



Mohammed v Cabinet Secretary Ministry of Transport, Infrastructure, Lands, Housing, Urban Development and Public Works & 3 others (Constitutional Petition 33 of 2022) [2023] KEELC 18413 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 18413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 33 OF 2022**

MN KULLOW, J

MAY 16, 2023

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 22 AND 23 OF THE CONSTITUTION IN THE MATTER OF: VIOLATION AND THREATENED VIOLATION OF ARTICLES 2, 3, 10, 19, 20, 21, 27, 28, 40, 47 AND 50 (1) OF THE CONSTITUTION BY THE RESPONDENTS

IN THE MATTER OF: ABUSE AND MISUSE OF POWER BY THE RESPONDENTS

IN THE MATTER OF: THE RESPONDENTS ACT OF DEMOLISHING THE PETITIONER’S BUILDING AND COMPULSORY ACQUISITION OF THE PARCEL OF LAND KNOWN AS PLOT NO. MOMBASA/ ZIWA LA NGOMBE SCHEME / 1076

BETWEEN

OMAR MBWANA MOHAMMED PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE, LANDS, HOUSING, URBAN DEVELOPMENT AND PUBLIC WORKS 1ST RESPONDENT

KENYA INFORMAL SETTLEMENTS IMPROVEMENT PROJECT(KISIP) 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 4TH RESPONDENT

JUDGMENT

I. Preliminaries.

1. The Judgement of this Honorable Court pertains to a Constitution Petition dated 12th September 2022 instituted and filed by Mr. Omar Mbwana Mohammed, the Petitioner herein on even date against



the 1st, 2nd, 3rd and 4th Respondents herein. The Petition was brought under the provision of Articles 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47 and 50 (1) of *the Constitution* of Kenya, 2010 seeking the orders as stated herein below.

2. Upon service, the 1st, 2nd, 3rd and 4th Respondents herein filed Notices of appointment of Advocates and their responses on 28th September, 2022, 19th October, 2022, 4th and 22nd November, 2022 respectively.

II. The Petitioner's case

3. The Petition was premised on the grounds, testimonial facts and the averments made out under the 27 Paragraphed Supporting Affidavit sworn by Mr. Omar Mbwana Mohamed dated on the even date together with fourteen (14) annexures marked as “OMM – 1 to 14” annexed thereto.
4. He deponed being the Petitioner and hence fully conversant with the matter and duly authorized to swear this affidavit. The factual matrix of the Petition was presented in the Petition, the supporting affidavit and the documents in support of the Petition. The Petitioner claimed being the legal, absolute and registered owner of all that parcel of land known as Plot No. Mombasa/ Ziwa la Ngombe Scheme/1076 together in May 2016 situated at Ziwa la Ngombe area within Mombasa County (hereinafter referred to as “The Suit Land”). He annexed a Copy of the Certificate of Title Deed marked as “OMM – 2” thereto. The Petitioner deposed that upon acquiring the property, he took possession and developed the same by building a residential house on it.
5. The Petitioner stated that the suit property was affected by the construction of a road connecting two (2) parallel roads; one road under Kenya Informal Settlement Improvement Project (hereinafter referred to as “The KISIP”) and the other by Kenya Slum Upgrading Programme (hereinafter referred to as “The KENSUP”) to ensure connectivity.
6. The Petitioner averred that his land was taken away and the construction undertaken when he travelled with his family to his rural home in Kilifi and was met by surprise when he came back the suit land where he called home was no more. He stated that through letters dated 6th February 2017, 19th May 2017, 15th August 2017 and 2nd October 2017 respectively, the Petitioner registered his grievances with the Respondents and sought to be compensated so as to look for alternative land. Through a letter dated 30th August 2017, the County Secretary of the 4th Respondent requested the Chief Officer Lands, Planning and Housing to avail a report of the suit property to enable the office advise the Petitioner accordingly.
7. The Chief Officer in Charge of Planning and Economic Planning for the 4th Respondent herein through letters dated 15th September 2017 and 18th September 2017 respectively advised the 4th Respondent that the suit property had been wholly utilized for the construction of roads and foot paths during the 2nd Respondent's infrastructure covering Ziwa la Ng'ombe area. Following deliberations held between the Respondents, the Director of Land Valuation, Ministry of Lands and Physical Planning directed the Chief Officer Lands administration of the 4th Respondent to undertake valuation of the suit property for purposes of compensating the Petitioner.
8. The Senior Principal Land valuer for the 4th Respondent, one Mr. Victor O. Olonde visited the suit property and prepared a valuation report dated 18th June 2018 assessing the value of the suit property at a sum Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000.00/=). The Petitioner provided a series of correspondences of letters dated 26th July 2018, 16th May 2019, 11th October 2019, 18th September 2019, 16th May 2019 and 22nd July 2019.
9. Despite the correspondences , the Petitioner had not been compensated to date as it appeared that the 2nd and 4th Respondents were throwing fingers at each other as to who should pay the compensation



due to the Petitioner. The Petitioner states that vide letters dated 13th January 2020, 16th January 2020 and 9th March 2020 the Petitioner explained to the Respondents that he was suffering as because he was and still going through having to rent a single room together with his wife and six children. In response, the 2nd Respondent yet again appealed to the 4th Respondent to compensate the Petitioner however the 4th Respondent neither responded to the letters nor compensate the Petitioner. The Petitioner states that the Respondent did not give the Petitioner any notice before compulsory acquiring the property. The Petitioner blamed the Respondents for destroying his house and taking over the suit property without compensating the Petitioner first so as to seek alternative accommodation and or property in total disregard of the security concerns caused by such acts.

10. The Petitioner stated that his right to be treated in a credible and accountable under the provision of Article 10, the Petitioner's right to enjoy fair administrative action as provided under the provision Article 47 ; Petitioner's inherent right to natural justice as codified under provision of Article 50 of *the Constitution* of Kenya, 2010 and the right to property under the provision Article 40 was violated by the Respondents. The Petitioner stated that at all material times had a reasonable and legitimate expectation that the Respondents would at the very least give him of notice to compulsorily acquire the Petitioner's property stating reasons instead of destroying his house and compulsorily acquiring the suit land which is contrary to *the Constitution* and the *Land Act*, No. . The Petitioner sought for Judgement against the Respondents jointly and severally, "inter alia":-
 - a. A declaration that the Respondents acted illegally and unconstitutionally in facilitating the demolition of the Petitioner's house and compulsory acquisition of the property known as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076.
 - b. A declaration that the Respondents are in violation of Articles 2, 3, 10, 19, 20, 21, 28, 40, 47 and 50 (1) of *the Constitution* of Kenya, 2010 and the provisions of the Fair Administrative Actions Act in the manner in which the Respondents compulsorily acquired the property known as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076.
 - c. Compensation of Kenya Shillings One Million Seven Hundred Thousand (Kshs 1,700,000/=) being the value of the of the property knows as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076 together with interests from May 2016 when the Respondents compulsorily acquired the same.
 - d. Compensation of Kenya Shillings Eleven Thousand (Kshs. 11,000/=) per month being the monthly rent that the Petitioner has been forced to pay since the illegal compulsory acquisition of the property knows as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076. Since May 2016 up to the date of Judgement.
 - e. interests on (c) and (d) above from the date of filing this petition.
 - f. General damages for violation of the Petitioner's fundamental rights.
 - g. Costs of the Petition be awarded to the Petitioner herein.



iii. The Responses by the 1st, 2nd and 3rd Respondents.

11. While opposing the main Petition, the 2st, 2nd and 3rd Respondents herein, filed a 22 Paragraphed Replying Affidavit sworn and dated 17th November, 2022 by Dr. Peris Mang'ira and filed in Court on 22nd November, 2022.
12. The Deponent was the National Coordinator, Kenya Informal settlements Improvement Project (Hereinafter referred to as "The KISIP") thus well versed with the facts herein and duly authorized and competent to swear this Affidavit.
13. She deponed by informing the Honorable Court that the KISIP began in the year 2011 and officially closed in 2020. It was a project of the Government of Kenya with support from the World Bank, the Swedish International Development Cooperation Agency (hereinafter referred to as "SIDA") and the Agence Francaise de Development (hereinafter referred to as "AFD"). The project was meant to improve the living conditions of people living in informal settlements by improving security of land tenure and investing in infrastructure based on plans developed in construction with communities.
14. KISIP was executed by the State Department for Housing and Urban Development and implemented in close partnerships with 14 participating Counties of Uasin Gishu (Eldoret); Embu, Garissa, Kakamega, Kericho, Kisumu, Kitui, Machakos, Kilifi (Malindi), Mombasa, Nairobi, Nakuru (Naivasha & Nakuru), Nyeri and Kiambu (Thika).
15. The County Government of Mombasa provided the list of informal settlements for Infrastructure Upgrading and Ziwa La Ng'ombe was among them . For the Settlement to qualify for KISP interventions, planning should have been undertaken where roads and public amenities were clearly marked on the Physical Development Plans and the Settlement residents had tenure security documents. This was important to ensure that public infrastructure was only undertaken on public land and the County Government provided these evidence as KISIP worked together with the County Surveyors and Planners since the Project had no provision of acquisition of private land.
16. The Engineering Design Consultants were introduced to the County team by the KISIP National team to work together in carrying out the design works. Further, they were to work together with the Settlement Executive Committee (SEC). The County team together with SEC were involved in the identification of priority infrastructure projects in the Settlement. The Consultant went ahead and designed the infrastructure including the roads.
17. The County participated in the meetings where the Consultant presented the Settlement upgrading plans for Ziwa La Ng'ombe showing the proposed layout of the infrastructure including roads and was satisfied with the reports and provided necessary approval before implementation. The County was therefore aware of the roads to be upgraded. Subsequently, the County participated in monthly progress review meetings on site organized by the Supervision Consultant where site visits were also done to various sections of the Settlement. Any proposed change in scope or specification was discussed and agreed in the meeting.
18. Further to the above, the Project had a grievance redress mechanism which played integral part in the project implementation including being involved during facilitation of the Project Affected Persons (hereinafter referred to as "PAPs") to pave way for construction of affected roads. After the works were completed, the County team participated in the inspection of the works before the start of Defects Notification Period (hereinafter referred to as "DNP") and all works done by the Contractor were inspected before the roads were opened for use by the community. During the inspection, there were no issues arising from either the County team or SEC or members of the community



in form of grievances including in relation to the and no issues were raised from the county team, Settlement Executive Committee or members of the community including grievances in relation to the suit land. The completed infrastructure was handed over to the County Government for operation and maintenance. In addition, after the end of the DNP, the final inspection was done with the participation by KISIP National team, the County team, the SEC, Contractor and the Consultant supervising construction works. The works were confirmed to have been completely successfully covering all scope as tendered together with changes effected during project implementation to the satisfaction of the users, being the community members and the County Government of Mombasa who were the beneficiary, Thereafter, the completed infrastructure were handed over to the County Government for operation and maintenance.

19. She deposed that towards the finalization of the works instructions were issued by the Governor's offices, County Government of Mombasa to have a loop done joining the two roads. The works were accordingly executed on the understanding that it was the responsibility of the County to ensure that the affected area was available for such works to be undertaken.
20. She informed Court that the Project prepared and implemented a Resettlement Action Plan (hereinafter referred to as "RAP") in the year 2014, to mitigate against mainly loss of encroached structures and livelihoods but not loss of private land. The implementation was jointly undertaken with the County Government of Mombasa, and with communities represented by the SECs and in consultation with PAPs. The County Surveyor was very instrumental in the exercise by showing Wayleave boundaries where beacons were not visible or clearly seen on the ground.
21. She stated that the Project had in place a Grievance Redress Mechanisms that involved the community through Grievance Redress Committee, the County Government and KISIP National Project Co-ordinating Team. She stated that through this process, the Project received and resolved all complaints until the closure of the project. However, the grievance by the Petitioner was never brought to their attention until it was after the closure of the Project.
22. The Dependent informed the Court that around August, 2017, the Petitioner alleged that his Plot being the suit land had been encroached by the infrastructure construction works undertaken. On 26th July, 2018, the 4th Respondent wrote to KISIP for consideration of the compensation claim for the Petitioner. The request was accompanied by a Valuation report from the County Valuer. A Joint team from the KISIP National office and the 4th Respondent undertook a site visit and consultation to verify the facts of the grievance on 22nd July, 2019. It was established that the suit property was almost wholly consumed by the construction of the road and the remaining part was not viable.
23. The allegation of demolition of the Petitioner's building was denied that there was no building, a fact corroborated by the valuation report. The project was expressly against forceful eviction and demolition of structures and facilitated the affected owners to rebuild and relocate in an orderly manner and this could not have been an exception for the Petitioner. On a without prejudice basis the County government of Mombasa should compensate the Petitioner since without their intervention, the displacement could not have happened. According to the Deponent, it was only the 4th Respondent that could set the wheels in motion in this case because KISIP had no provision for direct compulsory acquisition of private land and provided a letter dated 19th March 2021 marked as Annexure marked as "PM - 1" explaining the position to the Chief Officer, Lands, Planning & Housing County government of Mombasa.



Iv. The response by the 4th Respondent.

24. The 4th Respondent entered appearance through the County Attorney vide notice of appointment dated 17th October 2022 while the 1st, 2nd and 3rd Respondents entered appearance through the Attorney General vide memorandum of appearance dated 28th September 2022.
25. The 4th Respondent in a 15 Paragraphed Replying Affidavit sworn on 4th November 2022 by Rose Munupe the Acting Land Administrator of the 4th Respondent admitted that the suit land is owned by the Petitioner. Further, she admitted that the suit land was wholly utilized for the construction of roads and footpaths during the KISIP infrastructure project covering Ziwa la Ng'ombe area. The suit land was affected by the construction of a road connecting two parallel roads. Road A under Kenya Informal Settlements Improvement Project and the KENSUP to ensure through connectivity.
26. The 4th Respondent stated that the KISIP employed a Supervisor Consultant and Contractor who were the only ones who had the mandate to determine where to construct the road and how to determine and compensate the people affected by the project. To the 4th Respondent all the infrastructure works were based on the WayLeaves for the approved plans as guided by the KISIP Supervisor Contractor and Consultant and the 4th Respondent, the County Government of Mombasa had no mandate whatsoever in the project.
27. The 4th Respondent indicated that the KISIP had already established all the PAPS had been compensated prior to commencing the project. In any case, she deponed that the KISIP diversion from the WayLeaves for the approved plans resulted in the Petitioner's land being affected by the construction of a road connecting the two parallel roads. After receiving the complaint from the Petitioner, the 4th Respondent sometime in May 2018 requested the Ministry of Lands and Physical planning for the valuation of the suit land giving rise to the valuation report dated 18th June 2018 which showed the suit land was unencumbered freehold interest with compensation purposes being a sum of Kenya Shillings One Million Seven Hundred Thousand(Kshs.1,700,000).
28. The Deponent through a letter dated 26th July 2018 wrote to the then Kenya Informal Settlements Improvement Project National Co - ordinator attaching the Valuation report so that they would take action and compensate the Petitioner but they had never done so to date. That the 2nd Respondent, Kenya Informal Settlements Improvement Project (KISIP) should stop the blame game, own up their mistake and compensate the Petitioner just the way they compensated all the other project affected people.

V. The Parties submissions.

29. On 19th October, 2022 while in the presence of all the parties, directions were taken before the Honorable Court to have the Petition be disposed off by way written Submissions. Subsequently, all parties fully compiled and the Court reserved a date for the delivery of Judgement accordingly

A. The Written Submissions by the Petitioner.

30. On 15th November, 2022, the Learned Counsel for the Petitioner the Law firm Messrs. Mustiya Mwanzia & Ondeng Advocates filed written submissions dated 14th November 2022. Mr. Mwanzia Advocate commenced his submission by rehashing on the background details of the matter as already set out from the filed pleadings. He framed three (3) issues he urged Court to consider for its determination. These were
 - a. Whether the Respondents acquisition of the suit property was legal and constitutional?;



- b. Whether the Respondents were in violation of any of his constitutional rights?; and;
- c. Whether the Petitioner was entitled to reliefs sought?
31. On the first issue, the Learned Counsel submitted that the actions by the Respondents infringed on the rights of the Petitioner to own property contrary to the provision Articles 3 and 40 of *the Constitution* of Kenya, 2010. He recounted how he left the suit land situated within the County of Mombasa in company of his family members for his rural home in the County of Kilifi only for him to come back and find that his suit property was no more as it had been utilized by the Respondents for construction of the road. He stated that he had not been consulted before his property was compulsorily acquired. Neither was he compensated by the Respondents. To him all these acts by the Respondents were unlawful and illegal. To buttress his point, the Learned Counsel cited several cases of “Chief Land Registrar & 4 Others - Versus - Nathan Koech Tirop and 4 Others 2018 eKLR, Isaiah Oiato & 6 Others - Versus - County Government of Vihiga 2018 eKLR, Patrick Musimba - Versus - the National Land Commission & Others Petition No 613 of 2014; Rutongot Farm Limited - Versus Attorney General & 3 Others 2014 eKLR; and the South African Constitutional Court case of Carmichele – Versus – Minister of Safety and Security (CCT 48/00) of 2001 SA 938 (CC). The Learned Counsel placed great emphasis to the effect that the Respondents had violated the provisions of Articles 2, 3, 10, 47 of *the Constitution* of Kenya, 2010. To further support his case, the Learned Counsel made reliance onto the cases of “R - Versus - Council of Legal Education “Ex - Pparte” Nyabira Oguta (2016) eKLR, and Judicial Service Commission - Versus - Mbalu Mutava & Another 2015 eKLR.
32. On the issue of whether the Petitioner was entitled to the reliefs sought, the Learned Counsel referred to the provision of Article 40 (3) which provided that the State ought to provide for prompt payment in full of just compensation upon acquisition of land by the State. He cited the case of “Antony Milimu Lubulellah - Versus - County Government of Kakamega & Others 2019 eKLR with the approval of the case of “Horn – Versus Sunderland Corporation (1941) 2 KB 26, 40 where the Court held on 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 compulsory sacrifice.
33. The Learned Counsel stressed that the Petitioner was entitled to the reliefs sought because his land was illegally and unconstitutionally acquired by the Respondents and since May 2016 he ha been left with no option but to seek shelter for his family of six (6) children and wife in a single room rented house accruing rent of Kenya Shillings Eleven Thousand (Kshs. 11, 000.00) per moth. The disturbance and unnecessary burden was caused by the Respondents of demolishing his house and making him homeless. The contention by the Learned Counsel was upon receiving a confirmation of the Petitioner grievances vide a letter dated 15th September, 2017 with regard to the Petitioner’s land, the 4th Respondent thereafter recommending a Valuation assessment report to be undertaken for purposes of compensating him. To the Petitioner despite the land being valued at a sum of Kenya Shillings One Million Seven Thousand (Kshs. 1,700,000.00/=) the Respondents had been throwing fingers at each other. He further argued that he was entitled to interest as from May, 2016 when the Respondents compulsorily acquired the suit land. To support his case, the Counsel further cited the cases of Arnacherry Limited - Versus - the Attorney General 2014 eKLR, Samuel Mbuvi Mutemi t/a Samtech Building Contractors - Versus - County Government of Machakos 2020 eKLR; Tate & Lyle



Fod and Distribution Limited – Versus – Greater London Council & Another (1981) 3 ALL ER 716 where Courts held to wit:

“ An award of interest is not a punitive measure for having kept the Plaintiff out of his money but part of an attempt to achieve restitutio in integrum” .

34. The Petitioner contends that failure by the 1st , 2nd and 3rd Respondents to enter their appearance nor file responses to the notice of motion application and the petition should be taken as an admission of facts. The Petitioner relies in the cases of “Zulfikar Ali Hassanally & Rustam Hira (suing as the legal representatives of the late Abdul Abdul Hassanally); Nyota Service Station - Versus - Westco Kenya Limited & 3 Others (2016) eKLR . In conclusion, the Learned Counsel urged the Court to allow the Petition.

B. The Written Submissions by the 4th Respondent

35. On 22nd November, 2022 the Learned Counsel for the 4th Respondent the Law firm of Messrs. Elizabeth Kuria Advocate filed written submissions dated 22nd November 2022. M/s. Kuria Advocate begun her submission by confirming that the 1st , 2nd and 3rd Respondents never responded to the main Petition. Nonetheless, the 4th Respondent framed two (2) issues for determination. These were
- a. Whether the 4th Respondent was involved in violation of the Petitioner’s constitutional rights? and
 - b. Whether the 4th Respondent was liable and should compensate the Petitioner?
36. On the first issue, the Learned Counsel refuted that the 4th Respondent was involved in the construction that led to the Petitioner’s plot being affected. According to her, the entire mandate belonged to the 1st and 2nd Respondents. The only role that was to be undertaken by the 4th Respondent was the connecting the two parallel roads. The Learned Counsel argued that the Petitioner failed to adduce any evidence to show that the 4th Respondent interfered with the national Government project. The contention by the Learned Counsel was that the Petitioner only stated that the 4th Respondent carried out a valuation report to ascertain the value of the Petitioner’s plot which was carried out. The valuation was then forwarded to the 2nd Respondent for compensation but they failed to do so a fact admitted by the Petitioner. To buttress her point, the Learned Counsel sought guidance from the provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 on the burden of proof and the case of “Mbita Ntiro – Versus - Mbae Mwirichia & Another 2017 eKLR to counter the allegations made out by the Petitioner to the effect that the 4th Respondent interfered in the construction of the road.
37. To the Counsel, this was the sole mandate of the national government in collaborations with Kenya Informal Settlement Improvement. She held that despite of this fact, the Petitioner had failed to provide any probative evidence on how the 4th Respondent interfered. Additionally, the Learned Counsel submitted that through a letter dated 26th July 2018 it forwarded the Valuation report to the Kenya Informal Settlement Improvement for them to compensate the Petitioner as they were the ones responsible for the project and had all the mandate over it. She emphasised that to this end, the Petitioner had failed to show that it was the 4th Respondent who were involved in violation of his rights.
38. On the second issue, the Learned Counsel submitted that there was no evidence at all adduced by either the Petitioner or the 1st , 2nd and 3rd Respondents to show the involvement of the 4th Respondent in the construction of the road that left him homeless as alleged. It was clear that the responsibility of compensation lied with the 1st , 2nd and 3rd Respondents who compensated other People Affected by the Project (PAP) but chose to discriminate the Petitioner. She averred that had they been responsible



of compensating the Petitioner, then they ought to have compensated all the other PAPs and would have been involved on it from the onset.

39. In conclusion, the Counsel held that having established that the 4th Respondent had no mandate whatsoever in the violation of the Petitioner's right and it was the sole mandate of the 1st, 2nd & 3rd Respondent, the 4th Respondent was not liable. It is the 1st, 2nd & 3rd Respondents to compensate the Petitioner as they did to all the other PAPs without discriminating him.

C. The written Submissions by the 1st, 2nd and 3rd Respondents.

40. On 8th December, 2022 the State Learned Counsel from the offices of the Honorable Attorney General for the 1st, 2nd and the 3rd Respondents herein, filed their written Submissions dated 5th December, 2022. M/s. Opio Advocate recounted the facts of the Petitioner by stating that the Petitioner claimed ownership of the suit land and alleging having been displaced from it occasioned by the construction of a road in the implementation of a project for the upgrading of informal settlements. Towards this and while opposing the Petition, the Learned Counsel raised two issues for the consideration by Court while making its determination thereof. These were:-
- a. Whether the Petitioner was entitled to compensation from the 1st and 2nd Respondents herein as opposed to the 4th Respondent.
 - b. Whether the Petitioner had not proved he was entitled to the quantum of damages and rent payments amounting to a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1, 700, 000.00/=) and Kenya Shillings Eleven Thousand (Kshs. 11, 000.00/=) per month.
41. On the first issue, She averred that the Kenya Informal Settlement Project was a national government project in conjunction with the World Bank, the Swedish International Development Co – operation and the French Development Agency. According to the Learned Counsel, the purpose of the project was to upgrade informal settlements by granting them infrastructure improvements together with security of land. The project was undertaken in conjunction and with direct participation of the County Government of Mombasa, the 4th Respondent herein. Indeed the role of the 4th Respondent was to identify settlement areas for the infrastructure development together with identifying public land (being the County land) where such development was to be undertaken. She informed Court that the County Officers were closely involved in the planning of the infrastructure and provide final approval for the infrastructural development in Ziwa La Ng'ombe before the actual implementation commenced.
42. The Learned Counsel informed Court upon final phases of works the offices of Governor of County Mombasa requested that a further road be constructed to join to roads in informal settlement. The project obliged to construct the extension with the understanding that the County Government ensured the area affected was available for such works. To the Counsel, the responsibility for looking for the land fell directly into the hands of the 4th Respondent and hence they were to take up full responsibility on compensating the Petitioner. Therefore, to her, the resultant loss from the use of the said Mombasa/Ziwa la Ng'ombe Scheme/1076 was a direct result of negligence on the part of the 4th Respondent. The 4th Respondent had the requested for the joining of the two roads and also assured KISIP that the land was available. The 4th Respondent were the custodians of the Wayleaves within the County and as stated from a letter dated 11th October, 2019. To buttress her point on the negligence of the 4th Respondent, she cited the case of "Elijah Ole Kool – Versus – George Ikonya Thuo (2001) eKLR.



43. Secondly, the Learned Counsel submitted that the Petitioner had not proved he was entitled to the quantum of damages and rent payments amounting to a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000.00/=) and Kenya Shillings Eleven Thousand (Kshs. 11,000.00/=) per month. The contention by the Learned Counsel was that standard of proof in Civil matters was one on a balance of probabilities. She sought support of this point from the decision of: “Wareham T/ A.A.F Warehan & 2 Others – Kenya Post Offices Savings bank (2004) 2 eKLR 91” where Court held:-

“.....and the burden of proof is on the Plaintiff and degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non – existence of facts in issue or facts relevant to the issue.....”

44. To this extend, she argued that the Petitioner was not able to prove the quantum of loss and damages. She held that he kept on insisting that he had a house on the suit land and that it was demolished but never shown any evidence for instance through production of photographs or documents detailing the existence of the said house. Additionally, the Learned Counsel averred that the Petitioner misled Court that he been renting the house as he was a resident of the County of Kilifi and also failed to produce receipts for the rental payments made and the loss of income garnered all these as required by law under the provisions of Sections 107 and 109 of the *Evidence Act*, Cap. 80 that he had a house on the land but which was demolished.

Vi. Issues for determination.

45. As is apparent from the foregoing, I have extensively examined the Petition dated the 12th September 2022 and filed on the even date including the supporting affidavit, the annexures, the responses to the Petition, as well as the parties’ written submissions, myriad cited authorities, te relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and statutes.

46. For the Honorable Court to reach an informed, reasonable, Just and Equitable decision, it has crystalized the following to be the four (4) salient issues for its determination. These are:

- a. Whether *the Constitution* Petition dated 12th September 2022 by the Petitioner against the 1st, 2nd, 3rd, 4th and 5th Respondents herein has any merit whatsoever?
- b. Whether the constitutional rights entitled to the Petitioners had been violated, threatened, denied and/or infringed to warrant a grant of the orders sought in this Petition?
- c. Whether the parties herein were entitled to the reliefs sought.
- d. Who will bear the costs of the Petition?

Vii. Analysis & Determination.

Issue No. a). Whether *the Constitution* Petition dated 12th September 2022 by the Petitioner against the 1st, 2nd, 3rd, 4th and 5th Respondents herein has any merit whatsoever?

47. Under this Sub – heading, the Honorable Court wishes to the Constitutional concept as set out from the filed Petition. Ideally, the Constitutional basis of the Petition are well founded under Paragraphs 22 to 31 of the main Petition by the Petitioner. They include:-

- a. Article 2 of *the Constitution* is the Supreme Law of the Republic and binds all persons and all state organs at both levels of Government.



- b. Article 3 of *the Constitution* provides that every person has an obligation to respect, uphold and defend *the Constitution*.
- c. Article 10 of *the Constitution* provides that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons. The national values and principles of governance include inter alia patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development.
- d. Article 22(1) provides inter alia that 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 or infringed, or is threatened.
- e. Article 23(1) provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Clause 3 thereto states inter alia that in any proceedings brought under Article 22, a court may grant appropriate relief, including--(a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.
- f. Article 40(1),(2),(3), and (4) of *the Constitution* provides that:
 - “ 1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--(a) of any description; and (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person--(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--
 - (i) requires prompt payment in full, of just compensation to the person: and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.



- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”
- g. Further Article 47 of *the Constitution* states as follows:
- “ (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
- (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) Promote efficient administration.
- h. Article 162 of *the Constitution* establishes the three tiers of Kenya’s Superior Courts. It provides thus:
- “ 1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)
- 2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
- a) employment and labour relations: and
- b) The environment and the use and occupation of. and title to, land.
- 3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause(2)
- 4) The subordinate courts are the courts established under Article 169 or by Parliament in accordance with that Article.”
- i. Under Article 258 (1), *the Constitution* guarantees that every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- j. Under Article 259(1) it is provided that *the Constitution* shall be interpreted in a manner that--
- (a) promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights: permits the development of the law; and contributes to good governance.



48. 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.....”

49. This Honorable 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.

50. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own.....it needs to be watered, fed”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

51. 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 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 case: “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”.

52. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable 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 Respondents, the Affected parties and the Interested Parties herein and pleading for the prayers sought.

53. Contrary to the assertions made by the Petitioner and the 4th Respondent, on record is a memorandum of appearance by the 1st, 2nd and 3rd Respondents dated 28th September 2022 filed by the Attorney General. The 1st, 2nd and 3rd Respondents filed replying affidavit sworn on 11th November 2022 and received in Court on 22nd November 2022. From the pleadings on record, most of the factual matters raised by the Petitioner are not denied by the Respondents, the only issue being propounded by the Petitioner is that there is a blame game as to which Respondent is to compensate the Petitioner for the loss of his land. The Petitioner states that he is the registered owner of the parcel of land known as



- plot as Plot no. Mombasa/ Ziwa la Ng'ombe Scheme/1076 together in May 2016 situated at Ziwa la Ng'ombe area within Mombasa County. The petitioner states he acquired the suit land took possession and developed the same by building a residential house. The Petitioner states that the suit land was affected by the construction of a road connecting two parallel roads; one road under (KISIP) and the other by Kenya Slum Upgrading Programme (hereinafter referred to as "KENSUP") to ensure connectivity. The Petitioner states that his property was taken away and the construction undertaken when he travelled with his family to his rural home in Kilifi and was met by surprise when he came back the suit land where he called home was no more.
54. Vide letters dated 6th February 2017, 19th May 2017, 15th August 2017 and 2nd October 2017, the Petitioner complained to the Respondents seeking for compensation. In a letter dated 30th August 2017, the County Secretary wrote to the Chief Officer Lands and planning to avail the report on the matter to enable the office give an advise. The Chief officer in a letter dated 15th September 2017 confirmed to the acting director land administration that the suit land was wholly utilized by the project.
55. It is on record that on 21st June 2018 the ministry of lands and physical planning wrote to the chief officer land administration of the of the 4th Respondent that they have carried out the valuation of the suit land and the report is ready. On Wednesday, 13th June 2018, the Directorate ministry of lands and physical planning conducted a site visit and prepared report and valuation of the suit land which contents are contained dated 18th June 2028 and proposed a compensation in a sum of One Million Seven Hundred Thousand (Kshs. 1, 700,000.00/=)
56. Before I make further step, the 4th Respondent has stated that the 2nd Respondent should stop blame game and compensate the Petitioner just the way the compensated all the other project affected people maintaining it had no mandate in the project. Interestingly, the 4th Respondent admits having requested the ministry of lands and physical planning for valuation of the suit land. I will end up repeating myself but that is not an issue. At paragraph 12 of the Replying Affidavit for the 1st, 2nd and 3rd Respondents, it has been propounded that it is the Governor of the 4th Respondent who issued instructions towards the finalization of the project to have a loop done to join the two roads which instructions ended up into taking of the Petitioner's land which assertions have not been controverted.
57. The Kenya Informal Settlement Project was a project of the government of Kenya which began in the year 2011 and officially closed in the year 2020. This was a project of the Government of Kenya with support from the World Bank , the Swedish International Development Cooperation Agency (SIDA) and the Agence Francaise de Development (AFD) . The project was meant to improve living conditions of people living in informal settlements. The KISIP was executed by state department of Housing and Urban Development and implemented in close partnerships with 14 participating counties of Uasin Gishu, Embu, Garissa, Kakamega, Kericho, Kisumu, Kitui, Kilifi, Mombasa, Nairobi, Nakuru, Nyeri and Kiambu.
58. In relation to the instant case, the role of the 4th Respondent which is the county government of Mombasa was to provide the list of informal settlements for infrastructure upgrading and Ziawa La Ng'ombe was among them . For settlement to qualify for KISIP interventions, planning should have been undertaken where roads and public amenities were clearly marked on the Physical Development plans and the settlement residents had tenure security documents. This was important to ensure that public infrastructure was undertaken on public land and the county government provided these evidences as KISIP worked together with the County surveyors and planners since the Project had no provision of acquisition of private land. Any mind directing itself to the issue herein can only arrive at one conclusion which I hereby that the position taken by the 4th Respondent having no role in the



implementation of the Kenya Informal Settlements Project does not stand as it is clear they were part of implementing the project.

59. The 1st, 2nd and 3rd Respondents strongly denied the allegation of demolition of the Petitioner's building. They aver that there was no building on the suit land a fact corroborated by the valuation report and that the project was against forceful eviction and demolition of structures. With respect, I disagree with the 1st, 2nd and 3rd Respondents on this issue. The valuation report dated 18th June 2018 was a result of the site visit done on 13th June 2018. On 6th February 201, the Petitioner complained to the 2nd Respondent that his land had been affected by the tarmac road project. On 19th May 2017, the Petitioner wrote to the governor of the 4th Respondent claiming compensation. On 13th August 2017, the Petitioner sought compensation from national coordinator of the 2nd Respondent. On record is another illegible letter to the 1st Respondent and a letter dated 2nd October 2017 reminding the 2nd Respondent by the Petitioner to compensate. It is with no doubt that the valuation of the suit land was conducted and the report prepared after the suit land had been taken away. I am not convinced by the position proffered by the 1st, 2nd and 3rd Respondents on this issue.

Issue No. b). Whether the constitutional rights entitled to the Petitioners had been violated, threatened, denied and/or infringed to warrant a grant of the orders sought in this Petition?

60. Under this sub heading and in order to give a full understanding of the issue in dispute, the Honorable Court wishes to begin by reproducing the entire Article 40 of *the constitution* on the right to protection of right to property states that -
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person-
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
 - (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”



61. As noted from the provision of Article 40 (3) of *the Constitution* of Kenya, 2010 above a person's ownership of property shall not be taken away by the state unless 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 (emphasis added)

62. Even before the promulgation of the 2010 constitution, Indeed, the protection from arbitrary deprivation of property existed in the former Constitution where Section 75 of the said Constitution hereof stipulated that:-:

- “75 No property of any description, shall be compulsorily taken possession of, and
- (1) no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:
 - (a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote public benefit; and
 - (b) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
 - (c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

63. To give effect to the 2010 Constitution, Parliament enacted the *Land Registration Act*. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

64. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
65. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
66. Under the provision of Section 7 of the *Land Act*, No. 6 of 2012 prescribes methods of acquisition of title to land Title to land may be acquired through—
- (a) allocation;
 - (b) land adjudication process;
 - (c) compulsory acquisition;
 - (d) prescription;
 - (e) settlement programs;
 - (f) transmissions; (g) transfers;
 - (h) long term leases exceeding twenty-one years created out of private land; or
 - (i) any other manner prescribed in an Act of Parliament.
67. Part VIII of the *Land Act* clearly lays down the procedure to be adhered in compulsory acquisition of interests in land, provision of Section 107 on Preliminary notice provides as follows:-
- (1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under Section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.
 - (2) The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.
 - (3) The Commission may reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under sub - Section (2) and Article 40 (3) of *the Constitution*.
 - (3A) Where the Commission rejects a request of an acquiring authority in accordance with subsection (3), the Commission shall inform the relevant acquiring authority within fourteen days of the decision to reject the request.
 - (4) If the Commission establishes that the request under subsection (1) meets the requirements prescribed under subsection (2) and Article 40(3) of *the Constitution*, the Commission shall—
 - (a) cause the affected land to be mapped out and valued by the Commission using the valuation criteria set out under this Act; and
 - (b) establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land, confirming for each such occupation how much time they have been in uninterrupted occupation or ownership



of interest in the land prior to the date of the request for acquisition of the land, and the improvements thereon.

- (5) Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.
 - (5A) The notice issued under subsection (5) shall contain the following particulars—
 - (a) the purpose for which the land is to be compulsorily acquired; and (b) the location, general description and approximate area of the land.
 - (5B) Upon receipt of the notice under subsection (5), the Registrar shall make an order, pursuant to section 76 (1) of the *Land Registration Act*, 2012, prohibiting or restricting dealings with the affected portion of land thereof until it vests in the acquiring authority. 61 No. 6 of 2012 Land [Rev. 2019]
 - (6) Upon service of the notice, the registrar shall make an entry in the register of the intended acquisition.
 - (7) For the purposes of sections 107 to 133, interested persons shall include any person whose interests appear in the land registry and the spouse or spouses of any such person, as well as any person actually occupying the land and the spouse or spouses of such person.
 - (8) All land to be compulsorily acquired shall be geo- referenced and authenticated by the office or authority responsible for survey at both the national and county government.
68. From the surrounding facts and inferences in this proceedings there are a few fundamental issues which are not at all disputed by all parties. Firstly, the suit land where the project was implemented is legally and absolutely registered in the names of the Petitioner with all the indefeasible title, interest and rights vested in him by law as stated herein above. Secondly, the land for the Petitioner was compulsorily whether legally or not acquired for purposes of implementing the Project. According to the elaborate Replying Affidavit sworn by Dr Peris Mang'ira on behalf of the 1st, 2nd and 3rd Respondents herein, the Honorable Court was explicitly informed that the Project was only to be undertaken on public land. To that effect, the County Government provided the evidence to this effect. Indeed, KISIP worked together with the County Surveyors and Planners since they had no provision of acquisition of land by themselves. Finally, the project was implemented on the suit land to detailed and completed. Upto this point we all seem to be sailing through smoothly. However, at the same time, I pause a couple of questions - who then took away the private land belonging to Petitioner land? Contrary to the provisions of Section 107 (1) of the *Land Act* No. 12 of 2012, there was no notice of acquisition of the suit land issued to the Petitioner was submitted to the National Land Commission to acquire the land on behalf of any of the Respondents. There is no evidence that the National Land Commission approved the request and a notice to that effect in the Gazette and the county Gazette published and the notice to delivered to the Petitioner. For that fundamental legal lapse, it makes the whole process of the acquisition of the land belonging to the Petitioner illegal and unlawful.
69. Be that as it may, having stated this, the other herculean legal question to pose herein is whether the Petitioner as the registered proprietor of the suit land was involved in the Project implementation and through issuance of an award and/or being promptly, justly, fairly and adequately compensated for the land that was compulsorily acquired in accordance with the requirements of the law. To begin with, and in order to effectively respond to these fundamental issues, the Court takes Judicial notice to the fact that on how the suit land was taken is explained by the 1st, 2nd and 3rd Respondents in



their Replying Affidavit. The 1st, 2nd and 3rd Respondents stated that towards the finalization of the works, instructions were issued by the Governor's office, County Government of Mombasa which is the 4th Respondent herein to have a loop done joining the two roads. The works were accordingly executed on the understanding that it was the responsibility of the County of Mombasa to ensure that the affected area was available for such works to be undertaken. The Honorable Court was informed that the Project prepared a Resettlement Action Plan (RAP) in the year 2014 to mitigate against loss of encroached structures and livelihoods but not loss of private land. Further, the County Government of Mombasa and KISIP national Project coordinating team received and resolved all complaints until the closure of the project. It is instructive to note that while all these were taking place, the Petitioner was never involved at all despite of the suit land being registered in his name. It is until the project closure when the Petitioner's grievance was brought to attention. Evidently, the petitioner was never compensated despite all odds and ends.

70. The Court of Appeal in the case of "Christopher Ndarathi Murungaru – Versus - Kenya Anti - Corruption Commission & Hon. Attorney General (2006) eKLR, held that:-

“....Kenya has opted for the rule of law and the rule of law implies due process. The court must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions... The court must continue to give justice to all and sundry irrespective of their status or previous status...”

71. Clearly, as already noted the acquisition was illegal, what happened cannot be termed as acquisition and does not fall within the methods provided under Section 7 of the Land Act, No. 6 of 2012. Upon promulgation of the Constitution of Kenya, 2010, Kenyans gave themselves a new life, a new covenant and a new dispensation in all spheres of life. The days when a person was a law unto himself, herself or itself are long gone. The Constitution decree rule of law which must be respected and upheld by every person in every actions. Point blank, I must say that the Governor Mombasa County was wrong to issue instructions which effects is loss of Petitioner's land without following the due process.
72. I understand the 1st, 2nd and 3rd Respondent to be saying that there was no plan for the project to run through the suit land which is the Petitioner's land. It is only after receiving instructions from the office of the Governor for the 4th Respondent that the initial plan of the project suddenly changed and the ultimate decision was to have the project run through the suit land on the belief that it was the responsibility of the 4th Respondent to acquire the suit land while maintaining that the 2nd Respondent had no provision for acquisition of private land. The 1st, 2nd and 3rd Respondents attempt to exonerate themselves does not stand. Part of their actions of implementing the project through the suit land which has not been legally acquired caused the Petitioner loss of the suit land.
73. I have analyzed the Petition. I reiterate the fact that the Petitioner is the registered proprietor of the suit land has never been called into question, or challenged by the Respondents. The Petitioner's complaint is of the Respondents' actions of unconstitutionally, illegally and irregularly trespassing and taking of his property contrary to the provision of Article 40 (1), (2) and (3) of the Constitution of Kenya, 2010. The Petitioner's cry is that being the registered owners of the suit land the Respondents have forcefully taken his land and have failed to compensate him despite efforts he has made. In essence, it is not in dispute that the Petitioner's land was taken and utilized by the project. The main controversy between parties is who should compensate the Petitioner. Luckily, it is to be noted that the Petition is not intended to recover the suit land, the Petitioner's prayer is to be fully compensated.



74. In the case of “Arnacherry Limited - Versus - Attorney General (2014) eKLR where the court stated:-
- “ This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”
75. I associate myself with the sentiments in the above cited authority and render myself thus; this is a sad, distressing and unfortunate Petition. Todate, despite all efforts the Petitioner has not been compensated despite his land being illegally taken away by the Respondents in the year 2016. I say taken because the methods employed by the Respondents is not contemplated in law. The sheer responses filed by the Respondents is a plethora and concoction of blame games. Certainly, this Court loathes being embroiled in such smart and unnecessary merry go round gimmicks. The only concern by the Court is to have the grievances by the Petitioner settled immediately through compensation as per the dictum of Law.
76. From the analysis of the facts herein, it is clear that the 1st, 2nd, 3rd and 4th Respondents did not observe or follow the due process while carrying out acquisition and demolition of the Petitioner’s house. I emphasise that failure to follow the due process rendered the whole process unconstitutional, illegal and unlawful. If the State required the Petitioner’s land for the purpose of implementing the project, the State through the Respondents should have followed the due process as laid down in section 7 of the *Land Act* or even Part VII of the *Land Act* on Compulsory Acquisition of interest in land and further Article 40 of *the Constitution*. In demolishing the Petitioners house and taking of the suit land without following the due process, the State through the Respondents contravened the Petitioners Constitutional right as provided by Article 40 of *the Constitution*.
77. The provision of Article 47 of *the Constitution* of Kenya, 2010 lays comprehensive legal framework on fair administrative action thus: -
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
78. The argument advanced by the 1st, 2nd and 3rd Respondents herein and which led to them failure to compensate the Petitioner to the effect that the project only was to deal on public and not private land is neither here nor there. I say so as had this been factual and a policy matter why did they proceed to cause implementation of the Project on the said land despite of its legal land tenure or category. The wisest thing or decision to make would to have rejected the project from its inception on this basis alone. Unfortunately, the implementers proceeded on and only seem to have now remembered the land was private at its closure and having received the complaint grievances from the Petitioner and the Valuation Assessment for compensation. I wonder how to term this selfish and crude attitude depicted by the Respondents if its not mere afterthought. The closest I get is from the two English idioms on



“What is Good for the genduer is good for the Goose” and “You cannot eat the cake and continue having it”. Far from it. How lucky would they be – having the land for free and implemented their Project at no costs in these era and open world of entrepreneur dispensation. On this point, I further seek guidance from the case of “Mike Maina Kamau - Versus - Attorney General [2017] eKLR learned Judge L Gacheru rendered thus:-

“ Even if the public interest always supersede the private interest, at least due process ought to have been followed and the State had no right whatsoever to trample on the Plaintiff’s rights and/or breach his right to property as provided by Article 40 of *the Constitution*. The action of the State or Ministry of Roads officials and specifically the Minister for Roads who supervised the said demolition contravened Article 47 of *the Constitution*.

79. It is now trite law that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly. In the case of “Judicial Service Commission - Versus - Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 the Court of Appeal held that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

80. From the provision of Article 47 of *the Constitution*, it is clear that *the Constitution* now imposes a control on administrative bodies by requiring them to employ constitutional standards of legality, reasonableness and procedural fairness in any administrative actions. Under *the Constitution*, the administrative bodies are also required to accord the person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons’ right(s), the administrative body is required to give the persons written reasons for its actions. The right to fair administrative action is a right that must not be abrogated or compromised

81. Having considered the available facts and evidence, the Petitioner was never notified of the intention to acquire the suit land. Even after the suit land being taken the Respondents did not even care to reach out to the Petitioner until he complained. The Court finds there is no law permitting the Respondents to breach the Petitioner’s constitutional rights, as due process ought to have been followed in acquisition of the suit land. The Respondents took the Petitioner’s land without authority or having failed to follow the due process, even if the Court was to find that taking of the Petitioner’s land was for the benefit of the Public who use the road the Court cannot hold and find that the public interest herein overrides the private interest of the Petitioner who is the registered owner of the suit land.

82. In the case of “the Commissioner of Lands & Another – Versus - Coastal Acquaculture Limited [1997] eKLR the court stated:-

“ In Kenya where the statutory power to compulsorily acquire a person's land against his will is first derived from the carefully worded provisions of *the Constitution* itself; where land is a



most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry.”

83. The question that one would have to answer is whether in the circumstances above constitutes respect for *the Constitution* and the rule of law. There are no records for acquisition of the suit land. The provisions of Article 3 of *the Constitution* obligates every person to respect, uphold and defend *the Constitution*. The Respondents action are direct violation of the Petitioners’ constitutional right to property. As stated else where in this judgement, It is to be noted that the petition is not intended to recover the suit land , the Petitioner’s prayer is to be compensated. Section 2 of the *Land Act* defines prompt to mean within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission. This is not what has happened in the instant Petition.
84. In the case of “Horn - Versus - Sunderland Corporation [1941] 2 KB 26,40 it was held as follows:-
- “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.”
85. The Petitioner still has title of the suit land registered in his name but the actual land in reality does not exist anymore. A copy of certificate of official search dated 10th January 2022 reveals so. The Petitioner was not even notified that his land has been taken away and has been left with the title document but with no land.
86. The Petitioner submitted that failure by the 1st, 2nd and 3rd Respondents to enter appearance and file responses to the petition should be taken to be admissions of facts. Nonetheless, I have indicated else where in this Judgement that the 1st, 2nd and 3rd Respondents entered appearance and filed response.
87. For these reasons, and based on legal reasonings, I hold that the Petitioner who bears the burden to establish his case on a balance of probability has well established his case and therefore the Petition must succeed as prayed – full payment, adequate, prompt and fair compensation.

Issue No. d). Who will bear the costs of the Petition?

88. The issues of Costs are at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of the legal action, proceeding and process of any litigation. Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-
- “26.
- (1) The award of costs is at the discretion of the Court.
 - (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”
89. This legal position is upheld in the Court of Appeal cases of “Rosemary Wambui Munene – Versus – Ihururu Dairy Co – operatives & Societies Limited” eKLR (2014, Kenya Sugar Board – Versus –



Ndungu Gathini (2013) eKLR, the Supreme Court cases of “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR and in the “Reference No. 1 of 2014, Council of Governors – Versus - the Senate & another [2014] eKLR the Supreme Court further discussed discretion and the obligation upon the party praying for costs as under: -

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

90. Under the provision of Article 23 of the Constitution of Kenya, 2010 the Court can grant a number of reliefs thus:

- (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-
 - (a) a declaration of rights;
 - (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

91. Under Section 13(7) of the Environment and Land Court Act No.19 of 2011, the Court has jurisdiction as follows:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order or grant, any relief as the Court deems fit and just including:-

- a) Interim or permanent preservation orders including injunction.
- b) Prerogative orders
- c) Award of damages
- d) Compensation
- e) Specific performance
- f) Restitution
- g) Declarations or
- h) Costs.

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



Viii. Conclusion and disposition.

92. The upshot of the above, and having conducted such an elaborate analysis of the framed issues herein, the Honorable Court finds that the Petitioner has fully established his case of the infringement, violation and denial of his fundamental rights as are clearly enshrined in *the Constitution* of Kenya, 2010 and hence entitled to the orders sought. For avoidance of doubt, the Court proceeds to grant the following orders:-
- a. That Judgement be and is hereby entered in favour of the Petitioners as per the orders sought from the filed Petition dated 12th September, 2022 against the 1st, 2nd, 3rd and 4th Respondents jointly and severally.
 - b. That a declaration be and is hereby issued that the Respondents acted illegally and unconstitutionally in facilitating the demolition of the Petitioner's house and compulsory acquisition of the property known as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076 .
 - c. That a declaration is and hereby issued that the action by the 1st, 2nd, 3rd and 4th Respondents herein are in violation of the provision of Articles 2, 3, 10, 19, 20, 21, 28, 40, 47 and 50 (1) of *the Constitution* of Kenya, 2010 and the provisions of the Fair Administrative Actions Act in the manner in which the Respondents compulsorily acquired the property knowns as Plot No. Mombasa/ Ziwa la Ngombe Scheme/1076 .
 - d. That an order be and is hereby issued directing the 1st, 2nd, 3rd and 4th Respondents jointly and severally to compensate the Petitioner a sum of Kenya Shillings One Million Seven Hundred Thousand (Kshs. 1,700,000.00/=) being the value of the of the property knowns as Plot No. Mombasa/ Ziwa la Ngombe Scheme/1076 together with interests from May 2016 when the Respondents compulsorily acquired the Property.
 - e. That an order be and is hereby issued directing the 1st, 2nd, 3rd and 4th Respondents jointly and severally to compensate the Petitioner a sum of Kenya Shillings Eleven Thousand (Kshs. 11,000.00/=) per month being the monthly rent that the Petitioner has been forced to pay since the illegal compulsory acquisition of the Property knowns as Plot No. Mombasa/ Ziwa la Ng'ombe Scheme/1076 since May 2016 up to date.
 - f. That interests on (c) and (d) above from the date of filing this Petition be and is hereby awarded to the Petitioner.
 - g. That costs of the Petition is awarded to the Petitioner to be borne by the 1st, 2nd, 3rd and 4th Respondents jointly and severally.

It Is So Ordered Accordingly.

JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 16TH OF MAY 2023.

HON. JUSTICE MR. L.L NAIKUNI

JUDGE

THE ENVIRONMENT AND LAND COURT AT MOMBASA

