Mehisa Enterprises Limited v Kenya Urban Roads Authority & 3 others (Environment & Land Case 450 of 2016) [2023] KEELC 19341 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEELC 19341 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 450 OF 2016

JO MBOYA, J

AUGUST 10, 2023

BETWEEN

MEHISA ENTERPRISES LIMITED .... PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY .... 1ST DEFENDANT

THE NATIONAL LAND COMMISSION .... 2ND DEFENDANT

THE MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT..................................3RD DEFENDANT THE ATTORNEY GENERAL .... 3RD DEFENDANT

THE ATTORNEY GENERAL .... 4TH DEFENDANT

JUDGMENT

1. The instant suit was commenced by and on behalf of the Plaintiff herein in terms of the Plaint dated the 26th April 2016; albeit filed in Court on the 3RD of May 2016; but which Plaint was subsequently amended with Leave of the Honourable court. Consequently, the current and operative Pleading driving the Plaintiff's claim is the amended Plaint dated the 16th February 2021.

2. For good measure, the Plaintiff herein has sought for a plethora of reliefs, whose details are as hereunder;

    i. Interest of Kshs. 1, 929, 268.00/- which is interest accrued on the Loan from Baroda Bank.

    ii. Kshs. 46, 869, 481/- Only; Loss of Income from the Property.

    iii. Kshs. 371, 528, 714 Only, which is allegedly the difference in the value of the property at the time of valuation pending the award and the prevailing market rates at the time of the payment of the award.

iv. Kshs. 549, 270/- Only; which is the Land rates paid for the Premises from 2012

v. Valuation fee of Kshs. 160, 000/- Only.

vi. Interest on the delayed compensation

vii. Interests on i, ii, iii and iv above from the date the suit was filed until full payment

viii. Aggravated Damages

ix. Costs of the suit

3. Instructively upon being served with the Plaint and summons to enter appearance, the 1st, 3rd and 4th Defendants herein duly entered appearance and filed Statement of Defense on the 15th July 2016, wherein the named Defendants denied and/or disputed the claims by and on behalf of the Plaintiff herein.

4. On the other hand, the 2nd Defendant also entered appearance on the 28th April 2017 and filed a Statement of Defense on even date. Instructively, the 2nd Defendant also disputed the claims by and on behalf of the Plaintiff.

5. Subsequently, the subject matter underwent the requisite Pre-trial directions, whereupon the advocates for the respective Parties confirmed having filed and exchanged all the requisite pleadings, documents and witness statements; to be relied upon during the hearing of the dispute.

6. Further and in any event, the subject matter was thereafter fixed and/or scheduled for hearing, whereupon the Plaintiff summoned and called Three witness, whereas the 1st, 3rd and 4th Defendants called one witness. However, the 2nd Defendant herein did not call any witness and/or tender any document in evidence or at all.

Evidence By The Parties

a. Plaintiff's Case:

7. The Plaintiff's case revolves and/or gravitates around the Evidence of Three witnesses; namely, Hamsuk Meghji Shah, Ponnusammy Shivaji Saravanakumar and Peter W. Kanyungo, who testified as PW1, PW2 and PW3, respectively.

8. It was the testimony of PW1, that same is a Director of the Plaintiff Company and by virtue of being such Director, same is conversant and familiar with the facts of the subject matter. Furthermore, the witness added that same has been authorized and mandated by the Plaintiff Company to appear before the court and to tender evidence on behalf of the Plaintiff company.

9. Additionally, the witness also testified that on or about the 27th May 2011, the Commissioner of Lands, now defunct, published an intention to acquire all that property known as L.R no. 209/14694/1 (hereinafter referred to as the suit property), in accordance with the provisions of Section 6(2) of the Land Acquisition Act Chapter 295 Laws of Kenya.

10. It was the further testimony of the witness that the Notice which was published by and on behalf of the 2nd Defendant signaled and indicated that the intended compulsory acquisition was the for the purposes of the construction of the Eastern and Northern bypass (Mombasa Road/City Cabanas Interchange); and for complementary works by the 1st Defendant herein.

11. On the other hand, the witness testified that following the publication of the Gazette Notice relating to the acquisition of, inter-alia, the suit property, the Commissioner of Lands convened and held the

requisite Public Hearing, whereupon all the Parties, the Plaintiff not excepted, attended for purposes of ventilating their interests over the suit property.

12. Further and in addition, the witness testified that arising from the Public hearing; the Commissioner of land, now defunct, generated and issued an award dated the 2nd September 2011, whereby the Commissioner of Land awarded to and in favor of the Plaintiff herein the sum of Kes.364, 471, 286.00/= only, as compensation on account of Compulsory acquisition of the suit Property.

13. Other than the foregoing, the witness also testified that the award under reference also captured and or provided that the sum of Kes.28, 055, 000.00/= only, was to be paid directly to and in favor of Bank of Baroda (K) Ltd, towards and for purposes of settling and existing Financial facility, namely, loan facility which the Plaintiff herein had taken with the named Financier.

14. Further, the witness averred that other than the payment of Kes.28, 055, 000.00/= only to and in favor of Bank of Baroda (K) Ltd; the balance of the monies stated and stipulated at the foot of the award amounting to Kes.336, 416, 286.00/= only, was to be paid directly to the Plaintiff company.

15. Additionally, the witness testified that on or about the 16th September 2011, one of the Directors of the Plaintiff company executed a statement accepting the award and authorizing the 1st Defendant to make payments to her Bank account vide Electronic Transfer, in terms indicated and contained at the foot of the acceptance.

16. However, the witness testified that despite the execution of the acceptance, the 1st Defendant herein failed to timeously and or promptly pay the monies to both Bank of Baroda (K) Ltd; and to the Plaintiff herein. In this regard, the witness averred that arising from the default and or delay on the part of the 1st Defendant to pay the monies to Bank of Baroda (K) Ltd, the Bank levied and charged Interests amounting to Kes.1, 920, 268/= only, on the outstanding loan facility; which the 1st Defendant had covenanted to pay and/or settled in terms of the Letter of award.

17. On the other hand, it was the testimony of the witness that the 1st Defendant herein also failed to promptly and timeously pay the monies that were due to and in favor of the Plaintiff company. Instructively, the witness added that the 1st Defendant only made the 1st payment of Kes.100, 000, 000/= Only, to and in favor of the Plaintiff on the 29th April 2015.

18. Additionally, the witness testified that the 1st Defendant thereafter released the second tranche amounting to Kes.236, 416, 286/= only, to the Plaintiff, on the 4th June 2015. In this regard, the witness averred that the payments rendered by the 1st Defendant were delayed for a duration of more than four (4) years from the date of acceptance of the award.

19. In addition, the witness averred that the delay in making the payments by and on behalf of the 1st Defendant was unlawful, illegal and thus constituted breached and violation of *the Constitution*, 2010; and the law in general.

20. Other than the foregoing, the witness testified that as a result of the delay by the 1st Defendant to pay and or settle the monies at the foot of the award, the Plaintiff herein was substantially prejudiced and inconvenienced. In any event, the witness added that the Plaintiff was exposed to grave lose and damage, as a result of the failure by the 1st Defendant.

21. Arising from the foregoing, the witness averred that the Plaintiff herein is therefore entitled to compensation for the loses, which accrued and/or arose as a result of the actions and/or omissions by the Defendants; and in particular the 1st and 2nd Defendants herein.

22. Other than the foregoing, the witness alluded to the Witness statement dated the 15th July 2019; and thus sought to adopt and reiterate same. In this regard, the witness Statement dated the 15th July 2019; was adopted and constituted as the Evidence in chief of the witness.

23. On the other hand, the witness also alluded to the List and Bundle of Documents dated the 29th April 2016, containing 8 documents and which documents, the witness sought to adopt and to rely on. In this regard, the documents at the foot of the List dated the 29th April 2016; were admitted and constituted as exhibits 1 to 8 respectively.

24. Furthermore, the witness also indicated that the Plaintiff also filed a Supplementary List and Bundle of documents dated the 18th November 2020; and containing a total of 25 Documents. For good measure, the witness sought to adopt and rely on the named documents.

25. Nevertheless, Learned counsel for the Defendants took objections to various documents, inter-alia, documents numbers 19, 20, 21 and 23 respectively. However, upon hearing the objection taken by and on behalf of the Defendants, the court rendered a ruling whereupon the objection to document number 19 was upheld.

26. On the other hand, the rest of the documents were deemed admissible and thereafter the Honorable court proceeded to and indeed admitted the various documents as Exhibits P9 to P33, with the exception of the Valuation Report; which was marked for identification as MFI 27.

27. Additionally, the witness also alluded to a Further Supplementary List and Bundle of documents dated the 17th December 2020; and containing one document. In this regard and in the absence of any objection from the Defendants; the documents at the foot of the List dated the 17th December 2020 was produced as Exhibit P34.

28. Finally, the witness alluded to the Further/Supplementary List and bundle of Document dated the 17th December 2020; and sought to produce same as an Exhibit. Similarly, in the absence of any objection, the document at the foot of the named List of documents was admitted and marked as Exhibit P35.

29. On cross examination by Learned Counsel for the 1st , 3rd and 4th Defendants, the witness herein testified and reiterated that the 1st Defendant had offered to pay the sum of Kes.364, 471, 286/= only, as compensation at the foot of the compulsory acquisition.

30. Furthermore, the witness averred that out of the said monies, the sum of Kenya Shillings 28, 055, 000/= only was to be paid directly to Bank of Baroda (K) Ltd while the remainder thereof amounting to Kes.336, 416, 286/= only, was to be paid directly to and in favor of the Plaintiff.

31. Whilst under further cross examination, the witness testified that same vacated the suit property on or about the year 2012. However, the witness added that the 1st Defendant did not ask the Plaintiff to vacate the suit property.

32. Additionally, the witness averred that the Plaintiff vacated the suit property in 2012 because the Plaintiff obtained the information relating to vacating the suit property from the Land Officers during the interactive sessions attendant to the compulsory acquisition.

33. It was the further testimony of the witness that the Tenants who had hitherto been in occupation of the suit property, also vacated and left in the year 2012.

34. On the other hand, the witness testified that the Plaintiff herein is seeking for compensation on account of, inter-alia, loss of income as well as loss of rents, which the Plaintiff company would have

obtained from the various tenants, were it not for the delay by the 1st Defendant to release and/ pay the compensation money.

35. Other than the foregoing, the witness also pointed out that the Plaintiff herein is also claiming the Interests which same paid to and in favor of Bank of Baroda (K) Limited; and which Interests became payable merely because the 1st Defendant had failed to timeously and promptly settle the liabilities which was due and payable to the Bank.

36. It was the further evidence of the witness that the Plaintiff herein is also entitled to recovery of the land rates which were paid to and in favor of the County Government of Nairobi. However, when pressed to authenticate why the Plaintiff company proceeded to and paid Land rates, long after the suit property had been compulsorily acquired, the witness responded by stating that the rates were paid by the Accounts Clerk of the Plaintiff company, when same went to pay for rates for the other properties owned by the Plaintiff company.

37. As pertains to when the 1st Defendant took possession of the suit property, the witness herein indicated that same was not aware of the date of taking of possession. Nevertheless, the witness added that same is aware that the 1st Defendant herein had issued a Temporary Occupation License to and in favor of a Third Party, in respect of the suit Property. In this regard, the witness alluded to Exhibit P29; as evidence of the issuance of the Temporary Occupation License.

38. The second witness called by the Plaintiff was Peter W Kanyungo, who testified as PW2. For good measure, the witness testified that same is a registered valuer carrying out his business under the name and style of M/s Circuit Valuers & Management Consultants.

39. Furthermore, the witness testified that same is a graduate, holding a Bachelor's Degree in Land Economics and further that same is also registered as a valuers with the designated Institute and thus authorized to practice as such.

40. Additionally, the witness testified that same was retained and or instructed by the Managing Director of the Plaintiff Company to undertake valuation of L.R No, 209/ 14694/1; and that pursuant to the instructions, same proceeded to and undertook the inspection and thereafter valuation of the named property.

41. Subsequently, the witness averred that he proceeded to and prepared a Valuation report dated the 30th March 2015, which same sought to produce and tender before Honourable court as evidence. For good measure, the Valuation report dated the 30th March 2015; was thereafter tendered and produced before the Honourable court and same was marked as Exhibit P27.

42. Other than the foregoing, the witness also averred that same was paid the sum of Kes.160, 000/= Only, on account of Professional fees. In this regard, the witness alluded to a receipt dated the 12th April 2015, which was issued to and in favor of the Plaintiff company; as evidence of receipt of the Professional Fees.

43. On cross examination by Learned Counsel for the 1st, 3rd and 4th Defendants, the witness testified that the Plot in question, which same had been requested/instructed to inspect and value was developed with Go-downs. However, the witness added that at the time of the valuation of the suit property, the Go-downs were not occupied and or being used or at all.

44. Furthermore, the witness averred that at the time when he carried out and or undertook the valuation of the Property, same was not aware that the suit Property had been compulsorily acquired.

45. Be that as it may, the witness averred that same carried out and undertook valuation and upon completion of the valuation exercise; the same prepared the valuation report which showed that the value of the property amounted to Kes.736, 000, 000/= only

46. Whilst under further cross examination, the witness testified that the instructions that same was given to warrant the valuation of the suit property; was to the effect that the valuation was for purposes of Compulsory acquisition.

47. On cross examination by Learned Counsel for the Second Defendant, the witness testified that the property that same was instructed to value, was a Leasehold property. Further, the witness added that whilst valuing a Leasehold property, the term of the Lease is relevant in arriving at the final value.

48. Additionally, the witness averred that same undertook the valuation exercise on the 15th March 2015; and that in the course of the valuation, same established that the acreage of the suit Property was 0.949 Ha.

49. Be that as it may, when shown a copy of the Certificate of official search relating to and in respect of the suit property, the witness pointed out that the acreage shown therein was 0.949 Ha. However, when shown a copy of the award, the witness pointed out that the award in question showed and confirmed that the suit Property which was being acquired on behalf of the 1st Defendant measured 1.006 Ha.

50. It was the further testimony of the witness that in the course of undertaking the valuation exercise, same relied on Comparables; which the witness explained to be such properties in comparable nature in terms of location and area.

51. Nevertheless, the witness conceded that the Valuation Report tendered and produced before the Honourable court does not contain and or provide details of any comparable property, which were used and/or relied upon by himself to arrive at the amount at the foot of the Valuation report.

52. On the other hand, the witness testified that the suit property, which same valued on the 30th March 2015; was contained and appeared in Kenya Gazette notice Number 5608 of 27th May 2011. Further, the witness added that same has since established that the property in question was the subject of Compulsory acquisition as shown in the Letter of award dated the 16th September 2011.

53. It was the further testimony of the witness that by the time same carried out and undertook the valuation exercise, the Buildings/Go-downs standing on the suit property were still intact. In addition, the witness testified that similarly, the Road had not also been constructed.

54. Other than the foregoing, the witness testified that by the time same undertook the valuation exercise in the year 2015, no doubt the value of the suit property had increased/ appreciated; when compared/ contrasted with the value obtaining thereon in the year 2011.

55. Finally, the witness testified that where a Property has been compulsorily acquired, the payment of rates, if any, would shift to the owners as pertains to the Compulsory acquisition. In this case, the witness clarified that the Land Rates as pertains to the suit property, would be payable by the Government and not the Plaintiff.

56. The Third witness who testified on behalf of the Plaintiff was Ponnusamy Shivaji Saravanakumar. For clarity, same testified as PW3.

57. It was the testimony of the witness herein that same is a Director of a company known as PRD RIGS (K) LTD; based within the City of Nairobi. Furthermore, the witness added that his company was at

the material point in time a Tenant of the Plaintiff herein, occupying Go-down Number 8 on L.R No. 209/14694/1- Nairobi.

58. Further and in addition, the witness testified that his Company entered into and executed a Lease Agreement with the Plaintiff herein for a duration of 5 years and 3 months; commencing from the 1st October 2009.

59. On the other hand, it was the testimony of the witness that on or about the 27th May 2011, the 2nd Defendant herein published a Notice of intention to acquire all of the Property otherwise known as LR 14694/1 – Nairobi; for purposes of the construction of the Eastern and Northern Bypass (Mombasa Road/ City Cabanas and complementary works) by the Defendants.

60. Furthermore, the witness added that arising from the Notice of intention to compulsorily acquire the suit Property, the Plaintiff and the Tenants who were in occupation of portions of the suit property were invited to attend a Public hearing which was scheduled to take place on the 14th July 2011.

61. On the other hand, the witness averred that thereafter the tenants of the Plaintiff company were asked to and indeed tendered quotation relating to the expenses necessary to facilitate relocation of their businesses to alternative areas. In this regard, the witness averred that his Company indeed complied and submitted her claims.

62. It was the further testimony of the witness that subsequently, his Company was paid the sum of Kes.5, 219, 500/= only; on account of full and final compensation; which amount included 15% bonus, being monies to cater for expenses of moving out of the suit property and relocating her company business elsewhere.

63. Other than the foregoing, the witness alluded to his Witness Statement dated the 19th July 2019; and sought to adopt and admit same as Further Evidence in respect of the instant matter.

64. Furthermore, the witness averred that the payment of Kes.5, 219, 500/= only, was rendered and/or made vide RTGS, directly into the account of his company. In this regard, the witness tendered and produced in evidence a copy of the RTGS statement, which was marked as Exhibit P34.

65. On cross examination by Learned counsel for the 2nd Defendant, the witness pointed out that his Company was a tenant in the premises belonging to and owned by the Plaintiff herein. Furthermore, the witness added that the Tenancy agreement between his Company and the Plaintiff was indeed reduced into writing and was thereafter signed/executed by the respective Parties.

66. Nevertheless, the witness testified that the Tenancy agreement, which has been alluded to has not been produced and/or tendered before the Honourable court as evidence. However, the witness reiterated that his company was indeed a tenant in the suit premises and that the Lease in question commenced on the 1st October 2009 and same was to last up to and including January 2014.

67. With the foregoing testimony, the Plaintiff's case was closed.

1st, 3rd and 4th Defendants' Case:

68. The 1st, 3rd and 4th Defendants herein called one witness, namely; Abdul Kadir Ibrahim Jatani. For good measure, same testified as DW1.

69. It was the evidence of the witness that same is currently the Deputy Director In charge of Survey and working with the 1st Defendant, namely; Kenya Urban Roads Authority.

70. Additionally, the witness testified that by virtue of his portfolio and employment with the 1st Defendant; same is familiar and conversant with the subject matter.

71. Additionally, the witness averred that same is aware that the Commissioner of Land issued and published a Notice of intention to compulsorily acquired L.R No. 209/14694/1, for purposes of construction of the Eastern and Northern bypass (Mombasa Road/ City Cabanas Road Interchange).

72. Furthermore, the witness averred that following the publication of the Gazette Notice Number 5609; dated the 27th May 2011, the Commissioner of Land thereafter convened and held Public hearing pertaining to and concerning the compulsory acquisition relating to and concerning, inter-alia, the suit property.

73. It was the further testimony of the witness that on the 8th September 2011, the 1st Defendant herein received communication from the Ministry of Lands confirming that all the necessary processes had been complied with and or undertaken; and thereafter the Ministry of Lands forwarded a payment scheduled; containing the details of the persons to be compensated, as well as the requisite amounts to be paid.

74. Other than the foregoing, the witness testified that one of the persons whose details was contained in the payment schedule, forwarded and or submitted by the Ministry of Lands was the Plaintiff herein.

75. Additionally, the witness testified that thereafter the 1st Defendant processed and paid out monies to and in favor of the Plaintiff company. For clarity, the witness averred that the monies to and in favor of the Plaintiff company were paid out in two tranches.

76. In particular, the witness testified that the come of Kes.100, 000, 000/= only was paid out to and in favor of the Plaintiff on the 4th February 2015, whereas the second tranche amounting to Kes.236, 416, 286/= only, was paid on the 3rd June 2015.

77. Other than the foregoing, the witness averred that the payments to and in favor of the Plaintiff company were made in accordance with the provisions of Section 13 of the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed). In any event, the witness added that the payments were made as soon as was reasonably practicable and that the Plaintiff herein received the monies without any objection and or reservation.

78. Other than the foregoing, the witness referred to his witness statement dated the 18th July 2019; and thereafter sought to adopt and rely on the witness statement. In this regard, the Witness statement was duly adopted and admitted as the evidence in chief on behalf of the witness.

79. Other than the foregoing, the witness also referred to the List and Bundle of Documents dated the 19th May 2017; containing 9 documents and thereafter sought to adopt and rely on same. In this regard, the documents at the foot of the named List of Documents were admitted and constituted as Exhibits D1 to D9, respectively.

80. On cross examination by Learned counsel for the 2nd Defendant, the witness herein pointed out that same has worked with the 1st Defendant for a duration of more than 12 years and thus same is conversant with the process pertaining to compulsory acquisition.

81. Furthermore, the witness added that by the time the compulsory acquisition herein was being undertaken, National Land Commission, namely, the 2nd Defendant herein had not been established. In any event, the witness added that the 2nd Defendant was established and created in the year 2012.

82. Additionally, the witness testified that as pertains to the subject matter, same has come across a Valuation report prepared by and on behalf of the Plaintiff. In addition, the witness averred that the Valuation Report in question was prepared on the 30th March 2015.

83. Be that as it may, the witness averred that the Valuation Report by and on behalf of the Plaintiff herein could only be prepared and be presented during the stage of Enquiry and not otherwise.

84. However, the witness added that the stage of Enquiry was undertaken in the year 2011; and thereafter an award was made by the Commissioner of Lands, (now defunct) to the Plaintiff herein.

85. In any event, the witness further averred that the final payment to and in favor of the Plaintiff was made on the 3rd June 2015; and therefore the Valuation Report prepared by and on behalf of the Plaintiff on the 30th March 2015; is irrelevant.

86. Whilst under further cross examination, the witness averred that the 1st Defendant herein has not taken possession of the suit property. In addition, the witness testified that no Notice of taking possession of the suit property has since been issued and/or served by the National Land Commission.

87. Further and in addition, the witness also averred that the 1st Defendant has not taken possession of the suit property because the 1st Defendant is still waiting to acquire Funds to commence the intended Road works. Consequently and in this regard, the witness averred that the suit property is still under the custody and possession of the Plaintiff.

88. As pertains to the payments which were to be made to and in favor of Bank of Baroda (K) Ltd, the witness pointed out that the sum of Kes.28, 055, 000/= only, was indeed released and paid out to the Bank directly. However, the witness averred that same was not privy to and or knowledgeable of the date when the payments were made to the named bank.

89. At any rate, the witness averred that insofar as the monies payable to the Bank were paid directly thereto, no Interests can be claimed by and or become payable to the Plaintiff.

90. On cross examination by Learned Counsel for the Plaintiff, the witness testified that the intention to compulsorily acquire the suit property was published on the 27th May 2011. Besides, the witness added that thereafter an award was made to and in favor of the Plaintiff on the 2nd September 2011.

91. It was the further testimony of the witness that the award to and in favor of the Plaintiff herein was thereafter accepted by and on behalf of the Plaintiff on the 16th September 2011.

92. Whilst under further cross examination, the witness averred that the payments pertaining to and in favor of the Plaintiff was made vide two tranches, with the 1st payment being made on the 2nd February 2015; whilst the second tranche was paid on the 3rd June 2015. Nevertheless, the witness added that the payments in question were made after a duration of four years.

93. Other than the foregoing, the witness also testified that the 1st Defendant herein also paid to and in favor of Bank of Baroda the sum of Kes.28, 055, 000/= only, which payment were made directly to the Bank. However, the witness averred that same could not point out the date when the said payments were released to and or made in favor of the Bank.

94. Other than the foregoing, the witness averred that the Plaintiff herein wrote various Letters to the 1st Defendant and in respect of which same kept on urging the 1st Defendant to pay the various monies contained at the foot of the Letter of award. In this respect, the witness alluded to various Letters, inter-alia the Letter dated the 30th December 2013 and which Letter was responded to by the 1st Defendant letter dated the 10th January 2014.

95. Additionally, the witness testified that if the banking facility which had been taken by the Plaintiff, had not been settled and or liquidated; then same would continue to attract interests. However, the witness clarified that same is aware that the monies due and payable to the Bank were duly paid and or settled.

96. As pertains to the question of possession of the suit property, the witness herein testified that the 2nd Defendant had never issued and served the notice of taking possession. In this regard, the witness averred that in the absence of a Notice of taking possession, the suit property remained under the custody and possession of the Plaintiff.

97. Other than the foregoing, the witness testified that same is not aware of or privy to any Temporary Occupation License, issued over and in respect of the suit property by the 1st Defendant or otherwise.

98. In any event, when shown the document at page 360 of the Plaintiff's trial bundle, the witness indicated that same was not aware of the said document.

99. In respect of whether or not the Plaintiff herein had tenants on the suit property, the witness pointed out that same was aware of the fact that the Plaintiff had tenants on the suit property and in any event the tenants on the suit property were duly compensated. However, the witness clarified that same was not aware of the details/names of the tenants.

100. Furthermore, the witness added that the details of the tenants, who were hitherto on the suit property, were contained at the foot of the payment Schedule that was forwarded to the 1st Defendant from the Ministry of Lands.

101. With the foregoing testimony, the case by and on behalf of the 1st, 3rd and 4th Defendants was closed.

d. 2ND Defendant's Case:

102. Though the 2nd Defendant duly entered appearance and filed Statement of Defense; same however did not file any List and Bundle of Documents. Similarly, the 2nd Defendant also did not file any List of witnesses or witness statement or at all.

103. Furthermore, upon the close of the Plaintiff's case, Learned counsel for the 2nd Defendant sought to and addressed the court; and whereupon same intimated that the 2nd Defendant would not be calling any witness.

104. Arising from the foregoing, the 2nd Defendant's case was duly closed, albeit without production of any evidence and or documentary exhibit or at all.

Submissions By The Parties

a. Plaintiff's Submissions

105. The Plaintiff herein filed two sets of written submissions dated the 2nd March 2023; and the Supplementary Submissions dated the 25th May 2023, respectively. In respect of the written submissions, the Plaintiff has raised and highlighted five (5) salient issues for due consideration by the Honorable court.

106. Firstly, Learned counsel for the Plaintiff has submitted that the Notice of intention to compulsorily acquire the suit property was published on the 27th May 2011; and in respect of which the Commissioner of Lands, now defunct, intimated her intention to acquire the suit property for purposes of the construction of the Eastern/Northern bypass (Mombasa Road/City Cabanas and Complementary Works).

107. Furthermore, Learned counsel has contended that subsequently, the Commissioner of Lands convened and held a Public hearing; whereby the various Parties who had an Interest over and in respect of the suit property were invited to attend and to ventilate/canvass the nature of their interest to and in respect to the suit property.

108. On the other hand, Learned counsel for the Plaintiff has submitted that thereafter the Commissioner of Lands issued a notification of award, wherein the compensation over and in respect of the suit property was assessed and certified in the sum of Kes.364, 471, 286/= only.

109. Additionally, Learned counsel has submitted that upon the issuance of the notification of award, the Plaintiff herein proceeded to and executed a statement accepting the award. Instructively, Learned counsel has pointed out that the statement accepting the award was dated the 26th September 2011.

110. Be that as it may, Learned counsel has submitted that despite signing and returning the statement accepting the award on the 16th September 2011, the 1st and 2nd Defendants herein failed and/or neglected to promptly pay out and release the compensation to and in favor of the Plaintiff. In any event, Learned counsel has submitted that the payments on account of compensation were only made out on the 2nd of February 2015 and 3rd June 2015, respectively.

111. Based on the foregoing, Learned counsel for the Plaintiff has submitted that the payment of the compensation monies were rendered and/or made with inordinate and undue delay and thus defeating the constitutional and statutory threshold, which envisaged that such payment ought to be made promptly and without undue delay.

112. To buttress the submissions that the payment on account of the compensation was made contrary to and in violation of the statutory threshold, Learned counsel for the Plaintiff has cited and relied on various decisions, inter-alia, Attorney General versus Zinj Ltd (Petition No. 1 of 2020 KESC 23) (KLR); Reg versus Justices of Berkshire, for Q. B Division 471; Patrick Musimba versus National Land Commission & 4 Others (2016)eKLR; Geysher International Assets Ltd versus Attorney General & 3 Others (2021)eKLR and Commissioner of Lands versus Essaji Jiwaji & Public Trusttees (1978)eKLR, respectively.

113. In short, Learned counsel for the Plaintiff has submitted that the compensation at the foot of the compulsory acquisition was neither paid promptly nor timeously, in accordance with the dictates of Article 40(3) of *The Constitution* 2010.

114. Secondly, Learned counsel for the Plaintiff has submitted that pursuant to and in terms of Section 19(1) of The Land Acquisition Act, Chapter 295, now repealed, possession of the suit property, which was the subject of compulsory acquisition was to be taken by the acquiring authority/Commissioner of lands upon issuance and service of a Notice to take possession and which notice was to take effect not latter than 60 days from the date of the award.

115. Nevertheless, Learned counsel proceeded to and pointed out that the fact that no Notice of taking possession was ever issued by the Commissioner of Land; does not negate the legal position that possession was to be taken not latter than 60 days from the date of issuance of the award.

116. Consequently and in the premises, Learned counsel for the Plaintiff has submitted that 1st Defendant herein is deemed to have taken possession of the suit property within 60 days from the date when the award was made and in any event, the default by the 2nd Defendant to issue and serve the Notice of taking possession does not affect the legal position as pertains to the date of taking of possession.

117. Furthermore, Learned counsel for the Plaintiff has submitted that the 1st and 2nd Defendants herein, cannot be heard to invoke and rely on the failure to issue and serve the Notice of taking possession, as a basis to deny and or deprive the Plaintiff of her right and or entitlement to payment of Interests, arising from the delayed compensation.

118. Additionally, Learned counsel has also submitted that the 1st and 2nd Defendants cannot also agitate their defense on the basis of an illegality; arising from the failure by the 2nd Defendant to perform her statutory duty and or obligations. In this regard, Learned counsel for the Plaintiff has invoked the Doctrine of that no suit and/or Defense can be anchored on the basis of an illegality.

119. In support of the contention that possession was deemed to be taken not latter than 60 days from the date when the award was made, Learned counsel for the Plaintiff has cited and relied on, inter-alia, Kenafric Beakery Ltd versus National Land Commission & 2 Others (2017)eKLR; Monica Wambui Kamau & Another (Suing as the legal representative of the Estate of James Kamau Thiong'o) versus Golden Sparrow Trading Company Ltd & 3 Others (2021)eKLR; Elizabeth Wambui Githinji & 29 Others versus Kenya Urban Roads Authority & 4 Others (2019)eKLR, respectively.

120. Thirdly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein is entitled to the various reliefs, whose details, have been enumerated at the foot of the amended Plaint dated the 16th February 2021.

121. In respect of the claim, pertaining to and or concerning recovery of Interests that was paid to and on account of the loan facility with Bank of Baroda of Kenya Ltd; Learned counsel for the Plaintiff has submitted that the Interest in question was paid insofar as the 1st and 2nd Defendant had failed to timeously and promptly release the sum of Kes.28, 055, 000/= only to Bank of Baroda (K) Ltd, without undue delay.

122. Furthermore, Learned counsel for the Plaintiff has submitted that as a result of the delay by and on behalf of the 1st and 2nd Defendants to pay the money promptly following the acceptance of the award in September 2011; the Plaintiff herein was obliged to and indeed paid Interests in favor of the bank for the duration including October to December 2011; as well as January to May 2012, respectively.

123. In this respect, Learned counsel has implored the Honourable court to find and hold that the Interests in question amounting to Kes.1, 920, 268/= only, which was paid by the Plaintiff, as a result of the failure and/or omission by the 1st and 2nd Defendants to act timeously and/or promptly, in accordance with the stipulations of the law; is recoverable.

124. In respect of the claim for Loss of income, Learned counsel for the Plaintiff has submitted that the Plaintiff herein lost income on account of Rents , which same would have obtained and/or extracted from her Tenants, who were forced to vacate the suit property on or about the year 2012, on account of compulsory acquisition.

125. To vindicate the claim premised on Loss of income, Learned counsel for the Plaintiff has cited and relied on the Decision in the case of Isiaya Mugambi Muketha versus The Attorney General & 2 Others; John Muchai Mugambi (Interested Party).[no citation was availed]

126. Premised on the claim for loss of income, Learned counsel for the Plaintiff has thereafter proceeded to tabulate the Quantum of monies due and payable on account of Loss of income. For good measure, the tabulation of what is deemed to be Loss of income is contained at the foot of Paragraphs 83, 86 of the written submissions dated the 2nd March 2023.

127. Similarly, Learned counsel for the Plaintiff has submitted that the Plaintiff herein is also entitled to an award on account of the diference in value of the suit property from when the award was made to when payment was effected to and in favor of the Plaintiff.

128. Notably, Learned counsel for the Plaintiff has contended that the value of the suit property substantially appreciated between the time when the award was made up to and including the time when the compensation was released and/or paid out to the Plaintiff.

129. Furthermore, Learned counsel has submitted that compensation ought to be reflect the value of the property and should operate as restitution and not otherwise. In this regard, Learned counsel has contended that where the compensation is not equivalent to the value of the property under compulsory acquisition; then the compensation cannot be deemed to be just and in accordance with the provisions of Article 40(3) of *the Constitution*, 2010.

130. In support of the submissions that the Plaintiff herein is entitled to payment on account of the difference in value of the suit property from when the award was made to when payment was released; Learned counsel has cited the decision in the case of Bank of India versus Commissioner of Lands & Another (2011)eKLR.

131. Additionally, Learned counsel has submitted that the Plaintiff herein is also entitled to Interests on compensation in accordance with the law. In this regard, Learned counsel has contended that on the basis of the delay to pay out and/or release the compensation award to the Plaintiff; the value of the money reduced and the Plaintiff has been unduly prejudiced.

132. Arising from the foregoing, Learned counsel for the Plaintiff has therefore submitted that the Plaintiff is thus entitled to indemnification on account of Interests in accordance with the provisions of Section 16 of the Land Acquisition Act, now repealed.

133. In any event, Learned counsel has submitted that the Honourable court should find it appropriate to decree and award payment of Interests at the rate of 20% per annum; from the date when the award was made up to and including the date of payment in full.

134. To anchor the claim for payment of Interests on the compensation made to the Plaintiff; Learned counsel has cited and relied on the case of Toyobo Investment Ltd versus Rift Valley Water Services Board & 2 Others (2015)eKLR, wherein it was stated that the interest rate of 6% per annum stipulated vide Section 6 of The land Acquisition Act, now repealed; was merely the floor and not the ceiling. In this regard, counsel implored the court to exercise discretion and upgrade the interests to 20% per annum.

135. Finally and on account of the reliefs sought, Learned counsel for the Plaintiff has submitted that the Plaintiff herein is also entitled to an award on account of aggravated Damages. However, despite making submissions pertaining to entitlement on account of aggravated damages; Learned counsel for the Plaintiff has however failed to submit on the reasonable Quantum (sic) to be awarded, in any event.

136. Be that as it may, Learned counsel for the Plaintiff has cited and relied on various decisions to anchor the claim of entitlement to aggravated damages, inter-alia, Obong'o & Another versus Municipal Council of Kisumu (1971) EA 91; David Murithi Githaiga versus CFC Stanbic Bank Ltd (2018)eKLR and Geoffrey Githiri Kamau v Attorney General (2015)eKLR, respectively.

137. Fourthly and in answer to the submissions by Learned counsel for the 2nd Defendant that the instant suit is statute barred by dint of Section 67(b) of the *Kenya Roads Act* No. 2 of 2007; Learned counsel for the Plaintiff has submitted that the import and tenor of Section 67(b) of the *Kenya Roads Act*, (supra),

out to have been raised and canvassed as a preliminary objection and not as a substantive question of law.

138. Furthermore, Learned counsel for the Plaintiff has submitted that the issue of the Plaintiff's suit being time barred has been raised as an ambush by the 2nd Defendant and same is calculated to defeat the Plaintiff's suit, albeit through the backdoor.

139. For good measure, Learned counsel for the Plaintiff has submitted that the raising of the question of limitation at the tail end of the suit constitutes a classical case of an ambush.

140. Nevertheless, Learned counsel for the Plaintiff has proceeded and submitted that the cause of action in favor of the Plaintiff accrued when the Plaintiff was paid the last tranche, namely, on the 5th June 2015. In this regard, Learned counsel has contended that the 12 months alluded to and/or stipulated by dint of Section 67(b) of the Kenyan Roads Act would thus be computed from the 5th June 2015.

141. Based on the foregoing, Learned counsel for the Plaintiff has therefore submitted that the Plaintiff's suit was thus filed and lodged within the 12 months duration, stipulated and or envisaged vide the Provisions of Section 67(b) of the *Kenya Roads Act* No 2 of 2007.

142. Finally, Learned counsel for the Plaintiff has submitted that the question as to whether or not the Plaintiff herein issued and served the requisite Statutory Notice in terms of Section 67(a) of the *Kenya Roads Act* No 2 of 2007; is also irrelevant.

143. Nevertheless, Learned counsel has invited the Honourable court to find and hold that the Plaintiff indeed issued and served the 1st Defendant with the requisite notices, in terms in various demand notices; which were received and acknowledged by the Defendants herein.

144. In any event, Learned counsel for the Plaintiff has also submitted that the provisions of Section 67(a) *Kenya Roads Act* No 2 of 2007; as pertains to issuance and service of 30- days notice; upon the 1st Defendant, prior to commencement of suit, would constitute an infringement on the Plaintiff's Right of Access to Justice, as entrenched in Article 48 of *the Constitution* 2010.

145. Essentially, Learned counsel for the Plaintiff has therefore implored the Honourable court to find and hold that the Plaintiff has duly established and proved her case against the Defendants, jointly and/or severally.

146. Consequently and in the premises, learned counsel has thus implored the Honourable court to grant the reliefs sought at the foot of the amended Plaint; as well as to award costs to the Plaintiff.

b. Submissions By The 1St, 3Rd And 4Th Defendants

147. The 1st, 3rd and 4th Defendants' have filed written submissions dated the 12th April 2023; and in respect of which same have highlighted, canvassed and ventilated three (3) issues for consideration and determination by the Honourable court.

148. First and foremost, Learned counsel for the named Defendants has submitted that the 1st Defendant herein never took possession of the suit property prior to and or before the full payment of the compensation. In this respect, Learned counsel has therefore submitted that insofar as possession was never taken prior to and before full payment of the compensation; the Plaintiff herein cannot stake a claim for payment of interest, either as claimed or otherwise.

149. Furthermore, Learned counsel for the named Defendants has also submitted that the provision of Section 16(1) of The Land Acquisition Act, now repealed, which found the basis for payment of

Interests, can only be invoked and relied upon; if the acquiring authority has taken possession of the land prior to and before the payment of the compensation award.

150. Additionally, Learned counsel has also submitted that possession could only be deemed to have been taken by the acquiring authority if the Commissioner of Lands, had issued and served the requisite notice, indicating a specified day, not being latter than 60 days after the making of the award.

151. However, in respect of the instant matter Learned counsel has submitted that the Plaintiff has failed to tender and/or produced before the court any scintilla of evidence to show that same was ever served with a notice for taking of possession by the 2nd Defendant, either in terms of Section 16(1) of The Land Acquisition Act, now repealed or otherwise.

152. In a nutshell, Learned counsel for the named Defendants has therefore contended that it is not true that the Defendants took possession of the suit land in the year 2012, in the manner alleged or at all.

153. For good measure, the contents of paragraph 27 of the submissions on behalf of the named Defendants is instructive. In this regard, are same are reproduced as hereunder;

> " We maintain that the Defendants did not take possession of the suit land in 2012 as alleged by the Plaintiff and indeed have not taken possession up to date"

154. Secondly, Learned counsel for the named Defendants has submitted that the Plaintiff herein is not entitled to any of the reliefs that have been alluded to and or enumerated in the body of the amended Plaint or at all.

155. Furthermore, Learned counsel has submitted that the claim for recovery of Interests, if any, that was paid to and in favor of Bank of Baroda(Kenya) Limited; and amounting to Kes.1, 920, 268/= only, is not legally tenable.

156. In respect of the claim for Loss of income, Learned counsel for the named Defendants has submitted that the issue of Loss of income could only have been gone into at the time of the Public inquiry and the valuation of the suit property, prior to the making of the award. However, insofar as an award was duly made and thereafter accepted by the Plaintiff, the Plaintiff herein cannot turn back and now garner additional compensation albeit through the backdoor.

157. Ins support of the submissions that the Plaintiff herein is not entitled to the claim on the basis of loss of income on the suit property, Learned counsel for the named Defendants has cited and relied on the holding in Isaya Mugambi Muketha v Attorney General & 2 Others; John Muchai Mugambi (Interested Party). [Citation not availed]

158. As pertains to the claim based on the diference between the value of the property as at the time of making of the award and the time of payment of the award, Learned counsel for the named Defendants has submitted that such an award would be contrary to law and in particular the provisions of the Land Acquisition Act, now repealed; and the schedule thereto; which prescribe the matters to be taken into account whilst considering/determining the quantum of compensation payable for land that is to be compulsory acquired.

159. In this respect, Learned counsel for the named Defendants has cited and relied on the case of Five Star Agencies Ltd versus National Land Commission (2014)eKLR.

160. In respect of the claim for Interests on delayed compensation, Learned counsel for the named Defendants has submitted that the Plaintiff is not entitled to same. In any event, Learned counsel has invoked and relied on the provisions of Section 16 of the Land Acquisition Act, now repealed, which

is stated to only provide that interest is payable where the acquiring authority enters upon and takes possession long before payment of the compensation, which is said not to be the case herein.

161. Finally as pertains to the claims for aggravated damages, Learned counsel for the named Defendants has contended that the conduct of the 1st, 3rd and 4th Defendants has not been shown to have been malicious, reckless, spiteful and/or borne out of malevolence; to warrant payment of aggravated damages.

162. In support of the submissions that the claim for aggravated damages is not payable, Learned counsel for the named Defendants has cited and relied on the case of Neem Properties Ltd versus Wells Fargo (2021)eKLR.

163. In view of the foregoing, Learned counsel for the named Defendants has therefore submitted that the Plaintiff herein has not proved her suit to the requisite standard and thus same ought to be dismissed with costs.

c. 2ND Defendant's Submissions

164. The 2nd Defendant herein filed written submissions dated the 27th April 2023; and in respect of which same has raised, highlighted and canvassed Three (3) issues for consideration by the Honourable court.

165. Firstly, Learned counsel for the 1st Defendant has submitted that the Plaintiff's suit before the Honourable court is statute barred by dint of Section 67(b) of the *Kenya Roads Act* No 2 of 2007, whose contents are crystal clear and explicit.

166. In particular, Learned counsel for the 2nd Defendant has submitted that the Plaintiff's cause of action arose and/or accrued immediately same executed the acceptance letter; wherein same accepted the award by and on behalf of the 2nd Defendant herein.

167. Furthermore, Learned counsel has submitted that insofar as the compensation ought to have been paid promptly and/or timeously, the moment the Plaintiff discerned a delay in the payment of the compensation, it behooved the Plaintiff to file and or commence her suit, seeking for recovery of inter-alia the compensation and any interests, payable thereof.

168. Additionally, Learned counsel has submitted that if the non-payment of the compensation and the accrued Interests was deemed as continuing injury and or Damage, then the Plaintiff herein ought to have filed the instant suit within six months from when the injuries and/or damage complained of ceased.

169. For good measure, Learned counsel for the Plaintiff has contended that the injury and or damage, if any, arising from the non-payment of the compensation and the accrues Interests thereon, is deemed to have ceased on the 4th June 2015, when the final tranche was paid to and in favor of the Plaintiff.

170. Based on the foregoing, Learned counsel for the 2nd Defendant has therefore contended that the Plaintiff ought to have filed the instant suit, if at all, within six months computed and reckoned from the 5th June 2015; and not otherwise.

171. In support of the foregoing submissions, Learned counsel for the 2nd Defendant has cited and relied on, inter-alia, the case of Willmary Development Ltd versus National Land Commission & Kenya National Highways Authority (2020)eKLR and John Kibor Kipkorir versus Kenya Rural Roads Authority (2018)eKLR, respectively.

172. Secondly, Learned counsel for the 2nd Defendants has submitted that the 1st Defendant never took possession of the suit property or otherwise. In this regard, Learned counsel has contended that the

taking of possession can only be confirmed and authenticated by the issuance and service of the notice of taking possession as stipulated vide Section 19(1) of the Land Acquisition Act.

173. Furthermore, Learned counsel has contended that to the extent that the Plaintiff has neither tendered nor produce before the Honourable court any evidence of the taking of possession by the 1st Defendant; it is deemed that no such possession has since been taken.

174. Thirdly, Learned counsel for the 2nd Defendant has submitted that the Plaintiff herein is not entitled to any of the reliefs which have been enumerated in the body of the amended Plaint or at all. In this regard, Learned counsel for the 2nd Defendant has repeated and re-agitated the very submissions which have been alluded to by and on behalf of the 1st, 3rd and 4th Defendants.

175. Nevertheless, Learned counsel for the 2nd Defendants has cited various decisions; namely, Kenafric Bakery Ltd versus national Land Commission & Others (2022)eKLR, Nairobi Star Publication Ltd versus Elizabeth Atieno Oyoo (2018)eKLR, George Ngige Njoroge versus Attorney General (2018)eKLR and Kenyatta National Hospital versus Dorcas Odongo & Another (2021)eKLR, respectively; to anchor the contention that the Plaintiff is not entitled to the reliefs sought at the foot of the amended Plaint.

Issues For Determination_

176. Having reviewed the amended Plaint filed by and on behalf of the Plaintiff herein and the Statement of Defense filed in opposition thereto; and having taken into account the Evidence tendered (oral and documentary) and upon taking into consideration the elaborate submissions filed by and on behalf of the respective Parties; the following issues do arise and are pertinent for determination;

    i. Whether or not the Plaintiff's suit is barred by dint of the provision of Section 67(b) of the *Kenya Roads Act* No 2 of 2007 or otherwise.

    ii. Whether the Plaintiff is entitled to the Reliefs sought or any of the reliefs alluded to at the foot of the amended Plaint.

Analysis And Determination

Issue Number 1

Whether or not the Plaintiff's suit is barred by dint of the provision of Section 67(b) of the *Kenya Roads Act* No 2 of 2007 or otherwise.

177. Before venturing to address and deliberate upon the issue herein, it is imperative to appraise and take into consideration the facts forming the background over and in respect of the subject dispute. Consequently and in this regard, I shall endeavor to and reproduce the pertinent facts that underpin the subject dispute.

178. It is common ground that the Plaintiff herein was the lawful and legitimate proprietor over and in respect of L.R No. 209/14964/1 – Nairobi, (hereinafter referred to as the suit property) which is situated along Mombasa Road.

179. Furthermore, it is noteworthy that the suit was property was identified and earmarked for compulsory acquisition for purposes of the construction of the Eastern/Northern Bypass (Mombasa Road/City Cabanas and Complementary Interchange Works). In this regard, the Commissioner of Land, now defunct, proceeded to and published a Gazette notice, wherein same intimated to the public in general and to the Plaintiff herein, the intention to compulsorily acquire the suit property. For good measure,

the Commissioner of land published Gazette Notice Number 5608 which was published on the 27th May 2011.

180. Subsequently, the Commissioner of Lands, now defunct scheduled a Public hearing pertaining to and concerning the compulsory acquisition of the suit property and thereby invited various Interested Parties, inter-alia, the Plaintiff and the Plaintiff's tenants, who were in occupation of the suit property, to make submissions pertaining to their respective claims.

181. First forward, the representations and/or claims by and on behalf of the Plaintiff and the Plaintiff's tenants were thereafter taken into account by the Commissioner of Lands, now defunct, and thereafter the Commissioner of Lands generated Letters of award to and in favor of inter-alia the Plaintiff herein.

182. For good measure, the Letter of award to and in favor of the Plaintiff was dated the 2nd September 2011 and same was accepted by the Plaintiff on the 16th September 2011. In this regard, the Plaintiff thus signified her acceptance of the amounts that had been computed by and on behalf of the Commissioner of lands as representing the fair value of the suit property, which was the subject of compulsory acquisition.

183. Following the acceptance of the award, it was incumbent upon the Commissioner of lands, now defunct; replaced by the 2nd Defendants and the acquiring authority, namely, the 1st Defendant, to process and payout the compensation to the Plaintiff herein timeously and with due promptitude. Instructively, the position of the law is that such payment are supposed to be just and prompt.

184. Nevertheless, there is no gainsaying that the 1st and 2nd Defendants herein failed or neglected to pay the compensation money promptly and without undue delay. Indeed, evidence abound that the 1st tranche of the compensation was only paid to the Plaintiff on the 29th April 2015, whilst the second tranche was paid on the 4th June 2015, respectively.

185. Clearly and by any stretch of imagination, the payment of the compensation on the 29th April 2015 and 4th June 2015; respectively, constitutes inordinate and unreasonable delay in effecting the payments. Consequently, it cannot be said that the 1st and 2nd Defendants complied and/or adhered to the dictates of Article 40(3) of *the Constitution*, 2010.

186. Despite the foregoing, the question that now needs to be addressed and attended to is; whether the Plaintiff's suit, which touches on and concerns the question of payments of Interests on the compensation; has been timeously filed or otherwise.

187. To start with, there is no dispute that the entire compensation award has since been paid. Indeed, the last tranche was admittedly paid to and in favor of the Plaintiff on the 4th June 2015.

188. Consequently and in the premises, the tussle/ Dispute before the court is the Plaintiff's claim for interests arising out of the delay to process and pay out the compensation, promptly and without undue delay.

189. In this respect, there are two critical benchmarks, which would guide the court in determining whether the suit is statute barred or otherwise. Firstly, it is important to note that the acceptance of the award was made and communicated on the 16th September 2011.

190. Consequently and in view of the foregoing, it was incumbent upon the 1st and 2nd Defendants, to promptly and timeously to pay out the monies to and in favor of the Plaintiff. However, there is no gainsaying that the monies at the foot of the compensation was never paid promptly and in accordance with the law.

191. Owing to the foregoing, it is imperative to state and underscore that the moment the Plaintiff discerned that the 1st and 2nd Defendants were not processing and paying the compensation promptly and as required under the law, it behooved the Plaintiff to commence the requisite steps, including filing of court process, to procure and or compel the payment of the compensation award. For good measure, the Plaintiff herein was at liberty to take out and or commence Judicial Review proceedings to compel the performance of a statutory duty and obligations.

192. To my mind, the cause of action for recovery of the compensation money accrued to the Plaintiff upon lapse of reasonable time from the execution of the statement of acceptance. In this regard, the reasonable time would most probably be between the 16th September 2011 when the statement of acceptance was communicated to early January 2012. Consequently, the cause of action herein would be deemed to have arisen w.e.f 2012.

193. Arising from the foregoing, it was therefore incumbent upon the Plaintiff to commence and or mount her claim essentially against the 1st Defendant within 12 months, so as to fit within the stipulation contained vide the provisions of Section 67(b) of the *Kenya Roads Act* No 2 of 2007.

194. First forward, it could be very well be argued that the failure to process and pay the compensation and accrued Interests was a continuing injury and or damage being suffered by the Plaintiff. In this case, it then behooved the Plaintiff to ensue that her claim, if any, would then be filed before the court within six months when the injury and/or damage arising from the failure and/or inaction by the 1st Defendant abated and/or ceased.

195. I beg to proceed on the basis that the continued injury and damage, caused by the 1st Defendant in terms of failure to perform and/or execute her public duty pursuant to and in accordance with the *Kenya Roads Act*, inter-alia, processing and paying the compensation money on account of compulsory acquisition; ceased and/or abated on the 4th June 2015, when the last tranche of Kes.236, 416, 286/= only was paid out and/or released to the Plaintiff.

196. In this respect, once the 1st Defendant failed and/or neglected to pay (sic) interests arising from and/or attendant to the delayed compensation; it therefore behooved the Plaintiff to mount and/or lodge her claim seeking payment of Interests within six (6) months from the date of the payment of the last tranche.

197. To my mind, the last tranche having been paid on the 4th June 2015, the Plaintiff's cause of action relating to payment of Interests thus accrued w.e.f 5th June 2015; and same remained alive for a duration of six months therefrom. In my humble view, the six months duration stipulated and espoused by dint of Section 67(b) of the *Kenya Roads Act*, No. 2 of 2007; would run up to and including the 4th January 2016 or thereabout.

198. On the other hand, even assuming that the timeline between the 21st December 2015 to the 13th January 2016, would be deemed excluded; by dint of the provisions of Order 50 Rules 4 of the Civil Procedure Rules for purposes of filing pleadings (which I doubt, cover the commencement of suits); the six months duration would still have lapsed long before the 3rd of May 2016; when the original Plaint was filed and or lodged before the Honorable court as confirmed by Revenue receipt number 3547268 of even date.

199. At this juncture, it is appropriate to reproduce the provisions of Section 67(b) of the *Kenya Roads Act*, No. 2 of 2007, whose import and tenor have informed the deliberations in terms of the preceding paragraphs.

200. For ease of reference Section 67(b) of the *Kenya Roads Act* No. 2 of 2007 stipulates ass hereunder;

> 67. Limitation of actions
>
> Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and

(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and

(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

201. Additionally, the legal import and consequences of the provisions of Section 67(b) of the *Kenya Roads Act*, No. 2 of 2007; has been discussed and elaborated upon in various court proceedings. Instructively, it has been held that any claimant seeking to mount a claim against the 1st Defendant herein or the Kenya National Highways Authority; ought to mount the claims within the stipulated timeline.

202. Notably and for good measure, the import and tenor of Section 67(b) of the *Kenya Roads Act*, No. 2 of 2007; was deliberated upon and addressed by the Honourable court in the case of Willimary Development Limited versus National Land Commission & another [2020] eKLR, where the court held thus;

> " The Plaintiff is clear in its pleadings that the cause of action in its favour accrued on 28th May 2012. Under Section 67(b) of the Roads Act, any claim against the 2nd Defendant ought to have been commenced within twelve months from 29th May 2012. Even if we were to assume that interest is a continuing injury, interest continued to accumulate until 27th February 2017 when the principal was paid, then the Plaintiff was expected to file its claim within six months from 27th February 2017 when the principal sum was paid. This suit was filed on 3rd April 2018. It was therefore filed outside the statutory period and hence statute barred. In this regard, I agree with the decisions in NBI HCCC No.348 of 2013 Sumac Development Company Limited Vs Kenya National Highways Authority & 2 Others, and John Kibor Kipkorir (suing as the administrator of the Estate of William Kibor Ruto also known as Chebor Ruto Vs Kenya Rural Roads Authority (2018) eKLR . I therefore uphold the preliminary objection and proceed to strike out the Plaintiff's suit with costs to the 2nd Defendant."

203. Having re-examined the dictum espoused and alluded to in the decision (supra), I beg to point out that I share in the observation and the reasoning of the Learned Judge. Quite clearly, the payment of the compensation money and the consequential interests if any, were to be borne by the 1st Defendant and in this respect, any suit seeking redress pertaining to Interests ought to have been filed in accordance with the named provisions of the *Kenya Roads Act* No. 2 of 2007.

204. Consequently and in view of the foregoing analysis, I surmise that the Plaintiff's claim, essentially anchored on and pertaining to payment of Interests over and in respect of Delayed Compensation; is indeed statute barred.

Issue Number 2:

Whether the Plaintiff is entitled to the Reliefs sought or any or the reliefs alluded to at the foot of the amended Plaint.

205. As pertains to whether the Plaintiff herein is entitled to the rest of the reliefs sought for and enumerated in the body of the amended Plaint, it is appropriate to discuss each and every claim individually and thereafter to determine whether same is payable or otherwise.

206. Consequently and in view of the foregoing, I proposes to examine the reliefs sough seriatim. Firstly, the Plaintiff has sought for recovery of Interests which was paid on the loan facility with Bank of Baroda (K) Ltd and which payment were made on account of the fact that the 1st and 2nd Defendants had delayed and defaulted to remit the sum of Kes.28, 055, 000/= only to the said bank.

207. To this end, it is imperative to recall that the total award amounted to Kes.364, 471, 286/= only; out of which the sum of Kes.28, 055, 000/= only, was to be paid directly to M/s Bank of Baroda (K) Ltd.

208. Nevertheless, it has been contended that despite the clear stipulation of the law that the payments ought to have been prompt and thus meaning immediate and/or forthwith; the payments to and in favor of the Bank were never remitted until on the 11th May 2012.

209. Further and in addition, it has been contended that owing to the delay and/or default by and on behalf of the 1st and 2nd Defendant to promptly and timeously remit the money to Bank of Baroda; the bank levied and charged interests amounting to Kes.1, 920, 268/= only, which was paid and/or settled by the Plaintiff.

210. Having settled and/or paid the said sum of Kes.1, 920, 268/= only, on account of Interests to Bank of Baroda (k) Ltd; the Plaintiff herein is now seeking to recover the said amount from the 1st and 2nd Defendant.

211. Be that as it may, I beg to reiterate that the payment of the named amount of interests was made on or before the 11th May 2012; and therefore, if the Plaintiff herein was keen to pursue a cause of action relating to recovery of what was paid to the bank on account of interests, arising from the default and or inaction of the 1st Defendant; then same ought to have been commenced within 12 months from the date when that cause of action accrued.

212. Similarly and for good measure, I come to the said conclusion that the claim to recover the amount of Interests which was paid to and in favor of M/s Bank of Baroda (K) Ltd up to and including 11th May 2012; is statute barred by dint of Section 67(b) of *Kenya Roads Act*, No. 2 of 2007.

213. In my humble view, where a claim and/or cause of action is statute barred, such a cause of action is rendered redundant, otiose and sterile and cannot thus be mounted for purposes of determination by a court of law, or at all.

214. In this respect, it is imperative to adopt, restate and reiterate the dictum of the court of appeal in the case of Gathoni versus Kenya Co-operative Creameries Ltd[1982] eKLR, where the court stated and observed as hereunder;

> " The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done."

215. Additionally, the Legal implications and consequences of Limitation of actions, was also canvassed and elaborated upon by the Court of Appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another [2016] eKLR, where the court stated thus;

> " 33] With regard to the third issue, namely whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the "suit" having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit. That answers the third issue."

216. The second relief relates to the claim on account of Loss of income on the suit property. In this respect, Learned counsel for the Plaintiff has submitted that as a result of the compulsory acquisition, the Plaintiff's tenants were forced to vacate the suit property, despite the fact that their tenancies were still in existence.

217. Furthermore, Learned counsel has contended that as a result of the vacation of the suit property by the tenants, the Plaintiff herein was deprived of the rental income/proceeds, which would have been generated from the various tenants, were it not for the actions of the Defendants.

218. As pertains to the claim for Loss of income, it is imperative to reproduce the contents of Paragraph 75 of the Plaintiff written submissions of 2nd March 2023.

219. For good measure, same are reproduced as hereunder;

> " The Plaintiff prays for loss of income on account of the tenants who vacated on the suit property due to the compulsory acquisition from the time each tenant vacated the property to the time when the lease agreement for each tenants would have lapsed'

220. My understanding of this limb of the claim is to the effect that the Plaintiff still deems himself to have been the owner of the suit property even though same had signed and executed a statement of acceptance of award on the 16th September 2011.

221. For good measure, I hold the firm opinion that upon signing and executing the statement of acceptance on the 16th September 2011; the Plaintiff herein ceased to hold any legal rights and/or interests to

the suit property and in any event, her interests transmuted to the monetary award, which same had accepted to be paid at the foot of compulsory acquisition.

222. Further and in addition, having accepted the compensation, which reflected the market value of the suit property plus the statutory 15%, in accordance with the Land Acquisition Act, Chapter 295 Laws of Kenya, now repealed; the Plaintiff cannot now be heard to stake a claim on account of loss of income, which claim can only be grounded if the Plaintiff had remained the lawful owner of the suit property.

223. Other than the foregoing, it is also important to take cognizance of the submission made by Learned counsel for the Plaintiff in terms of paragraphs 33 and 37 of the submissions dated the 2nd March 2023.

224. For ease of reference, the submissions are reproduced as hereunder;

> 33 The duty to take possession of land compulsorily acquired is vested strictly and sorely with the 2nd Defendant. The date on which possession is to be taken is set by the 2nd Defendant but such date must in any event not be latter than 60 days after the award is made.
>
> 37 Consequently, there exists a well- founded presumption that the 2nd Defendant took possession in accordance with the provisions of Section 19(1) of the Land Acquisition Act (now repealed) upon the lapse of 60 days from the issuance of the award

225. From the import of the submissions, which I have reproduced herein before, it is evident and apparent that the Plaintiff is conceding that the suit property vested in the 2nd Defendant upon lapse of 60 days from the date of issuance of award. Instructively, the 60 days would be deemed to lapse on or about 3rd November 2011; taking into account that the award was issued on 2nd September 2011.

226. Premised on the Plaintiffs own position and which position, the Plaintiff is estopped from running way from; it is thus conceded that the Plaintiff ceased to be the owner of the property and hence the property vested in the 2nd Defendant.

227. In my considered view, from the date when the suit property vested in the 2nd Defendant irrespective of whether the notice of taking possession was issued or otherwise, the Plaintiff ceased to be the owner of the property and canont therefore lay a claim for Loss of income, whatsoever.

228. The third claim that the Plaintiff has also raised touches on and/or concerns the diference in value of the suit property at the time of the award and the market value obtaining at the time of payment of the award.

229. I beg to address the claim herein in a two-pronged manner. Firstly, the claim for the diference in value between the time of the award and when the compensation was paid, presupposes that the Plaintiff had remained to be the owner of the suit property during the intervening period/ duration. However, I have pointed out elsewhere herein before, that upon accepting the award , the Plaintiff divested herself of any legal rights and interests over the suit property.

230. Secondly, the claim in respect of the diference in value between the time of the award and the time of the payment of compensation is anchored on the basis of the valuation report dated the 30th March 2015; which was produced as exhibit P27. However, it is important to point out that as at the 30th March 2015, when the impugned valuation was being undertaken on the suit property, same was Public property, having been duly acquired for and on behalf of the 1st Defendant herein.

231. Further and in addition, the Plaintiff herein who was issuing instructions and seeking to procure a valuation report over and in respect of the suit property, was well aware of the fact that the suit property

was long acquired and indeed she had executed a statement of acceptance of the award on the 16th September 2011.

232. Lastly, it is also not lost on this court that the foundation upon which the impugned valuation report was procured and obtained was also erroneous and thus vitiates the entire substratum of the valuation report.

233. In this respect, it is important to take cognizance of the terms of reference reproduced in the body of the Valuation Report, which terms states as hereunder;

> " We received instructions from the managing director, Mehisha Enterprises Ltd of P.O Box 48162 -00100, Nairobi, to carryout an open market valuation of the above property for compulsory acquisition purposes"

234. Other than the terms of reference, the general remarks contained in the conclusion of the report also state as hereunder;

> " this being a compulsory acquisition of the property, Section 36(4) of The Land Acquisition Act allows for an additional 15% disturbance allowance to be added in the final valuation figure.
>
> In accordance with our terms of reference, limiting conditions and general remarks we value the above property for compulsory acquisition in the total terms of Kes.736, 000, 000/= only made up as follows.

235. Notably, the valuer was undertaking the impugned valuation allegedly for purposes of compulsory acquisition. However unknown to him (Valuer), the suit property was long compulsorily acquired and an award made out to and in favor of the Plaintiff on the 2nd September 2011.

236. Surely, the valuer in question proceeded on a wrong premise/ Foundation; and therefore the wrong premise colors and by extension vitiates the entire valuation report. In this regard, same is therefore invalid and devoid of any probative value.

237. The next claim which has also been sought for by the Plaintiff herein relates to refund of Kes.549, 270/ = only being Land rates which were allegedly paid out to the City County Government of Nairobi, for and in respect of the suit property.

238. On behalf of the Plaintiff, it was contended that the Plaintiff continued to and indeed paid Land rates in respect of the suit property, even though same had long been acquired by and on behalf of the 1st Defendant herein.

239. However, when cross examined as to why the Plaintiff proceeded to pay land rates even though same was aware that the suit property had long been compulsorily acquired, PW1 stated as hereunder;

> " Í also paid land rates to the city county government of Nairobi. I paid the rates because the clerk chose to pay for the same when he was paying the rates for the other properties belonging to the Plaintiff".

240. Other than PW1; PW2 also spoke to the question of payment of Land rates. In particular, PW2 stated thus;

> " the rates would shifts to the owners once the compulsory acquisition is done. In this case the rates would be paid by the government and not the Plaintiff herein"

241. Two things do arise from the evidence tendered by and on behalf of the Plaintiff. Firstly, the payment of land rates by the Plaintiff was borne out of the Plaintiff's own volition. In this regard, it is appropriate to underscore that the Plaintiff was not under compulsion to pay any land rate.

242. Secondly, the payment of land rates by and on behalf of the Plaintiff over and in respect of the suit property was informed by the ignorance/ want of knowledge on the part of the Plaintiff herein. Clearly, had the Plaintiff sought for legal counsel, no doubt, same would have been duly advised.

243. In any event and for good measure, even the Plaintiff's own valuer, would have given the Plaintiff the clear position in the manner alluded by himself whilst under cross examination by Learned counsel for the 2nd Defendant.

244. Additionally, the Plaintiff herein has sought to procure and or obtain refund of the sum of Kes.160, 000/= only being the amount paid to and in favor of the valuer, for purposes of undertaking the valuation exercise.

245. Though the receipt in proof of the payment of Kes.160, 000/= only was tendered and produced before the Honorable court; the question however, is whether the payment was precipitated by the Defendants or any of the Defendants.

246. However, it is my humble view that the instructions to commence and undertake the impugned valuation exercise, was unnecessary and act in futility. For good measure, no reasonable person could instruct a valuer to undertake valuation for purposes of compulsory acquisition on the 30th March 2015, whilst knowing that the suit property stood compulsorily acquired as at the 2nd September 2011; when the letter of award was issued.

247. Additionally and in my humble view, the engagement of the valuer and the payments that were made unto him, can only be deemed as sumptuous payments, for convenience and pleasure of the Plaintiff. In this regard, same are no recoverable from any of the Defendants.

248. Lastly, the Plaintiff herein has sought for payment of aggravated damages. Nevertheless, it is important to point out that the relationship between the Plaintiff on one hand and the Defendants on the other hand was governed by clear provisions of statute and by extension Article 40(3) of *the Constitution*; which stipulates due compensation on account of compulsory acquisition.

249. Premised on the explicit provisions of the law and *the constitution*, where there is default to abide by the law; the delay to render just and prompt compensation would only attract atonement/ indemnity by payment of Interests and not otherwise.

250. In any event, and even assuming that aggravated damages were payable, (which I humbly doubt), no evidence was placed before the court to show and/or establish that the conduct of the Defendants herein was informed by malevolence, ill-will, spite and/or recklessness; to warrant the grant of aggravated damages.

251. As pertains to the law on award of aggravated damages, I beg to adopt and reiterate the dictum in the case of Nairobi Star Publication Ltd versus Elizabeth Atieno Oyoo (2018)eKLR, where the court stated and held thus;

> " 37. In seeking aggravated damages, plaintiff must satisfy the principles as laid out in Gatley On Libel And Slander 12th Edition para 9.18 at page 353 which deals with aggravated damages as follows:
>
> "The conduct of the defendant his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages in so far as they bear on the injury to him.
>
> "It is very well established that in cases where the damages are at large the judge can take into account the motives and conduct of the defendant, where they aggravate the injury done to the Plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing appropriate compensation."

252. To surmise, no evidence was placed before the Honourable court by and on behalf of the Plaintiff to demonstrate and/or prove that any of the Defendants herein acted with malice, spite and/or malevolence, whatsoever, to warrant an order for aggravated damages.

253. In a nutshell, I also come to the conclusion that no such damages are either due or payable to the Plaintiff herein, either as claimed or at all.

Final Disposition

254. Having appraised and analyzed the various issues, (whose details have been enumerated in the body of the Judgment); it must have come crystal clear, nay, apparent that the Plaintiff's suit beforehand, is clearly misconceived, bad in law and Legally untenable.

255. Consequently and in the premises, the Plaintiff's suit vide amended Plaint dated the 16th February 2021, is devoid of merits and thus courts dismissal. In this respect, same be and is hereby Dismissed.

256. As pertains to costs, I beg to point out that the 1st and 2nd Defendant herein had an obligation to comply with and adhere with Article 40(3) of *the Constitution*, 2010. However, there is no gainsaying that the 1st and 2nd Defendant did not comply with and/ or adhere thereto.

257. Further and in any event, it is important to underscore that a critical segment of the claim beforehand, namely, the claim for payment of Interests, has only collapsed because of Limitation of Actions by dint of Section 67(b) of The *Kenya Roads Act*, No. 2 of 2007.

258. In this regard and taking into account the foregoing; I am not disposed to condemn the Plaintiff to pay costs. Consequently, the appropriate order on costs is to the effect that Each Party shall bear own costs of the proceedings/suit.

259. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF AUGUST 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. J.B Macharia and Mr. Charles Lwanga h/b for Mr Edwin Mukele for the Plaintiff.

Mr Allan Kamau h/b for Ms. Nyawira for the 1st, 3rd and 4th Defendants.

Ms. Cecillia Masinde for the 2nd Defendant