



Edelweiss Limited v Deputy County Commissioner, Nairobi County and Chairman, Dagoretti Sub-County Land Control Board & 2 others; Waiganjo (Interested Party) (Environment & Land Petition 11 of 2022) [2023] KEELC 17864 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 11 OF 2022**

JA MOGENI, J

MAY 24, 2023

**IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND
FUNDAMENTAL FREEDOMS IN ARTICLE 47 AND 50 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
ARTICLES 1(1), 2, 3, 24, 27, 48, 73(1) (A), 159 (2)**

AND

**IN THE MATTER OF SECTIONS 4, 6 AND 12 OF THE FAIR
ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015, LAWS OF
KENYA**

AND

**IN THE MATTER IF FAIR ADMINISTRATIVE ACTION
AND**

IN THE MATTER OF THE RIGHT TO A FAIR HEARING

BETWEEN

EDELWEISS LIMITED PETITIONER

AND

**THE DEPUTY COUNTY COMMISSIONER, NAIROBI COUNTY
AND CHAIRMAN, DAGORETTI SUB-COUNTY LAND CONTROL
BOARD 1ST RESPONDENT**

THE CHIEF LAND REGISTRAR 2ND RESPONDENT



THE ATTORNEY GENERAL 3RD RESPONDENT

AND

KINUTHIA WAIGANJO INTERESTED PARTY

JUDGMENT

Introduction

1. At the heart of the present petition is land reference number Dagoretti/Riruta/4130 (hereinafter referred to as the suit property). The petition was provoked by the actions of the Deputy County Commissioner of Nairobi and the County and Chairman of Dagoretti Sub-County Land Control Board. The Petitioner purchased the suit property at a public auction conducted by M/s Garam Auctioneers for and on behalf of M/S National Housing Corporation (NHC).
2. The successful bidder lodged the Application to the Land Control Board for transfer and it is when they found that the 1st Respondent had caused to be registered a restriction on the suit property despite there being a charge in favour of NHC. On 18/08/2020 the interested party lodged an application for the removal of the restriction stating the he was not party to nor was he consulted before the placement.
3. However, the 2nd Respondent declined to remove the restriction and rejected the application for removal and the reason they gave is that there was a family objection and interest on the land.
4. Another sitting for the board scheduled for 11/11/2020 according to the petitioner did not take place because they were informed that it was suspended due to Covid-19. At another meeting of the board on 10/03/2021, L.N Muchira sat in the meeting as a member of the LCB despite the Petitioner raising objections on the ground that there was a conflict of interest. At the meeting attended by both the Counsel for the Petitioner and the family representative a Mr. Njoroge, the only concern the family raised was the cost of relocation of graves on the property. The members of the LCB however declined to give consent referring the family concerns raised.
5. Before the 1st Board meeting which was slated for 14/10/2020, L.N Muchira & Co. Advocates on sits on the Dagoretti Sub-County Land Control Board (LCB) wrote to the Petitioner on 10/08/2020 alleging that the auction was illegal. Further at the first meeting the sub-county LCB declined to grant the consent.
6. That a planned site visit scheduled for 19/03/2021 which was ordered by the 1st defendant to which no formal invitation was sent to the Petitioner's Counsel did not take place as scheduled. When the Petitioner's Counsel visited the site, they were informed that the LCB Board members together with unknown members of the family had visited the site instead on 18/03/2021 and not on 19/03/2021 as had been scheduled.
7. That the office of the Ombudsman wrote to the 1st Respondent stating the complaints raised by the Petitioner and sent a copy to the Petitioner but the 1st Respondent never responded to the letter. The Petitioner bought the suit property with the intention to develop it but this has not happened because he Petitioner's right to title has been curtailed.
8. The parties;
 1. The petitioner is a Limited Liability Company incorporated in Kenya under the [Companies Act](#), 2015 Cap 486 Laws of Kenya.



2. The 1st Respondent is the Deputy County Commissioner and the Chairman of Dagoretti Sub-County Land Control Board, Nairobi County in charge of administration in the Ministry of Interior and Coordination of National Government in Dagoretti Sub- County.
3. The 2nd Respondent is the Chief Land Registrar situate in the Nairobi Registry and is in charge of effective discharge of the [Land Registration Act, 2012](#).
4. The 3rd Respondent is the Principal Legal Adviser to the Government and is statutorily mandated by Article 156 (4) b of [the Constitution](#) to represent the National Government in court and is sued in that capacity
5. The Interested Party was the registered proprietor of L.R No. Dagoretti/Riruta /4130 who obtained financial facilities from M/s National Housing Corporation and caused a charge to be registered against the title of the said property on 10/05/2013.

The petitioner’s case:

9. The petitioner’s case is as set out in the amended petition dated 17/11/2022 and the affidavit sworn in support of the petition by Ms. Florence Lihanda Isiaho, a Managing Director of the Petitioner dated 5/07/2022. By the petition the petitioner seeks the following prayers:-
 - i. An Order for Mandamus be issued directing the 1st Respondent and the Dagoretti Land Control Board to forthwith conclusively deal with the Petitioner’s Application to the Land Control Board dated 8th October 2020 and issue the relevant documentation
 - ii. A declaration be and is hereby issued, that the restriction filed against the subject property is unlawful and abuse of process;
 - iii. A declaration be, and is hereby issued, that the said Restriction amounted to an unfair administrative action;
 - iv. An Order of Mandamus for the Removal of the said Restriction and Registration of Transfer by Chargee in favour of the Petitioner;
 - v. An award for General Damages for economic loss for lack of development of the property;
 - vi. Any other Order that this Court deems fit for purposes of administering justice to the case
 - vii. Cost of the proceedings and Interest at court rates be provided for.
10. The petitioner, Eldelweiss Limited states that the Petitioner in purchased Title No. Dagoretti/Riruta/4130 at a public auction for and on behalf of M/S National Housing Corporation in respect of charge registered against the said Title on 5/10/2013. However, the 1st Respondent caused a restriction to be placed against the property despite the existence of the charge in favour of NHC through the letter dated 7/03/2019.
11. That the Chargor on 18/08/2020 execute an application to remove the restriction but the 1st Respondent did not accept the application to remove the restriction even when the property was advertised for auction and that after the sale the Chargee executed the transfer in favour of the Petitioner together with the relevant application to Land Control Board Consent which was lodged with the Board to discuss at its first setting on 14/10/2020. The Petitioner however received a letter from the Firm of L.N Muchira on 10/08/2020 alleging that the auction was illegal and that Ms. L.N Muchira was a sitting member of the Dagoretti Sub-County LCB Board despite objections of conflict of interest raised by the Petitioner.



12. The Board scheduled a meeting on 11/1/2020 to address the concern of the family members who were raising objections after declining to grant the LCB consent at its first meeting on 14/10/2020 stating that there were family objections. However, the Petitioner's advocate was later informed that the meeting was adjourned to 10/03/2021 due to Covid-19 pandemic but no notice was sent to the Petitioner.
13. At the meeting on 10/03/2021 the family members through a Mr Njoroge stated that the only concern they had concerning the suit property was the cost of relocation of graves on the property. The Board Members then stated that they would not issue the consent in view of the concerns raised. The Petitioner's advocates state that they were not granted an opportunity to speak. Thus the Petitioner was denied the right to a fair hearing.
14. The 1st Respondent ordered for site visit on 19/03/2021 at 2 pm whereupon the Petitioner made a request to be sent a formal invitation which was however not sent. On the said date when the Petitioner visited the site, they were informed that the Board together with unknown family members had visited the site on 18/03/2021.
15. That the 1st Respondent has used his position to maintain an illegal restriction despite there being a properly constituted legal charge in Cavour of NHC and this has affected NHC's power of sale and the Petitioner's right to acquire title to the suit property.
16. That the Petitioner was never accorded an opportunity to be heard, make a representation nor defend itself and the board meetings. Further that there are clear pointers to the complicity and bias of the 1st Respondent and Members of the Board.
17. The 1st Respondent's failure of fair administrative action violated the Petitioner's Constitutional right to fair administrative action and a fair hearing which is an affront to natural justice.
18. That the Petitioner is unable to execute any development on the suit property without the approval for building and construction since the transfer of the property has been withheld thus curtailing the Petitioner's right to property.
19. That there is an escalation of cost of construction every other day and the Petitioner prays to be granted the orders sought for the ends of justice to be met.
20. The petitioner avers that the ministerial directive as communicated to the Registrar of Titles vide the Memo dated 21st February 2012 and the Registrar of Titles action of cancelling the petitioner's title to the suit property was ultra vires and null and void. The petitioner contends that its title issued under the provisions of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) was absolute and indefeasible pursuant to Section 23 of the Act and could not be challenged otherwise than on account of fraud or misrepresentation to which the petitioner was shown to have been a party. The petitioner avers that the Minister and the Registrar of Titles did not follow due process in having the petitioner's title cancelled. The petitioner states that the Minister has no power under the law to direct the cancellation of a registered title on account of fraud and/or on any other basis and further that the Registrar of Titles could not affect the cancellation of a registered title unless there had been compliance with the provisions of sections 60 and 61 of the Registration of Titles Act (repealed) and the court had directed cancellation of the title.
21. The petitioner in consequence contends that the Minister's and the Registrar of Titles actions were unlawful and illegal and violated the petitioner's constitutional rights to property under Article 40 which guarantees property rights of every citizen and prohibits arbitrary deprivation of property unless the deprivation was for a public purpose and in which event prompt and just compensation would be



made in full by the state. By reason of the Minister's and the Registrar of Titles actions of cancelling its title the petitioner states it has been prevented from putting its property to the intended use and has suffered loss and damage for which it holds the respondents responsible and liable.

The Interested party's case;

22. The Interested party supported the petitioner's petition
23. The interested party avers that he was never alerted that the 1st respondent was placing a restriction on the suit property. Vide the letter dated 05/03/2020 from his Counsel, Mbuthia Kinyanjui, to the County Commissioner Dagoretti Sub County asked the restriction be removed to pave way for disposal of the same having been charged to the bank.

The Respondents case;

24. The respondents' case was undefended.
25. It is however the act of the 1st respondent of causing to be registered a restriction against the property despite the existence of the Charge in favour of NHC aggrieved the petitioner triggering the institution of the present petition.

Petitioner's submissions

26. Only the petitioner and the Interested party attended court sessions all parties having been served on 18/7/2022, 17/10/2022, 2/11/2022, and 17/11/2022, the last mention on 25/01/2023 the court gave directions for filing of written submissions.
27. Neither the petitioner nor the respondents filed submissions. The petitioner chose to rely on the petition as filed. The petitioner in the petition contended the 1st Respondent's actions were ultra vires *the Constitution* and has sought that the 1st Respondent be compelled through the law to remove the said restriction limiting the interest of the petitioner to the suit property.
28. It is the petitioner's case that they bought the suit property on 21/07/2020 through a public auction and the charge duly executed the transfer in favor of being the successful bidder together with the application for the LCB consent which was lodged by the petitioner at the LCB Dagoretti sub-county. Further that the delay by the LCB to remove the restriction is interfering with the petitioner's right to an indefeasible title which deserves the protection of the law.

Analysis and determination;

29. I have set out the case for the petitioner whose petition is unchallenged and the evidence uncontroverted. The petition as I understand is about fair administrative action and the right to equality before the law for all.
30. There are three issues that I have zeroed in as being the ones commending themselves for determination as follows:
 - i. Whether the 1st respondent's act of putting a restriction on the petitioner's title and denying it a hearing contravened Article 47 of *the Constitution*.
 - ii. Whether Article 24 and 27 of *the Constitution* were violated.
 - iii. Whether the Petitioner deserves the prayers in the Petition and an award of General Damages as pleaded.



31. On the first issue, the petitioner contends that its property rights relating to registration of the suit property to its name has been curtailed by the failure of the 1st Respondent to remove the restriction and or facilitate the transfer. The petitioner avers that the 1st respondent’s action were effected in contravention of Article 47 of *the Constitution* that entitles the petitioner to fair administrative action. The 1st respondent appears to justify its actions of putting a restriction that has denied the Petitioner the Transfer to be executed in its favour despite being the successful bidder. The petitioner maintains that he was the successful bidder.
32. The Petitioner alleges to have acquired proper title to the suit premises having purchased the same in a public auction, it is trite law that a mortgagor’s right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it as was held by the Court of Appeal in Captain Patrick Kanyagia & Another Versus Damaris Wangechi & Savings & Loan Kenya Ltd Civil Appeal No. 150 of 1993. Part v of the *Land Act* deals with the administration and management of private land.
33. Section 38 of that Act as amended by Section 55 of the Land Laws (Amendment) Act No. 28 of 2016 deals with the validity of a contract for sale of land. Section 38 (1) provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed. Further, Section 38 (2) provides:
- “Subsection (1) shall not apply to –
- a. a contract made in the course of a public auction.
 - b.
 - c.
34. From the analysis above, I believe that Article 47 of *the Constitution* was violated in the context of the Petitioner’s case. Article 47 provides as follows:-
- 47
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right of 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)
35. As already stated above, the advocates of the Interested Party who had charged its property wrote a letter dated 05/03/2020 to the 1st respondent seeking to have the restriction removed which was never responded to. NHC who had charged the suit property also wrote a letter dated 8/02/2021 pointing out to the 1st respondent that they needed to remove the “wrongful and unlawful” restriction over the suit property but the 1st respondent did not respond to the said letter. Further, the advocate for the petitioner wrote a letter dated 19/03/2021 to the 1st Respondent notifying the 1st respondent that the Application for Consent to Transfer has been pending before the Board since 18/08/2020 and also referred to the site visit that the Board undertook in the absence of the Petitioner on 18/03/2021



whereas it has been communicated that the visit would be on 19/03/2021 without notice. The Petitioner sought to know what came of the site visit.

36. Again, there was no response to this correspondence. The court has perused several correspondences by the petitioner to the Attorney General and the Office of the Ombudsman. Unfortunately, the 1st respondent chose not to defend the suit and therefore the court has to make a decision primarily from the documents filed before it which are from the petitioner.
37. The court has also perused a copy of charge and noted that there was spousal consent signed by one Esther Muthoni Muthiora ID No. 10224432 on 12/04/2013. This however is not the issue before the court and I will therefore not focus on this issue.
38. There is no doubt that the petitioner stood to be affected adversely by the 1st respondent's action of causing to be registered a restriction on its acquired rights and interests in the suit property. In terms of Article 47 (1) and (2) the 1st respondent had a duty and obligation to ensure the petitioner was given an opportunity to be heard before any action that was adverse to their rights and interest was taken. The petitioner has stated that they were not given any notice before the action was taken. Since the 1st respondent has not filed any response it is not disputed that no notice was given to either the petitioner or the Interested Party before the restriction was registered.
39. Under Article 10 of *the Constitution* which embodies the national values and principles of governance all state organs, state officers, public officers and all persons are bound to apply the rule of law whenever they interpret any law and/or make or implement any public policy decisions. Applying the rule of law would have entailed the petitioner being given a chance to be heard before registration of the restriction and during the sittings and site visit of the LCB Board concerning the suit property. The cardinal rule of natural justice is that no person should be condemned unheard. There is no evidence that the petitioner was accorded a chance of being heard.
40. I am satisfied the acts of the 1st respondent of putting a restriction on the suit property and failing to accord the Petitioner a hearing is totally highhanded and denied the petitioner a fair hearing to defend its title. The respondent did not follow due process where the petitioner would in terms of Article 50 (1) of *the Constitution* have been afforded a fair hearing. Article 50 (1) provides thus:-

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- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.

41. The upshot of what I have discussed above is that I am in agreement with the petitioner that the Chairman of the LCB acted ultra vires and therefore unlawful and contravened Article 47 of *the Constitution* for failure to afford the petitioner fair administrative action and consequently the same cannot stand.
42. Now, the right to a hearing which is directly linked to a right to a fair trial and a right to access justice are so fundamental that in the absence of exceptional circumstances, they cannot be limited.
43. The right to a hearing is also directly linked to the right to fair administrative action as stipulated in Article 47 of *the Constitution* as implemented by the *Fair Administrative Action Act* No. 4 of 2015, which espouses the right to an efficient, fair, lawful expeditious and reasonable and procedurally fair administrative action and Article 47(2) that the person has a right to be given written reasons for the action which adversely affects the right or freedom of that person. The 1st respondent did not respond



to any communication sent to him by the Petitioner nor explain why as the Chairman of Dagoretti Sub-County LCB he put a restriction on the suit property.

44. As was held in *Republic vs Commissioner of Co-operatives exparte Kirinyaga Tea Growers* [1999] 1 EA 245 the court held that:

“It is automatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.” See also *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1947] 2 ALL ER 680.

45. Further, In *Republic vs Secretary of State for the Home Department* [2003] UKHL 36 Lord Bingham though dissenting stated to persuasively and I concur:

“The right to access justice was fundamental and constitutional principle of the UK legal system. That right meant that notice of a decision was required before it could have the character of a determination with legal effect because the individual concerned had to be in a position on challenge that decision in the courts if he or she wished to do so. The constitutional principle requiring the rule of law to be observed also required that a constitutional stated had to accord to individuals the right to know of a decision before their rights could be adversely affected. It was an unjust proposition that an uncommunicated administrative decision could bind an individual. Parliament had not expressly or by necessary implication legislated to displace the applicable constitutional principles. The claimants appeal would accordingly be allowed.”

46. Lately, the courts have also held that administrative actions must now meet the constitutional test of legality, reasonableness and procedural fairness. This new standard was well articulated by the court in *Kenya Human Rights Commission & another vs Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR:

“Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

This Court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

47. In the instant petition, the petitioner in addition to seeking orders declaring the acts of the 1st respondent of filing the restriction against the property unlawful, they also sought general damages for economic loss for lack of development of the property. The respondents never responded to the petition. The Interested Party supported the Petitioner’s position although he did not file any pleadings. I believe that the action of the 1st respondent denied the Petitioner a fair hearing thus violating their right.
48. On the second issue as to whether Articles 24 and 27 were violated, one has to be careful not to depart from the threshold for the grant of orders in a constitutional petition as set out in *Anarita Karimi Njeru -vs- Republic* (1976-1980) KLR 1272.



49. Under the title Legal Foundations of the Petition, Articles 1 (1), 2, 3, 24, 27, 47, 48, 50, 73(1) (a) and Article 159 (2) (a) of *the Constitution* of Kenya are mentioned. However, this mention is not sufficient to infer threat of or violation thereof of rights.
50. The Petitioner under the subheading Violations/Infringements complained of the Petitioner claims that Articles 24, 47, 50 (1) and 27 of *the Constitution* have been violated.
51. Does the above analysis lead to a conclusion that the petitioner has:
- a. Set out the provisions that are said to have been infringed with regard to him and
 - b. The manner in which they are alleged to have been infringed?
52. The Petitioner has outlined from paragraph 32 of the petition to paragraph 39 of how their right was violated by the 1st respondent and I have also referred to this above and will not reproduce the same here.
53. The court in the case of David Katana Ngomba v Shafi Grewal Kaka (2014) eKLR while citing the case of Captain Patrick Kanyagia and Another vs Damaris Wangechi stated;
- “...no duty was cast on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell Accordingly, we find support in the above authorities and hold that the respondent as an intending purchaser at an auction sale had a duty to inquire into the rights of the charge to sell.”
54. The Petitioner has maintained that the 1st respondent has used his position to register and maintain an illegal restriction on the suit property despite the existence of properly constituted legal charge in favour of NHC thus affecting NHC’s power to sale and the Petitioner’s right to acquire title.
55. When a court of law is faced with the issue of whether a petition meets the threshold required in the Anarita case supra, in order to do substantive justice to the parties the court may in certain instances be constrained to concatenate arguments and statements scattered across the entire length and breadth of the petition in order to see whether the petition has revealed any threatened or actual violation of provisions of *the Constitution* with regard to a particular petitioner.
56. In the affidavit of Florence Lihanda Silaho the Managing Director of the Petitioner, sworn on 5/07/2022 it is clearly stated that the Petitioner purchased the suit property vide a public auction conducted by M/s Garam Auctioneers for and on behalf of NHC in respect of a charge against the title placed on 5/10/2013. That the restriction by the 1st respondent placed on 3/11/2019 was done despite the existence of the said charge and the 1st respondent has refused to remove the restriction. Further that the chargee duly executed the Transfer in favor of the Petitioner together with the relevant application for the Land Control Board (LCB) consent which the Petitioner lodged.
57. Given the foregoing and the fact that the 1st respondent did not file any response meaning that the auction was not set aside nor the transfer in favour of the petitioner, it is therefore a violation of Article 50 of *the Constitution* which speaks to the right to a fair hearing when the Petitioner’s advocate were not given a chance to present the Petitioner’s case. This right is non-derogable and is not limited as provided in Article 25 (c) of *the constitution*. Read together with Article 27 (1) and (2) of *the Constitution* which guarantees equality before the law, and equal protection and equal benefit of the law the Petitioner cannot be denied its day in court as did when the Board Members visited the site on 18/03/2021 when they had communicated that the visit would be on 19/03/2021.



58. From the pleadings on record, most of the factual matters raised by the Petitioner were not controverted by the Respondents and I am convinced that the petition before it has met the threshold required of a constitutional petition.
59. On the third issue on the orders give, this Court having found that the Petitioners' Constitutional rights were infringed, it is now under duty to consider the appropriate relief for the Petitioner. Under Article 23 of the 2010 Constitution the Court can grant a number of reliefs. Clause of the Article states that:
- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.
60. The petitioners have prayed for declaratory orders, mandamus, as well as for an award of general damages for economic loss. The award of damages falls under Sub-clause (e) of Article 23 referred to above.
61. In assessing damages for the violation herein, this Court is guided by the decision of *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR where the Court of Appeal citing among others, a decision of the Privy Council, stated as follows:

“The relevant principles applicable to award of damages for Constitutional violations under *the Constitution* was explained exhaustively by the Privy Council in the famous case of *Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004*. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminus with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional



right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. “Redress” in Section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object..... ”

62. Subsequent to that quotation, the Court put it as follows:

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

63. In the instant case, not much was revealed on the extent of the General damages for economic loss for lack of development of the property. It was not proved. Put differently, no evidence was given of how much in earnings the parcel of land if developed would have fetched for the Petitioner. This court is of the considered opinion that had it been that the petitioner accessed the land, they would have utilized it in one way or the other to generate income. They could have made losses as well. There is a difference between gaining profits and income from land and appreciation of the land in value. Doing the best I can, would therefore consider a sum of Kenya Shillings Two Million (Kshs. 2, 000,000/=) Only as appropriate compensation for general damages for economic loss for lack of development of the property.

64. In conclusion, this court finds that the petitioners have proved their case on a balance of probabilities. I thereby issue the following orders:

- a. An Order for Mandamus be and is hereby issued directing the 1st Respondent and the Dagoretti Land Control Board to forthwith conclusively deal with the Petitioner's Application to the Land Control Board dated 8th October 2020 and issue the relevant documentation
- b. A declaration be and is hereby issued, that the restriction filed against the subject property is unlawful and abuse of process;
- c. A declaration be, and is hereby issued, that the said Restriction amounted to an unfair administrative action;
- d. An Order of Mandamus for the Removal of the said Restriction and Registration of Transfer by Chargee in favour of the Petitioner;
- e. An award for General Damages for economic loss for lack of development of the property of Kesh 2,000,0000 against the respondents jointly and severally.



65. Costs follow the event therefore the 1st Respondent shall bear the cost of this Petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2023.

MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Mrs Onyango for the Petitioner

No appearance by the Respondents

