enforcement notice before the liaison committee established under the *physical planning Act*, Chapter 286 Laws of Kenya [now repealed].

397. What I hear the 5th respondent as well as the 1st and 4th respondents to be contending is to the effect that there existed a statutorily ordained mechanism, which ought to have been invoked by the petitioner before the filing of the instant Petition.

398. Bearing the foregoing factual and legal issues in mind, it is now apposite to revert to the question of the doctrine of exhaustion and to discern whether the issues raised at the foot of the Petition herein ought to have been subjected to the statutorily provided mechanism by way of [sic] an Appeal to the Liason Committee or otherwise.

399. To start with, it is not lost on this court that the Petition beforehand was filed long after the building on the suit properties was demolished and thereafter ceased to exist. Furthermore, it is common ground that the demolition complained of took place on the 10 August 2018 whereas the Petition was filed in court on the 22 January 2019.

400. The question is, could the petitioner have raised the issue[s] pertaining the demolition of the building on the suit property before the liaison committee established under the *Physical Planning Act*, Chapter 286, Laws of Kenya [now repealed].

401. Put differently, would the liason Committee have had the requisite jurisdiction to engage with and determine the issues that have been raised at the foot of the Petition herein.

402. To my mind, the issues raised at the foot of the Petition herein are Constitutional in nature and fall outside the ambit, purview and mandate of the liaison committee. To this end, the issues under reference could therefore not have been canvassed and or ventilated before the liaison committee or at all.

403. To underpin the foregoing exposition of the law, it suffices to cite and reference the decision of the Supreme Court [the apex Court] in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), where the court stated as hereunder;

> 100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows: "What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies

are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited *CA No 2 of 2008*. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that: "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

101. Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

102. In the above context, what was in issue in the appellant's petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant's rights under articles 40 and 42 of the *Constitution*.

103. The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.

104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of the *Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the *Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.

We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court [Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated: "In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court." [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

404. Furthermore, the court stated as hereunder;

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const and JR) (17 February 2023) (Judgment).

108. It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC.

405. The court continued and held thus;

110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.

406. In my humble, albeit considered view, the applicability of the doctrine of exhaustion to the instant matter is duly explained and addressed vide the *dicta* emanating from the decision [supra]. Simply put, the petitioner herein who has raised a plethora of constitutional issues was at liberty to and within his fundamental rights to approach the Environment and Land Court with a view to vindicating his proprietary rights in respect of the suit properties.

407. Secondly, it is also important to underscore that the Enforcement Notice dated the 23rd May 2018; which was being referenced by learned counsel for the 5th respondent ceased to exist taking into account

the contents of the letter dated the 6 July 2018. For good measure, the contents of the letter under reference, alluded to the determination of the riparian reserve [if any] by the 2nd and 3rd respondents.

408. To my mind, what comes to the fore is that any further action [if any] could only ensure upon the determination of the scope of the riparian reserve by National Environment Management Authority [NEMA] and Water Resources Management Authority [WARMA] and not otherwise.

409. Thirdly, it is imperative to underscore that the doctrine of exhaustion has exceptions and a party, the petitioner not excepted [subject to proof] can approach a court of law without necessity of filing the dispute before the statutorily provided forum.

410. The instances where a litigant can by-pass the inbuilt and statutorily circumscribed dispute resolution forum have been elaborated upon in a number of decision. It suffices to mention and highlight but a few.

411. In the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court [Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:"

> In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court." [Emphasis ours].

412. Likewise, it is important to take cognizance of the decision in the case of *Whitehorse Investments Ltd v Nairobi City County* [2019] KECA 102 (KLR)

> 30. The Appellant did not justify its choice of institution to resolve its grievance or explain why it chose to move to the ELC before it even responded to the Enforcement Notice, 3 months after service of the notice. It is now settled that where exceptional circumstances exist, a party cannot be barred from seeking the more efficacious and expeditious remedy. This was succinctly expressed in *Republic v National Environmental Management Authority* Civil Appeal No 84 of 2010 as follows;
>
> > "The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in, the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.." (Emphasis supplied)

413. Flowing from the foregoing analysis, my answer to issue number one [1] is to the effect that the Petition beforehand is not defeated by the doctrine of exhaustion either as canvassed by the Learned counsel for the 5th respondent and supported by the Honourable Attorney General or otherwise.

414. At any rate, there is no gainsaying that by the time the Petition beforehand was being filed, the Enforcement notice which underpins the invocation of the doctrine of exhaustion, had ceased to exist

insofar as the building in question had been demolished and hence it would have been an exercise in futility to purport to [sic] approach the Liason Committee.

Issue Number 2

Whether the petitioner was the lawful and registered proprietor of the suit properties and thus entitled to the protection under the *Constitution* and statute.

415. the petitioner herein through its director Bimal Shah [PW1] testified before the court and averred that the petitioner bought and acquired the suit properties from Africana Apartment Ltd and Mangoose Ltd, respectively. To this end, PW1 posited that the petitioner was not the allottee of the suit properties.

416. For ease of appreciation and to put the testimony of PW1 into context, it is imperative to reproduce the testimony of PW1 whilst under cross examination by learned counsel for the 1st and 4th respondent [the Honourable Attorney General].

417. PW1 stated thus;

> " In respect of LR No 209/11307, the same was purchased from Africana Apartment Ltd. I was not a director/shareholder of Africana Apartment Ltd".

418. Furthermore, the witness ventured forward and stated thus;

> " I played a role in the purchase of LR No 209/12829. In respect of the first two properties, I have the transfer documents. The transfer documents is not before the court".

419. From the foregoing testimony, what becomes apparent is that the petitioner herein was a purchaser of the suit properties and not a direct allottee thereof.

420. Other than the foregoing testimony, it is also worthy to recall that the validity or otherwise of the allocation, registration and issuance of the certificate of titles in respect of the suit properties had been the subject of a previous suit, namely; Nairobi HCC [ELC] Case No. 105 of 2010 between *Kental Enterprises Limited v The Honourable Attorney General and The Commissioner of Land*.

421. Suffices it to underscore that the Commissioner of lands [now defunct] had issued a gazette notice number 3460 and wherein same sought to revoke the titles in respect of the suit properties.

422. The Honourable court [Hon Justice D A S Majanja, Judge [now deceased] found and held that the impugned gazette notice which sought to revoke and/or cancel the titles of the suit properties was unconstitutional and unlawful. To this end, the learned judge directed that the said case stood determined in accordance with the decision [Judgment] that had been issued *vide* *Power Technique Limited versus the Honourable Attorney General & 2 others* [2012]eKLR.

423. At this juncture, it is imperative to reproduce the decision of Hon Justice Majanja, Judge; [now deceased] in the said case.

424. The Honourable Judge stated thus;

> Ms Koech, Counsel for the Defendant concedes that the suit properties in this matter, LR 209/11307 and LR 209/11308 are the subject of Gazette Notice No. 3640. By the said Gazette Notice the Registrar of Titles purported to revoke title to the said properties.
>
> In my judgment delivered on 19th June 2012, Power Technics Ltd v The Attorney General and Others, Nairobi Petition No 178 of 2011, I held that the Registrar of Titles had no

power to revoke titles by way of a Gazette Notice and such act was a breach of the owner's rights protected under article 40 and 47 of the *Constitution*. I therefore declared Gazette Notice No 3640 null and void

In view of the judgment in that case, no purpose will be served by these proceedings. The orders in that case have now been published in Gazette Notice No. 9815 issued on 20 July 2012. [Emphasis supplied]

In the circumstances, I therefore order that this suit be determined in accordance with the orders made in Nairobi Petition No 178 of 2011 in so far as Gazette Notice No 3460 is concerned. The plaintiff shall have the costs of this suit

425. In my humble view, the decision of Hon Justice Majanja, Judge [as he then was] was a decision in rem. The decision underscored the constitutional rights of the petitioner herein to the two suit properties. Furthermore, the decision under reference also highlighted that the constitutional rights of the petitioner as pertains to ownership rights of the petitioner to the suit property could only be impugned and/or invalidated in accordance with the law.

426. Pertinently, the Learned Judge [now deceased] underscored that due process of the law must be adhered to.

427. Despite the decision issued vide Nairobi HCC ELC No 105 of 2010 [*supra*], it is common ground that neither the Honourable attorney general nor any of the state organs who have been sued herein have ever filed any suit seeking to challenge, impugn and/or invalidate the petitioner titles to the suit property. Furthermore, it is not lost on this court that neither of the respondents herein have filed any Cross Petition or at all.

428. To the extent that the petitioner's titles to the suit properties have neither been impugned nor invalidated, it is common ground that the petitioner is entitled to partake of and to benefit from the rights flowing from ownership of the suit properties

429. In the case of *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] KEELC 2730 (KLR), the court stated as hereunder;

(17) the petitioner as a registered proprietor of the suit property has established a strong prima facie case for the grant of the reliefs for the protection of his property rights sought in the petition. I do not agree that the petition is about ownership of the suit property which should be determined by a civil suit rather than by petition for protection of property rights. Having perused petition, I do not accept that the petitioner has violated the rule of specificity of pleading constitutional claims as propounded by *Anerita Karimi Nejru v AG No 1* (1979) KLR 154. the petitioner as registered proprietor asserts his constitutional right to protection of property under article 40 of the *Constitution*. If he 2nd respondent contends that the title of the petition is vitiated by fraud, misrepresentation or the certificate of title is illegal, unprocedural or obtained through a corrupt scheme, it is for the said respondent to move the appropriate Court by suitable proceedings in that behalf for such determination. In the absence and prior to any such determination, the petitioner is entitled to protection of his undoubted property rights. [Emphasis supplied].

(18) As held by the Court of Appeal for *East Africa held in Moya Drift Farm Ltd v Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not

have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

> "I cannot see how a person could possibly be described as "the absolute and indefeasible owner" of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession : there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession."

Sir William Duffus, P ibid at p 117 agreed with Spry, JA as follows:

> "In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land."

The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.

430. Similarly in the case of *Kuria Greens Limited v The Registrar of titles & Another* [2012]eKLR, the court stated as hereunder;

> Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the petitioner was not party to such fraud or misrepresentation. the petitioner lawfully purchased the suit land from Riangi Estates Limited and obtained all the necessary consents and invested heavily on the suit land. The 1st respondent could not therefore purport to arbitrarily revoke its title without any notice and most importantly, without following the due process of law. Due process must be adhered to by all, the State and its citizens.

431. The necessity to comply with the due process of the law before impugning and/or invalidating a certificate of title was re-visited and affirmed in the case of *Isaac Wanjohi Gathangu v the Attorney General & Others* [2012]eKLR, where the court stated as hereunder;

> 44. I also hold that a the finding of "unlawful acquisition" referred to in article 40(6) of the *Constitution* must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. Thus, as was held in the case of *Kuria Green Limited v Registrar of Titles and another* (*Supra*), it must follow that the purported revocation to title LR No 209/2052 by way of Gazette Notice No 9230 is illegal, null and void and of no effect.

432. The 1st and 4th respondents herein contended that what comprises the suit properties was a road reserve and that because same was a road reserve the land in question could not have been sub-divided culminating into the suit properties. However, it is common ground that the 1st and 4th respondents did not file any cross petition for purposes of determination by the court as pertains to whether or not the suit properties fell on a road reserve.

433. Furthermore, and even assuming that the contention under reference is correct, [which I doubt, given the evidence on record] the First and Fourth respondents herein neither issued nor served any

Notice[s] upon the petitioner in that respect either in accordance with the provision[s] of article 47 of the *Constitution*, 2010; or at all.

434. Moreover, it is common knowledge that parties are bound by their pleadings. To this end, 1st and 4th respondents were bound by the replying affidavit sworn by Edwin Munoku Wafula on the 9th September 2019 and wherein the issue that the suit properties fell on a road reserve was neither raised nor canvassed. [See the decision of the court of appeal in *IEBC V Stephen Mutinda Mule* [2013]eKLR] [See also *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ)].

435. Additionally, it is also important to recall the evidence of RW2, namely; Wilfred Kabue Muchae.

436. Whilst under cross examination by Learned counsel for the petitioner, RW2 stated as hereunder;

> "I do wish to state that the suit properties were subdivided from LR No 1870/1/10/1. The plot in question was clearly marked. I also wish to add that the road was also earmarked. I do confirm that LR No 1870/1/10/1 was not earmarked road. I do confirm that the suit plot arose from the subdivision of LR No 1870/1/10/1".

437. Whilst still under cross examination, RW2 stated as hereunder;

> " I can also see LR No 1870/1/10/1 and I do confirm that the same is surrounded by two roads. However, I do confirm that the said plot was not on the road".

438. Additionally, RW2 ventured forward and stated thus;

> " The plot LR No 1870/1/10/1 measured 8.4 HA. FR No. 56/92 is dated 30th June 1949".

439. Similarly, and still whilst under cross examination RW2 is on record stating as hereunder;

> " The survey records before the court are valid. If there was any error in respect of survey record, the director of survey would recall the improper survey record. I do confirm that the survey records pertaining to the petitioner's plots have not been revoked/recalled. The survey records are still intact.
>
> I don't have any records to show that the Director of Survey ever wrote to the petitioner to intimate that the suit plot were situate on a road reserve".

440. On re-examination, by Learned counsel for the 1st and 4th respondents, RW2 stated as hereunder;

> " I wish to state that the director of survey has never recalled and rescinded the survey maps [FR] which shows the existence of the suit plot[s]. Further, I do clarify that the survey maps [FR] in question show that the suit plots are not on the road reserve. I do wish to add that the preparation of the survey maps [FR] is the responsibility of the directorate of survey and not the petitioner herein or any other citizen or at all".

441. RW2 proceeded further on re-examination and stated thus;

> " I do agree that if there is an error in the survey maps [FR], the error and the attendant responsibility will fall at the door step of the Director of survey".

442. Without belabouring the point, what becomes apparent from the testimony of Wilfred Muchai [RW2] is to the effect that the suit properties do not fall on a road reserve.

443. Back to the question as to whether the petitioner is the lawful and registered proprietors of the suit properties. In the course of the analysis, I have looked at various perspectives, namely; the purchase and acquisition of the suit properties; the fact that the titles of the suit properties have never been challenged in accordance with the law; and ultimately the fact that the assistant director of survey [RW2] has confirmed that the suit properties do not fall on a road reserve.

444. Before terminating on this issue, it is also imperative to highlight the fact that the petitioner was issued with a certificate of title [lease] over and in respect of the suit property. The certificate of lease under reference has not been impugned; quashed and/or rescinded.

445. To my mind, the Certificate[s] of title/lease held by the petitioner are deemed to be prima facie evidence of title until and unless same have been impeached in accordance with the due process of the law; thus far the certificate[s] of title remain in situ.

446. Does the petitioner have legitimate right[s] to and in respect of the suit properties? The answer to this question is certainly in the affirmative.

447. The Five Judge bench of the Court of appeal in the case of *Embakasi Properties Ltd v The Commissioner of Lands & Another* [2019]eKLR, considered the import and tenor of a Certificate of title issued in accordance with the law and stated thus;

> Although it has been held time without end that the certificate of title is; "...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the *repealed Registration of Titles Ac*t. Section 26 of the *Land Registration Act, 2012* though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, unprocedurally; or through a corrupt scheme".

448. Furthermore, the Court ventured forward and stated as hereunder;

> The three [3] main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of *Regal Constellation Hotel Ltd* Re 2004 Can LII 2006 Ontario C.A.) Page 13 para 42 as follows:
>
> "42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy."
>
> We reiterate that under the insurance principle the State guarantees the accuracy of all registered titles through the register; and that there would be indemnity in case a registered

proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register. The mirror principle is a guarantee that the register is a perfect mirror of the state of title while the curtain principle holds that a purchaser need not worry about the history of the title so long as from the register it is clear that whoever is transferring the property to him has the capacity.

449. The legitimacy of a title acquired in accordance with the law and whose validity has not been impugned was also underscored in the case of *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority [KURA]* [2019]eKLR, where the Court of appeal [per Ouko JA] stated as hereunder;

> Both the *Constitution* and statute law emphasise the sanctity of title to land. The registration of a person as the proprietor of land vests in that person the absolute ownership of that land subject only to the leases, charges, conditions and restrictions, if any, shown in the register. See: article 40 of the *Constitution* and sections 27, 28, 30, 32 and 143 of the repealed Registered Lands Act. Because of their relevance it is apposite to paraphrase and set out some of these provisions.
>
> Article 40 guarantees every person the right to acquire and own property in any part of Kenya and Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. Section 143 of the Registered *Land Act* underscores the sanctity of title to land by stating in subsection (2) that;
>
> > "(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default".
>
> Such, is the protection granted to a registered proprietor whose registration, as a bona fide purchaser, may only be cancelled where it is proved that it was obtained by fraud or mistake, in which the proprietor had knowledge of or was a party or substantially contributed to. The protection of innocent purchasers has been recognized from time immemorial. For example, *Fletcher V Peck*, 10 U.S 87 (1810), the landmark United States Supreme Court's decision in 1810, is remembered for being the first decision to declare a state law unconstitutional. But for this jurisdiction, the relevance of the decision is its creation of a precedent for the sanctity of legal title to land vis à vis innocent third party purchasers

450. Arising from the foregoing analysis, my answer to issue number two [2] is fourfold. Firstly, the validity of the title of the suit properties and whether same could be cancelled by the Registrar of titles without regard to the due process of the law was vindicated in the decision of Hon. Justice D A S Majanja, Judge [now deceased].

451. Secondly, even though the Honourable Attorney General who represent[s] the 1st and 4th respondents has posited that the suit properties fell on a road reserve, it is imperative to underscore that the said contention was disabused by their own witness, namely; Wilfred Muchai [RW2].

452. Thirdly, the contention that the suit properties fell on a road reserve or otherwise was brought to court on the basis of the witness statement filed on behalf of the 1st and 4th respondents. Nevertheless,

no pleading and/or cross petition was ever filed. In the absence of a cross petition, the 1st and 4th respondents cannot by side-wind bring the question of [sic] road reserve for purposes of determination by the court.

453. Fourthly, it is instructive to recall and reiterate that the petitioner was issued with certificate of title to and in respect of the suit properties by the designated state departments. The certificate[s] of titles which were issued in respect of the suit properties have neither been impugned nor invalidated in accordance with the law.

454. For as long as the certificate[s] of titles remain in situ, the petitioner herein is entitled to the constitutional protection espoused vide article 40[3] as read together with article 60[1][b] of the *Constitution*, which underpin the security of land rights including title to land.

Issue Number 3

Whether the petitioner's Fundamental rights and Freedoms as pertains to the suit properties were violated, breached and/or infringed upon by the respondents or otherwise.

455. Whilst discussing issue number two[2] elsewhere herein before, this court has found and held that the petitioner was entitled to protection under the law. Furthermore, the court has found and held that the petitioner is the lawful and legitimate proprietor of the suit properties.

456. Nevertheless, on the 10th August 2018 the petitioner's building otherwise known as Ukay Mall was brought down and demolished by a body known as the Multi-Sectoral Agency Consultative Committee [MSACC] comprising of various state organs [institutions].

457. The composition of the said multi-sectoral agency consultative committee [MSACC] is well delineated at the foot of paragraph 27 of the replying affidavit sworn by Edwin Munoko Wafula on behalf of the 1st and 4th respondents.

458. For ease of appreciation, paragraph 27 of the replying affidavit are reproduced as hereunder;

> 27. That the process leading to the marking of the suit property for demolition having been constructed on riparian land was undertaken under the auspices of the Nairobi Regeneration Programme and currently whose functions are undertaken by the Multi-Sectoral Agency Consultative Committee (MSACC) whose team is composed of the representatives from the following Ministries/Departments:-
>
> (a) Ministry of Lands and Physical Planning
>
> (b) National Environment Management Authority [NEMA].
>
> (c) Nairobi City County
>
> (d) Water Resources Authority [WRA]

459. Moreover, the fact that the building situate on the suit properties was demolished by the multi sectoral agency constlative committee was highlighted by Timothy Waywa Mwangi [RW1].

460. To this end, it is expedient to reproduce the evidence of RW1 whilst under cross examination by Learned counsel for the petitioner.

461. RW1 stated thus;

> " I was not a member of the multi sectoral task force/committee. I don't know when the multi task force was formulated. I do confirm that the demolition was carried out in 2018. The multi sectoral agency committee was responsible for the demolition of the building on the suit properties.
>
> The task force is the one that was responsible for the demolition of the suit properties. I have seen the report that was made by the multi task force committee. However, I have not brought the report before the court.

462. Bearing the testimony of RW1 in mind, and taking into account the contents of the replying affidavit sworn on behalf of the 2nd, 3rd and 5th respondents respectively, I find and hold that the offensive demolition was indeed undertaken with the involvement, participation and blessings of the respondents herein save for the 4th respondent [National Youth Service].

463. Secondly, it is apposite to venture forward and to discern whether the multi sectoral agency consultative committee issued any notice to the petitioner herein prior to and before undertaking the offensive demolition. Pertinently, there is no gainsaying that the impugned action could not have been undertaken without regard to the due process of the law.

464. Moreover, it is worthy to recall that due process of the law envisages that before any adverse action or decision is taken against a citizen, the petitioner not excepted, such citizen is entitled to due notice.

465. The import, tenor and importance of the concept of due process of the law, was highlighted in the case of the *Speaker, County Assembly of Kisumu v The Clerk Kisumu County Assembly Service Board* [2015]eKLR, where the court stated as hereunder;

> 72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them.
>
> As is clear from articles 47 and 50 of our Constitution, it is a constitutional imperative.
>
> 73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in Kanda v. Government of Malaya
>
> > "If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

74. What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.

466. Moreover, the petitioner herein was also entitled to partake of and benefit from the right to fair hearing as enshrined in article 50 of the *Constitution*. To this end, there is no gainsaying that no adverse decision could have been made against the petitioner and/or its properties without having been afforded the right to be heard.

467. The Supreme Court of Kenya [the apex court] in the case of *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment); while underscoring the importance of the right stated thus:

> 68. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014; [2014] eKLR (Njoki Ndungu, SCJ, Concurring), this court made the following finding concerning the right to a fair trial under article 50(1) and 50(2):"(255)article 50(1) refers to the right to a fair hearing for all persons, while article 50(2) accords all accused persons the right to a fair trial. Article 25(c) lists the right to a fair trial as a non-derogable fundamental right and freedom that may not be limited. Often the terms 'fair hearing' and 'fair trial' are used interchangeably, sometimes to define the same concept, and other times to connote a minor difference. Although the right to a fair trial is encompassed in the right to a fair hearing in our Constitution, a literal construction of these two provisions may be misconstrued in some quarters to mean that article 50(1) deals with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas article 50(2) is limited to accused persons thereby arguing that the protection of such right only relates to criminal matters. This is not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Bill of Rights, which calls for an expansive and inclusive construction to give a right its full effect...
>
> (257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem(hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled....
>
> (261) It is important to restate that a literal reading of the provisions of the *Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: "it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case

effectively before the court." (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).

468. Additionally, the petitioner herein was also entitled to the right to fair administrative action, in accordance with the provisions of article 47 of the *Constitution*. In this regard, it suffices to underscore that no adverse action could have been taken without compliance with article 47 of the *Constitution* as read together with the provisions of the Fair Administration Action Act, 2016. [See the decision of the Supreme Court in the case of *Kenya Revenue Authority v Export Trading Company Limited* (Petition 20 of 2020) [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment)].

469. With the foregoing in mind, it is appropriate to revert to the issue beforehand and to discern whether the offensive demolition was undertaken in accordance with the due process of the law or otherwise.

470. To start with, the only notice, [read enforcement notice] which was issued to the petitioner is the one dated 23 May 2018. The Enforcement notice under reference was generated and issued by the 5th respondent.

471. The contents of the said Enforcement notice were captured and reproduced elsewhere in the body of this Judgment. Nevertheless, the important feature[s] worthy of notice is to the effect that the impugned Enforcement notice concerned [sic] illegal alterations and addition to the existing building without statutory inspection and without approved structural plans from Nairobi city County Government.

472. Furthermore, the impugned Enforcement notice called upon the petitioner to stop the development forthwith and submit structural drawings to Nairobi City County Government.

473. Notably, the Enforcement Notice under reference was duly responded to by the petitioner vide letter dated 29 May 2018. In any event, the petitioner's Engineers clarified that the alterations under reference were being undertaken in accordance with the approval by the Nairobi city county government. For good measure, the duly approved structural drawings were submitted.

474. However, the critical point worthy of note is to the effect that the impugned enforcement notice did not call upon the petitioner to demolish the building that was standing on the suit properties. Besides, the 5th respondent did not indicate that in the event of default, any demolition would be carried out and/or undertaken.

475. Worse still, the enforcement notice under reference appears to have been substantially negated by the 5th respondent's own letter dated 6 July 2018 and in respect of which the 5th respondent changed tune from what was hitherto conveyed vide the Enforcement notice.

476. It is evident, that at the foot of the letter dated 6th July 2018 the 5th respondent [Nairobi City County Government] was now highlighting encroachment into the riparian reserve and calling upon the petitioner to demolish the part of the building encroaching onto the riparian reserve subject to determination by National Environment Management Authority [NEMA] and Water Resource Management authority [WARMA].

477. As to whether the 5th respondent by and of itself could determine [sic] encroachment onto riparian reserve is a different matter. Furthermore, I shall return to this issue presently.

478. Could the offensive demolition be undertaken on the basis of the Enforcement notice issued on the 23 May 2018?

479. My answer to this question is in the negative. The said Enforcement notice did not relate to the demolition of the building on the suit property and thus same cannot be relied upon to support the unconstitutional and barbaric demolition.

480. On the contrary, the Enforcement notice issued on the 23 May 2018 only called upon the petitioner to stop what was alleged to be illegal alterations and additions to the existing building and not otherwise.

481. Further and in any event, evidence abound that the alterations, additions and renovations that were being undertaken by the petitioner herein were duly approved by the 5th respondent in terms of the approved building Plan[s], which were forwarded to the same.

482. To this end, it is imperative to take cognizance of the evidence of RW5, namely; Wilfred Wanyonyi Masinde whilst under cross examination by Learned counsel for the petitioner.

483. The witness [RW5] stated as hereunder;

> " Referred to page 829 of the petitioners bundle of documents and the witness states that the document is an approved building plan. The building plan was approved on [the dates are not clear]. The property in question is LR No 209/11308. I also wish to state that the number of the property is shown as LR No 209/11308. I can see that the building was approved by the city council".

484. Even taking into account the allegations that were captured at the foot of the enforcement notice, there is no gainsaying that same were made for convenience and were thus built on quick- sand.

485. Next is the allegation that the building on the suit properties encroached onto the riparian reserve/ zone. The contention that the building on the suit property encroached onto the riparian zone is captured at the foot of the letter dated 6 July 2018 by the City County Government of Nairobi.

486. However, it is common knowledge that the only statutory body mandated to determine the extent of the riparian zone/reserve is Water Resource Authority [formerly Water Resource management Authority].

487. The foregoing position was highlighted and elaborated upon by the Honourable Court of Appeal in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others* (Civil Appeal E330 of 2020) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment)].

488. On the other hand, it is worthy to recall that the 3rd respondent herein had neither issued nor served any Enforcement notice. Furthermore, the 3rd respondent had neither visited the suit properties nor demarcated the extent of the riparian reserve/zone.

489. In this regard, it is imperative to take cognizance of the evidence of RW4, namely; John Nganga Kinyanjui.

490. The witness testified that he is an employee of Water Resource Authority and that same is currently the Manager in charge of Water Resources, Assessment and monitoring.

491. Whilst under cross examination by Learned counsel for the petitioner, the witness stated thus;

> " I was not involved in the demolition. However, I went to the site to measure the riparian. I do confirm that no report was prepared by the water resource committee. I do repeat that there was no report that was prepared. I do confirm that water resource authority have never raised any formal complaint with the petitioner".

492. Whilst under re-examination, the same witness [RW4] stated as hereunder;

> "I do state that the marking of the riparian reserve had not been achieved by water resource authority. The marking of the riparian had not been done".

493. What come out of the testimony of RW4 [both in cross examination and re-examination] is to the effect that Water Resource Authority had not undertaken the marking of the extent of riparian reserve or zone by the time the building on the suit property was demolished.

494. In the absence of the marking and demarcation of the riparian reserve/zone by Water Resources Authority [WRA] how would one [sensibly] contend that the building in question encroached upon or sat on the riparian reserve.

495. Next is the issue of canalization. It was also being contended that the petitioner herein had undertaken canalization of river Kibarage without the requisite approvals and authority from the designated bodies. Nevertheless, evidence abound that both National Environmental Management Authority [NEMA] and the Water Resources Management Authority [WARMA] had both issued approvals to the petitioner. [see the letter dated 12 July 2017 from water resources authority which gave the approval to the petitioner to undertake the canalization]. [See also the environmental impact assessment licence issued on the 25 September 2018 by NEMA].

496. Other than the letter of approval and EIA licence, it is also important to revert to the evidence of Zephania Owuor Ouma who testified that same is an employee of NEMA. Furthermore, the witness indicated that same is currently the Deputy Director in charge of compliance.

497. Whilst under cross examination by Learned counsel for the petitioner, the witness stated as hereunder;

> "I received an application for the expunction of the project. I am aware of one Catherine Ndaithi. I do confirm that same is an employee of NEMA. I do wish to confirm that same was working at Nairobi county office. The same visited the site and prepared a site visit report. The report contains various observations.
>
> Clause [c] speaks to the existing canal and the same is at the rare of the building. There is an open canal along the parking area. Observation [d] relates to existing excavation. The observation also states that the river is canalized upstream at the Nakumatt Wesgate area and downstream at visha Oshwal area. The canal is behind the building. The building does not sit on the canal. I do confirm that NEMA did not have any problem with canalization. I wish to add that canalization is a process/procedure which is recognized both technically and legally".

498. While still under cross examination, the witness stated as hereunder;

> "Referred to item 2 of the report and the witness state that the officer from NEMA have been availed various document including authorization from water resource authority. I do confirm that the officer proceeded to and approved the issuance of the licence. The licence was issued on the 25 September 2017. The same is for the proposed watercourse canalization of River Kibarage for capacity enhancement and storm water drainage".

499. Surely, how on earth would the Multi Sectoral Agency committee purport that the canalization of the river was illegal yet the designated authorities had issued the requisite licence and approval.

500. Similarly, how on earth would the same bodies, namely; the 2nd and 3rd respondents participate in a process purporting that the building in question was sitting on the riparian reserve and yet no measurements and demarcation[s] had been undertaken.

501. In my humble view, the allegations being thrown across the board by the respondents herein fall within what is commonly referenced "as the kicks of a dying horse".

502. Notwithstanding the foregoing analysis, one perspective remains and thus requires to be addressed. The perspective touches on and concerns whether all these allegations which have been raised and canvassed on behalf of the respondents were actually forwarded to the petitioner before the offensive demolition.

503. Pertinently, none of the allegations was ever forwarded to the petitioner before the offensive demolition. Instructively, if the allegations were [sic] credible and plausible, then the respondents ought to have complied with the provisions with articles 10[2], 27[1] and [2], 47 and 50 of the *Constitution* 2010.

504. Having not complied with the constitutional imperatives, I come to the conclusion that the rights and fundamental freedoms of the petitioner were violated, breached and infringed upon without due regard to the law.

505. The actions complained of were indeed arbitrary, whimsical, callous, barbaric and oppressive. Such acts, nay omission[s] must not be allowed to rear its ugly head under the current Constitutional dispensation.

506. Before departing from this issue, it is apposite to recall and reiterate the holding of the Court in the case of *Arnacherry Limited v Attorney General* [2014] eKLR; where the Learned Judge dealt with a similar situation and remarked thus:

> 57. Turning back to the allegation of violation of constitutional rights, the core right at the centre of this dispute is the right to property under article 40 of the *Constitution*, which has been reproduced elsewhere above. The facts in support of the allegation have not been contested and it is by now obvious that whereas the initial invaders of the suit land were civilians, the Government of the Republic of Kenya joined them and proceeded to establish a police station therein and also built schools and posted teachers to the said schools. It also set up its offices on the suit land including those of a Chief and Sub-Chief.
>
> 58. What other conclusion can be reached in the circumstances other that the State has, without lawful process, compulsorily acquired the said parcel of land? Acquisition is ordinarily direct and by processes known to the *Land Acquisition Act (Repealed)* and now the *Lands Act*, 2012. Constructive acquisition however may well occur in circumstances such as the ones obtaining in the present Petition and there is no doubt that article 40 was thereby violated.

507. Furthermore, the court proceeded and stated as hereunder;

> 77. This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.
>
> 77. I watched Justice Lutta testifying in Court. A man whose judgments and fingerprints dot our Law Reports now looks dejected and broken. His advanced years show more than they should, all because what he worked for in his youth was stolen by conniving civilians with Government

protection. No Kenyan should ever again be so treated and the State must draw lessons from this judgment.

508. I need to say no more.

Issue Number 4

What reliefs, if any ought to be granted.

509. the petitioner has sought for a plethora of declaratory reliefs at the foot of the Further amended Petition dated the 15 march 2022. Whilst discussing issue number three [*supra*] this court has engaged itself with the question of whether the petitioner was issued with the requisite notices prior to the impugned demolition; whether due process was complied with and whether the petitioner was afforded an opportunity to seek recourse before a court of law.

510. Sadly, the petitioner herein was denied and deprived of the due process of the law and the constitutional right of fair protection and benefit under the law. [See article 27[1] and [2] of the *Constitution* 2010].

511. Flowing from the findings whilst discussing issue number three [3] I encounter no difficulty in holding that the petitioner is entitled to the declaratory orders sought at the foot of the Further amended Petition. Same are hereby granted with the exception[s] highlighted in the Final Orders hereinafter.

512. Next is the issue compensation for the value of the suit properties which was forcefully taken away from the petitioner following the offensive demolition of the building that was erected/constructed thereon.

513. To start with, the petitioner called one James Marck Muthama Musau who testified as PW7. Same averred that he is a registered, licensed and practising valuer.

514. Moreover, PW7 testified that same was duly instructed by the petitioner to inspect the suit properties and thereafter to prepare a valuation report pertaining to the suit property.

515. To this end, the witness testified that same duly complied and undertook the inspection and valuation of the suit property. Furthermore, the witness testified that same thereafter prepared a valuation report dated the 6 November 2018; and which report same tendered and produced before the court.

516. It was the further testimony of the witness [PW7] that upon valuation, same returned the values of the suit properties as hereunder;

LR No	Current Market Value (Ksh)	15% Statutory Disburbance Allowance	Total Claim (Ksh)
209/11308	1,613,500,000.00	242,000,000.00	1,855,500,000.00
209/11307	200,000,000.00	30,000,000.00	230,000,000.00
209/12829	200,000,000.00	30,000,000.00	230,000,000.00

517. The report by the witness [PW7] contains the market value of the suit properties. In addition, the report also adverts to what is referenced as the 15% disturbance allowance.

518. However, it is common knowledge that the 15% disturbance allowance is an item that was only provided for under the Land Acquisition Act Chapter 295 Laws of Kenya [now repealed].

519. Additionally, there is no gainsaying that the 15% disturbance allowance is only claimable and payable where the designated property is the subject of compulsory acquisition in accordance with the provisions of the *Land Acquisition Act*, Chapter 295, Laws of Kenya [now repealed] and pursuant to Section[s] 109 to 113 of the *Land Act*, 2012[2016].

520. Arising from the foregoing, the element of 15% statutory disturbance allowance, which has been captured in the valuation report is neither claimable nor payable in the instant circumstances. For good measure, the dispute beforehand does not concern compulsory acquisition of the suit properties as known to Law or at all. In any event, it is not lost on this Court that there is nothing known as constructive compulsory acquisition. [See the decision of the Apex Court in *Attorney General versus Zinj* [*supra*]

521. On the other hand, the report contains the aspect of the current market value of the suit properties. In any event, there is no gainsaying that the market values highlighted have not been controverted by any other expert evidence [valuation report].

522. In the absence of a contrary valuation report, the values that have been highlighted by PW7 suffice. To this end, it is imperative to adopt the dicta of the supreme court of Kenya in the case of *Attorney General v Zinj Limited* [2021] KESC 23 (KLR) where the court [Apex Court] stated and held as hereunder:

> In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

523. The Court of Appeal in the case of *Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "Kenyac") & another* [2022] KECA 870 (KLR) has also reiterated the same position.

524. For good measure, the court stated thus:

> As properly held in *Stephen Kinini Wang'ondu* (*supra*), expert evidence can only be challenged by another expert.

525. the respondents herein did not procure and/or obtain any contrary valuation report. In this regard, I find and hold that the valuation report tendered by PW7 speaks to the market values of the suit properties.

526. In the premises, I am persuaded to decree and award the sum of Kes 2, 013, 500, 000 only as compensation for the value of the suit properties.

527. Next was the claim by the petitioner for loss of business. To this end, the petitioner called Muhamed Asif Chaudhry [PW6]. It was the evidence of PW6 that same is an accountant and forensic auditor.

528. Furthermore, the witness testified that same is a Member of Institute of Certified Public Accountants of Kenya [ICPAK].

529. It was the further testimony of the witness that same is an employee of PKF Consultant. In this regard, the witness testified that PKF-Consultant[s] was retained by the petitioner to undertake financial audit and accounts and thereafter prepare a report. To this end, the witness referenced exhibit P-38.

530. Nevertheless, whilst under cross examination by Learned counsel for the 3rd respondent the witness stated as hereunder;

> " The document is prepared PKF Consulting. However, I am an employee of PKF consulting. The document/report is not signed by any body. The report is not signed by myself. The only document that it is signed is the letter attached thereto".

531. From the testimony of PW6, it is evident that exhibit P38 was never signed nor authenticated. In this regard, I come to the conclusion that the document [Financial Report] under reference is devoid of probative value and hence cannot underpin the claim for Kes 114, 000, 000 which was claimed on account of [sic] loss of business.

532. At any rate, it is not lost on the court that the petitioner did not plead the claim for loss of business [income].

533. Next is the issue of Exemplary damages. The law on Exemplary damages is well settled. In the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

> " Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:
>
> i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute".

534. The parameters to be taken into account before making an award of Exemplary damages was also re-visited in the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR); where the Court stated thus:

> 28. This Court, in Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR stated as follows:
>
> > " The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing o do with compensating the plaintiff. This Court in The Nairobi Star Publication Limited V Elizabeth Atieno Oyoo [2018] addressed this issue as follows, and we agree;
> >
> > "As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halsbury's Laws of England, as follows:-

(1) Oppressive, arbitrary or unconstitutional actions by servants of government;

(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or

(3) Cases in which the payment of exemplary damages is authorized by statute."

See also John v MGN Limited [supra].

"We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG (the appellant), far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety."

535. To my mind, the manner in which the offensive demolition was carried out and undertaken befits an award of exemplary damages. Suffice it to state that perpetrators of the offensive demolitions were state agents, organs and/or Departments, who ought to have known better.

536. Moreover, it is not lost on this court that the offensive activities were being carried out and undertaken on the face of article[s] 1 and 10 of the *Constitution* 2010 which commands the state, the state organs and all persons to adhere to and comply with the *Constitution*.

537. In my humble view, I come to the conclusion that the petitioner is entitled to an award of Exemplary damages. Consequently, and in this regard, I proceed to and do hereby award the sum of Kes.50, 000, 000/= only.

538. I must say that in arriving at and awarding the sum of Kes.50, 000, 000/= only, I have taken into account the guidelines espoused by the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment).

539. Similarly, I have also been guided by the dicta espoused by the supreme court of Kenya in the *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (3 December 2021) (Judgment), wherein the court also enunciated the principle[s] to be taken into account.

540. In any event, it suffices to underscore that the award of Exemplary damage[s] is an award at large subject to exercise of judicial discretion, albeit taking into account the diverse circumstance[s] of each case.

Final Disposition:

541. Flowing from the foregoing analysis [details enumerated in the body of the Judgment], it must have become apparent that the petitioner has proven his case to the requisite standard. [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

542. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

i. A Declaration be and is hereby issued that the demolition of the petitioner's property situated on LR No 209/11307 and LR No 209/11308 constituted a violation, by the State, of its

Legitimate Expectation and Constitutional Rights as guaranteed under article 10 of the *Constitution* of Kenya.

ii. Declaration be and is hereby issued that the petitioners rights to acquire and own property without arbitrarily being deprived of the same as guaranteed by article 40 of the *Constitution* of Kenya was violated by the State following the demolition of the building that was erected on LR No 209/11307 and LR No 209/11308 on 10th August 2018.

iii. A Declaration be and is hereby that the demolition of the petitioner's property situated on LR No 209/11307 and LR No 209/11308 was undertaken without Due process and therefore violated the petitioners Constitutional Rights as guaranteed under article 47 of the *Constitution* of Kenya.

iv. A Declaration be and is hereby granted that the petitioner is not responsible for paying any land rent, rates and any taxes from the date of demolition of the properties LR No 209/11307, LR No 209/11308 and LR No 209/12289.

v. A Declaration be and is hereby issued that the respondents, their respective agents, servants and or employees and the Government of Kenya, have arbitrarily and compulsorily deprived the petitioner of its properties and buildings built thereon on LR No 209/11307, LR No 209/11308 and LR No 209/12829 Westlands Nairobi.

vi. Judgment be and is hereby entered for the petitioner, against the 1st, 2nd, 3rd and 5th Respondents, either jointly and /or severally in the sum of Kenya Shillings 2,013,500,000 only being compensation for the values of the suit properties, namely; LR No 209/11307, LR No 209/11308 and LR No 209/12829 Westlands Nairobi.

vii. Exemplary damages be and are hereby awarded in the sum of Kes 50, 000, 000 only.

viii. Subject to receipt of the Compensation in term[s] of Clause [vi] above, the petitioner shall surrender the Certificate[s] of Title to the Chief Land Registrar for purposes of cancellation to avoid unjust enrichment.

ix. The award in terms of [vi] shall attract interests at court rates [14%] per annum w.e.f the 22nd January 2019 [date of filing of Petition].

x. The award in terms of clause [vii] shall attract interests at court rates [14%] per annum w.e.f the date of Judgment.

xi. Costs of the suit be and are hereby awarded to the petitioner as against the 1st, 2nd, 3rd and 5th Defendants, jointly and/or severally.

xii. The Costs in terms of clause [xi] shall be agreed upon and in default to be taxed in the conventional manner.

xiii. Any other Relief[s] not expressly granted are hereby denied.

543. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THE 24TH DAY OF MARCH 2025

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma/Benson – Court Assistant.

Mr. Elijah Mwangi for the petitioner.

Mr. Allan Kamau [Principal Litigation Counsel] for the 1st and 4th respondents.

Mr. Ngararu Maina for the 2nd respondent.

Mr. Charles Agwara and Mr. Ochieng for the 3rd Respondent.

Ms. Pauline Matata and Mr Omonge Adero for the 5th Respondent.