



**Gollo & 3 others v Defence & 6 others (Petition E003 of 2021)
[2025] KEELC 1270 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
PETITION E003 OF 2021**

JO MBOYA, J

MARCH 13, 2025

**(2),40,165(3)(B),258,259 OF THE CONSTITUTION OF KENYA
2010ANDIN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL
RIGHTS UNDER ARTICLE 2 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: BREACH OF FUNDAMENTAL RIGHTS AND
FREEDOMS CONTRARY TO ARTICLE 40 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: CONTRAVENTION OF THE RIGHT TO OWN
PROPERTY CONTRARY TO ARTICLE 40 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE LAND ACT 2012ANDIN THE
MATTER OF: SECTION 25 OF THE LAND REGISTRATION ACT
2012ANDIN THE MATTER OF: THE COMMUNITY LAND ACT 2016**

AND

**IN THE MATTER OF: SECTION 1,14 OF THE AFRICAN CHARTER ON HUMAN
AND PEOPLES RIGHTS [ACHPR].**

BETWEEN

**TACHE BONSA GOLLO 1ST PETITIONER
PATRICK HALAKE JALDESA 2ND PETITIONER
ABDULRAZAQ HAJI ADAN 3RD PETITIONER
ADAN HAPPI FALANA 4TH PETITIONER**

AND



THE CABINET SECRETARY, MINISTRY OF DEFENCE	1 ST RESPONDENT
CHIEF OF THE DEFENCE FORCES	2 ND RESPONDENT
COMMANDER OF KENYA ARMY	3 RD RESPONDENT
THE ATTORNEY GENERAL	4 TH RESPONDENT
CABINET SEC. FOR LANDS & PHYSICAL PLANNING	5 TH RESPONDENT
NATIONAL LAND COMMISSION	6 TH RESPONDENT
MERU COUNTY GOVERNMENT	7 TH RESPONDENT

JUDGMENT

Introduction And Background:

1. The Petitioners herein have approached the court vide Petition dated the 8th May 2019 and wherein the Petitioners have sought for the following reliefs;
 - i. Declaration That the acts of trespass by the military officers onto the Petitioners' property and the threatened forceful acquisition of the Petitioners' parcels of land registered as Commercial Plot No. A2-Meru, Plot No. Li23, Commercial Plot No. Ai-Meru, Plot LI22 is a gross violation of their constitutional rights to private property and infringement of the protection afforded by Article 40 of *the Constitution* of Kenya 2010.
 - ii. A Declaration That the Respondents have no right in law to interfere with the quiet enjoyment of Petitioners' private proprietary rights as set out in Article 40 (3) of *the Constitution* of Kenya 2010.
 - iii. A Declaration That the Respondents are liable to compensate the petitioners for the unlawful demolition of the Petitioners' concrete fencing posts together with the chain-link erected around the piece of land as fence on the parcels of land registered as Commercial Plot No. a2-Meru, Plot No. 112; commercial Plot No. Ai-meru, Plot I I22.
 - iv. A Permanent Injunctive Order directing the Respondents, whether by themselves, their agents, employees and/or servants from interfering with the Petitioners' quiet and peaceful enjoyment, possession, use and/or any dealing of the properties known as Commercial Plot No. A2-Meru, Plot No. li23, Commercial Plot No. AI-Meru, Plot LI22.
 - v. A Prohibitory Order directed at the Respondents, whether by themselves, their agents, employees and/or servants from ever interfering with the Petitioners' quiet and peaceful enjoyment, possession, use and/or any dealing of the properties known as Commercial Plot No. A2-meru, Plot No. Li23; Commercial Plot No. ai-meru, plot Li22.

Consequently, An Order That Judgement Be Entered For The Petitioners As Follows:

- a) Special damages for the destruction of the Petitioners property which was occasioned by the intrusion and trespass of Kenya Shillings Eight Hundred and Six Thousand Njine Hundred and Ten (Kshs 806,910.00/-) only,
- b) General damages for trespassing onto the Petitioners property and interfering with the petitioners' right to quiet and peaceful enjoyment of the properties registered



as Commercial Plot No. A2-Meru, Plot No. Li23, Commercial Plot No. Ai-meru, PlotLI22 and for preventing the petitioners from accessing their property.

- c) Costs consequent upon this Petition be borne by the Respondents, in any event, on indemnity basis.
 - d) Interests on (a), (b) and (b) as per the court rates.
 - e) The Honourable Court do make any such other or further Orders as it may deem fair, just and expedient in the circumstances in enforcing violation of fundamental rights of the Petitioner's members.
2. The Petition is premised on various grounds which have been highlighted in the body thereof. In addition, the Petition is supported by a plethora of affidavits/supplementary affidavits. For coherence, the Petition is supported by inter-alia the supporting affidavit sworn on the 8th May 2019; supplementary affidavit sworn on the 4th November 2019; and supplementary affidavit sworn on the 4th November 2019, respectively.
 3. Moreover, the Petition is also anchored on the list and bundle of documents dated the 19th March 2020 and wherein the Petitioners have exhibited/annexed nine [9] documents, including copies of the letters of allotment; copies of [sic] survey map for Meru North Sub-County and assorted statements recorded at the police on the 10th April 2018 by the Petitioners.
 4. Upon being served with the instant Petition, the 1st, 2nd and 3rd Respondents duly entered appearance and thereafter filed a Replying affidavit sworn on the 5th September 2019 and wherein the 1st, 2nd and 3rd Respondents have highlighted various issues including That the portion of lands which are being claimed by the Petitioners form part of the land which had been set apart by the Government of Kenya for military use in the year 1977.
 5. On the other hand, the 4th and 5th Respondents also entered appearance and filed a Replying affidavit and wherein same essentially reiterated the position taken by the 1st, 2nd and 3rd Respondents.
 6. Furthermore, the 4th and 5th Respondents also filed a Notice of Preliminary objection dated the 28th February 2022 and wherein the 4th and 5th Respondents essentially contested the jurisdiction of the court to entertain and adjudicate upon the subject Petition. Nevertheless, it is appropriate to underscore That the preliminary objection was disposed of vide ruling of the court rendered on the 13th November 2023.
 7. The 6th Respondent herein duly entered appearance on the 2nd July 2019, but same did not file any response to the Petition or at all.
 8. The 7th Respondent duly entered appearance and thereafter filed two [2] sets of affidavits, namely, the Replying affidavit sworn on the 27th September 2019 and a Supplementary affidavit sworn on the 13th November 2019. In particular, the 7th Respondent has averred That the Petitioners herein have not made any allegations and or claims as against the 7th Respondent.
 9. Furthermore, it has been posited That the Petition beforehand does not disclose any reasonable cause of action as against the 7th Respondent.
 10. The Petition beforehand came up for directions on the 20th December 2021 before Hon Justice Muchoki Njoroge, Judge [now retired], whereupon the parties covenanted to canvass and dispose of the Petition on the basis of affidavit evidence. In addition, the parties also agreed to file and exchange written submissions.



11. The Petitioners filed written submissions dated the 19th January 2022 whereas the 1st, 2nd, and 3rd Respondents filed written submissions 12th March 2023. The 4th and 5th Respondents herein also filed submissions on the preliminary objection which was disposed of but did not file any submissions as pertains to the main Petition.
12. The 6th Respondent filed no written submissions, whereas the 7th Respondent filed written submissions dated the 23rd February 2022.
13. The written submissions [details highlighted in the preceding paragraphs] form part of the record of the court.

Petitioners' Case:

14. The Petitioners' case is premised on the Petition dated the 8th May 2019; the supporting affidavit sworn by Tache Bonsa Golo on the 8th May 2019, the supplementary affidavit sworn on the 4th November 2019 in response to the replying affidavit by the 1st, 2nd and 3rd Respondents; the supplementary affidavit sworn on the 4th November 2019 in response to the replying affidavit filed on behalf of the 7th Respondent; the list and bundle of documents dated the 19th March 2019 and the written submissions dated the 19th January 2022.
15. It is the position by the Petitioners That same [petitioners] are the lawful and registered proprietors of the suit properties whose details have been captured and alluded to in the body of the Petition. To this end, the petitioners have contended That by virtue of being the lawful and registered proprietors of the suit properties same [Petitioners] are entitled to exclusive and absolute possession, occupation and use thereof.
16. Additionally, the Petitioners have contended That the suit plots were lawfully allocated to and in their favour by the county council of Nyambene [now defunct] and the Ministry of Land, respectively. In this regard, the Petitioners have referenced the various letters of allotment That have been annexed to the supporting affidavit as annexures TBG 001 [a] to [d], respectively.
17. Premised on the fact That the suit properties were duly allocated to the Petitioners, it has been contended That the Petitioners were entitled to benefit from the suit properties without any interference from any third party, the Respondents not excepted.
18. Nevertheless, the Petitioners have averred That despite being the lawful and legitimate proprietors of the suit properties, the 1st, 2nd and 3rd Respondents herein trespassed onto the suit properties on or about the 2nd April 2019 and proceeded to bring down the chain-link fence which had been erected on the suit property. Furthermore, it has been posited That upon bringing down the chain-link fence, the military [78th Army Battalion] have since remained in occupation of the suit properties and thus denied and deprived the Petitioners of their lawful rights to and in respect of the suit properties.
19. Arising from the foregoing, the Petitioners have contended That the actions and omissions by the 1st, 2nd and 3rd Respondents [the military] constitute trespass to the suit properties. In any event, it has been averred That the actions complained of also amounts to violation of the Petitioners constitutional rights to property, which is protected by Article 40 of *the Constitution* 2010.
20. Moreover, the Petitioners have also contended That arising from the illegal and unconstitutional actions complained of, the Petitioners have been subjected to damage and in this regard, it has been posited That the Petitioners are therefore entitled to recompense on account of general damages for trespass.



21. Other than the foregoing, the Petitioners have also contended That same [Petitioners] incurred loss and damages when the military demolished and brought down the concrete and chain-link fence, which had been erected round the suit plots. To this end, the Petitioners have implored the court to decree and award special damages in the sum of Kes.806, 910/= only.
22. Finally, the Petitioners have also averred That the actions complained of constitute and/or amounts to expropriation of private land/property by the government, which act is not only illegal but unconstitutional. Furthermore, it has been contended That the manner in which the suit properties were taken over by the military is tantamount to constructive compulsory acquisition albeit without due compensation in accordance with the law.
23. In support of the various contention[s] That have been adverted to and highlighted by the Petitioners, same have cited and referenced various decisions inter-alia Virendra Ramji Gudka & 3 Others v Attorney General [2014]eKLR, New Munyua Sisal Estate Ltd v Attorney General [1972] EA 88; Kigika Developers Ltd v Nairobi City Commission [2006] 1 KLR 127; Patrick Musimba v National Land Commission & 4 Others [2016]eKLR and Arnachery Ltd v Attorney General [2014]eKLR, respectively.
24. Flowing from the foregoing submission[s], the Petitioners have implored the court to grant the reliefs sought at the foot of the Petition. In addition, the Petitioners have also sought for costs of the Petition.

The 1st, 2nd And 3rd Respondents' Case:

25. The 1st, 2nd and 3rd Respondents herein have relied on inter-alia [sic] the supporting affidavit sworn on the 5th September 2019 [in response to the petition]; [sic] the supporting sworn on the 18th June 2020 in response to the Petition and the written submissions filed on the 12th March 2023, respectively.
26. The 1st, 2nd and 3rd Respondents [hereinafter referred to as the Respondents] have contended That the suit plots which are claimed by the Petitioners fall within the land which was set aside by the Government for military use. In this regard, the named Respondents have cited and referenced the gazette notice number 3210 of 1977.
27. Secondly, the named Respondents have contended That upon the land in question being set aside for military use, the military proceeded to and established a base on a portion of the land but left other portions unused. Nevertheless, it has been posited That even though some portions were left unused, the said portions constituted buffer zone used by the military. In any event, it was posited That the land in question belongs to the military and thus same [suit plots] were never available for allocation or alienation.
28. Thirdly, the named Respondents have submitted That even though the Petitioners contend That same [Petitioners] were duly allocated [sic] the suit plots by the county council of Nyambene [now defunct] and the ministry of land, the letters of allotment being relied upon by the Petitioners are stated to be forgeries. In any event, the named Respondents have thereafter highlighted various perspectives at the foot of paragraph 12 of [sic] the supporting affidavit sworn on the 18th June 2020.
29. Fourthly, the named Respondents have submitted That other than the fact That the letters of allotment are forgeries, the Part Development Plan [PDP] which has been referenced by the Petitioners are incomplete, illegal and incapable of underpinning the purported allocation. In particular, it has been contended That the Part Development Plan [PDP] do not bear the reference and approval plan numbers, which are contended to be imperative and mandatory.



30. Fifthly, the named Respondents have submitted That the military did not occasion and/or cause any damage to the fence That had been erected by the Petitioners. On the contrary, it has been posited That upon discerning the trespass by the petitioners, the military went to the locus in quo and thereafter requested the Petitioners and their workers to remove the illegal fence That had been erected on the military land.
31. Furthermore, it has been submitted That the petitioners and/or their workers agreed and thereafter proceeded to and removed the offensive fence and the chain-link. To this end, it has been posited That the allegations and/or claims of destruction are not only misconceived but misleading.
32. At any rate, it has been posited That it is unfathomable to imagine That the military could deploy force against two individuals who are Kenyan citizens. Pertinently, it has been submitted That the claims being propagated by and on behalf of the Petitioners are not legally tenable.

The 4th And 5th Respondents' Case:

33. The 4th and 5th Respondent[s] entered appearance and filed a Replying affidavit. Nevertheless, it is apposite to state That though the responses are indicated to be filed by the Attorney general, but same are indicated to be on behalf of the 1st, 2nd and 3rd Respondents and not the 4th and 5th Respondents.
34. Other than the foregoing, it is also imperative to state That the 4th and 5th Respondents had filed a preliminary objection dated the 28th February 2022 and wherein same [4th and 5th Respondents] had highlighted the doctrine of constitutional avoidance; ripeness and exhaustion. Nevertheless, the preliminary objection was disposed of vide ruling rendered on the 13th November 2023. For coherence, the preliminary objection was dismissed.
35. Additionally, it is appropriate to underscore That despite being afforded a plethora of indulgence to file written submissions, no written submissions were filed by the 4th and 5th Respondents. For good measure, none is traceable to the e-platform of the court.

The 6th Respondent's Case:

36. The 6th Respondent filed a notice of appointment of advocate dated the 2nd July 2019 but same did not file any response or at all. Furthermore, the 6th Respondent also did not file any written submissions in respect of the instant matter.

The 7th Respondent's Case:

37. The 7th Respondent duly entered appearance and thereafter filed a Replying affidavit sworn on the 27th September 2019. Furthermore, the 7th Respondent also filed a further replying affidavit sworn on the 13th November 2019. In addition, the 7th Respondent filed written submissions dated the 23rd February 2022.
38. It was the 7th Respondent's case That the events complained of by the Petitioners and whose details have been highlighted at the foot of paragraph 8 of the petition only relate to the military and not the 7th Respondent. In this regard, it has been posited That there is no cause of action That has been disclosed as against the 7th Respondent or at all. To this end, the 7th Respondent has implored the court to find and hold That the Petitioners are non-suited as against the 7th Respondent.
39. Secondly, the 7th Respondent has contended That the dispute beforehand is a civil claim touching on and or concerning trespass to land. To this end, it has been posited That the Petitioners ought to have filed an ordinary civil claim and not a constitutional petition.



40. Instructively, the 7th Respondent has invited the court to find and hold That the issues raised beforehand are statutorily provided for and thus the invocation and deployment of the constitution was misconceived. Consequently, the court has been invited to find and hold That the entire petition is not only premature and misconceived but same is legally untenable.
41. Thirdly, the 7th Respondent has submitted That the allotments being relied upon by and on behalf of the Petitioners are neither legitimate nor authenticated. In this regard, it has been posited That the letters of allotments being adverted to are not supported by authentic PDP. For good measure, it has been contended That the PDP which the Petitioners have annexed are not only incomplete but same are not legitimate, insofar as the PDP do not have the plan reference and approval plan numbers, respectively.
42. Finally, it has been submitted That the Petitioners herein have neither particularly pleaded nor strictly proved the special claims at the foot of the petition. In the absence of strict proof of the monetary claim, it has been submitted That the Petitioners are not entitled to any recompense either in the manner sought or at all.
43. Arising from the foregoing, the 7th Respondent has invited the court to find and hold That the Petitioners herein have neither proved nor established the claims adverted to at the foot of the petition. To this end, the 7th Respondent has posited That the petition beforehand ought to be dismissed with costs to the 7th Respondent.

Issues For Determination:

44. Having reviewed the Petition; the supporting affidavit and the various supplementary affidavit[s] in support thereof; the responses on behalf of the Respondents and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination;
 - i. Whether the issues raised at the foot of the Petition ought to have been canvassed vide an ordinary civil suit or otherwise; and whether the Petition is incompetent.
 - ii. Whether the Petitioners are the lawful proprietors of the suit properties or otherwise.
 - iii. Whether the petitioners are entitled to the reliefs sought or otherwise

Analysis And Determination

Issue Number 1. Whether the issues raised at the foot of the Petition ought to have been canvassed vide an ordinary civil suit or otherwise; and whether the Petition is incompetent.

45. The 7th Respondent has contended That the issues raised and canvassed at the foot of the petition beforehand touched on and or concern the tort of trespass and malicious damage to property. In this regard, it has been contended That what has been clothed as a constitutional petition is indeed a simple civil case and thus same ought to have been filed as a civil suit and not otherwise.
46. Additionally, the 7th Respondent has posited That in clothing the dispute beforehand as a constitutional petition, the Petitioners by-passed the established statutory mechanism, which ought to have been invoked and deployed. In this regard, it has therefore been submitted That the impugned constitutional petition constitutes an abuse of the due process of the law and hence same [constitutional petition] ought to be dismissed.



47. The Petitioners herein filed written submissions dated the 19th January 2022 but same did not respond to the contention That the dispute beforehand is a simple civil claim. Furthermore, the petitioners also did not address the question as to whether same [Petitioners] could cloth a simple civil suit as a constitutional petition or otherwise.
48. Having considered the submissions by and on behalf of the 7th Respondent, I beg to take the following position. Firstly, it is common ground That a constitutional petition ought to be filed and/or mounted only where the dispute beforehand touches on and concerns breach, infringement or violation of *the constitution* 2010; or threatened breach, violation or infringement of *the constitution*. [See Articles 22 and 258 of *the Constitution* 2010].
49. Pertinently, where the dispute does not come within the four corners of Articles 22 and 258 of *the Constitution* 2010, then it behoves the claimant to resort to and deploy the established statutory mechanism so as to address the claims adverted to and/or complained of. Strictly speaking, a claimant need not cloth an ordinary suit and/or civil claim as a constitutional petition, merely to circumvent the legal strictures That govern the filing of ordinary suits, including *Limitation of Actions Act*.
50. The legal position to the effect That an ordinary claim ought not to be clothed as a constitutional petition has received various judicial pronouncement[s]. It suffices to cite and reference but a few.
51. In the case of Kennedy Odoyo Okello v District Land Registrar, Migori & 2 others [2015] KECA 553 (KLR), the Court of Appeal stated and held thus;

38. With regard to grounds 9 and 10, there is no basis of alleging That the appellant’s constitutional right to property was breached by any of the respondents. It is elementary law That where a property is lawfully charged to a financial institution to secure repayment of a loan, upon default, the charge has a statutory right to sell the charged property to realize the advanced sum. In such circumstances, it amounts to crying wolf for the appellant to allege That his constitutional right to property and those of his family members have been breached.

In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law.

52. Likewise, in the case of Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority (Civil Appeal 67 of 2015) [2016] KECA 411 (KLR) (1 July 2016) (Judgment), the Court of Appeal stated and held thus;

“Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent That the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds That where it is possible to decide a case without reaching a constitutional issue That should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media



Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue:-

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails That a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle That where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, That is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held That it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 [1936]).”

53. The Court of Appeal in the case of *Eaton Towers Kenya Limited v Kasing’a & 5 others* (Civil Appeal 49 of 2016) [2022] KECA 861 (KLR) (28 April 2022) (Judgment), also had an occasion to address the circumstances where a constitutional petition ought to have been invoked and/or deployed and where a party need to deploy the ordinary statutory mechanism for redress.

54. The court stated thus;

“ 34. From our reading of the petition, we concur with the appellant That the heart of it was a challenge on procedural issues. A look at the prayers sought in the said petition which included; the suspension of all the licences and approvals issued to the appellant is tell-tale sign as to what the petition was primarily about. We find That the 1st respondent creatively couched his complaints as a constitutional petition, when he could easily have lodged them with the tribunal on the issuance of the EIA licence and to the committee concerning the development approval. This Court has made numerous pronouncements on this issue. It stated in *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another*[2016] eKLR;

“In saying all these, we are not oblivious to the fact That a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities That constitutional litigation is a serious matter That should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate That the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.” (Emphasis added)

35. This is not to say That the 1st respondent may not have had a legitimate constitutional right That was infringed, However, it is impermissible That any and all complaints be constitutionalized. He ought to have exhausted all other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the court by way of constitutional petition. See



Bethwell Allan Omondi Okal v Telkom (k) Ltd (founder) & 9 Others[2017] eKLR.

36. For a claim to fit a constitutional petition, even when other avenues are available, a party ought to demonstrate That the respondents, who caused the injury, were barring him from pursuing the other avenues available for redress. As was held in *Royal Media Services Limited v Attorney General*[2018] eKLR; “[I]n our view, failure or refusal to make good a debt cannot be equated to a deprivation of property or appropriation thereof. In other words, non-payment of a debt due does not amount to deprivation of property as argued by the appellant. Nor can it be equated to compulsory acquisition of property as again submitted by the appellant. Such deprivation would only be justified, if, for instance, the respondent arbitrarily barred the appellant from claiming or pursuing the claim. As it were, at the time of filing the petition the debt was still alive and the appellant was entitled to invoke the relevant legally tenable procedure to secure a determination on account of the law provided for That purpose. The respondent had not failed to provide a forum or remedy for such determination or That it had impaired or placed roadblocks to the appellant’s right to seek redress under the ordinary and usual legal process.” (Emphasis added)
55. Duly guided by the decisions [supra], it is now apposite to revert to the instant matter and to discern whether the petitioners herein had a legitimate basis to invoke and deploy the constitutional petition as a mechanism for pursuing their claims beforehand.
56. To start with, it is imperative to observe That the Petitioners have contended That same are the legitimate owners and/or proprietors of the suit plots. Furthermore, the Petitioners have posited That despite being the lawful and legitimate owners of the suit plots, the military officers from the 78th Tank Battalion [Isiolo] entered upon and have since remained on the suit plots in contravention of their [Petitioners] constitutional rights to private property.
57. Moreover, the Petitioners have contended That as a result of the actions and/or omissions by the military officer[s], same [Petitioners] have been deprived of and/or denied the right to partake of and benefit from ownership of the suit properties.
58. Flowing from the foregoing claims, which are well captured in the body of the Petition, the petitioners have thereafter sought for inter-alia the following claims;
- i. Declaration That the acts of trespass by the military officers onto the Petitioners’ property and the threatened forceful acquisition of the Petitioners parcels of land registered as Commercial Plot No.A2-MERU, Plot No.LI23, Commercial Plot No.AI-Meru, PlotLI22 is a gross violation of their constitutional rights to private property and infringement of the protection afforded by Article 40 of *the Constitution* of Kenya 2010.
 - ii. A Declaration That the Respondents have no right in law to interfere with the quiet enjoyment of Petitioners’ private proprietary rights as set out in Article 40 (3) of *the Constitution* of Kenya 2010.
59. To my mind, the reliefs That have been highlighted in the preceding paragraphs espouse and highlight breach, violation and/or infringement of fundamental rights and freedoms enshrined in *the Constitution*. In particular, the Petitioners herein are seeking to vindicate their rights as enshrined vide



Article 40 and 64 of *the Constitution* 2010, which essentially underpin the extent and scope of the right to own private property.

60. Arising from the foregoing, even though there is an aspect of the petition That speaks to and highlights trespass, the mention of trespass by and of itself, does not mean That the petitioners cannot deploy a constitutional petition in pursuit of their [Petitioners] claims.
61. Flowing from the foregoing discussion, my answer to issue number one is twofold. Firstly, it is not open for any claimant, the Petitioners herein not excepted to resort to and deploy a constitutional petition in a purely civil claim which ought to be canvassed in the ordinary manner provided for under the relevant statute.
62. Secondly, it is my finding and holding That despite the principle adverted to in the various decisions cited and referenced herein before, the dispute beforehand was properly filed as a constitutional petition. In any event, the petitioners have cited and referenced the rights underpinned by Article 40 and which were thereafter contended to have been breached, violated and or infringed upon by the Respondents which essentially are state organs.
63. Simply put, I find and hold That the Petition beforehand is neither premature nor incompetent. In this regard, it suffices to venture forward and address the merits of the Petition.

Issue Number 2. Whether the Petitioners are the lawful proprietors of the suit properties or otherwise.

64. The Petitioners herein have contended That same [petitioners] were duly and lawfully allocated the suit plots by the County Council of Nyambene [now defunct] and the Ministry of Lands. To this end, the Petitioners have contended That same [Petitioners] are therefore the lawful owners and proprietors of the suit plots.
65. To be able to appreciate and contextualize the claim[s] by the Petitioners, it is apposite to reproduce the contents of paragraphs 3, 4, 5 and 6 of the supporting affidavit.
66. Same are reproduced as hereunder;
 3. That we are owners of commercial plots namely: UNS. Commercial Plot NoA2; UNS Comm Plot NoLI 23; UNS Comm Plot NoAI; UNS Comm PlotNoLI 22 situated along Isiolo- Wajir Road neighbouring Isiolo Barracks.(Attached herewith and marked TBG O01a, TBG OO1b, TBG OO1e and TBG 001d. are copies of our allotment letters)
 4. That we were issued with the allotment letters for the said plots of land on diverse dates between 1998 and 2012 vide Allotment Letters issued by the Ministry of Lands and County Council of Nyambene(Predecessor of County Government of Meru).
 5. That the plots were dully surveyed by both the Nyambene County Council Surveyor as well as a privately contracted surveyor. (Attached herewith and markedTBG 002a, TBG 002b, TBG002c are copies of payment receipts for the said survey exercise).
 6. That since the allotment was done, we have been dutifully paying annual rates to the County Government of Meru. (Attached herewith and marked TBG 003 are some of the copies of the payment receipts issued by the County Government of Meru Revenue Office)
67. From the foregoing paragraphs, what becomes apparent and evident is That the Petitioners' claim[s] are wholly underpinned by letters of allotment and not otherwise. In this regard, the critical question



That begs to be addressed is whether or not the letters of allotments espoused by the Petitioners vests any legal rights and/or interest capable of underpinning the claims beforehand.

68. I beg to address the issue beforehand in a four-pronged manner. Firstly, the 1st and 3rd Petitioners have exhibited copies of letters of allotment[s] dated the 19th September 2012 and which are said to have been issued by the County Council of Nyambene [now defunct].
69. According to the 1st and 3rd Petitioners, same were issued with the said letters of allotment[s] by the County Council of Nyambene [now defunct] and thereafter same [1st and 3rd Petitioners] proceeded to pay the rates and rents in respect of the designated plots. For good measure, it was posited by and on behalf of the 1st and 3rd Petitioners That same have variously paid the plot rate[s] and the rents to date.
70. Other than the question of paying the rates and the rents to the County Council of Nyambene [now defunct] and now to the County Government of Meru, the 1st and 3rd Petitioners have also posited That same entered onto the suit plots.
71. As pertains to the letters of allotment which are being espoused by the 1st and 3rd Petitioners, it is important to state and underscore That the County Council of Nyambene [now defunct] did not have the power to allocate and/or alienate what was hitherto trust land. Nevertheless, the County Council of Nyambene [now defunct] were vested with the mandate and authority to recommend allocation to designated persons and upon such recommendation, the Commissioner of Lands [now defunct] would issue the requisite letter of allotment. [See Section 53 of the Trust *Land Act* [now repealed] [See also Sections 114, 115 and 117 of the Retired Constitution].
72. Other than the provisions of the law That have been referenced in the preceding paragraph, the manner and process of allocating what hitherto constituted trust land was also elaborated by the Court of Appeal in the case of Ethics and Anti-Corruption vs Eunice N. Mugalia and another Civil Appeal No. 39 of 2019 [court of appeal at Kisumu] [unreported] where the Court of Appeal stated at paragraph thus;

“ 32. The first respondent was purportedly allocated government land under the government lands act and was to be issued with a certificate of lease in the form of a grant under the registration of titles act. How a government grant That was issued and accepted by the 1st respondent under the government lands act pursuant to which the government was to be the lessor changed to be the lease under the registered *land act* under which the municipal council of Kakamega became the lessee is a mystery.

As we have already stated, the government *land act* vested in the president and the commissioner of lands power to alienate government land as long as the procedure laid out in the act was followed. Trust *land act* on the other hand vested in the county council the power to alienate the land in their respective counties and the commissioner of lands had no power to alienate the same save as directed by the county council through a resolution. In the circumstances, we do not see how the letter of allotment dated 31st July 1998 under which the commissioner of lands offered to the 1st respondent a grant of the government land could have given rise to the lease dated 2nd June 2000 of trust land That was vested in the municipal council of Kakamega. So under what regime of the law was the commissioner of lands acting when he alienated the suit property? We ask this question because the two legal regimes, That is the government



lands act and the trust land act have different processes as regards to alienation of land". [Underlining Supplied].

73. Bearing the foregoing in mind, I must now return to the letters of allotment[s] which have been exhibited by the 1st and 3rd Petitioners and thereafter interrogate whether same [letters of allotment] have conferred upon the 1st and 3rd Petitioners any lawful rights and/or interests capable of underpinning the claim beforehand.
74. Suffice it to underscore, That it was incumbent upon the 1st and 3rd Petitioners to place before the court inter-alia the application letters for allotment; the minutes of the council [if any] approving the request for allotment; the recommendation for allotment and ultimately the letter of allotment by the Commissioner of Lands [now defunct]. Sadly, no such documents have been tendered and/or placed before the court.
75. In my humble view, the letters of allotment exhibited and relied upon by the 1st and 3rd Petitioners are incapable of conferring and/or vesting upon the 1st and 3rd Petitioners any legal rights and/or interests capable of being protected by the court.
76. The second perspective turns on whether the 2nd and 4th Petitioners acquired lawful and legitimate letters of allotment and if so, whether the impugned letters of allotment can underpin the claims by the 2nd and 4th Petitioners or otherwise.
77. To start with, the 2nd and 4th Respondents have each annexed letters of allotment [sic] signed by the Commissioner of Land and which letters of allotment are both dated the 18th August 1998. Nevertheless, it is evident from the face of the two letters of allotment That the issuing authority did not indicate on behalf of which county council the purported letters of allotment were being issued.
78. For good measure, it is imperative to recall and reiterate That the Commissioner of Lands [now defunct] would only allocate land on behalf of a county council or municipal council, albeit on recommendations and not otherwise. [See Sections 114, 115 and 17 of the retired Constitution].
79. Secondly, it is also worthy to note That the letters of allotment being referenced by both the 2nd and 4th Petitioners also do not speak to and/or capture the PDP number if at all. Furthermore, even though the 2nd and 4th Petitioners have exhibited copies of PDP, it is worthy to underscore That the PDP's which have been annexed are incomplete and devoid of the requisite authentication.
80. Suffice it to state That a PDP is a key instrument in the process of alienation and/or allocation of land. Pertinently, it is the PDP which confirms the availability of otherwise of [sic] the plot sought to be allocated. In this regard, the PDP must therefore comply with the provisions of the Physical Planning Act, Chapter 286 [now repealed] which underscored the necessity for the PDP to have both the approved plan number and the PDP number.
81. In the absence of the PDP number and approved PDP number, it is difficult, nay impossible to authenticate the validity of the PDP which have been by and on behalf of the 2nd and 4th Petitioners.
82. Notwithstanding the foregoing, it is also important to reiterate That it was imperative for the plan number [if at all] the PDP plans were legitimate to be captured and reflected in the body of the letters of allotment. However, I have pointed out elsewhere herein before That the two letters of allotment[s] did not capture [sic] the plan numbers.
83. To the extent That the letters of allotment being exhibited by the 2nd and 4th Petitioners do not capture the designated county council on whose behalf same were [sic] issued and do not capture [sic] the PDP numbers, it is imperative to state and underscore That the impugned letters of allotment are



legally deficient, incompetent and thus incapable of vesting or conferring any rights to the 2nd and 4th petitioners.

84. The significance of a PDP in the process of allocating and/or alienating land was underscored and elaborated upon by the Supreme Court [the Apex Court] in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) Neutral citation: [2023] KESC 30 (KLR), where the court stated thus;

“104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows: “...It is trite law That under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, That a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013* where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous That in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land That has not been alienated or surveyed...”

105. This process is restated in *African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003* [2007] eKLR where it was held That planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after That process That a land reference number is issued in respect of the plot.

106. We note That the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated That certain documents That were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, “the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land.”



107. We are careful to note That this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court’s jurisdiction under article 163(4)(a) in this case. It has not been disputed That indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court That the allocation of the suit property to HE Daniel T Arap Moi was irregular.”
85. The third perspective which equally merits due interrogation as pertains to the letters of allotment exhibited by the 2nd and 4th Petitioners touches on whether the 2nd and 4th Petitioners duly complied with the terms of the letters of allotment or otherwise. Instructively, it is apposite to state That the letters of allotment under reference contained special conditions which called upon the 2nd and 4th Petitioners to accept the letters of allotments and to make the requisite payments of the standard premium and statutory levies within 30 days from the date of issuance. For good measure, the letter of allotment proceeded further and intimated That in the event of default, the letters of allotment would be considered to have lapsed.
86. Back to the letters of allotment relied upon by the 2nd and 4th Petitioners. Did the 2nd and 4th Petitioners comply with the special terms; conditions and stipulations?
87. It was incumbent upon the 2nd and 4th petitioners to tender and place before the court a copy of the letter of acceptance; if any and the revenue receipt issued in acknowledgment of the standard premium and the statutory levies paid to the commissioner of lands [now defunct]. For coherence, it is worth reiterating That the letter of acceptance and the payment ought to have been made within 30 days from the date of post-mark, namely, the Date of issuance thereof.
88. In the absence of a letter of acceptance and the requisite revenue receipt, which are critical document[s], there is no gainsaying That the letters of allotment beforehand lapsed by effluxion of time. To this end, the impugned letters of allotment died a natural death and thus ceased to have any legal effect in the eyes of the law.
89. To buttress the foregoing position, it suffices to cite and reference the holding of the Supreme Court in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court stated as hereunder;
57. The respondent also challenged the letter of allotment on grounds That at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting That the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited.
- Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant’s ownership is traced back to this allotment Letter even if subsequently registered under the Registration of Titles Act cap 281 (Repealed) on April 26, 2001.
58. So, can an allotment letter pass good title? It is settled law That an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng’ok v Justice Moijo Ole Keiyua & 4 others* [CA 60/1997](#) [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others*



HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows: "It has been held severally That a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all " [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference That the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact That an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore That the allotment letter has not lapsed.
62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition That Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
90. Other than the Supreme Court, the legal position That a letter of allotment lapses by effluxion of time where the terms thereof are not complied with was also underscored by the Court of Appeal in the case of Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment), where the court stated as hereunder;
 54. From the foregoing, the legal position is not That once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To That extent, we associate ourselves with this Court's decision in Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR which express the general law in contractual matters. "It is elementary learning That for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration."
91. The final perspective as to whether or not the Petitioners herein have any lawful rights turns on the question as to whether a letter of allotment by and of itself can confer any legal rights and/or interests upon the bearer thereof. Suffice it to posit That the totality of the Petitioners case is underpinned by [sic] the letters of allotment and nothing more.
92. Without belabouring the point, the legal position That a letter of allotment by and of itself does not confer any legal rights to the bearer thereof is now settled and established. For good measure, the supreme court in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), stated and held as hereunder;
 61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference That the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact That an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the



land consequent upon the perfection of the Allotment Letter. It matters not therefore That the allotment letter has not lapsed.

93. In view of the foregoing exposition of the law, I come to the conclusion That the Petitioners herein have neither acquired nor obtained any lawful rights and/or interests over the suit properties which is capable of protection and/or vindication before this court. Notably, a claimant must first accrue and/or acquire legal rights and/or interests before approaching a court of law for protection.
94. To underscore the foregoing legal position, it is apposite to reference and reiterate the decision of the Court of Appeal in *Nelson Kazung Chai v Pwani University* [2017]eKLR, where the court stated thus;
22. Before we conclude, we need to say something about Dr. Khaminwa's submission about the appellants' human rights being violated, and also on forceful evictions. A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights That inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument That the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of *the Constitution*. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is That the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted.
95. My answer to issue number two [2] is to the effect That neither of the Petitioners herein have acquired nor accumulated any proprietary rights to and in respect of the suit plots. In the absence of any proprietary rights, the Petitioners herein cannot invoke and deploy the provisions of Article 40 of *the Constitution* 2010 or at all.
96. Moreover, the Petitioners herein cannot also approach the court to seek to protect their proprietary rights over the suit plots, yet same [petitioners] have not acquired any such rights.
97. Pertinently, courts of law, this court not excepted can only protect rights which have since been acquired. Such rights must not be inchoate, imaginary, fictitious or illusory like the ones beforehand.

Issue Number 3. Whether the petitioners are entitled to the reliefs sought or otherwise

98. The Petitioners herein have sought for a plethora of reliefs at the foot of the petition. Notably, the Petitioners sought for a declaration[s] That the actions and omission by the military officers, namely, entry upon the suit plots constitutes a gross violation of their [Petitioners] rights and fundamental freedoms.
99. Whilst discussing issue number two elsewhere herein before, this court has found and held That the petitioners herein have neither accrued nor acquired any lawful rights and interests to the suit plots. In the absence of lawful rights and or interests to the suit properties, can the petitioners seek the declaration under reference or at all?
100. To my mind, a declaration can only issue to vindicate and protect rights That have been acquired. On the contrary, a declaration cannot issue in the absence of such rights and or interests.[See the



decision of the Court of Appeal in the case of Johana Nyokwoyo Buti versus Beuttah Onsomu Rasugu [2010]eklr]

101. Arising from the foregoing, I am afraid That the Petitioners herein have neither established nor demonstrated a basis to warrant the issuance of the declaratory orders or at all.
102. Secondly, the Petitioners herein have also sought for an order of permanent injunction to restrain the Respondents and in particular the 3rd Respondent from entering upon and/or remaining on the suit properties.
103. Suffice it to state That an order of permanent injunction does and often issue to restrain encroachment onto land belonging to a designated person. To this end, before an order of permanent injunction can issue, it is incumbent upon the claimant to prove title to or ownership of the designated property. [See *Mohanson Kenya Ltd v The Registrar of Titles & Another* [2017]eKLR, *Moya Drift Farm Ltd v Theuri* [1973] EA 173].
104. Nevertheless, in respect of the instant matter, the Petitioners have neither established nor demonstrated any title to the suit properties. In this regard, it suffices to underscore That the prayer for permanent injunction has been sought for in vacuum.
105. Finally, the Petitioners sought for payment of the sum of Kes.806, 910/= only on account of special damages. Pertinently, the claim beforehand is premised on [sic] the concrete poles and the chain-link fence That was allegedly demolished by the military officer[s] on the 10th and 11th days of April 2019.
106. To support the claim for the sum of Kes.806, 910/= only [whose details have been highlighted in the preceding paragraph], the Petitioners herein have tendered assorted documents and receipts. However, it suffices to state That the documentation which have been placed before the court do not meet the legal threshold underpinned by the provisions of Section 19 and 20 of the [Stamp Duty Act](#), Chapter 480 Laws of Kenya. Simply put, it was incumbent upon the Petitioner[s] to ensure That the impugned receipts were affixed with the requisite stamps in accordance with the law.
107. Moreover, it is common ground That whosoever seeks to procure recompense on account of special damages must not only plead special damages but must also strictly prove same. In the absence of strict/specific proof, no award of special damages can issue.
108. To this end, it is apposite to reference the decision of the Court of Appeal in the case of *Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020)* [2024] KECA 1102 (KLR) (19 August 2024) (Judgment), where the court stated thus;

73. It is a basic principle That, before a court can award special damages, those damages must be specially pleaded and strictly proved. In *Ouma v Nairobi City Council* [1976] KLR 207, Chesoni, J. (As he then was) held as follows:

“Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence.”

The authors of *McGregor on Damages* (10th Edition), Para. 1498 explain why special damages must be specially pleaded, as follows:

“Where the precise amount of particular item of damages has become clear before the trial, either because it has already occurred and so become crystallised, or because it can be measured with complete accuracy, the exact loss must be pleaded as special damages”.

Similarly, in *Banque Indosuez v D J. Lowe & Co. Ltd.* [2006] 2 KLR 208, this Court held as follows:



“It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite That special damages must not only be claimed specially but proved strictly for they are not the direct and natural or probable consequences of the act complained of and may not be inferred from the act.”

74. When the law requires special damages to be specially pleaded, it means That those damages must be stated with certainty and particularity in the plaint or petition. If the damages are not tabulated in the plaint or petition, the party claiming them must apply to amend the plaint or petition to include them. Such party cannot purport to specially plead special damages in a subsequent affidavit.
109. In my humble albeit considered view, the Petitioners herein did not meet and/or satisfy the established the statutory threshold to warrant the grant of an order for special damages.
110. In any event, it is worth recalling That the 1st, 2nd and 3rd Respondents had posited That the military officers who went to the locus in quo allowed the Petitioners or their workers to remove the concrete poles and the chain-link fence and That the workers obliged.
111. Suffice it to state, That this positive averment was never controverted.
112. Either way, the petitioners did not prove their entitlement [if at all] to special damages. Same is therefore not available.

Final Disposition:

113. Having reviewed the thematic issues [details highlighted in the body of the judgment] it must have become crystal clear That the Petition beforehand is devoid and bereft of merits.
114. Consequently, and in the premises, the final orders of the court are as hereunder;
- i. The Petition be and is hereby dismissed.
 - ii. Costs of the Petition be and are hereby awarded to the Respondents save for the 6th Respondent who did not participate in the proceedings.
115. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF MARCH 2025

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma – Court Assistant.

Dr. Felix Odhiambo for the Petitioners.

Mr.[Major] Kiiru and Mr. Mugiira for the 1st, 2nd and 3rd Respondents.

Mr. Benjamin Kimathi for the 4th and 5th Respondents.

Mr. Ken Muriuki for the 7th Respondent.

N/A for the 6th Respondent.

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