



**Kahia v Kenya Airports Authority & another (Environment & Land Petition
13 of 2022) [2023] KEELC 18925 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 13 OF 2022**

LL NAIKUNI, J

MAY 30, 2023

BETWEEN

OSMAN AHMED KAHIA PETITIONER

AND

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

JUDGMENT

I. Preliminaries

1. This Judgement pertains to a Constitution Petition dated 12th April 2022 and filed in Court on 13th April, 2022 by the Petitioner herein, Osman Ahamed Kahia. Subsequently, on 18th May, 2022 the Petitioner filed an Amended Petition dated 17th May 2022. Fundamentally, the Petitioner sought for the reliefs on the grounds that there was infringement, violation and denial of his fundamental rights as enshrined under the provision of Articles 10, 27, 40 and 47 of the *Constitution of Kenya*, 2010.
2. On 22nd June, 2022 the 1st Respondent filed their Replying Affidavit dated 17th June, 2022. Additionally, I took cognizance of the fact that the 1st Respondent raised a Preliminary Objection which in the given circumstances and notwithstanding the legal ratio in “the *Classicus locus* case of “*Mukisa Biscuits Manufacturers Limited – Versus - West End Distributers Limited*, (1969) EA, 687” the Court felt it needful to be dealt with together with all the other issues. These issues will be deliberated at length herein below in this Judgement. At the time of penning down this Judgement, the 2nd Respondent herein had not filed any pleadings in opposition or otherwise to the filed Petition.

II. The Petitioner’s case.

3. It is the Petitioner’s case that he is the absolute and legal registered proprietor of all that parcel of land known as land reference numbers Title No.CR. 68272, L.R 5145/VI/MN (Hereinafter referred to as



“The Suit Property”) having been leased to him by the Government of Kenya for a term of 99 years from 1st July 2001.

4. The Petitioner averred that between April and May 2020 the 1st Respondent herein without any notification, compensation or his consent, excavated trenches and laid pipelines on the suit property. The Petitioner maintained that the 1st Respondent’s acts of omission and commission in failing to give notification, acquiring the suit property and compensating the Petitioner amounted to a breach, violation and infringement of his proprietary rights enshrined under the provision of Articles 10, 27 & 40 of the *Constitution of Kenya*, 2010.
5. The Petitioner claimed that the excavation of trenches and installation of several drainage pipelines on the suit property deprived him of his interest. He further averred that the 1st Respondent ought to be fully liable at a market rate of for a sum of Kenya Shillings Two Ninety One Million Five Hundred Thousand (Kshs. 291,500,000/=) as per the Valuation Report prepared by Messrs. Musyoki & Associates. Further the Petitioner contended that in the event the 1st and 2nd Respondents were not desirous to compensate him as required by law for their actions of having caused excavation of trenches and installation of pipelines on the suit property; they should be restrained from continuing with its usage forthwith. The Petitioner also claimed that the 1st Respondent ought to excavate and remove the said pipes from the suit property and compensate him for its usage at a monthly rate of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) together with the interest at the Court rate of 14% per annum effective from April, 2020 till the drainage pipes were fully removed therefrom.
6. The Petitioner prayed for judgement against the 1st and 2nd Respondents and sought for the following prayers:
 - a. Declaration that the 1st and 2nd Respondents’ actions of causing and/or permitting excavation of trenches and installation of pipelines on the land known a Title No. CR. 68272 Land Reference No. 5145/VI/MN without notification, consent and compensation is in breach of Article 10, 27, 40 & 47 of the Constitution.
 - i. Damages for breach of Articles 10, 22, 40 & 47 of the Constitution as regards the petitioner’s Land Reference No. 5145/VI/MN.
 - b.
 - i. An Order directing the 1st & 2nd Respondents to compensate the Petitioner in respect of the property known as Title No. CR. 68272 Land Reference No. 5145/VI/MN at market value of Kshs. 291,500,000/=;
 - ii. alternatively, the 1st Respondent to be ordered to excavate and remove the installed pipelines from the land known as Title No. CR. 68272 Land Reference No.5145/VI/MN within fourteen [14] days of the date of order and pay compensation to the Petitioner at the rate of Kshs.5Million per month with interest thereon at court rates of 14% per annum effective 30th April, 2020 till payment in full.
 - iii. The 1s Respondent be prohibited/restrained forthwith from trespassing and usage of the pipelines unlawfully installed on property known as Title No. CR.68272 Land Reference No.5145/VI/MN.
 - c. Costs of the Petition be provided.



III. The 1st Respondent's Responses

7. While opposing the Petition, the 1st Respondent replied to the Petition vide a Replying Affidavit dated 17th June 2022 sworn by Margaret Munene, the Acting Corporation Secretary. She raised a preliminary objection against the suit which she termed as incompetent and fatally defective. According to her, the suit was in direct contravention of the provision of Section 33 (1) of the Kenya Airport Act No. 3 of 1991 of the Laws of Kenya. She deponed that the Petitioner never engaged the Kenya Airports Authority in negotiations before the suit herein was instituted and where the negotiation failed, the Act required that the matter was to be referred to Arbitration and not brought to Court as such this suit was null and void *ab initio* and ought to be struck off with costs.
8. She further deponed that the parcel of land belonging to the Petitioner being L.R No. MN/VI/5145 borders with the parcel of land known as LR No. MN/VI/3888 which comprised of Moi International Airport (hereinafter referred to as The MIA"). As mandated by the provision of Section 15 of the Kenya Airports Act, the 1st Respondent executed a contract dated 4th December 2017 for the rehabilitation of the airside pavements and AGL system at the airport. This was to ensure that the airport grounds were well drained following the natural direction of the water. That during the contract period, the Petitioner instituted the civil suit - Mombasa ELC No. 52 of 2020 seeking injunctive orders alleging that, the 1st Respondent had trespassed into the suit property and was digging trenches. However, later on the Petitioner decided to withdraw the case. It was during that period that the 1st Respondent took upon itself to conduct investigation the petitioner's title to the suit land. This was because, all matters kept constant, the 1st Respondent was aware that the suit land was public property since in it, laid existing subsurface drainage pipes which followed the natural water course from the airport onto the drainage channels beyond. It was deponed that based on the topography of the suit land, it had no viable user since it's not fit for allocation as private property.
9. The 1st Respondent's surveyed the area and it was revealed that the suit land was unlawfully and illegally demarcated and allocated to the Petitioner. Further, it was revealed that the suit land was landlocked with no independent access. Indeed, that the only access to it would be passing through the airport, since it lies adjacent to the runway. The deponent averred that the airport being on LR No. MN/VI/3888 was surveyed on 19th August 1996 as seen from the Survey Plan No. F/R No. 296/56 while the suit property was LR No. MN/VI/5154 which was surveyed on 12th September 2014 as seen from Survey Plan No. F/R No. 580/58. The deponent argued that since the year 1996 the suit land had been open, unoccupied and used as public land with the airport's subsurface drainage pipes in it. It was deponed that since the airport was first to be surveyed it was evident that the Petitioner curved out the 1st Respondent's land and occasioned an overlap. The deponent maintained that the allocation of the suit land to the Petitioner was not only illegal but fraudulent for the following reasons: the same was allocated without access and the proposed access was through airport, adjacent to the runway, which was untenable due to the safety and security risks involved. The suit land was demarcated and the Lease granted to the Petitioner without the knowledge or involvement of the 1st Respondent and in total disregard that the suit land was in close proximity to the airport. She reiterated that the suit land was landlocked and that the airport subsurface drainage pipes were already in existence on the land. She maintained that the topography of the land lies on the natural water course from the airport towards the drainage channel beyond, hence there is no viable user for the land.
10. It was argued that the sought prayers could not be granted until the boundary dispute was settled and the boundaries were re - established. Further the deponent maintained that the works carried out by the 1st Respondent could not be done without affecting the suit land since the subsurface pipes were



already in the suit land and the works were following the natural course of water, since the land lies in the natural water course.

11. The deponent explained that the airport's subsurface drainage pipes lied on the suit land since the airport grounds were higher than the suit land and followed the water's natural course which led to the suit land. The deponent faulted the Petitioner for failing to carry out due diligence on the title before being issued with a certificate of lease. She contended that the Petitioner ought to have satisfied himself as to the condition and topography of the suit land and his failure to do so should cost him the suit herein.
12. The deponent maintained that under the provision of Article 40 (6) of the Constitution of Kenya 2010, if a property had been unlawfully acquired the rights under the provision of Article 40 did not apply. Since the Petitioner's title was illegally and unlawfully acquired, the same did not confer any rights to the Petitioner that were capable of being enforced by court. She argued that the issue of the 1st Respondent compulsorily acquiring the suit land and compensation to the Petitioner did not arise, since the suit land was already being used by the airport for drainage and all the 1st Respondent was undertaking were repairs. It was argued that the compensation being sought of a sum of Kenya Shillings Two Ninety One Million Five Hundred Thousand (Kshs. 291,500.000/-) and a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) per month were grossly exorbitant and exaggerated, since the land was vacant with no viable user and contrary to what was in the valuation report, there was no business capable of being relocated to another site.
13. The court was urged to disregard the valuation report since the Petitioner was seeking to unjustly enrich himself. The deponent maintained that the prayer for the removal of the pipes was untenable as that would affect the operations of MIA not to mention pose a security risk to the general public who used the airport. The deponent urged court to find that the Petitioner had not proven his case to the required standards and neither had he demonstrated that he was deserving of the orders sought in the Petition. Therefore, the Petition filed by the Petitioner ought to be dismissed with costs.

B. The Written Submissions by the Petitioner

14. On 8th December 2022, the Learned Counsel for the Petitioner, the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions in support of the Petition. Mr. Mogaka Advocate as a way of providing an introduction of the submissions, recapped on the brief facts of the case. He submitted that the Petitioner was the absolute and legal proprietor of all that suit property with the indefeasible rights, interest and title vested on him under the under Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 which could not be taken away except in accordance with the [Constitution of Kenya](#) and the law. The Learned Counsel submitted that the actions of the 1st Respondent of excavating trenches and installing of pipes in the suit property without the prior notice and consent from the Petitioner was a violation of the rule of law, private proprietary rights and fair administration guaranteed under the provision of Articles 10, 27, 40 and 47 of the [Constitution of Kenya](#), 2010.
15. The Learned Counsel contended that despite the 1st Respondent alleging that the suit property was fraudulently acquired and that the same was public utility land but no evidence had been adduced to demonstrate public ownership of the suit property. Further, there had been no distinctively pleaded elements of fraud which needed a much higher threshold on standard of proof than that of a balance



of probabilities. To buttress on this point, the Learned Counsel relied on the case of “[Central Kenya Ltd -Versus - Trust Bank Limited & 4 Others](#) [1996] eKLR the Court of Appeal stated:-

“fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary case.....”

16. The 1st Respondent was said to have admitted that its property had overlapped onto the Petitioner’s suit property. Therefore, its actions of excavating the trenches and installation of pipes in the said suit property was without due process as laid out in the provision of Section 16 of the [Kenya Airport Act](#) and without compensation of the Petitioner hence a violation of Articles 10, 27, 40 and 47 of the [Constitution of Kenya](#), 2010. The Counsel argued that the rule of Law was the foundation of constitutional order and hence failure to follow provisions of the law on matters of land proprietorship was chaotic and rendered nought sanctity of title in the Kenyan Legal & Constitutional system contrary to the wishes of the Kenyan public who brought into existence the protection enshrined in the [Constitution of Kenya](#), 2010.

17. The 1st Respondent actions were said to be of trespass and hence were criminal in nature and actionable. The Learned Counsel maintained that the 1st Respondent had not demonstrated any lawful or better entitlement/right to Title No. CR 68272 Land Reference No. 5145/VI/MN that superseded the Petitioner’s interest over the suit property. The Learned Counsel submitted that the Petitioner was entitled to damages and reliefs sought, since the law provided that where trespass was proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. In such circumstances, the Court was under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. The Court was urged to find the 1st Respondent was fully liable at the market rate of a sum of Kenya Shillings Two Ninety One Million Five Hundred Thousand (Kshs. 291,500,000/=) as per the Valuation report filed in Court. (see [Ajit Bhogal – Versus - Kenya Power And Lighting Co.Ltd](#) [2020] eKLR). Further the 1st Respondent was said to be in continuous trespass and was liable for exemplary and punitive damages. In the case of “*Obongo and another - Versus -Municipal Council of Kisumu* (Quoted in [Grinyamwaya – Versus - Nairobi City Commission](#) [1985] eKLR), the Court of Appeal stated:-

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants of the Government and conduct by a Defendant calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff. It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the Plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature.”

18. The Counsel further urged court in alternative, there be an order for the 1st Respondent to remove the installed pipes from the suit property and proceed to compensate the Petitioner for its usage so far at the rate of a sum of Kenya shillings Five Million (Kshs. 5,000,000/=) per month with court rate interest of 14% per annum effective April 2020 until the drainage pipes were fully removed therefrom.

19. Despite of the clear directions taken by consensus of the parties, its instructive to note that the 1st and 2nd Respondents never filed any written submissions. Thus, the case will be determined on its own merit accordingly.



IV. Issues for Determination

20. I have carefully considered the filed Amended Petition dated 17th May, 2022 by the Petitioner, the affidavit in support, the responses by the 1st Respondents, the written submissions by Learned Counsel, the myriad of authorities cited, the relevant and appropriate provisions of the [Constitution of Kenya](#) 2020 and statutes.
21. In order for the Honorable Court to arrive at an informed, reasonable, fair, Just and Equitable decision, it has crystalized the subject matter into the following salient five (5) issues for determination as follows:-
 - a. Whether the Preliminary Objection raised by the 1st Respondent herein meets the threshold of an objection as per the Law and precedents.
 - b. Whether the Constitution Petition meets the threshold of the principles of drafting Constitutional Petitions.
 - c. Whether the Amended Petition dated 17th May, 2022 by the Petitioner has any merit.
 - d. Whether the parties are entitled to the reliefs sought from the filed Petition.
 - e. Who will bear the costs of the Petition.

V. Analysis and determination

22. I will consider each of these issues in turn as herein below.

Issue No. a). Whether the Preliminary Objection raised by the 1st Respondent herein meets the threshold of an objection as per the Law and precedents.

23. Under this sub – heading, it is critical that the Honorable Court first and foremost deal with the issue of the preliminary objection raised by the 1st Respondent herein prior to proceeding on further with all the other issues. Legally speaking, an objection has very serious consequences. Ideally, should the objection succeed, then the entire suit by the Petitioner will collapse. Thus, the issue to deal with is the issue of whether the Preliminary objection on point of law as stated out in the case of “*Mukisa Biscuits (Supra)*” where the court observed that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

24. According to the [Black Law Dictionary](#) a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

25. Additionally, I hereby wish to cite the case of “[Attorney General & another – Versus - Andrew Mwaura Gitinji & another](#) [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection “*inter alia*:-

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.



- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
26. In the case of “*Nitin Properties Ltd – Versus - Singh Kalsi & another* [1995], the Court of Appeal stated that a preliminary objection raises a pure point of law and assumes that all the facts pleaded by the other party are correct. It cannot be raised if any fact needs to be ascertained or if it involves the exercise of judicial discretion.
27. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.
28. In the instant case, the 1st Respondent has raised a preliminary objection solely on grounds that the suit instituted by the Petitioner was in direct contravention of the provision of Section 33 (1) of the *Kenya Airport Act* No. 3 of 1991 of the Laws of Kenya. The 1st Respondent argued that the Petitioner never engaged the Kenya Airports Authority in negotiations before the suit herein was instituted and where the negotiation failed, the *Act* required that the matter was to be referred to Arbitration and not brought to Court as such this suit was null and void ab initio and ought to be struck off with costs.
29. Clearly, these are matters of both law and facts. Certainly, they are not of pure law as envisaged from the legal ratio of “*Mukisa Biscuits case*” (*Supra*). In saying so, I refer to the provision of Section 33 (1) of the *Act*, entitled “Compensation” holds that:-
- “In the exercise of the powers conferred by Sections 12, 14, 15 and 16 of the Authority shall do as little damage as possible; and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation thereof as may be determined by a single Arbitrator appointed by the Chief Justice”.
30. My quick reading of this provision of law, I discern two issues. Firstly, it is assumed that a suit has already been instituted and it’s the Court (“Suo Moto”) through the offices of the Chief Justice that may refer and/or appoint the matter pertaining to compensation to an Arbitrator. There is a slight departure on the Arbitration under the *Arbitration Act*, No. 4 of 1995 where its the parties themselves cause a matter to be referred for Arbitration either if its emanating from a Clause in the agreement duly executed by the parties themselves.
31. Secondly, from the wording of “May” used in the statute, clearly the whole process of the appointment of the Arbitrator is at the discretion of the Court. In order for this Court to arrive at any such decision, there ought to have been empirical documentary evidence placed before it for it to make a determination whether the process of arbitration had ever been initiated by either party. The moment evidence is called up then it ceases being an objection but one where evidence has to be adduced. For all these reasons, therefore, it is my own view that the preliminary objection by the 1st Respondent must fail for lack of merit.

Issue No b). Whether the Constitution Petition meets the threshold of the principles of drafting Constitutional Petitions.

32. As a matter of course, the *Constitution of Kenya* under Article 259 (1) provides a guide on how it should be interpreted as such:-



This Constitution shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
33. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.
34. Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own.....it breathes and needs to be watered and fed as a living tissue” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
35. As already stated, the Petitioner in the Amended Petition dated 17th May 2022 and filed on 18th May 2022 as the legal and absolute registered owner of the suit property with the Certificate of Title bearing numbers CR 68272 for a lease of 99 years from 1st July, 2001. The title was issued by the Registrar of Title on 29th August, 2016. The Petitioner also exhibited other documents to support ownership being the Certificate of Postal Search as on 25th October, 2021, the Land Surveyors report dated 24th April, 2020 by a Licensed Surveyor trading in the names and style of “Edward Kiguru land Surveyors” and a set of photographs indicating the development already carried out on the suit land by the 1st Respondent. In its conclusion, the reports holds that the said development being carried out by the 1st Respondent was without the authority and permission of the Petitioner; and the several correspondences from the Ministry of lands and Settlement and the National Land Commission. From all these, the Petitioner has specifically listed some constitutional rights that have been violated, denied or threatened by the 1st and 2nd Respondents herein. These are under the provision of Articles 10, 27 & 40 of the *Constitution of Kenya*, 2010 under the Bill of Rights being the ones that have been violated, threatened and denied by the 1st and 2nd Respondents herein. From the face value, he has provided the particulars of the said breaches perpetrated by the 1st and 2nd Respondents in the infringement of the said the rights. The Petitioner has framed his case with reasonable precision required and hence succeeded in the Anarita test. The principles of drafting constitutional Petitions were clearly captured in the case of *Anarita Karimi Njeru – Versus - Republic* [1979] eKLR:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

36. At this point, I am guided by the legal reasoning in the case of Court of Appeal case of “*Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR reiterated the principles in Anarita Karimi where they stated as follows:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However,



we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

However, our analysis cannot end at that level of generality. It was the High Court's observation that the Petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru* (*Supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Sections 1A and 1B of the *Civil Procedure Act* (Cap 21) and Sections 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

37. Juxtapose, the 1st Respondent as its defence emphatically hold that the parcel of land belonging to the Petitioner being L.R No. MN/VI/5145 borders with the parcel of land known as LR No. MN/VI/3888 which comprised of the MIA. As mandated by the provision of Section 15 of the *Kenya Airports Act*, the 1st Respondent executed a contract dated 4th December 2017 for the rehabilitation of the airside pavements and AGL system at the airport. This was to ensure that the airport grounds were well drained following the natural direction of the water. That during the contract period, the Petitioner instituted the civil suit - Mombasa ELC No. 52 of 2020 seeking injunctive orders alleging that, the 1st Respondent had trespassed into the suit property and was digging trenches. However, later on the Petitioner decided to withdraw the case. It was during that period that the 1st Respondent took upon itself to conduct investigation the Petitioner's title to the suit land assuming that the suit land was public property since in it, laid existing subsurface drainage pipes which followed the natural water course from the airport onto the drainage channels beyond. Based on the topography of the suit land, it had no viable user since it's not fit for allocation as private property. According to them, and the surveying of the area, was revealed that the suit land was unlawfully and illegally demarcated and allocated to the Petitioner. Further, it was revealed that the suit land was landlocked with no independent access. Indeed, that the only access to it would be passing through the airport, since it lies adjacent to the runway. They maintained that the allocation of the suit land to the Petitioner was not only illegal but fraudulent as the same was allocated without access and the proposed access was through airport, adjacent to the runway, which was untenable due to the safety and security risks involved. Further, the suit land was demarcated and the Lease granted to the Petitioner without the knowledge or involvement of the 1st Respondent and in total disregard that the suit land was in close proximity to the airport.
38. The 1st Respondent maintained that under the provision of Article 40 (6) of the *Constitution of Kenya* 2010, if a property had been unlawfully acquired the rights under the provision of Article 40 did not apply. Since the Petitioner's title was illegally and unlawfully acquired, the same did not confer any rights to the Petitioner that were capable of being enforced by court. Hence, they argued that the issue of the 1st Respondent compulsorily acquiring the suit land and compensation to the Petitioner did not



arise, since the suit land was already being used by the airport for drainage and all the 1st Respondent was undertaking were repairs.

39. The Honorable Court finds this argument rather unreasonable, unfair and without any merit from the following reasoning. Firstly, from the surrounding facts and inferences of the case, the Petitioner has established that he is the legal and absolute owner of the suit property with indefeasible title, rights and interest vested in him by the provisions of Sections 24, 25 and 26 (1) of the Land Registration Act, No. 3 of 2012. Secondly, based on the two correspondences from public offices and which have not been controverted by the 1st and 2ⁿ Respondents being a letter dated 6th December, 2021 from the Director of Surveys which graphically holds that:

“Records in our possession show that the parcel MN/VI/5145” was created through a new grant survey by EMJ Kiguru, Licensed Land Surveyor. The allottee was Osman Ahmed Kahia.....vide a Letter of Allotment Ref 90750/X dated 10th July, 2001.....the survey was processed through Comps No. 67779 and the Survey Plan as Folio No. 588/58. The parcel was issued with Number MN/VI/5145 and the Survey authenticated on 4th November, 2015. Deed Plan Number 39472 was issued on 19th November, 2015 and forwarded for registration. The parcel is adjacent to MN/VI/3888 (MIA) and is separated with the airport by proposed 40 road reserve.....”

The second letter is dated 20th January, 2022 from the National Land Commission addressed to the Principal Secretary, Ministry of Transport where the 1st Respondent is situated and it states verbatim:

“NLC would like to bring to your attention that you utilized Land reference Numbers MN/VI/5154 of the Certificate of Title No. CR 68272, Deed Plan Number 391472 of FR No. 580/58 without our involvement as the acquiring entity according to the National Land Act (No. 6 of 2012) and the Constitution.....After having studied the documents we are of the view that this should be as a matter of urgency be and regularized by starting the process of acquisition and avoid litigation.....”

Indeed, the Honorable Court has taken cognizance that not only have these state bodies expressed affirmed the ownership of the suit property being that of the Petitioner, pointed out and confirmed the acts of trespass by the 1st Respondents but also made proposals on commencing the process of compulsory acquisition of the suit land to avoid unnecessary litigation but which for apparent no good reason or justifiable cause the 1st Respondent decided to ignore, neglect or refused to heed.

Thirdly, the 1st Respondent seem to be challenging the title held by the Petitioner by raising an issue of fraud and illegality as a by the way and defence from an already instituted Petition by the Petitioner. Ideally, the Court would have expected them to have either formally lodged a complaint with the relevant authorities such as the Kenya Police, National Land Commission, the Ethics and Corruption Commission (EACC) or any other. In the alternative, they could have filed a Counter or Cross Petition raising these allegations to wit that the title deed was acquired through fraudulent means.

40. The Honorable Court has noted that there exists a land dispute on the use and occupation of the suit property meted by the 1st Respondent. Indeed, the 1st Respondent has admitted having utilized the land belonging to the Petitioner without his consent or authority. Clearly, this has threatened the constitutional provision vested unto the Petitioner without any compensation as envisaged under the



provision of Article 40 (3) of the Constitution of Kenya, 2010 and Sections 109 to 119 of the Land Act, No. 6 of 2012. Article 40(1),(2),(3), and (4) of the Constitution provides that:

- “ 1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person-
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - (i) requires prompt payment in full, of just compensation to the person: and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”
 - (a) Further Article 47 of the Constitution states as follows:
 - “ (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
 - (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and



(b) Promote efficient administration.’

41. From all the evidence placed before the Court, there is no doubt the land belongs to the Petitioner. The property is well safeguarded under the provisions of Article 40 (1) and (2) of the [Constitution of Kenya](#), 2010. Assuming that the 1st Respondent intended to compulsorily acquire the suit property from the Petitioner for public use the procedure for doing so is elaborate and well founded in law. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the [Land Act](#) No. 6 of 2012 and Article 40 (1), (2) and (3) of the [Constitution of Kenya](#) (See “[Viranda Ramji Gudka & 3 Others – Versus - The AG](#) (2014)eKLR as read together with Part V of The [Land Regulations](#) of 2017.
42. Under the provisions of the [Land Act](#), 2012, Section 107 of the [Act](#) holds that, the NLC ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of the [Constitution of Kenya](#). In this case the threshold must be met. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the [Act](#). Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified.
43. In the case “[Patrick Musimbi – Versus National Land Commission & 4 Others Petition](#) No. 613 of 2014 the word “Compensation” was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence. Therefore, from the above detailed statutory analogy, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person’s private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use these fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It’s a extremely delicate balance to be weighed with utmost case.
44. In the case of “[Patrick Musimbi](#) (*Supra*) held *inter alia*:-

“As the taking of a person’s property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights



require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both the *Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”.

45. Further Article 47 of the *Constitution* states as follows:’

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.’

46. From a cursory look of the court file and the evidence presented by the Parties it is evident the Petitioner is the absolute and legal proprietor of all that suit property with the indefeasible rights, interest and title vested on him under the under Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 which could not be taken away except in accordance with the Constitution of Kenya and the law. Therefore the use and occupation of the land by the Respondents was improper as it violated, threatened and infringed the Petitioner's rights to private property as entitled to under the provision of Article 40 of the *Constitution of Kenya*, 2010. In the Petition, the Petitioner talks of ‘continued violation and infringement of his private proprietary rights’, as provided for under Article 40 (1), (2) and (3) of the *Constitution of Kenya*, 2010. Having found that the Petition raises constitutional issues, the court would like to point out its concern about the manner in which the Petitioner has come to court.

Issue No c). Whether the Amended Petition dated 17th May, 2022 by the Petitioner has any merit and whether the parties are entitled to the reliefs sought from the filed Petition.

47. As stated above, the remedies sought from the Petition are constitutional in nature and they do adhere to the constitutionally appropriate relief set out in Article 22 (3) of the *Constitution*. The 1st Respondent has emphatically held that the title deed by the Petitioner was acquired illegally, fraudulently and wrongfully. Despite of the 1st Respondent alleging that the suit property was illegally, fraudulently acquired and that the same was public utility land but no evidence had been adduced to demonstrate public ownership of the suit property. Further, there had been no distinctively pleaded elements of fraud which needed a much higher threshold on standard of proof than that of a balance of probabilities. The provision of Section 109 of the *Evidence Act*, Cap. 80 is clear on the burden of



proof to wit that he who alleges must prove. The allegation of fraud is very serious and ought to be proved by the 1st Respondent herein.

48. According to the Petitioner, it was entitled for lawful compensation. I would once again emphasize that a finding of “unlawful acquisition” referred to in Article 40 (6) of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of *Adan Abdirahani Hassan and 2 Others – Versus - The Registrar of Titles and Others* Nairobi Petition No. 7 of 2012 [2013]eKLR that,

“[30] Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.”

49. In view of what I have stated, it is clear that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the Petitioner from enjoying the incidents of ownership of the land.

50. Despite of the above legal position, the Court finds the actions of the 1st Respondent of excavating trenches and installing of pipes in the suit property without the prior notice and consent from the Petitioner was a violation of the rule of law, private proprietary rights and fair administration guaranteed under the provision of Articles 10, 27, 40 and 47 of the Constitution of Kenya, 2010.

51. The 1st Respondent was said to have admitted that its property had overlapped onto the Petitioner’s suit property. Therefore, its actions of excavating the trenches and installation of pipes in the said suit property was without due process as laid out in the provision of Section 16 of the Kenya Airport Act and without compensation of the Petitioner hence a violation of Articles 10, 27, 40 and 47 of the Constitution of Kenya, 2010. I fully concur with the Counsel for the Petitioner that the rule of Law was the foundation of constitutional order and hence failure to follow provisions of the law on matters of land proprietorship was chaotic and rendered nought sanctity of title in the Kenyan Legal & Constitutional system contrary to the wishes of the Kenyan public who brought into existence the protection enshrined in the Constitution of Kenya, 2010.

52. Additionally, the Honorable Court finds that actions by the 1st Respondent amounted to trespass and hence were criminal in nature and actionable.

53. Trespass is defined under the provision of Section 3 (1) of Trespass Act Cap 294 as follows:-

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence”

From the book “*Clark & Lindsell on Torts* 12th edition” Paragraph 113, defines trespass as follows

“ trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”



Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another's real property who is in possession and ownership. While 'Continuous trespass' is trespass in the nature of permanent invasion on another's rights, such as a sign that overhangs another's property".

In the case of "*Lutaaya – Versus- Sterling Civil Engineering (Supra)*" the court stated as follows regarding the tort of trespass to land:-

"Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another's lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he pa..... with possession of land" ... where trespass is continuous, the person with the right to suesubject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.

Further according to *Clerk & Lindsell on Torts*, 19th Edition the writer states at Paragraphs 9 - 13:-

"Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession."

54. It is now well established that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Limited – Versus - John Mithamo Njika & 7 others* (2014) eKLR where J.M Mutungi J. stated:-

"I agree with the Learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.....".

55. Indeed, the 1st Respondent had not demonstrated any lawful or better entitlement/right to Title No. CR 68272 Land Reference No. 5145/VI/MN that superseded the Petitioner's interest over the suit property. For these reasons, therefore, the Petitioner was entitled to damages and reliefs sought, since the law provided that where trespass was proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. In such circumstances, the Court *proceeds to assess the damages awardable based on the facts and circumstances of this case. Hence, the Court finds that the 1st Respondent was fully liable at the market rate as per the Valuation report filed in Court by the Petitioner. I have noted that the 1st Respondent never filed any Valuation Report to counter the one by the Petitioner. Thus, this Court is bound to rely solely on the report already filed. Further the 1st Respondent was said to be in continuous trespass and was liable for exemplary and punitive damages.

56. Interestingly, and in all fairness, the interest of Justice, Equity and Conscience, the Court has taken instructive notice of the fact that the Petitioner in alternative, and as way of granting the 1st Respondent a second bite at the cherry as he wishes there be an order for the 1st Respondent to remove the installed pipes from the suit property and proceed to compensate him for its usage so far at the rate of a sum of Kenya shillings Five Million (Kshs. 5,000,000/=) per month with court rate interest of 14% per annum effective April 2020 until the drainage pipes were fully removed therefrom. The Honorable



Court, for whatever its worth, is guided from the English saying “What is good for the Goose is good for Gendur” and “You cannot eat the Cake and have it”. This would be a viable, open and pragmatic option extended to the 1st and 2nd Respondents herein in the worse case scenario for them to consider embracing thereof.

Issue No. e). Who will bear the Costs of the Petition.

57. The issues of Costs are at the discretion of Courts. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. In the case of “Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

Rule 26 (1) and (2) of the *Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013)* provides :-

“26.

- (1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

58. This legal position is upheld in the Court of Appeal cases of “Rosemary Wambui Munene – Versus – Ihururu Dairy Co – operatives & Societies Limited” eKLR (2014), Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR, the Supreme Court cases of “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR and in the “Reference No. 1 of 2014, Council of Governors – Versus - the Senate & another [2014] eKLR the Supreme Court further discussed discretion and the obligation upon the party praying for costs as under: -

“Since it (award of costs) is a discretionary power, what matters is that the same has to be exercised judicially and not whimsically. A party who moves the Court to make such an order for costs has an obligation to lay a firm basis by giving sufficient reasons why he should be awarded costs.....Costs follow the event is not used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case...”.

59. In the instant case, taking into account the circumstances of the Petition, I find it fair, reasonable and just to exercise my discretion and grant costs to the Petitioner herein. This Court having found that the Petitioner has succeeded in demonstrating that the Constitutional rights were infringed, violated, and threatened is now under duty to consider the appropriate relief for him which is entitlement to costs of the Petition.



VI. Conclusion & Disposition

60. Ultimately, I reach the conclusion that this Petition does reveal special or unique feature that would make a constitutional relief more efficacious. Certainly, this Constitutional Petition is not an abuse of the court process. Its on this premise that I proceed to make the following orders.
- a. That Judgement be and is hereby entered in favour of the Petitioner and against the 1st and 2nd Respondents herein jointly and severally as sought from the filed Amended Constitution Petition dated 17th May, 2022.
 - b. THAT there be a declaration that the Petitioner is the legal and absolute registered proprietor all that parcel of land known as Title No. CR. 68272 and Land Reference No. MN/VI/5145 with all indefeasible rights, title and interest vested in him by Law – Article 40 (1) and (2) of the Constitution of Kenya, 2010 and Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.
 - c. That there be a declaration that the 1st and 2nd Respondents' actions of causing and/or permitting excavation of trenches and installation of pipelines on to all that parcel of land known as Title No. CR. 68272 and Land Reference No. 5145/VI/MN without notification, consent and compensation amounts to acts of trespass and is in breach of the provision of Articles 10, 27, 40 & 47 of the Constitution of Kenya, 2010.
 - d. That an order be and is hereby made directing the 1st and 2nd Respondents herein to compensate the Petitioner in respect of the property known as Title No. CR. 68272 Land Reference No. MN/VI/5145/ at market value of a sum of Kenya Shillings Two Ninety-One Million Five Hundred Thousands (Kshs. 291, 500,000/= within the next One Hundred and Eighty (180) days from the date of the delivery of this Judgement that is on or before 30th November, 2023.
 - e. That an order for damages for breach of acts of trespass and the provisions of Articles 10, 22, 40 & 47 of the Constitution of Kenya, 2020 as regards all that parcel of land known as Title No. CR. 68272 Land Reference No. MN/VI/5145 belonging to the Petitioner be awarded.
 - f. That alternatively, the 1st Respondent be and is hereby ordered to excavate and remove the installed pipelines from the land known as Title No. CR. 68272 Land Reference No. MN/VI/5145 within the next One Hundred and Eighty (180) days of the date of the delivery of this Judgement pursuant to the provision of Section 152E of the Land Act, No. 6 of 2012 and to pay compensation to the Petitioner at the rate of Kenya Shillings Five Million (Kshs.5, 000, 000.00/=) per month with interest thereon at court rates of 14% per annum effective from 30th April, 2020 till payment in full.
 - g. That failure to comply with the orders no. (d), (e) and (f) above the 1st Respondent be prohibited/restrained forthwith from trespassing and usage of the pipelines unlawfully installed on property known as Title No. CR.68272 Land Reference No. MN/VI/5145.
 - h. That Costs and interest of the Petition to be awarded to the Petitioner and be borne by the 1st and 2nd Respondents herein jointly and severally.

It Is So Ordered Accordingly

**JUDGEMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS,
SIGNED AND DATED THIS 30TH DAY OF MAY 2023**



.....
JUSTICE HON. MR. L.L. NAIKUNI (JUDGE).
ENVIRONMENT & LAND COURT AT
MOMBASA

Judgement delivered in the presence of:

- a) M/s. Yumnah, the Court Assistant.
- b) Non Appearance for the Petitioner.
- c) No appearance for the 1st & 2nd Respondents.

