Auto Hauliers (K) Limited v Ministry of Lands and Physical Planning & 4 others (Environment and Land Constitutional Petition 19 of 2022) [2023] KEELC 17618 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 19 OF 2022

LL NAIKUNI, J

MAY 16, 2023

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 1, 10, 19, 21, 22, 23, 24, 40, 47, 94, 95, 114, 124 AND 125 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: THE LAND ACT, NO. 6 OF 2012 AND IN THE MATTER OF: THE NATIONAL LAND COMMISSION AND IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015 BETWEEN

BETWEEN

AUTO HAULIERS (K) LIMITED .... PETITIONER

AND

MINISTRY OF LANDS AND PHYSICAL PLANNING .... 1ST RESPONDENT

LAND REGISTRAR MOMBASA .... 2ND RESPONDENT

NATIONAL LAND COMMISSION .... 3RD RESPONDENT

DIRECTOR OF SURVEY .... 4TH RESPONDENT

ATTORNEY GENERAL .... 5TH RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment of this court pertains the filed Constitution Petition dated 9th May, 2022 instituted by the Petitioners on 10th May, 2022. *The Constitution* Petition was brought against the 1st, 2nd, 3rd, 4th and 5th Respondents herein under the dint of the provisions of Articles 1, 10, 19, 21, 22, 23, 24, 40, 47, 94, 95, 114, 124 and 125 of *the Constitution* of Kenya 2010, The *Land Act* and the Fair Administrative Actions Act.

2. Upon service, the Respondents filed their responses accordingly.

II. The Petitioners' Case - The legal foundation of the Petition

3. The Petition was founded on the following legal provisions:

   a. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.

   b. Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

   c. Article 50(1) of *the Constitution*, which provides that 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.

   d. Article 165 (3) (d) of *the Constitution*, which provides that the High Court shall have jurisdiction to interpret *the Constitution* to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*.

   e. Article 259 of *the Constitution* of the Republic of Kenya, which provides that *the Constitution* must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the developments of the law and contributes to good governance.

   f. Part VIII of the *Land Act* 2012 Sections 107-133 which provide extensively for the process and procedures relating to Compulsory Acquisition of Land

III. The brief facts

4. The brief facts of the case are that the Petitioner is the registered proprietor of that parcel of land known as CR. 35841 being LR No.MN/II/9024 situated in Mtwapa Creek in Mombasa and measuring 4.003 Hectares (hereinafter referred to as "the subject property") having purchased the same from LOKI DEVELOPERS LIMITED sometimes in 2012.

5. The land tenure of the subject property is a leasehold from the Republic of Kenya, for a term of 99 years with effect from 1st June 1991 for an annual rent of Kenya Shillings Fifty Five Thousand (Kshs. 55,000/=). The Petitioner averred that upon purchase of the subject property the same was lawfully and procedurally transferred to it on 14th September 2012 after meeting all the legal requirements, including but not limited to payment of stamp duty, and as such it acquired a good and indefeasible title to the suit property thereof.

6. Subsequent to the transfer of the suit property to it, the Petitioner had been diligently observing all the covenants and stipulations of the interest granted thereof including but not limited to payment of Land Rent. Sometimes in the year 2017, the Respondents, without following the requisite procedure provided for under Part VIII of the *Land Act* 2012, without notice to him or gazettement, unlawfully issued eighty (80) new title deeds within the same geographical location as the subject property under a purported Settlement Scheme, as a result of which the newly created parcels of land overlapped or

were superimposed into the subject property, and thereafter, proceeded to settle squatters on the new parcels of land.

7. The processing and issuance of the 80 new title deeds and the settlement of the squatters was carried out without notice, consultation and/or reference to the Petitioner which was a blatant violation of its right to fair administrative action under Article 47 of *the Constitution* of Kenya and in contravention of Part VIII of the *Land Act* 2012 dealing with Compulsory Acquisition of interests in land.

8. The Petitioner was not given reasons for the decision reached by the 1st Respondent which action was a violation of its right to fair administrative action under Article 47 of *the Constitution* of Kenya entitling every Kenyan citizen to the right to administrative action that was expeditious, efficient, lawful, reasonable andprocedurally fair, and where a decision is likely to affect the rights of any person, such person has a right to be given written reasons for such actions.

9. The Petitioner was arbitrarily dispossessed of the suit property by the 1st Respondent sometimes in 2017 and the dispossession was made absolute when the 1st Respondent re- surveyed the area, purported to form a Settlement Scheme and proceeded to settle squatters on the parcels of land bearing new title numbers which overlapped into the suit property, hence the suit property is not available for restitution.

10. As a result of the Respondents actions of issuing new title deeds which overlapped into subject property's title, the Petitioner has been arbitrarily deprived of his right to acquire and own property of any description in violation of Article 40 (3) of *the Constitution* of Kenya.

11. It was the Petitioner's case that the said deprivation of the subject property was not undertaken in accordance with the law since due process was not followed as required by the provision of Article 40 (3) of *the Constitution* of Kenya and by Part VIII of the *Land Act* 2012. Upon dispossessing the Petitioner of the subject property the 1st Respondent through the 3rd Respondent ought to have paid the Petitioner prompt payment in full of just and full compensation of the value of the land. The Respondents never had power under the law to demand the surrender of the Suit Property and or to subdivide the same, issue letters of allotment over the same or to issue title deeds jet property, which they had failed to do so, to date. The Respondents did not have power under the law to demand the surrender of the Suit Property and or to subdivide the same, issue letters of allotment over the same or to issue title deedsto any person over the same, to extend registration boundaries into privately owned property and or to change the registration regime of any parcel of land already registered under the Registration of Tiles Act without following due process as provided under *the Constitution* of Kenya, 2010 and Part VIII of the *Land Act*, 2012 on compulsory acquisition of land.

12. The Respondents had proceeded in an ultra vires manner, acting outside of the scope of their authority to revoke the Titles to Your Petitioner's property, the illegal and unconstitutional adjudication, allocations, issuance of unconstitutional titles and sub - divisions and invasion of the Suit Property, Thus, the Petitioner was reasonably apprehensive that the Register, Folders, Kalamazoos, parcel files and all other documents relating to the Suit Property described above would be destroyed, altered, concealed, or otherwise dealt with before the determination of this Petition.The Suit Property continued to be sub - divided and re-surveyed to create new titles and various dealings involving the above-named plots and their sub - divisions continued being registered at the Mombasa District Lands office to allow new occupants and owners take possession, the main aim being the total takeover and dispossession of the property from your Petitioner. The Petitioner retained a firm of licensed valuers known as M/s Elite Africa Valuers Limited on 19th April 2022 who conducted a valuation of the subject property exclusive of the developments and the said firm in its valuation report found the

current market value of the suit property to be a sum of Kenya Shillings Three Sixty Million (Kshs. 360,000,000/=).

13. The dispossession of the suit property was without notice, unlawful, irregular and unconstitutional, unfair and irrational. The Petitioner has suffered grave financial loss from the deprivation of the said Property, having been left unable to sell it, rent it or utilize it for any purpose at all from the year 2017.The 2nd Respondent failed to publish a gazette notice announcing an intention to acquire the subject property for any public purpose or in public interest in violation of Section 107 of the *Land Act*. The Petitioner had written to the 3rd Respondent to pay compensation following the compulsory acquisition of the subject property however the former has never reverted back or issued an award of compensation to date, clearly in violation of Section 111 of the *Land Act* 2012.

14. The Petition was premised on the testimonial facts, grounds and the averments made out in the 25 Paragraphed Affidavit of MAHESH KANTILAL SANGHRAJKA SHAH together with sixteen (16) annextures marked as "A.H.L 1 to 16" annexed thereto. He averred that:

    a. The Petitioner is the registered proprietor of that parcel of land known as CR. 35841 being LR No. MN/II/9024 and delineated on Land Survey Plan No. 243209, situated in Mtwapa Creek in Mombasa and measuring 4.003 Hectares (hereinafter referred to as "the subject property") having purchased the same from LOKI DEVELOPERS LIMITED sometimes in 2012. He annexed and marked as Exhibit "A.H.L - 4",a copy of the title deed and marked as "A.H.L - 5" is the Certificate of Postal search dated 20th September, 2012,after transfer to the Petitioner.

    b. The land tenure of the subject property is a leasehold for a term of 99 years from the Republic of Kenya with effect from 1st June 1991 for an annual rent of a sum of Kenya Shillings Fifty Thousand (Ksh.55,000/=). That upon purchase of the subject property the same was lawfully and procedurally transferred to the Petitioner on 14th September 2012 after meeting all the legal requirements including but not limited to, payment of stamp duty and as such it acquired a good and indefeasible title thereof. He annexed and marked as "A.H.L - 6" a copy of Letter of Consent to Transfer from the District Land Registrar, exhibit marked as "A.H.L - 7" a copy of the Transfer Form duly stamped and Exhibit as A.H.L - 8" a copy of the Valuation for Stamp duty, Banking receipt and Kenya Revenue Authority (KRA) pay in slip.

    c. Subsequent to the transfer of the suit property to the Petitioner, it had been diligently observing all the covenants and stipulations of the interest granted thereof including but not limited to payment of land rent. He annexed and marked as Exhibit "A.H.L - 9" is a copy of Land Rent Clearance Certificate up to 31st December 2020.

    d. The processing and issuance of the eighty (80) new title deeds by the 1st Respondent was carried out without notice, consultation and/or reference to the Petitioner which was a blatant violation of its right to fair administrative action under the provision of Article 47 of *the Constitution* of Kenya, 2010. The Petitioner was not given reasons for the decision reached by the 1st Respondent which action was a violation of its right to fair administrative action under Article 47 of *the Constitution* of Kenya which entitles every Kenyan citizen including a juristic person to the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair and where a decision was likely to affect the rights of any person, such person has a right to be given written reasons for such actions.

    e. The Respondents' actions infringed, contravened and/or violated the Petitioner's property rights under Article 40 of *the Constitution* of Kenya, 2010 and that the said actions in so far as they are designed to arbitrarily deprive the Petitioner of the subject property are

unconstitutional, illegal, null and void.Petitioner was arbitrarily dispossessed of the subject property by the 1st Respondent sometimes in year 2017 and the dispossession was made absolute when the 1st Respondent settled squatters on the parcels of land, bearing new title numbers which overlapped into the suit property; Hence the suit property was not available for restitution. Annexed herewith and marked as Exhibit "A.H.L - 12" were photographs of residential houses and the squatters on the subject property."

f. As a result of the 1st Respondent's actions of issuing new title deeds which overlapped into subject property's title, the Petitioner had been arbitrarily deprived of hisright to acquire and own property of any description in violation of its right under Article 40 (3) of *the Constitution* of Kenya. The said deprivation of the subject property was not undertaken in accordance with the law since due process was not followed as required by Article 40 (3) of *the Constitution* of Kenya, 2010 and by Part VIII of the *Land Act* 2012.

g. Upon dispossessing the Petitioner of the subject property the 1st Respondent through the 2nd Respondent ought to have paid the Petitioner prompt payment in full, of just and full compensation of the value of the subject property and they had failed to do so to date. The Petitioner retained a firm of licensed valuers known as M/s Elite Africa Valuers Limited on 19th April 2022 who conducted a valuation of the subject property exclusive of all the developments and the said firm in its valuation report found the current market value of the suit property to be a sum of Kenya Shillings Three Sixty Million (Kshs. 360,000,000/=).

h. The dispossession of the suit property was without notice, unlawful, irregular and unconstitutional, unfair and irrational. The 2nd Respondent failed to publish a gazette notice announcing an intention to acquire the subject property for any public purpose or in public interest in contravention of Part VIII of the provisions of the *Land Act* No. 6 of 2012.

i. Petitioner had since written to the 2nd Respondent demanding payment of compensation and issuing a notice of intention to sue upon the office of the Honorable Attorney General following the compulsory acquisition of the subject property. However, the former had never reverted back or issued an award of compensation to date.

j. A copy of current search clearly indicated that the suit land herein was still registered in favour of the Petitioner herein. (Annexed herein and marked as Exhibit "AHL - 16" a copy of a current Certificate of search).

k. It was therefore in the interests of justice that the Petitioner be paid prompt, full and just compensation in tandem with the current market value of the subject property which was a sum of Kenya Shillings Three Sixty Million (Kshs.360,000,000/=). By reasons aforesaid he humbly prayed that this Honourable Court grants the reliefs sought in the Petition.

l. The Petitioners sought for the following orders:-

   a. A declaration do issue that the Petitioner is the lawful registered owner of the parcel of land known as CR. 35841 being LR No. MN/ II/ 9024, and that his title to the same is valid.

   b. A declaration that the dispossession of the Petitioner of the subject property by the 1st Respondent is in contravention and violation of the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya and therefore wrongful, illegal, unconstitutional, null and void.

c. An interim order of injunction restraining the Respondents, their agents, servants and or anyone acting on their authority from alienating, transferring, dealing with, changing the allotment status of the suit property or otherwise interfering with the Petitioner's title thereof, until hearing and determination of this application;

d. An order of mandamus compelling the 2nd Respondent to pay to the Petitioner by way of a fair compensation the amount of Kshs. 360,000,000/= together with interest at 12% per annum from the date of Judgement;

e. General Damages for loss of Use of the Suit Property from the year 2017, to be assessed by this Honorable Court and, an Order of Mandamus compelling the 2nd Respondent to pay to the Petitioner the said assessed sum, together with interest at 12% per annum from the date of Judgement;

f. The Petitioner to surrender his title to the Government of Kenya upon receipt of Payments in Prayers d and e and for the 1st and 2nd Respondent to ensure that the Register reflects the surrender.

g. Costs of this petition be borne by the Respondents.

h. Such other orders(s) as this Honorable Court shall deem just to grant.

15. On violation of fundamental rights and freedoms the Petition averred that:

i. The acts and omissions of the Respondents herein and their officers were in disregard of the rule of law and the Petitioner was apprehensive that unless curtailed by the Honourable Court his rights to property and fair administrative action as guaranteed under the provision of Articles 40 and 47 of *the Constitution* of Kenya, 2010 would be violated and continue to be violated.

ii. The government was mandated in law to Compensate the Petitioner to mitigate against the loss and effects of the unlawful takeover and dispossession of the Subject Land.

iii. The wrongful alienation of the portion of subject land.

iv. In order to regularize the formation of the Settlement Scheme, legalize the issuance of the eighty (80) title deeds and prevent upheaval and loss of homes to the eighty (80) settled squatters and their families, and further to prevent embarrassment to the Respondents herein, whilst mitigating and compensating for the Loss of Property to the Petitioner, the Petitioner prayed for resolution by way of compensation as provided for under Article 40 of *the Constitution* of Kenya 2010 and Section 111 of theLand Act 2012 together with General Damages for loss of use of the Subject Land.

v. Due to settlement of the eighty (80) squatters and their families, the act of eviction and restitution of the title back to the Petitioner would cause great upheaval and animosity and hostility between the squatters and the Petitioner herein, eviction orders were therefore untenable and potentially risky, and hence the Petitioner seeks Compensation and General Damages from the Respondents.

vi. In any event the settlement scheme was not created in compliance with the provisions of the provision of Section 134 of the *Land Act*, No. 6 of 2012.

vii. The acts complained of in the Petition herein amounted to compulsory acquisition of the Petitioner's property without following the provisions of the *Land Act* 2012 and were therefore illegal under the provision of Article 40 of *the Constitution* of Kenya, 2010.

iv. The 1st, 2nd, 4th and 5th Respondents case

16. In response to the Petition the 1st, 2nd, 4th and 5th Respondents filed a Reply to Petition dated 6th of June,2022. They raised the following grounds in defence of the Petition.

a. The Petition was misconceived, vexatious and an abuse of the process of court.

b. The Petition as drawn failed the test of the famous case of "Anarita Karimi Case" and should to be dismissed with costs.

c. The Petition as drafted was imprecise to the extent that it failed to disclose the name of the Settlement Scheme allegedly created on the parcel of land known as C.R 35841, L.R No. MN/II/9024 situated in Mtwapa creek in Mombasa and measuring 4.003 hectares.

d. The Petition as drafted was imprecise to the extent that it failed to set out with precision the parcels of land alleged to have been carved out of the land parcel known as C.R 35841, L.R No. MN/II/9024 situated in Mtwapa creek in Mombasa and measuring 4.003 hectares.

e. The Petitioner was guilty material non - disclosure to the extent that he failed to disclose the registered owners of the eighty (80) parcels of land alleged to have been carvedout of the parcel of Land known as C.R 35841 being L.R No. MN/II/9024 situated in Mtwapa creek in Mombasa and measuring 4.003 hectares.

f. The Petition as drafted contravened the principles of natural justice to the extent that it sought orders adverse to the rights and/or interests of parties who were not before this Honourable Court.

g. Grant of the orders sought would contravene the principles of natural justice.

h. This Honorable Court lacked the original jurisdiction to determine the award/amount payable in the case of compulsory acquisition.

i. The valuation report relied on by the Petitioner failed to comply with Section 107B of the *Land Act* No. 6 of 2012.

j. The Petition as drafted did not comply with the provision of Section 135 of the *Land Act* No. 6 of 2012.

V. The 3RD Respondents case

17. The 3rd Respondent responded to the Replying affidavit through a 15 Paragraphed Replying Affidavit dated 8th June, 2022 sworn by a Chief Land Officer, ZACHARIA NDEGE and one annexture marked as "NLC – 1" where he averred that:

a. According to records in the correspondence file, the suit property is situated in Mtwapa Creck Mombasa measuring 4.003 Hectares.

b. The suit and was allocated to Loki Developers Limited by the then Commissioner of Lands for a leasehold term of 99 years with effect from 1st June, 1991 with an annual rent of annual rent of Kenya Shillings Fifty Five Thousand (Kshs. 55,000/=).

c. A Deed Plan number 243209 was subsequently prepared and signed by the Director of Survey on 15th August, 2002.

d. The suit land was subsequently registered as CR35841 on 28th August, 2002 at the Coast Inland Registry.

e. Records available at the said Registry indicated that Loki Developers Limited transferred the suit land to the Petitioners herein on 14th September 2012 and the Petitioner were the registered owners.

f. The Petitioner had never been in occupation or use of the suit land and it had historically been occupied by residents who were subsequently formally settled there by the movement in the year 2017 when Majaoni settlement scheme was established thereon by the government.

g. The area was now fully developed and in occupation of parties who had since been issued with title documents pursuant to the establishment of the settlement scheme on the land.

h. The said settlers had not been joined as parties to this Petition and there was an imminent risk that the occupants of the land would be condemned unheard in violation of their Constitution right to a fair hearing and fair administrative action.

i. Granting the orders of eviction as sought would occasion a security nightmare since the area was fully occupied by the parties who were not before Court.

j. The case failed the test in case of "Annarita Kariml – Versus - The Attorney General. The Petitioner did not set out with reasonable precision the rights that were violated and in what manner thus falling short of the threshold set out in this case.

k. He annexed a bundle of exhibits marked as "NLC – 1" to support the averments above.

VI. Submissions

18. On 2nd November, 2022 upon the closure of the case, in the presence of all the parties Honorable Court directed that they all prepare and file their written submissions accordingly. On 21st November, 2022, the parties were accorded an opportunity to orally highlight their written Submission a duty M/s. Moolraj Advocate, Mr. E. Makuto Advocate and Mr. S. Mbuthia Advocate executed with great diligence, devotion and dedication. They exhibited high standards of professionalism. It was thereafter, that the Honorable Court reserved a date for the delivery of Judgment on notice accordingly.

A. The written submission by the Petitioners.

19. On 2nd August, 2022, the Learned Counsel for the Petitioner from the Law firm of Messrs. K.A. Kasmani & Company Advocates filed their written submissions dated the same day. M/s. Moolraj Advocate commenced by stating that further to the orders issued on 26th July, 2022, they have proceeded to draw their submissions below. They had to date, not been served with any Documents of opposition or affidavits in response to their submissions, from any Respondent save for the 3rd Respondent. The Learned Counsel submitted that the Petition revolved around compulsory acquisition of the suit land which is private land by the Respondent but failing to compensate the Petitioner as required by law. The Counsel held that the Petitioner - AUTOHAULIERS (K) LIMITED was the current proprietor of CR. 35841 being plot No. 9024/ II/ MN in Mombasa. It bought the land from Loki Developers Limited in the year 2012 and registered to the Petitioners on

14th September, 2012. The affidavit in support was sworn by Mahesh Kantilal Sanghrajka Shah who was a director of the Proprietor company and authorized vide resolution issued by the said Company.

20. The Learned Counsel submitted that they had attached to the affidavit of Mahesh Kantilal Sanghrajka Shah (filed on 10th May 2022 and attached to the Petition the following documents in support:-

    a. Exhibit marked as "A.H.L - 1" on Page 15 - showed the Certificate of Incorporation of the Petitioner herein;

    b. Exhibit marked as "A.H.L - 2" on Page 16 - showed the CR -12 Form of the Petitioner company and details of its directors;

    c. Exhibit marked as "A.H.L - 3" on Page 17 - showed the resolution of the proprietor company granting authority to the said Mahesh Kantilal Sangrajka Shah to file a suit against the Respondents.

21. The Learned Counsel submitted that dispossession had been admitted under Paragraphs 8 & 9 of the 3rd Respondents affidavit, sworn by Zacharia Ndege and filed on the 8th June 2022, where he stated:-

> " residents who were subsequently formally settled there by the Government in 2017, when the Majaoni settlement scheme was established thereon by the government." In para 9, "the area is now fully developed and in occupation of 3rd parties who have since been issued with title documents, pursuant to the establishment of the settlement scheme on the land."

22. The Learned Counsel averred that in or about the year 2017, the 1st Respondent issued eighty new titles (80), which superimposed and overlapped on top of the Petitioners Property. This was done without the requisite notification, consultation or reference to the Petitioners and without gazettement. Attached and marked as Exhibit "A.H.L - 10" on Pages 29 and 30 was a list of the newly created titles that overlap/are superimposed onto the Petitioner's land. Exhibit "A.H.L - 11" on Page 31 showed the Petitioners Plot No. 9024 (in green) with the superimposed smaller plots thereon, ranging from Plot no.1951-1856.The property was quite valuable, it fronts Mtwapa Creek with a Panoramic Views. The Petitioner having purchased the property in the year 2012 and having expended time and money on the same, were distressed and shocked to discover, that they had been divested of the property without any notification or compensation at all, and feel violated of their rights and property, which *the Constitution* was meant to protect and preserve.

23. The Learned Counsel argued that the Petitioner had lost their land in reality, since new titles had been issued over the same, which new titles continue to be sold onwards. The area had been settled upon and developed as per Exhibits "A.H.L - 12" on pages 32 and 33.Meanwhile, the Petitioner's paper titles and records at the Land's Registry, Mombasa subsist, as shown by a Searches carried out on the 22nd April 2022 as exhibited on Page 43.

24. The Learned Counsel's contention was that it was clear and obvious that the acts of the Respondents amounted to Compulsory Acquisition of the Land. Since creation of the new Overlapping titles, civilians had settled on the property, developed it, sub-divided it and carried out transaction at the Land's registry. The Petitioner's title deeds and records at the Lands Registry Mombasa, had been rendered useless and of no effect. In the year 2017,when the 1st, 2nd and 4th Respondents proceeded to survey, demarcate and issue new titles over the Land, the Land Acquisition Act Cap 295, had already been repealed by The *Land Act* 2012. Part VIII of the *Land Act* 2012, details clearly the notices, practices, and processes necessary in properly carrying out compulsory acquisition by the Government of interests in Land.

25. For instance, Section 107 (5) provides for a notice of the land intended to be acquired, to be Gazetted and for the said notices to be delivered to interested parties. Section 108 (2) prevents entry upon the land, without consent of the occupier; Section 112 of the *Land Act* 2012 provides for an inquiry to be held, to hear claims for compensation, and Sections 112 - 115 provide in mandatory terms for the National Land Commission to assess the value of the land, make an award of compensation and promptly pay the said compensation to persons entitled. In the matter before you, the Proprietors were kept in the dark completely, and only discovered the acquisition, when squatters began appearing on the land, claiming that they had "bought" it. The requisite publication in the Gazette was not carried out, no notice was issued to the Proprietors and they were never called to submit an inquiry for grant of compensation, award was not made and compensation was not offered.

26. The Learned Counsel opined that the most important section impinging on this matter is Section 120 of the *Land Act* 2012 which provides, "only after the award had been made, and the amount of the first offer has been paid, the Commission shall take possession of the land by serving on every person interested in the land, a notice on that specified day possession of the land and the title to the land will vest in the national or county governments as the case may be." Also of noteis Section 120(4) which provides "Upon taking possession and payment of just compensation in full, the land shall vest in the National or County Governments absolutely free from encumbrances". Also in the same vein is section 125 of the *Land Act* 2012, "The commission shall as soon as practicable, before taking possession, pay full and just compensation to all persons interested in the land."

27. The Learned Counsel opined that the Act was crystal clear, in making it a pre-requisite condition, that compensation be paid before the title vests in the Government. It was therefore clear, that the petitioner's title No. CR. 35841 being plot No. 9024/II/MN, had not yet vested in the government, and therefore, all actions to survey, demarcate and allot titles were carried out illegally, ultra vires and without following the protocols and steps which are mandatory in as per the *Land Act* 2012. Furthermore, and sadly, the Petitioners had been stripped of their right to their Land without any notification or compensation in contravention of Article 40 of *the Constitution*.

28. On the issue of compensation the Learned Counsel submitted that the Petitioners realized that civilians had been settled on the Land and had built their own houses thereon, as evidenced by the photographs on Pages 32 and 33 and the overlapping titles had been sold onwards. It would be unfeasible to seek for the land to be restituted back to the Petitioners, this would involve, hostility, animosity and eviction, and would not bode well for the collective reputation of the Respondents either, none of which followed the requisite due process. On 26th October 2020, the Petitioner's Advocates wrote and addressed a 30 days notice seeking compensation to the Respondents herein. Copy of the said letter was exhibited as "A.H.L - 15" on Page 50. Sadly, there was no response to their claim for compensation. In light of the circumstances, the Petitioner sought for award of compensation for the market value of said land – a sum of Kenya Shillings Three Hundred Million (Kshs. 300, 000, 000/=). The Petitioner had filed a valuation reports by Elite Valuers Africa Limited for the said Land, exhibited as "A.H.L - 14" on Pages 36 – 48 which showed that the current market value of the land was a sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360,000,000/=.

29. Therefore, it was her submission that the Petitioner sought for an order of mandamus compelling the 3rd Respondent to pay to the Petitioner the sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360,000,000/=) as compensation, together with interest at 12% from the date of Judgement. The Petitioners also sought for General Damages for Loss of use of the property from January 2018 (since overlapping titles were created in year 2017), to be assessed by this Honourable Court. The Court was respectfully asked to bear in mind, provision of Section 117 of the *Land Act* 2012, which provided for compensation that had not been paid out to be placed in a special Bank lending rate by

the Central Bank of Kenya and prevailing at that time, from the time of taking possession until the time of payment. In this matter, compensation was neither paid out, nor had it been placed in any special account that they knew of. The Petitioners humbly requested that General damages be assessed as interest would have been 360,000,000x12%x4.5 years=Ksh.194,400,000/=.

30. Rebutting to the Responses by the 3rd Respondent, the Learned Counsel opined that the claim by the 3rd Respondent in Para 8 that the Petitioner had never been in occupation of the land was a non -issue.In response to this assertion, the Counsel relied on the provision of Section 26(1) of the *Land Registration Act* 2012 which provides that:-

> " The Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named encumbrances...endorsed in the certificate, and the title of that proprietor shall not be title has been acquired unprocedural". The Learned Counsel held that taking that the 3rd Defendant had admitted that the Petitioner was the proprietor of the land, and on Page 18 and 19, exhibiting as "A.H.L - 4" and A.H.L – 5 were the title and official search of the Petitioner, there could be no question that the Petitioner was indeed recognized as the absolute and indefeasible owner of the land.

31. The Learned Counsel made reference to the assertion that the 3rd Defendant claims that the settlers had not been enjoined in this suit and that granting eviction orders would occasion a security nightmare. On that argument, the Learned Counsel averred that the Petitioner never sought for eviction of the settlers on the said land and did not wish to be involved in the acrimonious and dangerous exercise of eviction. She emphasized that the settlers had not been enjoinedin the suit, since the Petitioner does not seek restitution of the land back to themselves, therefore the settlers shall not be affected by this claim at all. The Counsel asserted that the Petitioner only sought for compensation and Loss of Use from the Respondents, as compensation for the illegal divesting of their property and infringement of their constitutional rights.

32. She submitted that the allegation by the 3rd Respondent that the suit failed the test in the case of: "Anarita Karimi - Versus – Attorney General" was not true as the Respondent having admitted to all the imperative facts of the suit and the suit land was estopped from alleging that adequate details of the suit had not been particularized; the face of the Petition clearly indicated the Legal foundation, citing all sections of *the Constitution* and *Land Act* 2012 relied upon, the facts were laid down in chronological order and extensive exhibits detailing proof of proprietorship, overlapping by the Government, topographical surveys showing overlapping and independent valuation reports had all been attached to the Petition, clearly fulfilling the test in case of "Annarita Karimi – Versus – the Attorney General.

33. To buttress on these points, the Learned Counsel relied on the Supreme Court of Kenya, which was at par and alike in circumstances to the matter before this Court. This was case of "Attorney General -Versus - Zinj Limited (Petition of 2020)[2021]KESC 23 (KLR) (Civ) (3 December 2021),where the presiding Supreme Court Justices MK Koome, CJ&P, PM Mwilu, DCJ&VP, MK Ibrahim, SC Wanjala & W Ouko,SCJJ unanimously held as follows:-

> " On Acquisition of Land: Pg. 9 Para 27 "The only way the Government could lawfully deprive the Respondent of part or all of its property was through a compulsory acquisition, stipulated in the Land Acquisition Act, (now repealed) which was the applicable law at the time"

Pg.10 Para 28- "Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the Respondent.....issuance of the titles over a portion of the suit property, in favour of third parties was unlawful, unprocedural and an egregious violation of the Respondent's right to property.

34. The Learned Counsel on damages submitted that in Pages 10 on Paragraph 29 –

> " It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under Article 22 (1) of *the Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (Article 23 (3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused."

35. On Page 10 para 30 the court proceeded to state that:

> " Having determined that the Respondent's right to property had been violated by the Government, the trial Court, and later the Appellate court, made orders for compensation in favour of the Respondent. Both Courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard. We take note of the Appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the Appellant, was not only unreliable, but could very likely have been tailored to support the Respondent's claim. However, in answer to this court's question as to whether, the Appellant had tabled in Court, a Government Valuation Report to counter the contents of the impugned one, the Counsel for the Appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case."

36. The Learned Counsel submitted that on Pages 12 - 13 sentence, the Supreme Court proceeded to affirm the Compensation award of Kshs. 464,973,248.70.

37. On the issue of the claim, the Learned Counsel argued that in a nutshell, the Petitioner basically prayed for a declaration that the Petitioner was the lawful true registered owners of the Land being CR. 35841 (LR NO. 9024/III/MN); an order of mandamus compelling the 2nd Respondent to pay to the Petitioner by way of a fair compensation the amount of a sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360,000,000/=) together with interest at 12% per annum from the date of Judgement; General Damages for loss of the use of the property from the year 2017 to be assessed by this Honourable Court, preferably, in the same manner that interest on delayed compensation would have been calculated, in the sum of Kenya Shillings One Hundred and Ninety Four Million Four Hundred Thousand (Kshs. 194,400,000/=) together with interest at 12% per annum from the date of

Judgment; and upon the receipt of the payments above, for the Petitioners to surrender their titles to the Government for cancellation.

38. In conclusion, the Learned Counsel submitted that the overlapping of plots on the ground and the conflicting titles could not remain as was. The entire affair was an embarrassment. The Petitioner titles and records at the Mombasa Land registry on 35841 (9024/III/MN) produce searches that show their names as proprietors. The Overlapped newly created titles created, produce searches against the sub - divisions, in the squatters/ civilian's names. Yet, the land on the ground was the same land. The only resolution here, was compensation as claimed. They humbly urged the court to follow the Judgment of the Supreme Court of grant the claim as prayed.

B. The Written Submission by 1st, 2nd, 3rd, 4th and 5th Respondents.

39. On 17th October, 2022, the Learned Counsel for 1st, 2nd, 4th and 5th Respondent, the office of the Honorable Attorney General filed their written Submissions dated the same date. Mr. Makuto Advocate submitted that the Petitioner filed a Petition dated 9th May, 2022 alleging that he is the owner of all that parcel of land known as CR. 35841 being LR MN/11/9024 situate in Mtwapa creek measuring 4.003 Hectares. The Petitioner alleged that sometime in the year 2017 the Respondents without following the requisite procedure provided for in part VIII of the *Land Act* No. 6 of 2012 and without notice to him or gazettement, unlawfully issued eighty (80) new title deeds within the same geographical location as his property.

40. The Learned Counsel opined that the Petitioner stated that the processing and issuing of titles deeds and settlement of squatters was carried out without notice and or consultation in violation of the Petitioner's rights under the provision of Articles 40 and 47 of *the Constitution* of Kenya, 2010. He claimed that the land was worth a sum of Kenya Shillings Three Hundred and Sixty Million (Kshs. 360, 000,000/=).

41. The Learned Counsel reiterated the prayers in the Petition and the Replying affidavits by the Respondents. From the onset it was important to point out that while the Petitioner alleges that the Respondent had issued eighty (80) title deeds in the same geographical location as his parcel of land, the Petitioner had not availed to Court the details of the persons issued with the alleged titles and or the details of the title deed issued.As a result of the forgoing the Respondent were unable to properly respond to the allegation that the eighty (80) title deeds had been issued in the same geographical location as the Petitioners' parcel of land.In failing to set out the precise particulars of the persons and the title deeds allegedly issued the Petitioner failed to comply with the requirement that Petition was to be precise to allow the Respondents respond. This was contrary to the rules set out in the Anarita case.

42. The Learned Counsel relied on the decision in case of "Anarita Karimi Njeru v Republic No.1 (1979) I KLR, 54 and which was echoed in the case of "Mumo Matemo – Versus - Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR: where the Court said:-

> " 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."

43. The Counsel further referred to the case of "Mumo Matemu Case, where the Court said:-

> " ....the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... 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"

44. He argued that by virtue of the fact that there was lack of clarity on the person "allotted" the land and details of the titles allegedly issued, this Petition could not and ought not succeed. The Petitioner was also guilty of material non - disclosure. He failed to state the names of the persons in whose favour he alleged the eighty (80) titles deed had been issued to. Ideally, he opined that the failure to provide the details of the eighty (80) title allegedly issued was also another case of material non disclosure which hampered the ability of the 1st, 2nd, 4th and 5th Respondents to properly respond to the issues raised from the Petition. It should be noted that by the Petitioners own Petition there was an admission of conflicting claims to be same parcel of land if the Petitioners statement that 80 new title had been issued in the same geographical location as the suit parcel of land.

45. The Learned Counsel averred that the question that arose were:-

    a. Could this Court determine the question of competing titles without the alleged third - party owner of the eighty (80) parcels of land?

    b. Could the Court declare the Petitioner the rightful owner of the suit parcel of land without hearing the other parties alleged to have titles?

46. He asserted that to hear this Petition and grant the orders sought without the other parties alleged to have titles would deny the third parties a right to be heard before a decision that would affect them was made. This was contrary to the right to fair hearing enshrined in the provision of Section 4 (3) and (4) of the Fair Administrative Action which provides as follows;-

    (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

        (a) prior and adequate notice of the nature and reasons for the proposed administrative action;

        (b) an opportunity to be heard and to make representations in that regard;

        (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

        (d) a statement of reasons pursuant to section 6;

        (e) notice of the right to legal representation, where applicable;

        (f) notice of the right to cross-examine or where applicable; or

        (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

    (4) The administrator shall accord the person against whom administrative action is taken an opportunity to–

        (a) attend proceedings, in person or in the company of an expert of his choice;

        (b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

47. Therefore, the Learned Counsel called upon the Court to decline the invitation by the Petitioner to make declarations in the absence of the alleged beneficiaries of the eighty (80) titles without observing the provisions of Sections 4(3) and (4) of the Fair Administrative Actions Act.If indeed they were in the same geographical location as the suit parcel of land surely they were traceable. They could be found and served before a decision was made. He opined that there was no reasonwhatsoever had been given by the Petitioner why they were not made a party to this Petition and or in the very least served with the pleadings in this case. In the absence of details of the beneficiaries of the alleged eighty (80) title deed and or the title deed details it was impossible to prove that the 1st, 2nd, 4th and 5th Respondents disposed of the Petitioner's property violation of the petitioners right to acquire and own property under the provision of Article 40 of *the Constitution* of Kenya, 2010.

48. The Learned Counsel submitted that no survey report had been presented verifying that the alleged eighty (80) parcels of land overlap land parcel C.R 35841 being L.R No.MN/II/9024.In fact we do not know the alleged details of the eighty (80) parcel of land to enable this court analyses whether they occupy the same geographical position as the suit parcel of land the subject matter of this suit.The burden of proving that the alleged eighty (80) parcels of land occupy the same location and or coordinates with the suit parcel of land, land parcel C.R 35841 being L.R No. MN/II/9024, belonged to the Petitioner pursuant to the provisions of Sections 107 and 108 of the *Evidence Act*, Cap. 80 which provide as follows:-

> " Section 107
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> Section 108
>
> The burden of proof in a suit or proceeding lies on that person who would fall if no evidence at all were given on either side."

49. The Learned Counsel submitted that the Petitioner had only adduced a valuation report in this case which was attached to the Petition. The report has computer printouts in the nature of maps and photographs which were not accompanied with a Certificate of production as envisaged under the provision of Section 106B(4) of the *Evidence Act*. In the absence of the certificate envisaged under section 106B(4) of the *Evidence Act* the evidence was not admissible in law and this court ought to disregard such evidence.On this point, the Counsel relied on the case of:- Bhavna Patel Mandaliya – Versus - Chetan Aroon Solanki [2021] eKLR the trial court quoted with approval the court of appeal case of County Assembly of Kisumu & 2 others – Versus - Kisumu County Assembly Service Board

& 6 others [2015] eKLR where while discussing the application of Section 106 (B) the court observed that:

> "Section 106B of the *Evidence Act* states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer."
>
> In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced".

50. The Learned Counsel submitted that they call upon the court to disregard the evidence contained in the valuation report in the absence of compliance with section 106B of the *Evidence Act*.

51. On prayer number 40 (c) of the Petition it was the Learned Counsel's submission that interim orders cannot be granted as a final prayer. In any event, what was being heard was the Petition and not an interlocutory application to warrant grant of an interlocutory injunction pending the hearing and determination of the application. This prayer was therefore not available.

52. On the prayer of an order of mandamus and interest under Paragraph 40 (d) and (e) respectively the Learned Counsel submitted that such a prayer was not available. It was worth noting that no proof has been established supporting the Petitioner's allegation that eighty (80) title deeds have been issued overlapping his parcel of land. Similarly it was the 3rd Respondents mandate to determine what was payable in cases of compulsory acquisition. This court had no jurisdiction to determine the question of amount payable in cases of compulsory acquisition was any in the 1st instance. The National Land Commission was mandated to determine the amount to be awarded after and inquiry under Section 113 of the *Land Act*. The section provides as follows;-

> 113. (1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.
>
> (2) Subject to Article 40 (2) of *the Constitution* and section 122 and 128 of this Act,an award-
>
> (a) shall be final and conclusive evidence of-
>
> (i) the size of the land to be acquired;
>
> (ii) the value, in the opinion of the Commission, of the land;
>
> (iii) the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and

53. It was the Learned Counsel's submission that if any award was to be made the national land commission needed to make a determination after an inquiry as provided for under Section 113 of the

Land Act. Any dispute that may then arise would be forwarded to the Environment and Land Court as provided for under Section 128 of the *Land Act* which provides as follows:-

> 128. Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.

54. In the absence of the third parties mentioned from the Petition, he argued, this suit could not be determined. This was a proper case for the Court to direct the Petitioner to file a civil suit where all the parties laying claim to the suit property would be made a party in this way all parties would have an opportunity to be heard on how they acquired title and the evidence would be tested through cross - examination.

C. The Written Submission by the 3rd Respondent

55. On 25th October, 2022 the 3rd Respondent filed their written submissions through the firm of Messrs. S. Mbuthia Advocates dated 10th October, 2022. Mr. Mbuthia Advocate submitted that Petition dated 9th May, 2022 was opposed and the 3rd Respondent relied on the Replying Affidavit sworn by Zacharia Ndege on record and the submissions herein.Upon perusal of the Petition herein, the only issue that lends itself due for determination was whether the orders sought ought to issue and our resounding answer was no.

56. The Learned Counsel submitted that the property LR NO.MN/I/6748 (C.R 2165) (herein after referred to as the 'suit land' was/is public land within the meaning of Article 62 of *the Constitution* and the same was/is not available for allocation to the Petitioner since it had already been set aside for the establishment of a settlement scheme which constituted public use under Section 2 of the *Land Act*. Land set aside for a particular use cannot be put to another use absent very elaborate re - planning and change of user process and a clear process of alienation and allocation.

57. The Learned Counsel's contention was that the Petitioner had never been in occupation or use of the suit land and it had historically been occupied by squatters who were formally settled there by the government when the settlement scheme was established. There were thousands of households and families who only knew the suit land as home. The Settlement schemes was established on public land since settlement of the landless was not only a public use/purpose of land but also a function of the national government under section 134 of the *Land Act*. In case of "Nelson Kazungu Chai & 9 others – Versus - Pwani University (2014) eKLR, the Court held that:

> " The law provides that the Commissioner of Lands, under the repealed Government Lands Act, could not allocate Government land reserved for public purpose to individuals for their private use. Section 3 of the repealed Government Lands Act, which is the applicable law in this case, provides that the President may, subject to any other law, make grants and dispositions of any estates. interests or rights in or over unalienated Government land. Section 9 of the same Act provides that the Commissioner of Lands may cause any portion of a township which is not required for public purpose to be divided into plots and may be disposed of in the prescribed manner. The above two sections clearly show that land reserved for public purpose cannot be allocated to individuals. This position has been reinstated at Article 62 (1) (b) of *the Constitution*. The Article has defined "public land" to include land lawfully held, used or occupied by any State organ. Such land cannot be disposed of or otherwise used except in terms of an Act of Parliament."

58. In the case of:- Kenya Guards Allied Workers Union – Versus - Security Guards Services & 38 others, Misc. 1159 of 2003 Justice Nyamu (as he then was) expressed himself as follows:-

> "Where national or public interest is denied, the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy center stage in the courts"

59. The Learned Counsel averred that the Petitioner was waving a title that was naked and not supported by any alienation or allocation process. The title was illegal for having been issued over land that was not available for allocation. There was an elaborate alienation and allocation process of un-alienated public land and the title held by the Petitioner was not supported by any known allocation process. For starters, there were no official records in support of the allocation of the suit propertyto the Petitioner not even a correspondence file where the allocation ought to have been lawfully done or even a card in the Senior Plans Records office evidencing the opening of a correspondence file. There equally was no approved part development. Plan which was a prerequisite for the allocation and there was even no authority to allocate the suit land either from the President or the then Commissioner of land on behalf of the President.

60. The Learned Counsel submitted that the Petitioner has not even produced the letter he wrote to the Commissioner of Lands requesting to be allocated the Suitland. The petitioner would ordinarily have a copy of such a letter and the letter of allotment which he has not even produced in evidence as proof of allocation. Similarly. there is no evidence of acceptance of the offer for allocation of the land and neither has any evidence of payment of stand premium being adduced before this Honourable Court and none exists in our official records. It is this letter of allotment that creates a contractual relationship between the government and the Petitioner and lays the foundation for the issuance of the Grant and in the circumstances no such contractual relationship exists and no foundation has been laid for the issuance of the Grant or for the allocation of the suit land to the Petitioner.

61. The Learned Counsel submitted that similarly, there was no authority or approval to survey the land and prepared or issued a deed plan or even a grant. In the circumstances your Ladyship, the only conclusion was that the allocation process was void ab initio and replete with defects that were passed on to the title and the Petitioner could not be heard to be saying that he had a clean title to the property. Article 40(6) of *the Constitution* divests off any constitutional protection to any property found to be unlawfully acquired. To buttress his point, he cited the Court of Appeal case of:- "Munyu Maina – Versus - Hiram Gathiha Maina, Nyeri CA No.239 of 2009 the Court held that:-

> "When a registered proprietor's root of title is under challenge, it is not sufficient for the registered proprietor to produce the instrument of title as proof of ownership. In such circumstances, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title."

62. More strongly, he referred the Court to the case of:- "Henry Muthee Kathurima – Versus - Commisioner of Lands & another(2015) eKLR while citing the case of: Maritime Electric Co. Limited – Versus - General Dairies Ltd. (1937) 1 All ER 748) held that:-

> The trial court made a finding of fact that the suit property was unlawfully acquired. Guided by the provisions of Article 40 (6) of *the Constitution*, it is our finding that the doctrine of legitimate expectation cannot be used to protect property that has been unlawfully acquired. We find that the appellant cannot rely on this doctrine to circumvent the provisions of Article 40 (6) of *the Constitution*. Further, the doctrine of legitimate expectation cannot oust clear statutory provisions of the Government Lands Act on how to alienate public land. It is our view that Sections 3, 7, 9 and 12 of the Government Lands Act cannot be ousted by estoppel and the doctrine of legitimate expectation. Due process must be followed to alienate public land before legitimate expectation can arise. There cannot be a legitimate expectation without adherence to statutory or constitutional provisions. It has been held in several persuasive authorities, R. v. Devon County Council, ex parte Baker & Another, [1995] 1 All. E.R. 73; R. v. Durham County Council, ex parte Curtis & Another, [1992] 158 LG Rev R 241 (CA) and R. v. DPP ex p. Kebilene [1993] 3 WLR 972, that no legitimate expectation can override clear statutory provisions.

63. The Learned Counsel invited the court to adopt the approach taken by the Honourable Court in Republic vs. Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No.617 Of 2003 [2006]1 KLR (E&L)563,where the court held that;

> " Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefensibility of title deed. It is clear from section 75 of *the Constitution* that the doctrine of public trust is recognized and provided for by the superior law of the land and applies in a very explicit way as regards trust land."

64. The Counsel cited the Apex Court in "National Land Commission – Versus - Afrison Export Import Limited & 10 others (2019) eKLR had occasion to state the position of searches when adduced as evidence of ownership and stated thus:-

> " Based on the inherent danger of the search system which is based on the Torrens System of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant had bothered to delve into the history of the title, it would have discovered that the title had two mortgages besides other entries in the register and the other transactions in respect of L.R. No. 7879/4 which were not noted on the register. We appreciate the fact that searches are generated by the Registrar of Titles but the Applicant being the National Land Commission which works closely with the Ministry of Lands under which the Registrar falls, the Applicant should have, in the spirit of the Advisory Opinion of the Supreme Court in In the matter of National Land Commission (2015) eKLR gone a step further to ascertain the true status of the title to the land in question."

65. The Learned Counsel further relied on the case of: "Mureithi & 2 others (for Mbari ya Murathimi clan) – Versus – Attorney General & 5 others (2006) 1 KLR 443, Nyamu,J (as he then was) held as follows:-

> " Courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, brief-case investors and speculators with high connections use public land as tickets to individual largesse in the wake of public pain or inconvenience. Government cannot compulsorily acquire land only for it to be gifted or otherwise conveyed to private individuals who have access to the shakers and movers for purposes of selling them off to line their pockets. I would say that by serious forensic application of such legal methods and means as tracing, and restitution, the courts when appropriately moved should ensure that those who have fatted themselves on public utility land are made to disgorge the proceeds."

66. On compensation sought by the Petitioners, the Learned Counsel submitted that there was a clear process of compulsory acquisition of land espoused under Article 40 of *the Constitution* and Part VIII of the *Land Act* and the same had not been applied to the suit land to entitle the Petitionersto compensation if any. In any event, the suit land was public land and the government could not compulsorily acquire what was already public land. Equally, the government could not compulsorily acquire land that was clearly unlawfully acquired. The Learned Counsel employed the Court to consider the public interest in this matter which this Court was enjoined to consider since it exercises sovereign power on behalf of the people of Kenya. They prayed for the court to find that public interest outweighed the private interests of the Petitioner and tilted in favour of preserving public land and homesteads of thousands of Kenyans who risk being rendered homeless. Additionally, the thousands of families residing on the suit land would stand condemned unheard in violation of their rights to a fair trial and due process since the Petitioner deliberately failed to ensuit or enjoin them to the Petition despite acknowledging their existence on the land.

67. The Learned Counsel urged the Court to consider the security nightmare that would be posed if the Court were to direct the eviction of the thousands of families on the land. Similarly, he prayed that the Court takes into consideration the principles of financial management espoused under Article 201 of *the Constitution* and make a finding that it was misuse of public funds and financial imprudence to expend public funds on compensating the Petitioners over land that was unlawfully acquired. The Petition failed the test in 'the locus classicus" case of "Annarita Karimi -Versus - The Attorney General since the Petitioner never set out with reasonable precision the rights that were violated by the 3rd Respondent and in what manner thus falling short of the threshold set out in this case.

D. The Petitioner's response to the 1st, 2nd, 4th & 5th Respondents submissions dated 17th October 2022

68. The Learned Counsel from the firm of Messrs. K.A. Kasmani submitted that having filed their initial submissions, blindly, without the benefit of the Respondent's affidavits or submissions, which were filed much later in time, they reserved the right to respond at a later stage. They now exercised that right in the response below. The Respondent's submissions alleged that the Petition was imprecise and failed to disclose the name of the settlement scheme and details of land owners on the overlapping titles. The information that was within the hands of the Respondents themselves, and easily available to them. In addition, Paragraph 8 of the 3rd Respondent's Replying affidavit admitted as follows:- "Residents were formally settled there by the Government in the year 2017 when Majaoni Settlement Scheme was established thereon by the Government". Under the provision of Section 24 of the *Evidence Act*, Cap. 80 having admitted to the fact that Majaoni Settlement Scheme was initiated over the subject land, the

Respondents were now estopped from disputing that fact. Furthermore, a full list of titles had been exhibited in Exhibit marked as "A.H.L – 10" on pages 29 and 30 of the Petition.

69. On the point of The Fair Administration of Actions Act and the inclusion of the eighty (80) allotees of the land, as parties to this suit, our response was as follows:-

> " The Petition before you, seeks compensation for land that was compulsorily acquired by the Government and given out to settlers. It does not seek eviction of the settlers, nor does it seek for cancelation or expunging of the settler's titles. Therefore, this Petition does not affect the settlers, at all, adversely or otherwise. The settler's titles, legality and occupation will not be affected at all, as long as the Government pays the requisite compensation as per the *Land Act* 2012 and *the Constitution* of Kenya. There is therefore no need to rope in 80 further parties to this suit, when their rights will not be affected at all. In the same vein, the Petition does not impinge on the Fair Administrative Actions act at all. On the contrary, the only party that was divested of their land unheard and without inquiry and award, was the Petitioner!"

70. The Learned Counsel opined that the survey map showing the overlap had been exhibited as Exhibit "A.H.L - 11 on Page 31 of the Petition and had also been included in the Valuation report (exhibit "A.H.L - 14 – on page 36). In any case, the Counsel held again, this information well within the knowledge of the 4th Respondent, who had not put in any differing survey plan or deeds or reports, or indeed any evidence contrary to the reports produced by the Petitioner. The survey was carried out by Elite Africa Registered Valuers, who state clearly in their report that all details had been obtained from the Land Registry.

71. The Learned Counsel relied on Section 106B of the Environment Act:

> Firstly, this has not been included in the Respondent's Pleadings/ affidavit and cannot form part of their submissions, since it is not grounded in the pleadings;
>
> Secondly, it is a long stretch of the imagination to call a valuation report an "Electronic Document". It is not. The valuation report is documentary evidence produced by an expert and as such s. 48 and 49 of the *Evidence Act* are applicable. S.106B does not apply and no certificate is needed. Valuation reports are commonplace in our jurisdiction and frequently used to assist the courts to value properties/compensation.

72. The Learned Counsel submitted that the Respondent's submissions propose that NLC now, at this stage, makes an inquiry and assesses an award. The response by the Petitioners was that:-

> " The main reason why we are before this court is because NLC and the remainder of the Respondents failed to follow the *Land Act* 2012, and all the requisite steps and processes leading up to compensation. The Petitioner's letters seeking compensation were ignored(Exhibit AHL 15 Pg. 50),which is what has lead to the Dispute, now framed in the Petition before you. The Petitioner cannot be forced to go backwards, to NLC, which has failed to follow requite procedure. This court is well within its rights and jurisdiction to hear this matter and make an award of the same. Please see Para 29 & 30 Supreme Court Authority AG -Versus - Zinj Limited (Pet 1 of 2020) [2021]KES 23(KLR) (Civ)(3 December 2021) attached to our submissions of 2/8/2022,which we have already reiterated in our earlier submissions.

73. In conclusion, the Learned Counsel urged the court to grant the claim as prayed.

VII. The Issues for Determination.

74. I have had ample opportunity to critically assess the filed Constitutional Petition, the responses, both the written and oral submissions, myriad of authorities by all the parties herein, the relevant and appropriate provision of *the Constitution* of Kenya, 2010 and statures.

75. For the Honorable Court to reach an informed, fair, just, reasonable and equitable decision, it has crystalized the subject matter into the following three (3) salient issues for its determination. These are:-

    a. Whether *the Constitution* Petition dated 9th May, 2022 by the Petitioners herein meets *the Constitution* thresholds of such Petitions.

    b. Whether the fundamental rights of the Petitioners were violated, threatened, infringed and denied and If Yes, whether the parties herein are entitled to the reliefs sought.

    c. Who will bear the costs of the Petition.

VIII. Analysis and Determination

Issue No. a). Whether *the Constitution* Petition dated 9th May, 2022 by the Petitioners herein meets *the Constitution* thresholds of such Petitions.

76. Under this sub - heading, the Honorable Court has carefully considered all the filed pleadings pertaining to the Petition dated 9th May, 2022, the Supporting and Replying Affidavits by both the Petitioners and the Respondents, the oral evidence testified by all the witnesses in court during the hearing of the full trial, the articulate written submissions, the myriad cited authorities by parties, provisions of *Constitution of Kenya, 2010* and the Provisions of the law thereof.

77. In this Petition, the Petitioner is seeking for a declaration that it is the lawful registered owner of the parcel of land known as CR. 35841 being LR No. MN/ II/ 9024, and that its title to the same is valid, legal and regular. A declaration that the deprivation, dispossession and disownment of the Petitioner of the subject property by the 1st Respondent is in contravention and violation of the Petitioner's right to acquire and own property under the provision of Article 40 (1), (2), (3), (4), (5) and (6) of *the Constitution* of Kenya, 2010 and therefore wrongful, illegal, unconstitutional, null and void.

78. Additionally, the Petitioner is seeking for an interim order of injunction restraining the Respondents, their agents, servants and or anyone acting on their authority from alienating, transferring, dealing with, changing the allotment status of the suit property or otherwise interfering with the title belonging to the Petitioner thereof.

79. Further, the Petitioner is seeking for a Prerogative writs in form of an order of Mandamus compelling the 2nd Respondent to pay to the Petitioner by way of a just, fair and adequate compensation being an amount of the sum of Kenya Shillings Three hundred and Sixty Million (Kshs. 360,000,000/=) together with interest at 12% per annum from the date of Judgement and general damages for loss of Use of the Suit Property from the year 2017, to be assessed by this Honourable Court and, an Order of Mandamus compelling the 2nd Respondent to pay to the Petitioner the said assessed sum, together with interest at 12% per annum from the date of Judgement.

80. Lastly, the Petitioner has willingly undertaken to surrender its original title deed to the Government of Kenya upon receipt of Payments under Prayers (d) and (e) and for the 1st and 2nd Respondents to ensure that the Register reflects the surrender.

81. Be that as it may, to begin with, the Honorable Court must establish the constitutional basis of the Petition which is founded under paragraph 7 to 11 which include but not limited to:-

   a. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.

   b. Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

   c. Article 50(1) of *the Constitution*, which provides that 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.

   d. Article 165 (3) (d) of *the Constitution*, which provides that the High Court shall have jurisdiction to interpret *the Constitution* to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*.

   e. Article 259 of *the Constitution* of the Republic of Kenya, which provides that *the Constitution* must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the developments of the law and contributes to good governance.

82. 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……"

83. 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.Further, it is important to fathom that *the Constitution* is "a living instrument having a soul and consciousness of its own". This Court has on numerous occasions stated that Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes. Without oxygen and freshness, it will die. I have learnt that these things are not just metaphorical. They are real. *The Constitution* must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

84. Based on the principles set out in the edit of The Court of appeal case of "the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR (Supra) provided the standards of proof in the Constitutional Petitions as founded in the case of Anarita Karimi Njeru –

Versus - Republic [1980] eKLR 154 where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-

> " Constitutional violations must be pleaded with a reasonable degree of precision..........."
>
> Further, in the "Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
>
> > "The whole object of pleadings is to bring the parties to an issue and the meaning of the rule......was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing".

ISSUE No. b). Whether the fundamental rights of the Petitioners were violated, threatened, infringed and denied and If Yes, whether the parties herein are entitled to the reliefs sought.

85. In application of the above set out principles for filing a Constitutional Petition to this case, the Honorable Court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1st, 2nd, 3rd, 4th and 5th Respondents herein and pleading for the prayers sought.

86. It is not disputed that the Petitioner is the registered owner of the suit property. The Petitioner produced a copy of the title deed and marked it as Exhibit "A.H.L – 4" , a "prima facie" and conclusive evidence of bearing indefeasible title, rights and interests over the suit land vested in it by law. Furthermore, it also produced a certificate of postal search dated 20th September, 2012 indicating that the suit land was and remains to be legally and absolutely registered in its name. The land tenure of the subject property is a leasehold of 99 years from the Republic of Kenya with effect from 1st June 1991 for an annual rent of a sum of Kenya Shillings Fifty Five Thousand (Kshs 55,000/-). Although in its submission the 3rd Respondent wants to give an impression that the suit land fell under the category of public land and thus not available for private ownership and hence could not be a subject of compulsory acquisition, but it is contradictory that it's the same 3rd Respondents through the Affidavit sworn by Zacharia Ndege, the Legal Affairs Manager and filed in court on the 8th June 2022, under the averments of Paragraphs 3 to 7 hold verbatim as follows:-

> " ....Records available at the said Registry indicated that Loki Developers Limited transferred the suit land to the Petitioners herein on 14th September 2012 and the Petitioner were the registered owners. The Petitioner had never been in occupation or use of the suit land and it had historically been occupied by residents who were subsequently formally settled there by the movement in the year 2017 when Majaoni settlement scheme was established thereon by the government. The area was now fully developed and in occupation of parties who had since been issued with title documents pursuant to the establishment of the settlement scheme on the land. (Emphasis is mine)

87. Parties are bound by their own pleadings. From these assertions, that the 3rd Respondent confirm that the Petitioner is the legitimate proprietors of the suit land and that the same was validly transferred to them. The only issue of concern to them was that the Petitioner had never taken possession over the suit land, which to me and I concur with the Learned Counsel for the Petitioner is a non issue in the given circumstances of the instant Petition. This aspect of proprietorship, is therefore not disputed.

The title deed attached number CR. 35841, being LR No. MN/II/9024, being leasehold from the Government of Kenya for a term of 99 years from 1/06/1991. As can be seen from the Entry No. 2 on the said title, the same was transferred to the Petitioners herein by Loki Developers Limited and registered on the 14th September 2012. Soon thereafter a post registration search was carried out on the 20th September 2012, confirming the Petitioners proprietorship. Therefore, I will categorically disregard the contention advanced by the 1st, 2nd, 4th and 5th Respondents that the Petitioner should give details of the alleged 80 title deeds issued in the same geographical location as its parcel of land and that the issue in contention is on the suit property owned by the Petitioner. Based on the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 so long as the title deed is not being challenged for having been acquired by mistake, omission and/or through fraudulent means or scheme, the Petitioner has no burden to proof the ownership of the suit land as alleged.

88. By and large, it is trite that under Article 40 of *the Constitution*, the Petitioner has the right to property, which right includes the use of the suit property. Article 40 of *the Constitution* provides as follows:

" 40.

(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.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

89. The Respondents have argued that the Petitioner has neither demonstrated how the cited Articles of *the Constitution* have been breached by the Respondents nor explained how the Respondents have breached its constitutional right to property under Article 40 of *the Constitution*.

90. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

i. Allocations;

ii. Land Adjudication process;

iii. Compulsory acquisition;

iv. Prescription;

v. Settlement programs;

vi. Transmissions;

vii. Transfers;

viii. Long term leases exceeding Twenty one years created out private land; or

ix. Any other manner prescribed in the Act of Parliament.

91. Having cited the provisions of Article 40 of *the Constitution*, and having shown how he has been deprived the use of the suit property by the Respondents, which allegation has been admitted by the Respondents, the Petitioner has particularized the provisions of *the Constitution* which have been allegedly contravened by the Respondents.

92. In the case of Trusted Society of Human Rights Alliance – Versus - Attorney General & 2 Others Civil Appeal No. 290 of (2012) eKLR, the Court of Appeal held as follows:-

> " However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives

proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."

93. The Petition clearly brings out the complaint that the Petitioner has as against the Respondents, that is the breach of the Petitioner's right to not only own the suit property, but also to use the property. Consequently, the Petition is validly before this court.

94. The Respondents have admitted to the alleged compulsory acquisition of the suit property. As it is provided for under the provisions of Article 40 (3) of *the Constitution* of Kenya, 2010 and Sections 110 to 119 of the *Land Act*, No. 6 of 2012, upon compulsory acquisition of land for public use, as it was in this case for the settlement of the squatters, the Petitioner ought to have been notified through publication of a gazette notice, an inquiry been conducted and thereafter full, prompt, just and adequate payment made as compensation to follow. This procedure was never followed at all. In the case of: "Patrick Musimba – Versus - National Land Commission & 4 others [2016] eKLR, the Learned Judges held that:

> "In our view, a closer reading of Article 40(3) of *the Constitution* would reveal that *the Constitution*....intend to have the land owner who is divested of his property compensated or restituted for the loss of his property.....Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3). forms the basis for 'prompt payment in full, of just compensation to the person' deprived of his property though compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation [1941] 2 KB 26,40: The word 'compensation' almost of itself carries the 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 be equivalent to the compulsory sacrifice". Effectively Lord Scott's statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as 'fair compensation requires that he should be paid for the value of the land to him. not its value generally or its value to the acquiring authority': see Director of Buildings and Lands -v-Shun Fung Wouworks Ltd [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. *The Constitution* decrees 'just compensation' which must be paid promptly and in full. *The Constitution* dictates that the compensation be equitable and lawful when the word 'just' is applied as according to Black's Law Dictionary 9th Ed page 881 the word 'just' means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment: he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.' As earlier stated, these mandates are now codified under the provisions of Sections 107 to 113 of the *Land Act*, No.6 of 2012.

95. From this decision, 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, I hold that 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 citizens have 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.

96. Additionally, 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".

95. In view of the compulsory acquisition, the only question for determination is the quantum thereof. In the Petition, the Petitioner has prayed for declaratory orders; compensation amounting to Kshs 360,000,000/- and general damages for loss of use of the suit property. The Petitioner has also pledged to surrender the land to the Respondents hence the issue of compensation will arise.

96. Finally, the 1st, 2nd, 4th and 5th Respondents made such a case on the issue of the Petitioner being guilty of non disclosure of material facts and breach of the principles of natural. Indeed, they made a meal out of these assertion. Primarily, they held that the Petitioner alleged that the land had been sub – divided into eight (80) parcels of land, occupation and transactions already taken place on the suit land. Thus, the Respondents argument was that these were mere allegations as non of these title deeds were produced in Court as empirical evidence to the assertion. Furthermore, the petitioner ought to have joined these parties as failure to do so would tantamount to them being condemned unheard and not fair hearing as provision for under Articles 50 (1) and (2) of *the Constitution* of Kenya, 2010 and the Fair Administration Action Act, of 2012. Indeed, the 3rd Respondent threw the spanners in the works by holding that should the Petition succeed, it would be an imaginable security nightmare to cause any eviction of the people who had already been settled on the suit land.. My very simple, clear, plain and straightforward response to these concerns and I fully concur with the submissions by the Learned Counsel for the Petitioner is that - nowhere from the filed Petition has the Petitioner sought any relief on eviction. The whole pleading is on compensation of the land having been unlawfully acquired by the Respondents. I see no role at all of the other third party in the matter. For these reasons, I perceive the said issues as misplaced fears of the unknown

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

97. Regarding the issue of the costs of the Petition, the Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of "Reids Heweet & Company vs Joseph AIR 1918 cal. 717 and Myres vs 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....."

98. From these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the Petitioner has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner by the Respondents jointly and severally herein.

IX. Conclusion and Disposition

99. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from their filed Petition. For avoidance of doubt, I proceed to grant the following orders:-

    a. That Judgement be and is hereby entered in favour of the Petitioner in terms and conditions stated out in the filed Constitutional Petition dated 9th May, 2022 herein

    b. That a declaration that the Petitioner is the lawful registered owner of the parcel of land known as CR. 35841 being LR No. MN/ II/ 9024, and that its title to the same is valid.

    c. That a declaration that the dispossession of the Petit ioner of the subject property by the 1st Respondent is in contravention and violation of the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya and therefore wrongful, illegal, unconstitutional, null and void.

    d. That an order of Mandamus hereby do issue compelling the 2nd Respondent to pay to the Petitioner by way of a fair compensation the amount of Kshs. 360,000,000/= together with interest at 12% per annum from the date of Judgement.

    e. That the Petitioner herein is awarded Kshs. 90,000,000/= as General Damages being 5% of the quantified damages of (Kshs 360,000,000/=) for loss of user on the unconstitutional and unlawful acquisition of land to the Government and subsequent orders from the year 2017.

    f. That the Petitioner to surrender his title to the Government of Kenya upon receipt Payments in Prayers c and d and for the 1st and 2nd Respondents to ensure that the Register reflects the surrender.

    g. That the Costs of the Petition to be borne by the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally to be awarded to the Petitioner herein.

It is so ordered accordingly.

JUDGMENT DELIVERED THORUGH MICROSOFT TEAMD VIRTUAL MEANS SIGNED, AND DATED AT MOMBASA THIS 16TH DAY OF MAY 2023.

...

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

ENVIRONMENT AND LAND

MOMBASA.

Judgement delivered in the presence of:-

a. M/s. Yumna – the Court Assistant.

b. M/s. Moolraj Advocates for the Petitioner.

c. No appearance for the 1st, 2nd, 4th and 5th Respondents.

d. No appearance for the 3rd Respondent.