



Omoror v National Land Commission & 3 others (Environment & Land Petition E007 of 2022) [2023] KEELC 22256 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22256 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND PETITION E007 OF 2022
LC KOMINGOI, J
DECEMBER 14, 2023
IN THE MATTER OF ARTICLES 3, 10, 20, 22, 23,
162, 40 & 47 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF SECTION 13 RULES 1&2 OF THE
ENVIRONMENT AND LAND COURT ACT NO 1934 OF 2011
AND
IN THE MATTER OF THE CONTRAVENTION OF THE BILL
OF RIGHTS UNDER THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF UNLAWFUL ACQUISITION,
USE AND OCCUPATION OF PRIVATE PROPERTY

BETWEEN

JOSEPH ALUKWE OMORO PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS LTD 2ND RESPONDENT

KENYA POWER & LIGHTING COMPANY LTD 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. By a Petition dated 16th September 2022, the Petitioner claims that he together with his late wife Florence Kamay M’Imana were the registered owners of parcel of land known as Kajiado/



- Kitengela/27257 (suit property) measuring approximately 0.10 hectares which was fully developed with permanent buildings, animal structures, farm produce and mature timber trees.
2. Sometime in 2017, the 1st Respondent gazetted the suit property for compulsory acquisition by the government to pave way for the construction of Standard Gauge Railway phase 2A Nairobi-Naivasha. According to a letter given to him in a meeting held at Tuala Chief's camp in 2018, the Petitioner was to be awarded Kshs. 16,380,000 as compensation for the acquisition of suit property by the 1st Respondent. However, when they were called to receive the money, the Petitioner's new award was indicated as Kshs. 8,436,870 which he refused to accept. The two letters bearing the two different awards were also taken away by the 1st Respondent's officials. The Petitioner claimed that he wrote several letters to the 1st Respondent on this issue but they were never responded to. In addition, the 2nd Respondent caused the 3rd Respondent to disconnect power supply to his property inhibiting his daily activities and income generation from baking.
 3. His suit property was consequently demolished, the project proceeded as planned and was completed sometime in 2019. But he was yet to be compensated years after his property was demolished in total contravention of his fundamental and Constitutional rights to: fair administrative action; right to full and prompt compensation; right to own property; right to housing, shelter and a clean environment; right against discrimination and discriminative acts. This caused him loss and damage particularised as: value of his premises; unlawful entry to his suit property; living without electricity from September 2019; loss of earnings of Kshs. 120,000 per month from selling cakes and other food stuff from the date electricity was disconnected; damage and loss of his crops and trees; health problems due to pollution from construction work and noise pollution from the trains.
 4. He thus sought for:
 - a. A declaration that the Petitioner's rights as enshrined in Article 40(3) and 47(1) of *the Constitution* of Kenya have been violated and infringed by the Respondents jointly and severally in the manner pleaded hereinabove.
 - b. A declaration that the Petitioner's proprietary rights in Land parcel Kajiado/Kitengela/27257 were infringed/ contravened by the Respondents.
 - c. A declaration that the Petitioner herein is entitled to prompt, just and adequate compensation in full within the meaning of Article 40(3) (b) (i) of *the Constitution* for the compulsory acquisition of his suit premises known as Kajiado/Kitengela/27257 situated in Kajiado County.
 - d. A declaration that the Petitioner had been subjected to double discrimination by refusing to pay him yet others were paid and by infringing on his rights as a disabled person (PWD).
 - e. Special damages in the sum of Kshs. 20,000,000 being compensation for the compulsory acquisition of plot no. Kajiado/Kitengela/27257.
 - f. General, exemplary and aggravated damages under Article 23 (3) of *the Constitution* of Kenya for the unconstitutional conduct of the Respondents.
 - g. Exemplary damages for double discrimination.
 - h. Loss of income from baking business at the rate of Kshs. 120,000 per month starting from 17th September 2019 to date.
 - i. Damages for lost and destroyed items at Kshs. 5,000,000 from the 3rd Respondent.



- j. General and punitive damages for inconvenience, financial embarrassment, misrepresentation and treating the Petitioner with contempt.
 - k. Damages for exposing the Petitioner to health hazards by exposing him to pollution making him stay in uninhabitable premises.
 - l. The sum of Kshs. 250,000 for relocating the grave of the Petitioner's wife who is buried in the suit premises.
 - m. Special damages for fees of valuation report Kshs. 25,000.
 - n. The 2nd Respondent to be restrained from operating its trains on the Petitioner's suit premises until compensation is effected and in the alternative, the 2nd Respondent do remove its structures and restore the Petitioner's land to its original state.
 - o. A mandatory order directing the 3rd Respondent to reconnect electricity supply to the Petitioner's house and in the alternative, in case the Petitioner is compensated and shifts/relocates, the 3rd Respondent to connect electricity in his new premises.
 - p. Costs of this Petition plus interest on all the above.
 - q. Any other further relief that this Hon. Court may deem fit and just to grant.
5. The 2nd Respondent in its response dated 5th December 2022 denied the Petitioner's claim stating that the 1st Respondent was in charge of the compulsory acquisition process and the 2nd Respondent could thus not respond to those issues. The 2nd Respondent indicated that it carried out the Standard Gauge Project as per its mandate on land that had been acquired by the Government and denied all allegations of infringement of the Petitioner's rights, loss and damage of property. As such, the Petitioner's prayers were unavailable against the 2nd Respondent and should be dismissed.
 6. The 1st Respondent who was represented by counsel was given an opportunity to put in a response and submissions to the Petition. However by the time of writing this Judgment neither a response nor submissions had been filed.
 7. The 3rd Respondent in their response to the Petition dated 5th December 2022 contested their involvement in the Petition on grounds that the compulsory acquisition was undertaken by the 1st Respondent and issues highlighted in the Petition were not in their knowledge and the Petition against the 3rd Respondent should be dismissed with costs.
 8. The 4th Respondent did not participate in these proceedings.
 9. On the 25th October 2022 the court with the consent of the parties directed that the petition be canvassed by way of written submissions.

The Petitioner's Submissions

10. Counsel submitted on the following four issues for determination as summarised hereunder;
11. On whether the court had jurisdiction to determine the claim against the 3rd Respondent, counsel submitted that the Petitioner had raised constitutional issues against the 3rd Respondent which included infringement of his right to fair administrative action, breach of consumer rights, discrimination and breach to earn a living from 2019. And that the power disconnection was not due to unpaid electricity bills but factors connected to the construction of SGR adding that the 3rd Respondent neither issued a disconnection notice as required nor responded to the Petitioner's



- inquiries as per the letters sent which was a violation of his right to fair administrative action citing *Wekesa vs Kenya Power and Lighting Company Ltd & another* [2023] KEHC 2900 (KLR) and *Alan E Donovan vs Kenya Power and Lighting Company* [2019] eKLR.
12. Counsel submitted that the Petitioner's rights under Article 40, 47, 27-29 of *the Constitution*, Article 17 of the Universal Declaration of Human Rights had been infringed citing *Patrick Musimba vs National Land Commission & 4 others* (supra), *Khimji Bhimji Seyani & 2 others vs Attorney General* [2015] eKLR and *Gami Properties Limited vs National Land Commission* [2017] eKLR.
 13. Counsel went on to submit that the Petitioner's right under Article 40 of *the Constitution* as well as Sections 107- 115 of the *Land Act* to get just, full and prompt compensation had also been infringed by the 1st and 2nd Respondents making reference to *Patrick Musimba vs National Land Commission & 4 others* (supra) and *Sparkle Properties Limited v National Land Commission & another* [2022] (KLR). Counsel pointed out that the 2nd Respondent did not adduce evidence to show that they had deposited compensation funds with the 1st Respondent and was thus equally culpable. Counsel added that the Petitioner's award letters were taken away and the only recourse was to compensate him at market value.
 14. On whether the Petitioner was entitled to damages and the quantum, counsel while making reference *Livingstone vs Rawyards Coal* (1880) 5 App Cap 25 and *Horn vs Sunderland Cooperation* (1941) 2 KB 26, 40 submitted that the Petitioner was entitled to the award of damages as prayed pointing out that the valuation report indicated that the Petitioner's land was valued Kshs. 20,000,000; Kshs. 4,320,000 against the 3rd Respondent for loss of monthly income of Kshs. 120,000 from September 2019 to September 2022 when the suit was filed due to disconnection of power; Kshs. 5,000,000 against the 3rd Defendant for loss of items stolen due to lack of security lights; compensation of Kshs. 250,000 for relocation of the Petitioner's wife's grave; Kshs. 10,000,000 against the 1st and 2nd Respondents as damages for infringement of his right to own property citing *Amachery Ltd vs Attorney General* [2014] eKLR; Kshs. 6,000,000 against the 1st, 2nd and 3rd respondents for infringement of the Petitioner's right to fair administrative action citing *Isaac Gathungu Wanjohi & Another vs AG & others*, *Kaimba Mangaara v Tharaka Nithi County Government* [2018] eKLR and *Shimioni Resort vs Registrar of Titles & others* (2016) eKLR; Kshs. 10,000,000 jointly against all the Respondents as damages for infringement of right to human dignity and non-discrimination citing *Kaimba Mangaara v Tharaka Nithi County Government* (supra), Kshs. 50,000,000 against 1st, 2nd and 3rd respondents as damages for exposing the Petitioner to health hazard, pollution and inhabitable premises, plus interest on all the above.

The 2nd Respondent's Submissions

15. Counsel submitted that Petition did not meet the Constitutional threshold because the issue of non-payment for compulsory acquisition was a civil claim citing *Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority* (2016) eKLR and *Edward Karanja Chogo & 2 others vs County Governmnet of Kakamega* [2018] eKLR where Matheka J. held: "...A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim..." Counsel added that the Petitioner's alleged violation had not been proved as established in the *Anarita Karimi Njeru vs Attorney General* [1979] KLR 154.
16. On the issue of damages and compensation, counsel submitted that it was the 1st Respondent's mandate as detailed under Sections 115-125 of the *Land Act* to compensate the Petitioner citing *Sparkle Properties Limited v National Land Commission & another* [2022] KEELC 3687 (KLR),



Geysler International Assets Limited vs Attorney General & 3 others [2021] eKLR and Patrick Musimba vs National Land Commission & 4 others (2016) eKLR.

The 3rd Respondent's submissions

17. Counsel submitted that this court lacked jurisdiction to determine the Petition because the issues raised offended provisions of Sections 3, 10, 11(e), (f), (i), (k) & (l), 23-25, 36, 37, 40, 42, 159(3), 160(3), 167, 168 and 224(2)(e) of the *Energy Act*; Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, Section 9(2) and (3) of the Fair Administration Act and Articles 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya. Counsel added that the Petition was contrary to the doctrine of exhaustion since the grievance against the 3rd Respondent ought to be addressed by the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal as espoused by the *Energy Act* and the Energy (Complaints and Dispute Resolution) Regulations because the issue was a matter of billing and electricity disconnection. Counsel cited the following authorities on jurisdiction and the doctrine of exhaustion among others: Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 others [2019] eKLR, United Millers Ltd vs Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 others [2021] eKLR, Phoenix of E.A Assurance Company Limited vs SM Thiga t/a Newspaper Service [2019] eKLR and Dhow House Limited vs Kenya Power & Lighting Company Ltd [2022] KEHC 11840 (KLR) (Ruling).
18. Counsel asked for dismissal of the Petition with costs to the 3rd Respondent.

Analysis and determination

19. I have considered the Petition and the grounds, the rival submissions, and the authorities cited. The issues for determination are:
 - i. Whether the Petitioner is entitled to the orders sought;
 - ii. Whether the Petition goes against the doctrine of exhaustion;
 - iii. Who should bear costs.
20. The Petitioner claims that he was yet to be compensated for the compulsory acquisition of his property LR No. Kajiado/Kitengela/27257 years after his property was demolished and the Standard Gauge Railway Phase 2A project completed. He claimed that his property was gazetted for acquisition in the year 2017 and in the year 2018 the compulsory acquisition awards were issued. However, his award of Kshs. 8,436,870 was considerably lower than what had been initially indicated (Kshs. 16,380,000). He also claimed damages against the 3rd Respondent for loss of business and income after they disconnected electricity from his property. It is not in contention that the Petitioner was the lawful owner of the suit property as shown on the title deed adduced as evidence.
21. The 1st and 4th Respondents neither entered appearance nor filed any response to the Petition. Established pursuant to Article 67 of *the Constitution*, the 1st Respondent was enjoined in these proceedings as the primary agency charged with the responsibility to acquire and manage land for and on behalf of both the national and Country Governments.
22. In the absence of the 1st Respondent, the 2nd Respondent who was involved in the implementation of the project was more than happy to deflect blame to the Commission contesting that the Petitioner had failed to demonstrate their role in the acquisition of the suit property since the statutory mandated of compulsory acquisition does not fall within its mandate. The 3rd Respondent also sought to be exonerated of any blame on account that the suit was premature under the doctrine of exhaustion.



23. The Court shall first make a determination on the doctrine of exhaustion which is an issue that goes to the jurisdiction of this court.
24. The Supreme Court in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR) made the following pronouncement on the doctrine of exhaustion:
 87. This is further firmly rooted in article 159 of *the constitution* which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.
25. The *Land Act* makes elaborate provisions of compulsory acquisition dispute resolution mechanisms as highlighted below.
26. Section 133A of the *Land Act* (revised in 2019) establishes a Land Acquisition Tribunal :
 1. There is established a Tribunal to be known as the Land Acquisition Tribunal...
27. Section 133C of the *Land Act*:
 - (1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
 - (2) A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
28. Section 133D of the *Land Act*:
 1. A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court...

...
 2. An appeal from the decision of the Tribunal may be made on a question of law only.
29. This position was affirmed by Eboso J. in *Giciri Thuo & 5 others v National Land Commission & 4 others; Kenya Human Rights Commission (Interested Party) Dorcas Wairimu Kamau & 154 others (Intended Interested Parties)* [2022] eKLR where he held:
 - “20. Because of the many disputes that arise in relation to the state’s exercise of the power of eminent domain, Parliament established the Land Acquisition Tribunal. Section 133C of the *Land Act* sets out the jurisdiction of the Tribunal...
 21. In its wisdom, Parliament enacted Section 133D of the *Land Act*, vesting in this court appellate jurisdiction in disputes relating to the exercise of the state’s power of eminent domain ...



22. It is therefore clear from Part VIII and Part VIIIA of the *Land Act* that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112. If there is no satisfactory resolution of the dispute, the next port of call is the Land Acquisition Tribunal established under Section 133A of the *Land Act*. If a party is dissatisfied with the determination of the Tribunal, the next port of call is this court. The appellate jurisdiction of this court is, however, restricted to issues of law.
25. Secondly, Section 133C(8) of the *Land Act* vests in the Tribunal jurisdiction in matters relating to compulsory acquisition of land, to hear and determine complaints arising under Article 23(2) and Article 47(3) of *the Constitution* using the framework set out in the *Fair Administrative Action Act* or any other law...”
30. To determine whether the Petitioner exhausted the established mechanism before turning to this court, I have examined the evidence adduced and note that:
31. There are letters dated 20th December 2018, 20th February 2020 and 19th August 2021 from the Petitioner addressed to the National Land Commission referenced as Appeal against award. The said letters do not bear any evidence that they were received by the 1st Respondent.
32. The Petitioner further wrote a letter dated 14th December 2021 to the Kenya Power and Lighting Company for reconnection and reimbursement. The said letter bears no evidence of receipt as well. It however reads in part:
- “ ... Due to me not relocating since I have not been paid by the Ministry of lands which had an agreement with the SGR company to allow me to get a new place, 2019 September, 17th at around 3.00 pm KPL field team pulled out poles that were along to the railway line leaving me disconnected from power due to one of the poles pulled out was the one connecting power to my house.
- After a word with the KPLC field team, they advised me to visit their office, which I did the following day. Upon visiting and mentioning my challenge to why I have not relocated, they promised to send someone to have the power issue resolved.
- ...
- ... At one given time, after few months while still waiting for them a metre reader visited, to do the usual of meter reading sent from the office, to my shock, it came to my attention that my metre was still moving, which he could not be able to explain but requested me to visit the office since my bill was reading Kshs. 70,000 by then.
- After visiting and laying my complaints to the office, they promised to check on the whole issue of the meter moving whereas no connection was active...
- ...
- It’s with my understanding that I’m required to relocate once paid, which payments have not been done yet, making things be constant as they were, pulling out of the pole was an



interference as to the point that I have not been paid. Secondary the meter readings moving while no connection at all to the pole should be a statement to be explained.”

33. The National Council for Persons with Disabilities also wrote a letter dated 18th August 2021 to the National Land Commission for compensation of the Petitioner’s property that had been compulsorily acquired. This letter has a receipt stamp dated 12th October 2021.
34. Additionally, the National Council for Persons with Disabilities also wrote to the Commission of Administrative Justice vide a letter dated 1st November 2021 seeking intervention for National Land Commission’s failure to compensate the Petitioner.
35. On 17th June 2022 the Petitioner’s Advocate also wrote to the National Land Commission seeking Petitioner’s compensation of Kshs. 17,405,250. This letter has a receipt stamp dated 17th June 2022.
36. And finally, in a letter dated 30th June 2022 the Petitioner’s Advocate also wrote to Kenya Power & Lighting Company on behalf of the Petitioner seeking compensation for damages caused during the removal of the electric poles that were along the railway line. This letter has a receipt stamp dated 30th June 2022.
37. There is no evidence that any of these letters were responded to. This court takes cognisance that whereas the said letters were addressed to the Commission and not to the Land Acquisition Tribunal established by the *Land Act*, Section 133C (1) provides that: The Tribunal’s jurisdiction is to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land. However, the instant Petition is not on the process of the acquisition but on the infringement of the Petitioner’s right to a just, fair and prompt compensation. In this regard, I find that the Petition is rightfully before this court.
38. I now consider the issue as to prompt, just and full compensation, whether the constitutional principle in this regard has been violated and whether the Petitioner is entitled to the orders sought.
39. The process of compulsory land acquisition is a matter of grave significance, inherently burdening the land owner or proprietor. This is precisely why *the Constitution* stipulates that such acquisitions must serve the public interest and offer compensation for the hardship inflicted upon any individual with an interest or right in the property. One condition is that of prompt compensation made to all the persons who have an interest or a right over property that is compulsorily acquired as was echoed by the Supreme Court of Kenya in *Attorney General v Zinj Limited* [2021] KESC 23 (KLR) (Judgment) stated thus;

“28. ... Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent...”

40. Article 40 of *the Constitution* goes on to stipulate that the only way the Government should deprive of a person property that is not illegally, unlawfully or un-procedurally acquired is by way of compulsory acquisition which ought to be promptly compensated:

“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.

...

(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.”

41. The *Land Act* has also greatly elaborated on how compensation should be done.

42. Section 111 *Land Act*: (1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

43. Section 115 *Land Act*: (1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder...

44. No evidence was adduced to show that the Petitioner was ever compensated for the compulsory acquisition of his property. The five Judge bench in the High Court case of Patrick Musimba v National Land Commission & 4 others [2016] eKLR held:

“ 84. With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the States development needs, Part III was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.

113. There exists, no doubt, an overarching right to compensation under Article 40 (3) of *the Constitution* where a person is deprived of his property for a public purpose or in the public interest.

114. The power to expropriate private property as donated to the State by both *the Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait



for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property.

118. 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”.

119. Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority”: see *Director of Buildings and Lands –v- Shun Fung Wouworks Ltd* [1995] AC 111,125.

120. 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 reference to the market value of the land.”

45. I fully associate myself with the following holding. The fact that the 1st Respondent acquired the property in 2018, a period spanning five years ago, defies reason to have the owner still deprived of compensation. This not only violates the owner’s rights but also constitutes a blatant disregard for constitutional provisions and fundamental principles of justice and fairness. I cannot fathom the ordeal the Petitioner has endured in pursuing what is rightfully theirs, which should have been rightfully granted long ago. Such a delay is inconceivable and runs contrary to the standards expected of a reputable institution.



46. The Petitioner has gone on to seek special damages of Kshs. 20,000,000 for the suit property and adduced a valuation report Valuation report dated 17th August 2022 valuing the property at that amount. He similarly sought general and exemplary damages to a tune of Kshs. 9,595,000 as pleaded in the Petition. However, in the submissions, counsel went on to submit a claim of damages totalling to Kshs. 90,595,000 for loss of income, destruction of items, health hazard, infringement of rights among others.
47. Looking at the damages sought by the Petitioner, I wish to state that courts have been urged to exercise caution when dealing with landowners who deliberately fabricate excessively high compensation claims, as this could negatively impact taxpayers. The Court of Appeal in Attorney General & another v Rahimkhan Afzalkhan Rahimkhan & 4 others [2019] eKLR held:
- “ 57. Going back to the issue of compulsory acquisition of the suit property, we, like the trial court, find that the respondents were not compensated for the said acquisition. Nevertheless, we disagree with the manner in which the trial court assessed the compensation due to the respondents. Why do we say so? The learned Judge in his computation relied solely on the valuation report prepared by Edwin Muturi Mbugua, a registration officer, who was engaged by the respondents to carry out a valuation of the property, as well as his testimony.
58. We cannot help but note that Edwin in his own evidence admitted that the title did not disclose the size of the suit property and that he did not take into account any encumbrances on the suit property. It is also instructive to note that he testified that in carrying out his task he only relied on the documents supplied to him by the respondents. In his testimony, Edwin adjusted the market value of an acre of the suit property from Kshs.25 million as indicated in his report to Kshs.30 million.
59. In light of the foregoing coupled with the fact that there are encumbrances registered against the title which certainly affected the acreage of the suit property, the respondents were entitled to have the veracity of the valuation report called into question. We find that the learned Judge should not have relied on the report as he did.
60. It is common ground that the award of damages to the tune of Kshs.60 million was with respect to the infringement of the respondents’ rights to the suit property and more specifically, the deprivation thereof. The justification for issuing the said award, in the learned Judge’s own words was as follows:
- “However, the act of deprivation of the suit property necessarily caused the Petitioners to suffer loss of enjoyment of their property rights, and they also thereby suffered physical, mental and psychological torture for which they deserve compensation from the Respondents.”
61. It is trite that an award and assessment of damages is at the discretion of the court...



62. This Court in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR while discussing the rationale of an award of damages for constitutional violations under *the Constitution*, expressed itself as follows:

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual’s right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court’s discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.” [Emphasis added]

63. Applying our minds to the above principles, we respectfully find that the learned Judge erred in granting the award of damages of Kshs.60 million. It is not in dispute that the respondents were deprived of the suit property and in our view, such deprivation, in the circumstances of this case, requires to be vindicated by an award of compensation for the compulsory acquisition. Furthermore, there was no evidence to substantiate the trial court’s finding that the deprivation of the suit property resulted in the physical, mental and physiological torture of the respondents.”

48. Associating itself with the above pronouncement, this court similarly finds that there is no evidence substantiating deprivation of the property to the distress, discrimination, health hazard and other inconveniences claimed. The court shall therefore only order that the Petitioner be paid 17, 405,250 as award for the compulsory acquisition which is the amount cited in the letters to the Commission.
49. The case against the 3rd Respondent is hereby dismissed. This is because the removal of the electricity poles was a procedural requirement for purposes of constructing the railway line and had nothing to do with discrimination against the Petitioner.
50. The case against the 2nd Respondent is similarly dismissed.
51. Each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF DECEMBER 2023.

L. KOMINGOI



JUDGE.

IN THE PRESENCE OF:

N/A for the Petitioner.

N/A for the 1st Respondent.

Ms. Omwenga for the 2nd Respondent.

Mr. Ododa for the 3rd Respondent.

N/A for the 4th Respondent.

Court Assistant – Mutisya.

