



Husainiz Investment Limited v County Government of Mombasa (Constitutional Petition 21 of 2021) [2023] KEELC 21885 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 21 OF 2021**

LL NAIKUNI, J

NOVEMBER 28, 2023

**N THE MATTER OF: ARTICLES 2, 10, 19, 20, 22 AND 23 OF THE CONSTITUTION
AND IN THE MATTER OF: VIOLATION AND THREATENED FURTHER
VIOLATION OF ARTICLES 2, 3, 10, 19, 20, 21, 27, 28, 40, 47 AND 50 (1) OF THE
CONSTITUTION BY COUNTY GOVERNMENT OF MOMBASA AND IN THE
MATTER OF: ABUSE AND MISUSE OF POWER BY THE COUNTY GOVERNMENT
OF MOMBASA AND IN THE MATTER OF: THE COUNTY GOVERNMENT
OF MOMBASA ACT OF DEMOLISHING THE PETITIONER'S BUILDING AND
PERIMETER WALL STANDING ON THE PARCEL OF LAND KNOWN AS
PLOT NO. 1436 SECTION XVII, MOMBASA ISLAND AND THE THREATENED
ILLEGAL COMPULSORY ACQUISITION OF THE PETITIONER'S PROPERTY**

BETWEEN

HUSAINIZ INVESTMENT LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

JUDGMENT

1. The Judgment of this court pertains to the filed Constitution Petition dated 24th May, 2021 by Husainiz Investment Limited, the Petitioner herein. It was filed on 26th May, 2021 against the County Government of Mombasa, the Respondent herein. *The Constitution* Petition was brought under the dint of the provisions of Articles 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 40, 47, and 50 (1) of *the Constitution* of Kenya 2010.
2. Upon effecting service of the Petition, while opposing the Petition, the Respondent filed replies dated 7th December, 2021 accordingly. The Honourable Court will be dealing with the said replies indepth at a alter stage of the Judgement. Pursuant to this, the Honourable Court provided directions on how to dispose off the Petition and which was through affidavits and filing of written Submissions.



II. The Petitioner's Case

3. The Petitioners sought for the following orders:-
- a. A declaration that the Respondent acted illegally and unconstitutionally in facilitating the demolition of the house and the perimeter wall to the properties known as plot number 1436 Section XVII, Mombasa Island.
 - b. A declaration that the Respondent is in violation of the provision of Articles 2, 3, 10, 19, 20, 21, 28, 40, 47 and 50(1) of *the Constitution* of Kenya, 2010 and the provisions of the Fair Administrative Actions Act in the manner in which the Respondent demolished the house and the perimeter wall standing on the suit property and fenced off the same.
 - c. Compensation with respect to the house and the perimeter and/or boundary wall demolished by the Respondent on the property known as plot number 1436 Section XVII, Mombasa Island.
 - d. An order that the petitioner is are entitled to full compensation for the value of the known as plot number 1436 Section XVII, Mombasa Island subject to the petitioner surrendering the leasehold title to the Respondent.
 - e. Special damages of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) for the valuation reports.
 - f. Compensation for loss of use of the property as pleaded herein above.
 - g. Interest on (c, d and e) above from the date of filing this Petition.
 - h. General damages for violation of the Petitioner's fundamental rights.
 - i. In the alternative to prayer d above, the Petitioner prays for an order directing the Respondent, its employees and/or agents to forthwith remove the fence with covers the suit property.
 - j. An order of permanent injunction restraining the Respondent from interfering with the Petitioner's use, peaceful and quiet occupation of the property known as plot number 1436 Section XVII, Mombasa Island.
 - k. Costs of the Petition be awarded to the Petitioner herein.

III. The Legal foundation of the Petition

4. The Petition was founded on the following legal provisions:
- a. The Petitioner has a right to be treated in a credible and accountable manner by the Respondents as state organs under Article 10 of *the Constitution* of Kenya, 2010 which right as aforesaid, been violated by the Respondent.
 - b. Similarly, the Petitioner's fundamental right to enjoy a fair administrative action by the Respondent as provided in Article 47 of *the Constitution* of Kenya, 2010 has been violated by the Respondent. The provision of Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



- c. The Petitioner's inherent right to natural justice as codified in the provision of Article 50 of *the Constitution* of Kenya, 2010 had been violated by the Respondents. The provision of Article 50 (1) of *the Constitution*, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- d. The Petitioner's right to the suit property as provided under Article 40 of *the Constitution* of Kenya, 2010 has been violated by the Respondent in the manner in which the Petitioner's house and perimeter wall were destroyed without prior notice having been given to the Petitioner by the Respondent. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.
- e. All in all, the Respondent has failed to act in an accountable manner so as to ensure that it did not interfere with the Petitioner's property rights guaranteed under Articles 10, 40 and 47 of *the Constitution* of Kenya, 2010.

IV. Brief Facts

5. The brief facts of the case are that the Petitioner is the registered owner of the parcel of land known as plot number 1436 Section XVII, Mombasa Island (Hereinafter referred to as "the Suit Property"). Upon acquiring the aforesaid property, the Petitioner took possession of the same, cleared the land and developed the property by building a commercial cum residential house on the said property. To secure its interests on the property, the Petitioner resolved and constructed a perimeter and /or boundary wall around the properties.
6. Before undertaking the construction of the house and the perimeter wall, the Petitioner made an application to the Respondent for approval of its Development Plan of the house and the said perimeter and /or boundary wall and paid the requisite charges and the said plans were duly approved. All other necessary approvals were also obtained and the Petitioner constructed the said house and the perimeter wall. While undertaking its development agenda, the Respondent approved a project dubbed "Urban Renewal and Re-development of Old Estates within Mombasa County" whereby around 520 house units, registered in the Respondent's name, around Buxton Estate were to be demolished for purposes of construction of new apartments by Buxton Point Apartments Limited who is a private investor in partnership with the Respondent.
7. The suit property and the house which was standing thereon is a privately-owned property which is registered in the name of the Petitioner. The said property did not form part of the old estates registered in the name of the Respondent which the Respondent intended to re-develop. On 6th March, 2021 the Respondent through its employees and/or authorized agents and servants started demolishing the old estates around the Buxton area so as to set up the place ready for the re-development exercise. However, while doing so, they also descended on the Petitioner's property, chased away the Petitioner's employees, tenants and demolished the house together with the perimeter wall which was standing the suit property. The Respondent, its employees and/or authorized agents and servants were so reckless and negligent and did not listen to anybody during the demolition exercise. The Petitioner's directors were forced to watch helplessly as their investment was illegally put down by the Respondent. The Respondent did not give the Petitioner a chance to be heard before demolishing the Petitioner's house



- and perimeter fence on the suit property and/or give the Petitioner a notice of the intended demolition exercise.
8. Upon demolishing the Petitioner's house and perimeter wall, the Respondent cleared the site and then fenced off the entire area. It was therefore apparent to the Petitioner that the Respondent intends to undertake construction work on the Petitioner's property. The manner in which the Respondent had fenced off the suit property denied the Petitioner a chance to access its property and/or to undertake any new developments thereon. The Respondent was negligent in the manner in which it demolished the Petitioner's house and perimeter fence on the suit properties due to the following reasons:
 - a. The Respondent did not give the Petitioner any notice before demolishing the Petitioner's house and perimeter fence on the suit properties.
 - b. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware that that was a private property belonging to the Petitioner and never formed part of the municipal houses which were liable for demolition.
 - c. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware about the security concerns which could be caused by such an act.
 9. The Petitioner had at all material times had a reasonable and legitimate expectation that the Respondent would at the very least give it a notice of its intention to demolish the Petitioner's house and the perimeter wall stating the reasons thereof and giving the Petitioner a chance to defend itself. The Respondent was subject to *the Constitution* and the Bill of Rights contained therein and, in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*. The Respondent's decision to destroy the Petitioner's perimeter wall without notice was contrary to the enabling law (the *Land Act*, 2012) and in violation of the Petitioner's right to fair administrative action as guaranteed by the provision of Article 47 of *the Constitution*.
 10. As a result of the Respondent's aforesaid actions, the Petitioner had suffered loss of income as it was no longer receiving the monthly rent of a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/-) which it used to fetch from the property. Further, the Petition was now being portrayed as a land grabber in the public eye yet it followed due legal process in the acquisition of the suit property and obtained all necessary approvals before developing the same. It was necessary that this Petition be heard and determined so that the Respondent could know the ramifications of demolishing any property in Kenya without following the law.
 11. Vide a Valuation report dated 26th April, 2021, by a Valuer trading as M/s Nyange Integrated Consultants Ltd quantified the loss suffered by the Petitioner as a result of the demolition of the house and perimeter wall was estimated to be a sum of Kenya Shillings Twelve Million Ninety Two Thousand Three hundred and Ten and Nine Cents (Kshs.12,092,310.09/=). The Petitioner therefore sought for compensation for the destruction of its property at a sum of Kenya Shillings Twelve Million Ninety Two Thousand Three hundred and Ten and Nine Cents (Kshs. 12,092,310.09/=). The Petitioner also sought for the loss of income at the rate of Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/-) per month from the date when the Petitioner's house and perimeter wall were demolished to the date when the Petitioner would be compensated by the Respondent for the value of the said structures as stated above.



12. The Petition was premised on the testimonial facts, grounds and the averments made out in the 38 Paragraphed Affidavit of Hussein H. Pothiwalla together with annexures marked as “HHP” annexed thereto. He deposed as follows:
- a. The Petitioner is the registered owner of the parcel of land known as plot number 1436 Section XVII, Mombasa Island. He annexed a copy of the Certificate of Title and certificate of postal search which he marked as annexure ‘HHP-1’.
 - b. The Petitioner had been diligently paying his land rates as and when the same fell due. The Respondent had at all material times accepted the said rates and/or rent from the Petitioner. Annexed in the affidavit and marked “HHP” were documents in support of the above fact.
 - c. Upon acquiring the aforesaid property, the Petitioner took possession of the same, cleared the land and developed the property by building a commercial cum residential house on the said property. To secure its interests on the property, the Petitioner resolved and constructed a perimeter and /or boundary wall around the properties. Before undertaking the construction of the house and the perimeter wall, the Petitioner made an application to the Respondent for approval of its Development Plan of the house and the perimeter and/or boundary wall and paid the requisite charges and the said plans were duly approved. All other necessary approvals were also obtained and the Petitioner constructed the said house and the perimeter wall. He was still trying to trace if he could get any copies of the said document elsewhere as the copies he had were lost when the house was demolished as he had kept them in his office which was on the suit property.
 - d. While undertaking its development agenda, the Respondent approved a project dubbed “Urban Renewal and Re-development of Old Estates within Mombasa County” whereby around 520 house units, registered in the Respondent’s name, around Buxton Estate were to be demolished for purposes of construction of new apartments by Buxton Point Apartments Limited who is a private investor in partnership with the Respondent.
 - e. The suit property and the house which was standing thereon is a privately-owned property which is registered in the name of the Petitioner. The said property never formed part of the old estates registered in the name of the Respondent which the Respondent intended to re-develop.
 - f. On 6th March, 2021 the Respondent through its employees and/or authorized agents and servants started demolishing the old estates around the Buxton area so as to set up the place ready for the re-development exercise. However, while doing so, they also descended on the Petitioner’s property, chased away the Petitioner’s employees, tenants and demolished the house together with the perimeter wall which was standing the suit property. He reported the matter whereby he was issued with an OB No. Annexed in the affidavit was a copy of the OB No. and marked as annexure “HHP-3”. The Respondent, its employees and/or authorized agents and servants were so reckless and negligent and never listened to anybody watch helplessly as their investment was illegally put down by the Respondent.
 - g. The Respondent never gave the Petitioner a chance to be heard before demolishing the Petitioner’s house and perimeter fence on the suit property and/or give the Petitioner a notice of the intended demolition exercise. Upon demolishing the Petitioner’s house and perimeter wall, the Respondent cleared the site then fenced off the entire area. It was therefore apparent to the Petitioner that the Respondent intends to undertake construction work on the Petitioner’s property. Annexed and marked as “HHP – 4” were photographs in support of the same. The



manner in which the Respondent had fenced off the suit property denies the Petitioner a chance to access its property and/or to undertake any new developments thereon.

- h. The Respondent was negligent in the manner in which it demolished the Petitioner's house and perimeter fence on the suit properties due to the following reasons:
 - i. The Respondent never gave the Petitioner any notice before demolishing the Petitioner's house and perimeter fence on the suit properties.
 - ii. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware that that was a private property belonging to the Petitioner and did not form part of the municipal houses which were liable for demolition.
 - iii. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware about the security concerns which could be caused by such an act.
- i. Further, the Respondent's aforesaid actions were illegal and in contravention of the provision of Articles 10, 47, 40, and 50 of *the Constitution* of Kenya, 2010 as well set out in the Petition. The Petitioner had at all material times had a reasonable and legitimate expectation that the Respondent would at the very least give it a notice of its intention to demolish the Petitioner's house and the perimeter wall stating the reasons thereof and giving the Petitioner a chance to defend itself.
- j. The Respondent is subject to *the Constitution* and the Bill of Rights contained therein and, in every case, the High Court as the custodian of the Bill of Rights is entitled to intervene where the facts disclose a violation of the rights and fundamental freedoms guaranteed under *the Constitution*. The Respondent's decision to destroy the Petitioner's perimeter wall without notice is contrary to the enabling law (the *Land Act*, 2012) and in violation of the Petitioner's right to fair administrative action as guaranteed by Article 47 of *the Constitution*. As a result of the Respondent's aforesaid actions, the Petitioner had suffered loss of income as it was no longer receiving the monthly rent of a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/-) which it used to fetch from the property. Further, yet it followed due legal process in the acquisition of the suit property and obtained all necessary approvals before developing the same. The tenancy agreement was annexed and marked as "HHP – 5" in the affidavit.
- k. It was- necessary that this Petition be heard and determined so that the Respondent can know the ramifications of demolishing any property in Kenya without following the law. Vide a valuation report dated 26th April, 2021, by the Valuers trading in the name and style of M/s Nyange Integrated Consultants Ltd quantified the loss suffered by the Petitioner as a result of the demolition of the house and perimeter wall was at a sum of Kenya Shillings Twelve Million Ninety Two Thousand Three Hundred and Ten and Nine cents (Kshs.12,092,310.09/=). The Petitioner therefore seeks compensation for the destruction of its property at a sum of Kenya Shillings Twelve Million Ninety Two Thousand Three Hundred and Ten and Nine cents (Kshs. 12,092,310.09/=). A copy of the said Valuation report was annexed and marked as "HHP – 6".
- l. The Petitioner also sought for loss of income at the rate of a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs.120,000/-) per month from the date when the Petitioner's house and perimeter wall were demolished to the date when the Respondent would



compensate the Petitioner for the value of the said structures as stated above. The manner in which the Respondent had cleared the suit property and fenced the same off, it was clear that the Respondent intended to develop the suit property by building apartments thereon yet the Respondent had not paid the requisite compensation to the Petitioner.

- m. Vide a valuation report dated 18th March, 2021, by a Valuer trading in the name and style of M/s Ultimate Valuers valued the suit property at a sum of Kenya Shillings Fifty Three Million (Kshs. 53,000,000/-). Therefore, the Petitioner sought for an order that the Petitioner was entitled to full compensation for the value of the suit property in the sum of Kenya Shillings Fifty Three Million (Ksh.53,000,000/-) subject to the Petitioner surrendering the leasehold title to the Respondent. A copy of the Valuation report was annexed and marked in the affidavit. The Petitioner also sought for general damages with regard to the manner in which the Respondent undertook the demolition exercise as the same was done in total violation of the law.
- n. Unless this court made a declaration that the Respondent acted illegally and unconstitutionally in facilitating the demolition of the house and the perimeter wall to the property known as plot number 1436 Section XVII, Mombasa Island there is likely hood that the Respondent will in future repeat the said action against the Petitioner or against another person owning property in Kenya. It is therefore necessary that this petition be heard so that the Respondent can understand the law with regard to demolition of properties in Kenya.
- o. Vide a letter dated 10th May, 2021 the Petitioner demanded that the Respondent admitted liability and/or arranged a meeting to discuss the Petitioner's issue but the Respondent neither acknowledged receipt nor responded to the said letter. The copy of the letter was annexed and marked as "HHP" in the affidavit. It was therefore in the interests of justice, fairness and in showing fidelity to *the Constitution* that the prayers sought in the Petition filed herewith should be granted.

V. The Petitioner's further affidavit

- 13. On 16th November, 2021, the Petitioner filed a 5 paragraphed further affidavit in support of the Petition dated the same day where deponent Hussein H. Pothiwalla, the Petitioner's Director averred as follows:-
 - a. The Respondent had been busy undertaking construction works on the petitioned suit property.
 - b. Even though the Petitioner's property had been compulsorily taken over by the Respondent, the Respondent had not paid any compensation to the Petitioner but its busy undertaking construction works and delaying the determination of this Petition.
 - c. Therefore, he urged the Honourable Court to ensure that Justice was not only done but seen to be done as I believe that justice cannot be seen to be done when the Respondent was busy undertaking construction works on the suit property and at the same time delaying the determination of this matter.

VI. The Respondent's Case

- 14. In response to the Petition the Respondent, on 8th December, 2021 filed a 25 Paragraphed Replying Affidavit to the Petition dated 7th December, 2021. The deponent Caxton Mbaru, the Respondent's Officer in charge of survey, together with annexures marked as "A", "B", "C" and "D" annexed thereto. He averred as follows:-



- a. Contrary to the Petitioner's averments, it was not the owner of the suit property, but rather a holder of a previous holder of a leasehold interest as a result of a sub - lease entered into between itself and the Respondent who was the head Lessor of the suit property. However, by virtue of Gazette Notice No.4671, the said Lease was revoked and/or cancelled which accordingly expunged the Petitioner's interest. Accordingly, and disparately the Petitioner's belief and/or averment a leasehold interest never created an absolute right to the sublessee as the head lessor still retained the substantive interests and rights to enable policing of development on the leased land, as was the case instantly.
- b. He reckoned that the Sub Lessee's misconstruction of the arrangement was what gave rise to this present suit, as although it claimed that it had been given absolute ownership over the suit premises by virtue of receiving physical possession, it failed to appreciate that the Respondent still retained all the rights eminent affecting and relating to control over the property. Therefore, by retaining the primary, superior and/or priority compared to those of the sublessee, the Respondent had the powers to undertake any action that would give a proper outlook and/or value to the suit property being a fundamental principle of land governance as enshrined in *the Constitution* of Kenya.
- c. Documentary evidence produced by the Petitioner only evidenced a previous leasehold interest passed by the Respondent and this was no way representative of an absolute right over the suit property. Resultantly, the Petitioner could not bar the Respondent from taking measures to enhance the quality of the land, especially where such conduct came with innumerable benefits to the residents of the County Government of Mombasa. Further, the lease having been cancelled as per the Gazette Notice No. 4671, the alleged lease which the Petitioner purported to produce herein lacks a force of law.
- d. The Respondent had at all material times retained absolute ownership in the form of a freehold interest over the suit premises over the property, which as per the provisions of the Land Laws in Kenya, was indefeasible and undefeatable by other rights unless expressly alienated, which was not the case herein. The Petitioner on the other hand only holds a right inferior to that of the Respondent, which allowed it to use the property within the confines of the conditions precedent. (Annexed in the affidavit and marked "Annexure - A" was a copy of the Certificate of Title in the Respondent's name).
- e. It abhorred logic to demand payment from the Respondent over the suit property as the same belonged to it, and as such any payment in the form of compensation as the Petitioner claimed, would deviate the ideals of land ownership, fly in the face of possession of title and amounted to unjust enrichment. This was likely to give way by opening floodgates of similar claims by Sub - Lessees who assessed themselves as owners of properties by merely having a leasehold interest to the detriment of the owners of the land. Indeed, records from the Land Registry showed that it was the Respondent who was and has always been the proprietor of the property. (Annexed in the affidavit and marked "Annexure - B" was a copy of search from the Land's Registry.)
- f. The fundamentals of land ownership, the purpose of possession of title documents all caution against perceiving possession of another person's property as tantamount to actual ownership as the same only herald anarchy. The Respondent was a stranger as to the averments made by the Petitioner as to having obtained approvals from the Respondent to construct a parameter wall, as the same is factually inaccurate clearly evidenced by the lack of proof in the form of documents containing such approvals.



- g. In any event, acting to develop, modify and/or alter the status of the property subject to Sub - Lease without relevant approvals from the Respondent is not only contrary to the provisions of the laws and/or regulations both at the National and County levels, but also deviated the conditions attaching the Sub - Lease.
- h. Without prejudice to any of the preceding paragraphs, the sustainability of leasehold interest was sanctioned by other overriding interests which have been recognized by *the Constitution* of Kenya and the various land laws in Kenya. One such overriding interest was use for public purpose, in which case, the Lessor controlled and maintained the right to cancel the interest to benefit the public. To determine whether an objective qualifies and meets the threshold of public interest, the spirit of the project ought to be looked at holistically as against the populace likely to benefit from the implementation of the project. In this case the people of Mombasa County would enjoy accessible, adequate and affordable housing of reasonable standards of sanitation which is a part of the Government of Kenya's Big Four Developmental Agenda.
- i. To determine the position of the people of the County of Mombasa, who they reckoned the foremost of this public interest initiative, the Respondent invited members of the public to proffer their views and comments on the proposed project, as part of public participation. Consequently, the people expressed their satisfaction with the project and recommended strongly that the Respondent as the custodian of their rights and interests proceed to put to works the project. (Annexed in the affidavit and marked as "Annexure - C" was a copy of the notice inviting participation from members of the public).
- j. The public views which demonstrated the ideals of the people of the County of Mombasa coupled with advice from the County Formalization and Regularization Development Committee on the developmental deficit and acute dearth of affordable housing witnessed within the suit property, that is, the whole of the amalgamated section, was what informed the idea to proceed and cancel the subleases within Buxton Housing Estate so as to pursue an even broader agenda of land improvement within the area monikered "Urban Renewal and Re-development of Old Estates within Mombasa County".
- k. Resultantly, it was only upon the receipt of the views, the satisfaction that the views given had met the requisite threshold set out in law and the recommendation by the Development Committee, that the Respondent proceeded to issue Gazette Notice No.4671 expressing the intention to cancel certain sub - leases issued and the specific properties affected by this proposed plan. The Respondent made sure to give sufficient notice to all the affected sub - lessees and the members of the public as a whole in line with the good governance principle of transparency and accountability. Therefore, the allegation that there lacked sufficient notice was unfounded especially as against the Respondent. (Annexed in the affidavit and marked as "Annexure - D" was a copy of the Gazette Notice).
- l. The issue of public participation and violation of constitutional rights as raised in the present suit had been subject of litigation in previous proceedings wherein the Courts found that the Petitions never disclosed any colorable claim for a constitutional violation capable of engaging the constitutional jurisdiction of this Honourable Court.
- m. In any case, the issues raised in the current Petition and those previously before the Court in the cases of:- "Mombasa High Court Petition No.39 of 2016 Legal Advice Centre & 3 Others – Versus - County Government of Mombasa and 4 others [2016] eKLR", "Mombasa Civil Appeal No.46 of 2017 Legal Advice Centre & 3 Others – Versus - County Government of Mombasa and 4 others, Mombasa High Court Petition No.6 of 2017", "Peter Obhunga



Wakoyo & 87 others – Versus - County Government of Mombasa & 3 Others, Constitutional Petition No. 58 of 2020” and “Justus Chai Mbaru & 12 Others – Versus - County Government of Mombasa & 3 Others” were substantially and directly the same. Hence, they fell under a series of litigious proceedings already before Court and conclusively decided. The issues had extensively been litigated by parties all the way up to the level of the Court of Appeal and the Courts were heard to bespeak the same thing, that is, the Petitions never raised any substantial constitutional issues to be decided by the Court and that due to the multiplicity of cases, on the same subject matter already determined, the matters were “Res Judicata”. The Court in the case of:- “Constitutional Petition No. 58 of 2020 Justus Chai Mbaru & 12 Others v County Government of Mombasa & 3 Others” which was the most recent suit in time had this to say about the Petition:

“I do not think that there can be any question, that the issue of whether or not the Mombasa Urban Renewal and Redevelopment of Old Estates is a project that should proceed or be stopped, has already been determined in the previous two suits in the High Court. Buxton Estate, which this Petition relates, was one of the Estates that was the adequate public participation and that the project as envisaged does not violate the right to housing. It follows that the requirement for the tenants to give vacant possession of the premises that they occupy has already been found not to violate the right to housing. There has also been finding that in so far as there is alleged violation of statutory provisions, then the avenue is to commence proceedings following the dispute resolution mechanism provided in the subject statutes alleged to have been violated. I am afraid that these are issues cannot reopen afresh, if I do so then I will be contravening the principle of res judicata.” (Annexed in the affidavit and marked “Annexure - E” is a copy of the said Judgment)

- n. Similarly, as the Court did in the above dispute, this Court equally possesses the powers to dismiss the suit for it raised issues that had been materially and substantively dealt with by the Court in previous suits and the Court should not play to the tune by re-opening the same, this was despite the fact that the Petitioner was not a party to the previous suits. As was noted by the Court in Justus Mbaru (supra) at paragraph 99:

“In my view, the principle of res judicata would still apply, irrespective of whether the parties are different, so long as the issues are the same. This would apply especially where the issue is one affecting the general public so that any person capable of filing action. If one person files action and fails, with the issue being addressed and dismissed, another person cannot now re-litigate the issue, claiming he was not a party in the previous suit.”

- o. Indeed, the demolitions were rightfully and/or properly undertaken contrary to the Petitioners averments which set into motion the picture of a gloom, arbitrary and/or capricious decision to bring down the said structures. The Respondent made sure to issue all the necessary notices and even more sufficient notice to properly equip the Petitioner and other residents with enough time to vacate the premises.
- p. The Petitioner however in a show of outright defiance opted to disregard the notices, which had validly and/or genuinely become due through following the right channels of public participation in a civil act of disobedience to proper authority. The urban leases were subjected to strict conditions to ensure continued and controlled development within the specified regions to avoid the degradation and degeneration of the property. Further, where there was a



plan to spur urban growth, it was in the public interest that the same objective be pursued to the benefits of the residents of the specified region, which was the case in the instant matter.

- q. The Petitioner's leasehold interest as well as all the other interests that were subject of the amalgamation plan had failed to advance the requirement and/or objective of urban growth, as the same were severely undeveloped thus exposing the land to urban sprawl. Wherefore to avert the risk of reducing the standards of housing while concomitantly improving the housing conditions in the County, the Respondent proceeded to cancel the subleases to these various sublessees. This incidentally and crucially aligns with the government's big Four Agenda which was to provide affordable housing to the people of the republic of Kenya, hence, a public interest concern.
- r. The broader public interest, especially the interest of the people of Mombasa County and the applicable provisions of *the Constitution*, the statutes hereinabove made reference to, favour the denial of the orders sought in the Petition. The Petition was not merited as it never not only disclosed any constitutional violation that was capable of being adjudicated by this Court, but also failed under the test of the doctrine of "Res Judicata" for having been litigated upon previously by this Honourable Court ad nauseum and the same ought to be dismissed with costs.

VII. The further (further) Affidavit of the Petitioner

- 15. On 14th December, 2021, the Petitioner filed a 17 Paragraphed further (further) affidavit to the Petition, sworn by Hussein H. Pothiwalla, one of the Petitioner's director, sworn on the same date. He averred that:
 - i. The Petitioner is the registered owner of the parcel of land known as Plot number 1436 Section XVII, Mombasa Island through a lease issued by the Respondent for a term of 99 years from 1st December, 1993.
 - ii. He was shocked to learn from the Replying Affidavit that the Respondent allegedly revoked and/or cancelled the Certificate of Title issued to the Petitioner through Gazette Notice No. 4671 as the Respondent had never notified the Petitioner of the intended cancellation of its title. The purported cancellation of the Certificate of Title issued to the Petition was illegal, null and void for the following reasons:
 - a. The Respondent had never served the Petitioner with any notice before the purported cancellation of the Petitioner's title. The cancellation is therefore in violation of Article 47 of *the Constitution* of Kenya, 2010.
 - b. Vide a Land Rent Demand Note dated 9th March, 2021 the Respondent demanded the sum of Kenya Shillings Fifty Seven Thousand Three Hundred and Sixty (Kshs. 57,360/-) being the land rent for the period between the years 2018 to 2020. Annexed in the affidavit was a copy of the said demand and mark the same as annexure "HP - 1". The Respondent never indicated to the Petitioner its intention to cancel its title at all.
 - c. Under the provision of Section 79 (a) and (b) of the *Land Registration Act*, the Respondent was under a legal obligation to serve the Petitioner with a ninety (90) days' notice before altering with the register to cancel the Petitioner's name. Having failed to give the said notice, the purported cancellation of the Petitioner's title was, ipso facto, illegal.



- d. Having leased the suit property to the Petitioner for a period of 99 years as per the Certificate of Lease dated 7th June, 2019, the Petitioner acquired proprietary rights which were protected under the provision of Article 40 of *the Constitution* of Kenya, 2010. The Respondent could only lawfully affect the said rights upon fully compliance with the procedure set out both in *the Constitution* of Kenya, 2010 and the legislations made thereunder.
- iii. The Petitioner was not served with the “Tangazo Tangazo” notice annexed and marked as “JCM - 8” in the Replying Affidavit. If the Respondent intended to interfere with the proprietary rights of the Petitioner, the Respondent would have simply served the Petitioner in the same manner that it served the Land Rent Demand Note.
- iv. Upon acquiring the aforesaid property, the Petitioner took possession of the same, cleared the land and developed the property by building a commercial cum residential house on the said property. The said development exercise was fully sanctioned and approved by the Respondent vide building approval number RPR/2017/123. He annexed a copy of the said approval and mark the same as annexure “HP - 2”.
- v. The Respondent had never served him with any notice alleging that the developments which were undertaken on the suit property were illegal. It was only after such a notice had been issued and upon compliance with the procedure set down for demolition of an illegal structure could the Respondent lawfully demolish any structure in Mombasa. The developments which the Petitioner had undertaken on the suit property were approved by the Respondent and were therefore lawful developments.
- vi. The Respondent was in-charge of the municipal houses standing around Buxton area. The municipal houses were being leased to the workers of the Respondent and other Government officials at the rate of a sum of Kenya Shillings Three Thousand Six Sixty two hundred (Kshs. 3,662/=) for a two-bedroom house and a sum of Kenya Shillings Two Thousand Eight Hundred and ten Hundred (Kshs. 2,810/=) for a one-bedroom house.
- vii. Crucially, the said tenants who were paying rent at the rate of a a sum of Kenya Shillings Three Thousand Six Sixty two hundred (Kshs. 3,662/=) for a two-bedroom house and a sum of Kenya Shillings Two Thousand Eight Hundred and ten Hundred (Kshs. 2,810/=) for a one-bedroom house were compensated with an amount of a sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) for the two (2) year period which they would be relocated from the houses and would be given first priority when the said houses would be sold and/or leased out. However, the Petitioner herein who was holding a lease of 99 years and having huge investment of the suit property was thrown out without being paid any compensation at all.
- viii. When the Respondent initiated its development plans, the tenants moved to court vide the cases of:- “Mombasa ELC Court Constitutional Petition No. 28 of 2020; Justus Chai Mbaru & 12 others – Versus - County Government of Mombasa & others” seeking to declarations that the development plan was being undertaken contrary to the law and an order seeking to stop the said development exercise. He annexed in the affidavit a copy of the said Petition and mark the same as annexure “HP - 3”.
- ix. The Petitioner herein was not a party in the case of:- “Mombasa ELC Court Constitutional Petition No. 28 of 2020; Justus Chai Mbaru & 12 others – Versus - County Government of



Mombasa & others” and the issues raised in the said Petition were distinct and separate from the issues raised herein.

- x. The Respondent had clearly conceded that the Petitioner is the registered owner of the suit property save that the Respondent contended that it cancelled the Certificate of Lease issued to the Petitioner vide Gazette Notice No. 4671. Clearly the issues raised in this Petition were never related to the issues raised in the case of “Mombasa ELC Court Constitutional Petition No. 28 of 2020; Justus Chai Mbaru & 12 others – Versus - County Government of Mombasa & others”.
- xi. The Respondent unlawfully acquired the Petitioner’s property, demolished the Petitioner’s developments thereon. It had already commenced construction works on the property. In as such, as the Petitioner never disputed the fact that the developments were for public use. However, the Respondent ought to have compensated the Petitioner as provided for under Article 40 of *the Constitution* of Kenya, 2010 when acquiring the suit property.
- xii. On 17th November, 2021 the Court made an order directing the Respondents to file their responses within 14 days, that is, by 1st December, 2021 failure to which the construction works were to stop until further orders by the Court. However, the Respondent filed its responses on 8th December, 2021 but was still proceeding with the construction works in total disregard to the orders made by the court. The photographs are annexed and marked as “HP – 4”.
- xiii. The Respondent seemed to be delaying this matter since it was busy undertaking construction works and collecting money from persons who were purchasing the houses off - plan. Therefore, he urged the court to hear and determine this matter on priority basis as the Petitioner’s rights were still being violated by the Respondent. It was therefore in the interests of justice, fairness and in showing fidelity to *the Constitution* that the prayers sought in the Petition filed herewith should be granted.

VIII. Submissions

16. On 28th February, 2023 in the presence of both parties the Court directed that the Petition be dispensed off by way of written submissions. On 27th April, 2023, the Honourable Court confirmed that only the Petitioner had complied and had filed his written submissions on record. Despite of the stringent timelines granted by Court, the Respondent never filed nor served their written submission. Hence, the Honourable Court reserved a Judgment on notice accordingly.

A. The Written Submission by the Petitioner

17. Sometimes in the month of April, 2023, the Learned Counsel for the Petitioner the Law firm of Messrs. Mutisya Mwanzia & Ondeng Associates filed their written submissions dated 17th April, 2023. Mr. Mwanzia Advocate commenced his submission by providing Court with a brief introduction and brief facts of the case. He stated that for consideration was the Petition dated 24th May, 2021 which was supported by the Affidavit sworn by Hussein H. Pothiwalla on the same date and the Further Affidavit sworn on 14th December, 2021. He informed Court that the Respondent opposed the Petition through the Replying Affidavit sworn by Caxton Mbaru Kai on 7th December, 2021. On 28th February, 2023, parties recorded a consent to have the main Petition be disposed off by way of written submissions.
18. By way of providing Court with brief facts of the case, the Learned Counsel stated that at all material times, the Petitioner was and still is the registered owner of the suit land. According to him, the Petitioner had been diligently paying his land rates as and when the same fell due. The Respondent had at all material times accepted the said rates and/or rent from the Petitioner. The payment evidence was



- seen at page 6 to 8 of the Petitioner's bundle of documents. Upon acquiring the aforesaid property, the Petitioner took possession of the same, cleared the land and developed the property by building a commercial cum residential house on the said property. To secure its interests on the property, the Petitioner resolved and constructed a perimeter and /or boundary wall around the properties. Before undertaking the construction of the house and the perimeter wall, the Petitioner made an application to the Respondent for approval of its Development Plan of the house and the perimeter and /or boundary wall and paid the requisite charges and the said plans were duly approved. All other necessary approvals were also obtained and the Petitioner constructed the said house and the perimeter wall.
19. While undertaking its development agenda, the Respondent approved a project dubbed "Urban Renewal and Re-development of Old Estates within Mombasa County" whereby around 520 house units, registered in the Respondent's name, around Buxton Estate were to be demolished for purposes of construction of new apartments by Buxton Point Apartments Limited who is a private investor in partnership with the Respondent. The suit property and the house which was standing thereon was a privately owned property which was registered in the name of the Petitioner. The said property did not form part of the old estates registered in the name of the Respondent which the Respondent intended to re-develop.
 20. On 6th March, 2021 the Respondent through its employees and/or authorized agents and servants started demolishing the old estates around the Buxton area so as to set up the place ready for the re development exercise. However, while doing so, they also descended on the Petitioner's property, chased away the Petitioner's employees and tenants and demolished the house together with the perimeter wall which was standing the suit property. The Petitioner reported the matter to the police whereby it was issued with an Occurrence Book Numbers. The Respondent, its employees and/or authorized agents and servants were so reckless and negligent and did not listen to anybody during the demolition exercise. The Petitioner's directors were forced to watch helplessly as their investment was illegally put down by the Respondent. The Respondent never gave the Petitioner a chance to be heard before demolishing the Petitioner 's house and perimeter fence on the suit property and/or give the Petitioner a notice of the intended demolition exercise.
 21. Upon demolishing the Petitioner's house and perimeter wall, the Respondent cleared the site then fenced off the entire area and had now constructed commercial apartments. A two bedroom apartment was going for the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/=) as seen from the photographs at pages 10 to 15E of the Petitioner's bundle of documents. The Respondent never gave the Petitioner any notice before demolishing the Petitioner's house and perimeter fence on the suit properties. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware that that was a private property belonging to the Petitioner and never formed part of the municipal houses which were liable for demolition. The Respondent decided to destroy the Petitioner's house and perimeter fence on the suit properties yet the Respondent was aware and/or ought to be aware about the security concerns which could be caused by such an act.
 22. Vide a letter dated 10th May, 2021 which was served upon the Respondent on 11th May, 2021 the Petitioner demanded that the Respondent admits liability and/or arranges a meeting to discuss the Petitioner's issue but the Respondent neither acknowledged receipt nor responded to the said letter. Through a Replying Affidavit sworn by Caxton Mbaru Kai, the Respondent admitted that the Respondent had leased the suit property to the Petitioner for a period of 99 years. However, the Respondent contended that the lease was quashed through a Gazette Notice No. 4671 dated 13th May, 2021. As such, the Respondent contend that the Petition was unmerited.



23. The Learned Counsel raised three (3) issues that according to him fell for determination by this Honourable Court. These were as follows:-

Firstly, whether the cancellation of the Petitioner's lease for the suit property was lawful and in compliance with the Constitutional dictates under Article 10 and 47 of *the Constitution* of Kenya, 2010. The Learned Counsel held that on 6th March, 2021 the Respondent through its employees and/or authorized agents and servants started demolishing the old estates around the Buxton area so as to set up the place ready for the re development exercise. However, while doing so, they also descended on the Petitioner's property, chased away the Petitioner's employees and tenants and demolished the house together with the perimeter wall which was standing the suit property.

Vide a letter dated 10th May, 2021 which was served upon the Respondent on 11th May, 2021 the Petitioner demanded that the Respondent admits liability and/or arranges a meeting to discuss the Petitioner's issue but the Respondent neither acknowledged receipt nor responded to the said letter. Through a Replying Affidavit sworn by Caxton Mbaru Kai, the Respondent admits that the Respondent had leased the suit property to the Petitioner for a period of 99 years. However, the Respondent contends that the lease was quashed through a Gazette Notice No. 4671 dated 13th May, 2021.

Thus, it was the Learned Counsel's contention that the purported cancellation of the Petitioner's title was only a cover up for the Respondent's illegal actions. There was no valid reason why the Respondent proceeded and demolished the Petitioner's house and allegedly cancelled the Petitioner's title without according the Petitioner's a chance to be heard and without paying any compensation. The purported cancellation of the Petitioner's title by the Respondent is illegal, null and void for the following reasons:

- a. The Petitioner was not accorded a fair hearing before the Respondent reached the conclusion to quash the Petitioner's lease. The Petitioner only learnt, for the first time, through the Replying Affidavit that the Respondent allegedly quashed the Petitioner's lease.
- b. The Respondent never complied with the mandatory provisions of Article 40 and Article 47 of *the Constitution* of Kenya, 2010 in the manner in which it allegedly quashed the Petitioner's certificate of lease.
- c. The Petitioner was not paid any compensation before the Respondent acquired the suit property and commenced the construction works yet the Petitioner had a right to the suit property which was protected under Article 40 of *the Constitution* of Kenya, 2010.

24. According to the Learned Counsel, the rules of natural justice require that a person should not be condemned unheard; that decisions affecting him/her should not be reached behind his/her back. The Courts had been consistent on the importance of observing the rules of natural justice and in particular hearing a person who was likely to be adversely affected by a decision before the decision is made. In the case of:- "Onyanqo - Versus - Attorney General [1986-1989] EA 456, Nyarangi, J.A asserted at page 460:-

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

The Respondent was therefore under a duty to serve the Petitioner with a Notice setting out the reasons and/ or grounds thereof before the Respondent could lawfully cancel the Petitioner's title.



Furthermore, there was no evidence before this court to show that the Petitioner was heard before its title was revoked. Article 47(1) and (2) of *the Constitution* provides as follows:-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair .

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

25. The Learned Counsel to buttress its point he cited the case of: "Pastoli – Versus - Kabale District Local Government Council & Others (2008) 2 EA 300, the Court held as follows:

"... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision..."

He further cited the case of: "Republic – Versus - The Honourable The Chief Justice of Kenya & Others Ex - Parte Moijo Mataiya Ole Keiwua, HCMA No. 1298 of 2004, the court held as follows:-

".....The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individual or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken... As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated..."

Also, the Learned Counsel relied on the case of: "De Souza – Versus - Tanga Town Council (1961} E.A 377, where the court held as follows:

"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."

26. According to the Learned Counsel, considering that the Petitioner has deponed that it was never heard before the Respondent cancelled its title, the Respondents should have shown that indeed the Petitioner was heard, or was given an opportunity to be heard. Having not shown that the Petitioner was heard, this court should find that the Petitioner was not afforded an opportunity of being heard before the cancellation of its title was effected.



27. Secondly, whether the acquisition of the suit property by the Respondent was in conformity with Article 40 of *the Constitution* of Kenya, 2010. The Learned Counsel referred Court to the provision of Article 40(3) of *the Constitution* of Kenya, 2010 provides as follows:-

- “ 40 The state shall not deprive a person of property of any description, or of any
 (3 } interest in, or right over property of any description, unless the deprivation-
- a. with Chapter five; or
 - b. Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - i. Requires prompt payment in full, of first compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4)
- (5)
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

28. The Petitioner's property was forcefully acquired on 6th March, 2021 when the Respondent's employees demolished the Petitioner's house on the property and fenced the same. The said action was followed by a Gazette Notice dated 13th March, 2021 cancelling the Petitioner's title. Even though it was not in dispute that the suit property was acquired for purposes of public purpose, that is, the Respondent's approved project dubbed "Urban Renewal and Re-development of Old Estates within Mombasa County", the manner in which the Respondent acquired the suit property contravened the provisions of Article 40(3) of *the Constitution* of Kenya, 2010.

29. To support his point, the Learned Counsel cited that case of:- "Commissioner Lands & Another – Versus - Coastal Aquaculture Ltd Civil of Appeal No. 252 of 1996 KLR (E&L 264) where the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of *the Constitution* and the Land Acquisition Act (now repealed). Further, in the case of:- Arnacherry Limited – Versus - Attorney General (2014) eKLR the court held that:-

“This is indeed a sad and distressing Petition . It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”

30. Therefore, if land was so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40 (3) of *the Constitution* that no person shall be deprived of his property of any description unless the acquisition was for a public purpose and subjected to prompt payment in full of just compensation. Having compulsorily acquired the Petitioner's property without prompt compensation, it followed that the acquisition of the Petitioner's property was in violation of Article 40(3) of *the Constitution* of Kenya, 2010.



31. Thirdly, whether the Petitioner was entitled to the reliefs sought in the Petition dated 24th May, 2021. Vide a valuation report dated 26th April, 2021, M/s Nyange Integrated Consultants Limited quantified the loss suffered by the Petitioner as a result of the demolition of the house and perimeter wall at a sum Kenya Shillings Twelve Million Ninety Two Thousand Three Ten Hundred and nine cents (Kshs. 12,092,310.09). The Valuation report at pages 37 to 64 of the Petitioner's bundle of documents. Further, vide a valuation report dated 18th March, 2021, M/s Ultimate Valuers valued the suit property at a sum of Kenya Shillings Fifty Three Million (Kshs. 53,000,000/=). Seen from the Valuation report at pages 19 to 36 of the Petitioner's bundle of documents. The Petitioner also produced documentary evidence to demonstrate loss of income at the rate of Kenya Shillings One Hundred and twenty Thousand (Kshs. 120,000/=) per month from the date when the Petitioner's house and perimeter wall were demolished to the date when the Respondent would compensate the Petitioner for the value of the said structures as stated above.
32. On all these, the Learned Counsel relied on the decision of: "Linus Nganga Kiongo & 3 others – Versus - Town Council of Kikuyu [2012] eKLR where Honorable Justice G. V. Odunga clearly held that when a party failed to controvert evidence given by the opposite party, the same results in the uncontroverted evidence standing as the truth in respect of that particular fact. The said decision is binding on this Court . The Hon. Judge put it this way:-
- “What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another - Versus - Raju Govindji, HCCC No. 548 of 1998 stated: "Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail." Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.
33. He asserted that the value of the demolished building and value of the suit property is not disputed. Therefore, in the event that the court finds merits in the petition, the Petitioner should be awarded compensation as per the valuation reports produced. He relied on the decision in the case of:- "Rahimkhan Afzalkhan Rahimkhan & 4 others – Versus - Chief Land Registrar & 2 others [2017] eKLR where the court held that:-
- “.....as I have found in this Judgment, the Petitioners' rights were violated. And a wrong done does not rot. Neither can it be wished away. It can only be redressed. Under this new Constitutional dispensation, the Petitioners shall be vindicated. Although the said property is no longer available because it has been sub-divided and sold to third parties, the Petitioners are entitled to full compensation at the current market value. The Petitioners are also entitled to damages for the loss suffered over the years”.
34. He submitted that the facts in this case were more or less similar to the facts in the Rahimkhan case as the Petitioner has been deprived of the suit property illegally by the Respondents and the suit property



was handed over to third party. Following the reasoning in the above case, we humbly urge the court to compensate the Petitioner for the value of the suit property at the current market price. Article 23 (3) (e) of *the Constitution* empowers this court to make compensation in any action brought under Article 22. The Petitioner is therefore entitled to an award of general damages. He relied on the decision in case:- “Rhoda S. Kiilu – Versus - Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR and submit that an award of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/= as damages for violation of the Petitioner's rights would be sufficient in this matter.

In conclusion, the Learned Counsel asserted that having adequately demonstrated that the Petition dated 24th May, 2021 was merited and the same should be allowed with costs.

IX. Analysis and Determination

35. I have carefully considered all the filed pleadings pertaining to the Petition dated 24th May, 2021, the Supporting and Replying Affidavits by both the Petitioner and the Respondent, the written submissions, the cited authorities, relevant and appropriate provisions of *Constitution of Kenya, 2010* and the statutes.
36. For attaining an informed, reasonable, fair and Equitable decision, the Honourable Court has crystalized the subject matter into the following four (4) salient issues for its determination. These are as follows:-
 - a. Whether *the Constitution* Petition dated 24th May, 2021 by the Petitioner herein meets the threshold of a Petition.
 - b. Whether the Constitutional Petition dated 24th May, 2021 by the Petitioner has any merit;
 - c. Whether the Petitioner is entitled to the reliefs sought from the filed Petition.
 - d. Who should bear the costs of the Petition?

ISSUE No. a). Whether *the Constitution* Petition dated 24th May, 2021 by the Petitioner herein meets the threshold of a Petition.

37. As a matter of course, *the Constitution* of Kenya under Article 259(1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

 - a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
38. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
39. The Petitioner has alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - Trusted Society



of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru vs Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

40. The Petitioner has a right to be treated in a credible and accountable manner by the Respondents as state organs under Article 10 of *the Constitution* of Kenya, 2010 which right as aforesaid, been violated by the Respondent. Similarly, the Petitioner has alleged that its fundamental right to enjoy a fair administrative action by the Respondent as provided in Article 47 of *the Constitution* of Kenya, 2010 has been violated by the Respondent. Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
41. The Petitioner’s inherent right to natural justice as codified in Article 50 of *the Constitution* of Kenya, 2010 has been violated by the Respondents. Article 50(1) of *the Constitution*, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
42. The Petitioner’s right to the suit property as provided under Article 40 of *the Constitution* of Kenya, 2010 has been violated by the Respondent in the manner in which the Petitioner’s house and perimeter wall were destroyed without prior notice having been given to the Petitioner by the Respondent. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*. and provides for compensation to be made to property holders, in the event of acquisition of Land by the State. From these legal prepositions, clearly the Petition meets the threshold of a Constitution Petition herein.

ISSUE No. b). Whether the Constitutional Petition dated 24th May, 2021 by the Petition has any merit;

43. Under this Sub heading, the main substratum of this Petition is on the validity of two (2) title deeds and the ownership to the same suit property; the existence of any breach, violation and/or threat to the fundamental rights entitled to the Petitioner by the Respondent as have been enshrined in the Bill of Rights and whether the Petitioner as a result is entitled to compensation for the acquisition of the suit land and the demolition of property on it by the Respondent herein. The Petitioner has argued that it is the lawful registered owner of the parcel of land known as Plot number 1436 Section XVII, Mombasa Island. There was a produced a Certificate of Lease and Certificate of Postal of official search conducted and annexed and marked as “HHP – 1” in the affidavit in support of the Petition dated 7th June, 2018 for a lease running from 1st December, 1993 for 99 years. Indeed, the Respondent from their Replying Affidavit admitted having leased the land to the Petitioner for this stated period. The Petitioner contended to having been diligently paying his land rates as and when the same falls due. Ideally, the Respondent has at all material times accepted the said rates and/or rent from the Petitioner evidence by annexure marked as “HHP – 2” thereof.
44. On the other hand, the Respondent contended and vehemently refuted that the Petitioner was not the owner of the suit property, but rather a holder of a previous holder of a leasehold interest as a result of a Sub - Lease entered into between itself and the Respondent who is the head lessor of the suit property.



However, by virtue of Gazette Notice No.4671 dated 13th May, 2021, the said lease was revoked and/or cancelled which accordingly expunged the Petitioner's interest.

45. Accordingly, and disparately the Petitioner's belief and/or averment a leasehold interest does not create an absolute right to the Sub - Lessee as the head Lessor still retains the substantive interests and rights to enable policing of development on the leased land, as is the case instantly. The misconstruction of the arrangement is what gives rise to this present suit, as although it claims that it had been given absolute ownership over the suit premises by virtue of receiving physical possession, it fails to appreciate that the Respondent still retained all the rights eminent affecting and relating to control over the property.
46. Therefore, by retaining the primary, superior and/or priority compared to those of the sublessee, the Respondent had the powers to undertake any action that would give a proper outlook and/or value to the suit property being a fundamental principle of land governance as enshrined in *the Constitution* of Kenya. The Respondent has maintained that at all material times retained absolute ownership in the form of a freehold interest over the suit premises over the property, which as per the provisions of the Land Laws in Kenya, is indefeasible and undefeatable by other rights unless expressly alienated, which is not the case herein.
47. The Petitioner on the other hand only holds a right inferior to that of the Respondent, which allows it to use the property within the confines of the conditions precedent. The Respondent annexed and marked as "Annexure A" copy of the Certificate of Title in the Respondent's name. I have had the pleasure to peruse the certificate of registration issued on 28th May, 2021 and shall be dealing on the matter more critically at a later stage of this Judgement.
48. It is trite law that the burden of proof on any allegation including fraud and so forth is on the person alleges. In the instant case, it is on the Respondents. The provision of Section 107 of the *Evidence Act*, Cap. 80 stipulates as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
49. Taking that the ownership of the suit property has been disputed the title lease been challenged, its critical that the Court traces the history, root of the title and effectiveness of registration particularly to establish whether the same was acquired by mistake, frau or omission. The end produce then would lead to its cancellation from the dictum stated under Section 80 of the *Land Registration Act*, No. 3 of 2012. The Honourable Court is guided by the Court of Appeal decisions in the matter of:-

"Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239 of 2009", the Appeal Court held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

And in the case of:

"Dennis Kuria & Anor –Versus- The Attorney General, High Court of Kenya (Nbi) in Misc Civil Application No. 663 of 2006" where the Court held: -



“I find that history is very relevant to enable the Court establish whether or not the allotment of the Suit Land to the Petitioners or the issuance of the titles is legal. The fact that the Respondents did the allocation does not confer legality to the title as the same was unconditional”.

50. The efficacy and effect of registration of title provided for under the provision of Sections 24 and 25 of the [Land Registration Act](#), No. 3 of 2012. Section 24 stipulates as follows:-

“Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

51. While the provision of Section 25 of the act provides:

- “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

52. The Respondent contends that the fundamentals of land ownership, the purpose of possession of title documents all caution against perceiving possession of another person's property as tantamount to actual ownership as the same only herald anarchy. The Respondent further averred that it is a stranger as to the averments made by the Petitioner as to having obtained approvals from the Respondent to construct a parameter wall, as the same is factually inaccurate clearly evidenced by the lack of proof in the form of documents containing such approvals.

53. In any event, acting to develop, modify and/or alter the status of the property subject to sublease without relevant approvals from the Respondent is not only contrary to the provisions of the laws and/or regulations both at the National and County levels, but also deviates the conditions attaching the sublease. The sustainability of leasehold interest is sanctioned by other overriding interests which have been recognized by [the Constitution](#) of Kenya and the various land laws in Kenya. One such overriding interest is use for public purpose, in which case, the lessor controls and maintains the right to cancel the interest to benefit the public.



54. In the case of “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others[2016] eKLR”, Munyao J held as follows:-

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

55. Needless to say, it is on record, a fact which is though disputed by the Respondent, whereas the Petitioner herein obtained its Certificate of Lease on 7th June, 2018 for a lease running from 1st December, 1993 for 99 years, the Respondent obtained its Certificate of Lease issued on 28th May, 2021. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of “Wreck Motors Enterprises – Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997”, where the court held that:

“Where there are two competing titles the one registered earlier is the one that takes priority’

56. The same position was held in the case of: “Gitwany Investment Limited – Versus - Tajmal Limited & 3 Others (2006) eKLR” where the Court held that:-

“...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

57. Critically speaking, this Honourable Court, finds that the Petitioner’s title was the first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then Petitioner’s title deed was the first in time and should prevail. I have noted that there having been no evidence called by the Respondent to challenge the same. No evidence was called to confirm how the 2nd title deed came into being and whether the title deed held by the Respondent was genuine or not. Indeed, the Respondent has averred that the Petitioner only held the title as a Sub – lessee from the main Lessor and upon the expiration of the term the title was called and called through a publication of a notice in the Kenya Gazette, Numbers 4671. To me this procedure is not only irregular, wrongful, alien but also illegal. The only known ways for the cancellation or revocation or annulment of a titles is by a Court of Law on grounds of it having been acquired through mistake or fraud or omission as stated out under the provision of Section 80 of the [Land Registration Act](#), No. 3 of 2012. Section 80 provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Sub section (2) states that:



“The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake.”

Based on this provision of the Law, the act of omission and commission by the Respondent was unlawful as they failed to demonstrate that the Certificate of Lease held by the Petitioner had breached any of these grounds for it to be cancelled. Thus, the situation cannot be resuscitated. On this ground, I further seek refuge from the famous decision of:-

“Macfoy -Versus - United Africa Company Ltd (1961) 3 All ER 1179” applies in that if the 1st action is wrong all the subsequent actions were wrong. It held:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

58. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.
59. Balancing the two competing titles, it is my view that the Petitioner holds a good title to the suit property. Justapose and on the contrary, the title held by the Respondent in my view, and in the absence of evidence to rebut the same, could only have been obtained not in line with the law. Further, the provision of Section 26 of the *Land Registration Act*, No. 3 of 2012 holds to the effect that:

“Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

60. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.



61. In the given circumstances, I am fully satisfied that the Petitioner is the bona fide registered owner of the suit property and had proved their claim on the land. To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be “the prima facie” conclusive evidence of the stated registration. For these reasons, the Petition by the Petitioner must succeed thereof.

ISSUE No. c). Whether the Petitioner is entitled to the relief sought from the Petition.

62. Under this sub – title having affirmed that the Petitioner is the bona fide and absolute and legal registered owner to the suit property with indefeasible title, interest and rights vested in by Law, the Honourable Court now wishes to assess what the Petitioner is entitled to in Law. All in all, the Respondent has failed to act in an accountable manner so as to ensure that it does not interfere with the Petitioner's property rights guaranteed under Article 10, 40 and 47 of *the Constitution* of Kenya, 2010. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.

63. In the case of “Republic – Versus - Kombo and 3 Others Ex - Parte Waweru [2008] 3 KLR (EP) 478” which was cited by the Petitioner it was held, inter alia, that:-

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

64. This Honourable Court is of the opinion that the Petitioner has demonstrated a violation of his legal and constitutional rights, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioner herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought.

65. In view of the forgoing, it goes without saying that that the Petitioner who is the bona fide owner of the lease is therefore entitled to compensation arising from compulsory acquisition under the provision of Article 40 (3) of *the Constitution* of Kenya, 2010. On the issue of compulsory acquisition Mutungi, J stated in the case of “Virendra Ramji Gudka & 3 Others – Versus - Attorney General (2014) eKLR”, that,

“Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of *the Constitution* and Sections 107 to 133 of the *Land Act*, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act”.

66. The meaning and intent of the provision of:- Article 40 (3) of *the Constitution*. The provision of Article 40, reads in part as follows:



40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
67. The acquisition by the Government is ordinarily direct and by processes known to the Land Acquisition Act (now repealed) by the [Land Act](#), No. 6 of 2012. The law governing compulsory acquisition is in Part VIII, Sections 107 to 133 of the [Land Act](#) 2012. The process of compulsory acquisition was laid down in the decided case of “Patrick Musimba – Versus - National Land Commission & 4 others (2016) eKLR” where the court held as follows;

“Under Section 107 of the [Land Act](#), the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of [the Constitution](#). In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the [Land Act](#), the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission’s due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the [Land Act](#).



The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.

68. The Respondent has contended that to determine whether an objective qualifies and meets the threshold of public interest, the spirit of the project ought to be looked at holistically as against the populace likely to benefit from the implementation of the project. In this case the people of Mombasa County will enjoy accessible, adequate and affordable housing of reasonable standards of sanitation which is a part of the Government of Kenya's Big Four Developmental Agenda. To determine the position of the people of the County of Mombasa, who they reckoned form the foremost of this public interest initiative, the Respondent invited members of the public to proffer their views and comments on the proposed project, as part of public participation. Consequently, the people expressed their



satisfaction with the project and recommended strongly that the Respondent as the custodian of their rights and interests proceed to put to works the project.

69. The public views which demonstrated the ideals of the people of the County of Mombasa coupled with advice from the County Formalization and Regularization Development Committee on the developmental deficit and acute dearth of affordable housing witnessed within the suit property, that is, the whole of the amalgamated section, is what informed the idea to proceed and cancel the subleases within Buxton Housing Estate so as to pursue an even broader agenda of land improvement within the area monikered “Urban Renewal and Re-development of Old Estates within Mombasa County”.
70. Resultantly, it is only upon the receipt of the views, the satisfaction that the views given had met the requisite threshold set out in law and the recommendation by the Development Committee, that the Respondent proceeded to issue Gazette Notice No.4671 expressing the intention to cancel certain subleases issued and the specific properties affected by this proposed plan. The Respondent made sure to give sufficient notice to all the affected sublessees and the members of the public as a whole in line with the good governance principle of transparency and accountability. Therefore, the allegation that there lacked sufficient notice is unfounded especially as against the Respondent.
71. The provision of Article 47 of *the Constitution* states as follows:
- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.’
72. From the evidence presented, it is not in doubt that at the time the Petitioner’s land was gazetted for compulsory acquisition, vide a valuation report dated 26th April, 2021 marked as “HHP – 7”, M/s Nyange Integrated Consultants Limited quantified the loss suffered by the Petitioner as a result of the demolition of the house and perimeter wall at a sum Kenya Shillings Twelve Million Ninety Two Thousand Three Hundred and Ten and nine cents (Kshs.12,092,310.09/=). The Petitioner therefore seeks compensation for the destruction of its property at said amount. At the same time, vide a Valuation report dated 18th March, 2021 marked as “HHP – 8”, M/s Ultimate Valuers valued the suit property at a sum of Kenya Shillings Fifty Three Million (Kshs. 53,000,000/=) .The Petitioner therefore seeks an order that the Petitioner is entitled to full compensation for the value of the suit property as stated herein subject to the Petitioner surrendering the leasehold title to the Respondent.
73. In the case of “Patrick Musimba – Versus - National Land Commission & 4 others (Supra)” where the Learned Judges held that:
- “In our view, a closer reading of Article 40(3) of *the Constitution* would reveal that *the Constitution* did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just



as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property through compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of *Horn-v-Sunderland Corporation* [1941] 2 KB 26,40: “The word “compensation” almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice”. Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority”: see *Director of Buildings and Lands – Versus - Shun Fung Wouworks Ltd* [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. *The Constitution* decrees “just compensation” which must be paid promptly and in full. *The Constitution* dictates that the compensation be equitable and lawful when the word “just” is applied as according to Black’s Law Dictionary 9th Ed page 881 the word “just” means “legally right; lawful; equitable”. In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.”

74. As regards relief, under Article 23 of *the Constitution* the court may grant appropriate relief to indicate the right so infringed. As I have stated, this case is about due process rights and I shall therefore grant orders necessary to secure these rights. The Petitioner is entitled to a nominal award and costs of the suit to vindicate its rights.

75. The Petitioner also sought special damages for valuation worth a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=). In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in “*Hahn – Versus - Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721” where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

76. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See the cases of:- “*Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited – Versus - Janevams Limited* [2015] eKLR”; “*Zacharia Waweru Thumbi – Versus - Samuel Njoroge Thuku* [2006] eKLR”; “*Sanya Hassan – Versus - Soma Properties Ltd*”). Having stated this, with all profound respect and dignity to the law, clearly the Petitioner has not attached any receipts for the valuation of the demolished properties and the



suit property. For these reasons, therefore, I shall decline the prayers sought and not award the special damages as sought.

ISSUE No. d). Who will bear the Costs of the Petition.

77. The Black Law Dictionary defines “Cost” to mean,

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

It is not well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Court.

78. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company – Versus - Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

79. This position was upheld in the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans Rai Singh (2014) eKLR. From the provisions of the law, it means the whole circumstances and the results of the Petition where a party had won the case. The events in the instant Petition are that the Petitioner has succeeded in its claim and therefore this Honourable Court awards the costs to the Petitioner herein.

X. Conclusion and Disposition

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

- a. That Judgement be and is hereby entered in favour of the Petitioner as per the terms of the filed Constitution Petition dated 24th May, 2021 against the Respondent herein in its entirety.
- b. That a declaration that the Respondent acted illegally and unconstitutionally in facilitating the demolition of the house and the perimeter wall to the properties known as plot number 1436 Section XVII, Mombasa Island.
- c. That a declaration that the Respondent is in violation of Articles 2, 3, 10, 19, 20, 21, 28, 40, 47 and 50 (1) of *the Constitution* of Kenya, 2010 and the provisions of the Fair Administrative Actions Act in the manner in which the Respondent demolished the house and the perimeter wall standing on the suit property and fenced off the same.
- d. That an order is herein made that the Petitioner is entitled to full compensation for the value of the known as plot number 1436 Section XVII, Mombasa Island subject to the petitioner surrendering the leasehold title to the Respondent.



- e. That the Petitioner is entitled to the following:-
- i. A sum of Kenya Shillings Three Fifty Million (Kshs. 53,000,000/-) being the current market value of the suit land.
 - ii. A sum of Kenya Shillings Twelve Million, Ninety-two thousand and three hundred and nine cents (Kshs. 12,092,310.09) being the value of the destruction of its property.
 - iii. A sum of Kenya Shillings Two Million, Six hundred and fifty thousand (Kshs 2,650,000/-) as general damages for loss of use being 5% of the quantified damages of (Kshs. 53, 000, 000.00) for loss and suffering on the unconstitutional and unlawful cancellation of the title documents transfer to the Government and subsequent actions.
- f. That upon compensation as stated herein, the Petitioner ordered to surrender the original Certificate of Lease for the suit land to the Respondent for their action thereafter.
- g. That the Petitioner will have the costs of the Petition.

It is so ordered accordingly.

JUDGMENT IS DELIVERED THROUGH E - MAIL AS PER THE NOTICES DISPATCHED TO ALL PARTIES, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

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

ENVIRONMENT AND LAND COURT AT MOMBASA.

