REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MACHAKOS ELC NO. 2 OF 2021

(PREVIOUSLY MILIMANI ELC NO. 616 OF 2010)

HARP INVESTCO LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH DEFENDANT

JUDGMENT

1. In the Amended Plaint dated 25th February 2019, the Plaintiff has averred that it entered into a sale agreement with the 1st Defendant dated 18th January 2005 and varied on 27th April 2005 for the purchase of L.R. No. 11895/24 (*the suit property*) situated in Mavoko Municipality measuring 76.25 hectares (188.35 acres) at a consideration of Kshs. 154,447,648, which sum was duly paid.

2. According to the Plaintiff, although the 1st Defendant passed to it the original title and the Transfer document for 124 acres, it failed to deliver 20.234 hectares (50 acres) despite full payment for 76.25 hectares (188.35 acres); that the 1st Defendant failed to offer monetary compensation at market value for the loss of 20.235 hectares (50 acres) and that the 1st Defendant acted fraudulently in failing to inform the Plaintiff about the excision of 50 acres from the land it purchased by the 2nd Defendant vide Gazette Notice No. 3577 of 2006 after the sale agreements of 18th January 2005 and 27th April 2005.

3. According to the Plaintiff's Plaint, the 1st Defendant abused its office by not informing or stopping the 2nd Defendant from excising the 50 acres; that the 1st Defendant knew that 14 acres had already been excised from the suit property for a road reserve and that as a result, it has suffered loss and damage.

4. The Plaintiff averred that the 2nd Defendant breached its statutory duty by: not giving notice of the acquisition of the 50 acres; not enquiring into the ownership of the suit property and not granting an award under Section 10 of the Land Acquisition Act. The Plaintiff averred that the 2nd Defendant is also in breach of Sections 3, 6, 7, 8, 9, 10 and 11 of the Land Acquisition Act because it (the Plaintiff) has not been compensated for the loss of the 50 acres.

5. The Plaintiff averred that vide the 4th Defendant's Notice of Indemnity dated 23rd June 2012, the 4th Defendant admitted that it has utilized a substantial portion of the suit premises and continues being in possession of the said portion; that the 4th Defendant has developed public utilities, including public schools, on a portion of the suit property and that the area acquired by the 4th Defendant without compensation is 17.44 acres, which the 4th Defendant had offered to purchase from the Plaintiff for Kshs. 165,000,000 in February 2013.

6. The Plaintiff stated in its Plaint that the 1st Defendant conducted survey work resulting in the excision of the 17.44 acres and registration of sub plots L.R. No. 11895/90, 91, 92, 93, 94, 95 and 96, which subplots were conveyed to the Plaintiff by the 1st Defendant. According to the Plaintiff, it thus acquired 32.56 acres of the 50 acres and that the only land in dispute is 17.44 acres which the 4th Defendant had offered

to purchase but failed to do so. The Plaintiff averred that its claims is for compensation equivalent to the open market value of the 17.44 acres.

7. In the Plaint, the Plaintiff has particularized the loss damage and expenses that it has suffered as follows: Loss of 20.235 Ha. (50 acres) or its current market value; special damages of Kshs 9,457,412 paid to the Quantity Surveyor; land rent of Kshs. 15,400,000 paid to the Commissioner of Lands; rates of Kshs. 10,096,540 paid to Mavoko Municipality; and loss of bargain and profits.

8. In the Amended Plaint, the Plaintiff has prayed for the following orders:

a. As against the 1st Defendant, a permanent injunction restraining the First Defendant by itself or its servants or agents from selling, disposing of, alienating or effecting any transfer or interfering in L.R. No. 11895/24 situated in Mavoko Municipality.

b. As against the 2nd Defendant, a permanent injunction from selling, alienating, disposing of, acquiring ownership by itself, its agents or servants.

Bb. As against the 2nd Defendant, a declaration that the commencement and later abandonment without due completion of the acquisition process was illegal and unlawful.

c. As against the 3rd Defendant, a permanent injunction restraining it by itself, its agents or servants from registering any ownership of title to L.R. No. 11895/24 until full compensation to the Plaintiff is made.

d. A declaration/ order declaring Gazette No. 3577 of 2006, illegal, unlawful, null and void.

e. As against the 1st Defendant, to deliver up original titles and transfer of 20.235 hectares (50 acres) to the Plaintiff.

f. As against the 4th Defendant, prompt and just compensation of 17.44 acres.

Ff. As against the 4th Defendant, a declaration that its occupation and use of the subject property without due compensation or private agreement is illegal, unlawful and in breach of the Plaintiff's constitutional right to ownership of property.

g. As against the 5th Defendant, an order of prompt compensation of the 17.44 acres.

h. As against the Defendants jointly and severally prompt and just compensation for 17.44 acres acquired at the market value

In the alternative only:

1. As against the First Defendant:

i. 20.35 hectares (50 acres) from L.R.11895/24 or compensation of its current market value.

ii. Special damages of Kshs. 9,457,412/- paid to the Quantity Surveyor for subdivision of the land.

iii. Compensation for land rent of Kshs. 15,400,000/- and

iv. Compensation for rates of Kshs. 10,096,540/- and

v. Loss of bargain and loss of profits.

2. Interest on damages at Commercial rates.

3. Costs of suit.

4. As against the Second Defendant:

i. 20.35 hectares (50 acres) from L.R.11895/24 or compensation of its current market price;

ii. Special damages of Kshs. 9,457,412/- paid to the Quantity Surveyor for subdivision of the land;

iii. Compensation for land rent of Kshs. 15,400,000/- and

iv. Compensation for rates of Kshs. 10,096,540/- and

v. Loss of bargain and loss of profits.

5. Interest on damages at commercial rates.

6. General damages for unlawful and or illegal acquisition.

7. Costs of the suit.

8. Any other further or alternative order or relief that this Honourable Court may deem fit and just to grant.

9. In its Statement of Defence and Cross- claim against the 2nd and 4th Defendants, the 1st Defendant admitted that it entered into a sale agreement with the Plaintiff and that while the Plaintiff made full payment and acquired beneficial ownership of the land measuring 20.235 hectares (50 acres), the delivery of the 50 acres was frustrated by the unforeseen acquisition, possession and vesting of a portion of the land by the Government absolutely, albeit contrary to the mandatory process and requirements of the **Land Acquisition Act.**

10. The 1st Defendant averred that the Ministry of Roads initially requested the 1st Defendant to surrender a portion of its land; that an agreement was reached that the surrender of a portion of its land would be for a consideration of Kshs 41 million; that an agreement between the 1st and 4th Defendant was to be entered into to adequately safeguard the Plaintiff's beneficial interest in the land and that the 4th Defendant abandoned this agreement in favor of compulsory acquisition, leading to gazettement of the Government's intention to compulsorily acquire the land vide gazette notice No. 3577 of 19th May 2006.

11. The 1st Defendant averred in its Defence that the Commissioner of Lands failed to hold an inquiry within 24 months and that accordingly, the gazette notice stood automatically revoked 24 months from 19th May 2006; that the 2nd and 4th Defendants failed to comply with **Sections 8-23** of the **Land Acquisition Act** and that despite the automatic lapse of the notice by operation of law, the Government unlawfully took possession of the land notwithstanding that no inquiry had been held, no compensation had been paid and no notice of possession or vesting had been served on the Plaintiff or the 1st Defendant.

12. It was averred by the 1st Defendant that by reason of acquisition of the 50 acres of the suit land by the 4th Defendant, title vested absolutely in the Government under **Section 19 (4)** of the **Land Acquisition Act**, subject to full compensation by the Government for the damages suffered and all costs and expenses reasonably incurred by persons interested in the land due to failure to comply with the law.

13. It was averred by the 1st Defendant in the Defence that it notified the Government that the Plaintiff was the actual and beneficial owner of the 50 acres it had acquired; that the Government failed or ignored to assess and remit adequate compensation to the 1st Defendant for transmission to the Plaintiff and that the 4th Defendant subsequently had the land valued for purposes of compensating the Plaintiff but they failed to pay to the Plaintiff the requisite compensation.

14. The 1st Defendant stated that it was not legally responsible for the events giving rise to the Plaintiff's claim; that the 2nd and 4th Defendants were the proximate cause of the Plaintiff's loss; that the 4th Defendant has utilized the suit property for road expansions and other public utility infrastructure without compensating the actual beneficial owner of the land and that the 1st Defendant cannot be held liable for the damages resulting from the 4th Defendant's breach of the law.

15. In its cross-claim against the 2nd and 4th Defendants, the 1st Defendant has sought for full indemnity by the 4th Defendant solely or jointly with the 2nd Defendant for any damages arising out of the Plaintiff's claim, and the 1st Defendant's costs for defending the main action and the cross-claim.

16. The 2nd and 3rd Defendants filed a Statement of Defence wherein they denied the Plaintiff's assertions and stated that the 2nd Defendant was well within his statutory right to acquire the property for the Northern Corridor Transport Improvement Project and the East Africa Trade & Transport Facilitation Project.

17. It was averred by the 2nd and 3rd Defendants that the 2nd Defendant issued a gazette notice No. 3577 of 2006 to acquire the suit property from the 1st Defendant for the purposes of a road reserve and that the land having been acquired by the Government could not be sold or transferred to third parties. They prayed that the Plaintiff's suit as against them be dismissed with costs.

18. The 4th Defendant filed an Amended Statement of Defence and Counter-Claim and a Notice of Indemnity against the 1st Defendant. The 4th Defendant denied the Plaintiff's allegations relating to the sale agreement between itself and the 1st Defendant, and the particulars of breach of agreement, fraud, abuse of office, breach of statutory duty and loss, damage and expenses incurred by the Plaintiff. The 4th Defendant denied that it had offered to purchase the disputed 17.44 acres of land from the Plaintiff.

19. In its Counter-Claim, the 4th Defendant stated that on 1st March 2006, the 1st Defendant accepted a request by the Ministry of Roads to surrender 50 acres of land for Kshs. 41 million; that by gazette notice No. 3577 of 19th May 2006, the 2nd Defendant acquired the suit property on behalf of the Ministry of Roads and Public Works, which thereafter took possession of the land for expansion of the road, the road reserve and other related public purposes and that the 4th Defendant is now in possession of the land.

20. The 4th Defendant averred that it has since developed two schools on the acquired land for over 1800 students at the cost of more than Kshs. 100 million; that the Plaintiff is not entitled to the suit premises and has no lawful basis to fault its acquisition and that the Plaintiff's suit should dismissed with costs.

21. In its Notice of Indemnification, the 4th Defendant contended that the 1st Defendant was at all times aware of the surrender of the 50 acres to the Ministry of Roads for expansion of the road and development of public utility infrastructure; that the action, inaction or representation of the 1st Defendant gave the Plaintiff the impression that the suit premises was available for sale and as a result, the Plaintiff purchased the land and that should any damages be found payable to the Plaintiff, the sum awarded should be borne by the 1st Defendant.

22. The Plaintiff filed a reply to the 4th Defendant's Amended Statement of Defence and Defence to Counterclaim. the Plaintiff denied that the 4th Defendant is entitled to the suit premises; that the 4th Defendant acquired 50 acres without compensating the Plaintiff and that the 4th Defendant's Counter-Claim should be dismissed with costs and judgement entered in favor of the Plaintiff as prayed in the Plaint.

The Plaintiff's Case

23. The Plaintiff's Director, PW1 adopted his Witness Statement. PW 1 informed the court that the Plaintiff bought the suit property from the 1st Defendant; that however, the 1st Defendant only transferred 124 acres, leaving out 50 acres, which the Plaintiff later learnt was subject to compulsory acquisition and that the 4th Defendant, who is in possession of the property, abandoned the compulsory acquisition process in favor of negotiating a private treaty with the Plaintiff.

24. PW1 stated that the survey work and sub division of the 50 acres was conducted and the resultant sub plots measuring 32.54 acres were conveyed to the Plaintiff by the 1st Defendant; that the 4th Defendant offered to purchase the remaining 17.44 acres which it did not do and that the Plaintiff's claim as against the Defendants, jointly or severally is for compensation of 17.44 acres which was acquired by the 4th Defendant without following due process, at its current open market value and for special damages .

25. In cross-examination, PW1 stated that the subdivision scheme for the 50 acres was proposed by the 4th Defendant and that despite paying the 1st Defendant for 50 acres, 17.44 acres was never transferred to the Plaintiff and is currently being used for public utility. PW 1 stated that the Plaintiff was to get 17.44 acres from the 1st Defendant (NSSF), to whom it had paid the purchase price, and that the suit property is still in the name of NSSF.

26. It was the evidence of PW 1 that a draft agreement was drawn between the Plaintiff and the 4th Defendant for the purchase of the 17.44 acres for Kshs. 165,000,000; that the said agreement was never signed by the 4th Defendant and that there was a gazette notice in 2016 to compulsorily acquire the 17.44 acres.

27. PW 1 testified that they engaged Geoled Surveys which prepared a report dated 26th August 2009 in respect of the suit property; that they paid Kshs. 9,459,412 to Geoled Surveys for the report and that it is the 4th Defendant that requested to purchase the suit property based on the valuation of the land that was done in the year 2013. According to PW 1, the 4th Defendant was aware of the terms on which the Plaintiff had agreed to sell the land.

The 1st Defendant's Case

28. DW1 adopted her Witness Statement in which she stated that she is an advocate employed as a Legal Officer by the 1st Defendant. PW 1 informed the court that the 1st Defendant entered into a sale agreement with the Plaintiff for the purchase of its land on 18th January 2005 and that in December 2005, the Ministry of Roads offered to pay Kshs. 41million for the suit property, which the 1st Defendant accepted on 1st March 2006.

29. It was the evidence of DW 1 that the Ministry of Roads abandoned the plan to acquire the suit land by private treaty and sought to compulsorily acquire the same; that the Commissioner for Lands failed to hold any inquiry as to compensation of the land within 24 months as required by law, and that the Notice of Intention to compulsorily acquire the suit property lapsed 24 months after 19th May 2006. DW 1 stated that the 4th Defendant took possession of the suit property before holding any inquiry as provided under the law and relocated two public schools from Mlolongo Weighbridge Area to the suit property.

30. DW 1 stated that the 4th Defendant wrote to the 1st Defendant on 6th September 2010 seeking to revive the abandoned purchase of the suit property by private treaty; that the 1st Defendant responded to the letter on 29th March 2012 and informed the 4th Defendant that the suit property had been sold to the Plaintiff who had paid the full purchase price and that the 4th Defendant communicated of its intention to pay to the Plaintiff for the land.

31. DW 1 informed the court that the valuation and survey of the land measuring 50 acres that the Plaintiff had purchased from the 1st Defendant was undertaken in 2013, resulting in the excision of the 17.44 acres from the 50 acres, with the rest of the land being conveyed to the Plaintiff and that the 1st Defendant forwarded the Certificate of Title and Deed plan for the acquired land measuring 17.44 acres to the 4th Defendant.

32. It was the evidence of DW1 that negotiations to settle the dispute out of court collapsed in 2014 when the 4th Defendant, through its letter dated 28th March 2014, reneged on its position, and only agreed to pay for 14.38 acres arguing that the 3.2 acres that was an access road was a surrender. DW1 stated that it is the 4th Defendant that ought to compensate the Plaintiff for the land that it acquired. It was the evidence of DW 1 that the case against the 1st Defendant should be dismissed, the 1st Defendant having fulfilled its obligations, save for the 17.44 acres which is unlawfully occupied by the 4th Defendant.

33. In cross-examination, DW1 testified that the 4th Defendant should indemnify the 1st Defendant against any orders that the court may make against it; that the gazettement for compulsory acquisition of the suit land was at the behest of the 4th Defendant and that the negotiations with the 4th Defendant halted when the 4th Defendant sought not to pay for the 3.2 acres, yet the 1st Defendant had sold the whole 50 acres to the Plaintiff. According to DW 1, the 4th Defendant should compensate the Plaintiff for the entire 17.44 acres and not 14.38 acres.

34. The 4th Defendant's witness, DW2 adopted her Witness statement dated 2nd July 2020. DW 2 stated that she is the 4th Defendant's Assistant Director, Survey Mapping; that the need to acquire the suit property arose during the construction of the Jomo Kenyatta International Airport Junction to Machakos turn, off Sultan Hamud Section, off Mombasa Road and for the relocation of Mlolongo Public Schools from that section of the road.

35. DW 2 informed the court that the acquisition process of the land commenced in 2006; that the 1st Defendant was the registered owner of the suit property and that the 4th Defendant took possession of the suit property for the expansion of the road, the road reserve and other related public purposes, including the relocation of public schools to the land.

36. It was the evidence of DW 2 that the 4th Defendant's Board of Management sought the Attorney General's advice on the issue of acquisition of the suit property; that the Attorney General advised them to seek valuation of the land where the school is built; that the 4th Defendant determined that it only required 17.44 acres, which the Government valuer valued at Kshs. 165 million in 2013 and that thereafter, the suit property was divided into several parcels including L.R. No. 11895/24/14 (L.R. No. 11895/90) measuring 14.83 acres, occupied by the public school and L.R. No. 11895/24/13 measuring 3.2 acres, which was surrendered by the 1st Defendant as an access road to old Mombasa Road.

37. DW 2 stated that the land occupied by the school was gazetted for acquisition through gazette notice No. 6600 of 19th August 2016 together with the land that was surrendered as an access road and that the 4th Defendant cannot compensate the Plaintiff who had no registrable interest in the land in 2006, when the Government expressed interest to acquire the land.

38. In cross-examination, DW2 stated that the 2006 gazette notice has never been cancelled; that the 2016 gazette notice amended the 2006 notice; that the access road was created for public use and the 4th Defendant took possession of the land in 2006 and that the 4th Defendant proposed to acquire the 17.44 acres in 2013. According to DW 2, the 4th Defendant could not pay for the 3.2 acres as it had been surrendered.

39. DW2 clarified that the Ministry of Roads initially required 50 acres; that she was not aware of any valuation by the Government valuer in respect of the suit property and that she was only aware that the dispute related to 3.2 acres which had been surrendered to the Government by the 1st Defendant. In re-examination, DW 2 stated that it is the NLC which should compensate the Plaintiff.

Plaintiff's Submissions

40. The Plaintiff's counsel submitted that this suit relates to land known as LR No. 11895/24 located in Mavoko Municipality; that even though the said land is registered in the name of the 1st Defendant, it is owned by the Plaintiff by virtue of a sale agreement dated 18th January, 2005 and varied on 27th April, 2005.

41. It was the submissions by the Plaintiff's counsel that the Plaintiff purchased the parcel of land from the 1st Defendant; that the 1st Defendant transferred the entire land to the Plaintiff save for 17.44 acres comprising a school and a road which had been acquired by the 4th Defendant and that initially, the 4th Defendant had expressed an intention of acquiring 20. 235 ha (50 acres) vide gazette notice number 3577 dated 19th May, 2006 which was later amended. According to counsel, the process of compulsorily acquiring the land was never completed as per the law.

42. The Plaintiff's counsel submitted that the 4th Defendant was in possession of 17.44 acres of the land it unlawfully acquired, a fact it has admitted in various correspondences; that the subdivision of the property to create L.R. No. 11895/24/14 and 11895/24/13 was at the behest of the 4th Defendant and that in accordance with Section 120 of the Evidence Act, the 4th Defendant was estopped from denying its occupation of 17.44 acres. Counsel relied on the English case of ***Pickard v Sears v Sears 112 E.R. 179***, where Lord Denman CJ stated:

> ***"The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time..."***

43. Counsel also relied on the Court of Appeal decision in ***Serah Njeri Mwobi vs John Kimani Njoroge [2013] Eklr*** where it was held that:

> ***"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."***

44. The Plaintiff's advocate submitted that by its letter, the 4th Defendant requested for the 17.44 acres to be sub divided into 14,24 acres for public schools and 3.2 acres for the access road; that the Plaintiff incurred expenses to the tune of Kshs. 9,459,412 for the sub division of the land and that it is the 4th Defendant who sought for the valuation of the land by the Government valuer.

45. Counsel submitted that no citizen ought to be deprived of his land by the State or any public body, unless authorized by law. Counsel

relied on the provisions of Article 40 of the Constitution which provides for the right to property and Article 47 on fair administrative action. Counsel also set out the provisions of the Land Act on compulsory acquisition of land and relied on the case of ***Virendra Ramji Gudka & 3 others vs The Attorney General (2014) eKLR***.

46. It was submitted that the 4th Defendant is in possession of the suit property; that the Plaintiff's land has consequently been acquired and that the Plaintiff should be compensated for the acquired land. Counsel relied on the case of ***Horn vs Sunderland Corporation [1941] 2 KB 26,40*** where it was held as follows:

> ***"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice."***

47. The Plaintiff's counsel submitted that the Plaintiff has been denied the use of its property for 16 years by the actions of the 4th Defendant and that exemplary damages should thus be awarded for the same. Counsel relied on the case of ***Mikidadi vs Khaigan & Another (2004) eKLR*** where it was held as follows:

> ***"Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of Government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute."***

48. The Plaintiff's counsel submitted that the Plaintiff is also entitled for the loss of Kshs. 9,457,412 which was the cost of subdivision of the suit property into two titles for the school and access road, as directed by the 4th Defendant and for Kshs. 730,000,000 being the market value of the land as at 24th June, 2021.

The 1st Defendant's Submissions

49. The 1st Defendant's counsel submitted that the suit revolves around the unlawful occupation of L.R. No. 11895/24/14 and 11895/24/13 by the 4th Defendant and that while the suit property has at all material times been registered in the name of the 1st Defendant, the beneficial interest in the land vested in the Plaintiff vide a sale agreement dated 18th January, 2005 and varied on 27th April, 2005.

50. It was submitted by counsel that while the process of compulsory acquisition was commenced in 2006 and in 2016 through gazette notices, it was never concluded; that the 4th Defendant, under the advice of the Attorney General, undertook the process of purchasing the 17.44 acres and that the negotiations for sale broke down when the 4th Defendant argued that 3.2 acres of the land was not subject to acquisition because it had been surrendered by the 1st Defendant.

51. When the negotiations for the sale of the suit property broke down, it was submitted that the 4th Defendant opted to compulsorily acquire LR No. 11895/24 being the area occupied by the school and L.R No. 11895/24/13 being the proposed u turn; that the NLC proceeded to gazette the land on 16th August 2016; that the 1st Defendant submitted to the NLC that the Plaintiff was the beneficial owner of the land and was entitled to compensation and that to date, no response has been forthcoming on the issue of compulsorily acquiring the land.

52. The 1st Defendant submitted that it was uncontroverted that the process of compulsory acquisition of the suit property has never been finalized. Counsel relied on the case of ***Patrick Musimba vs National Land Commission (2016) eKLR*** where Onguto J extensively set out the process of compulsory acquisition of land as provided in the Land Act.

53. The 1st Defendant's counsel submitted that the 4th Defendant failed to act in good faith and has caused inordinate delay, denying the Plaintiff the fruits of ownership of their land. Counsel relied on ***Arnacherry Limited vs Attorney General (2014) eKLR*** where the court stated:-

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

54. The 1st Defendant submitted that NSSF, being the holder of the title, had the right to use and occupy the land in the manner it pleased; that the 4th and 5th Defendants have acted with impunity by denying the Plaintiff and the 1st Defendant due process, contrary to Article 47 of the Constitution and that as State organs, the 4th and 5th Defendants are mandated to act in a fair and procedural manner as provided in Article 10 of the Constitution.

55. Counsel submitted that despite a second gazette notice having been issued in the year 2016 by NLC for acquisition of the land on which the public school and the access road is built, the 4th and 5th Defendants have failed to take relevant steps to finalize the valuation of the land, issue an award for compensation and promptly compensate the Plaintiff for the land.

56. Counsel for the 1st Defendant submitted that the Plaintiff's claim for damages ought to be paid by the 4th Defendant because of its continued act of trespass on the Plaintiff's land. Counsel relied on the case of ***Bank of Baroda vs Timwood Products (2008) eKLR***, where it was held that the Plaintiff is entitled to substantial damages which should accrue from the date of judgement until Kenya Urban Roads Authority complies with the laws relating to acquisition of private properties.

57. The 1st Defendant submitted that the actions of the 4th Defendant are tantamount to trespass. In determining the appropriate remedy for damages, counsel relied on the finding of Obaga J in ***Philip Ayaya Aluchio v Crispin Ngayo (2014) eKLR*** where the court held as follows:

> ***"The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See Hostler – VS – GreenPark Development Co. 986 S. W 2d 500 (No. ct App. 1999)."***

58. It was submitted that the value of the land as indicated in the 2005 sale agreement was Kshs 900, 000 per acre and that in the 2013 valuation report, the market value of the suit land was Kshs. 41,000,000 per acre. Counsel for the 1st Defendant submitted that the court should be guided by these figures while assessing damages.

59. On the issue raised by the 4th Defendant that the 3.2 acres acquired for the road reserve was a surrender, the 1st Defendant's counsel submitted that it is the 4th Defendant who requested the creation of the road from the suit land; that the subject property was always private property and that the 4th Defendant's forceful occupation of the land should not deny the Plaintiff its proprietary rights.

60. The 1st Defendant submitted that the 4th Defendant's conduct through letters, furnishing of drawings and its subsequent reversion, stating that a portion of the land was a surrender, is unprofessional and is made out of bad faith. It was submitted that the 4th Defendant has to show that the land measuring 3.44 acres was and has always been a road. With respect to costs, the 1st Defendant submitted that the costs of the suit should be borne by the 4th Defendant as this suit is premised on its failure to undertake its statutory mandate.

The 2nd and 3rd Defendant's submissions

61. The Attorney General, on behalf of the 2nd and 3rd Defendants submitted that the suit property is still in the name of the 1st Defendant; that the 1st Defendant and the Plaintiff had entered into an agreement for sale; and that the Plaintiff paid the full purchase price the under agreement.

62. The 2nd and 3rd Defendants' counsel submitted that the process of compulsory acquisition which was commenced in 2005 was not completed as the steps of inquiry, compensation and surrender of title were not all undertaken. Counsel referred the court to **Section 8** and **9(1) and (4A)** of the **Land Acquisition Act** which sets out the requirements for compensation, publication of a notice and inquiry.

63. On this basis, it was submitted that the Attorney General advised the 4th Defendant to amicably resolve the matter by compensating the owners of the suit land. The 2nd and 3rd Defendants relied on the case of ***Commissioner of Lands & Another vs Coastal Aquaculture Limited [1997] eKLR*** where the Court of Appeal held that:

> ***"There is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry."***

64. The Attorney General stated that the parties had sought to settle the matter out of court by agreeing to compensate the Plaintiff for the suit land at the market rate of KShs. 165 million in 2013; that a further gazette notice was published in 2016 varying that of 2005 but the process of compulsory acquisition was again not completed and that the 4th Defendant is already in possession of the suit land, yet compensation for the land has not been made.

65. While he concedes that under **Section 19(2)** of the **Land Acquisition Act**, the Government could take possession of land before payment of an award, the 2nd and 3rd Defendants' counsel submitted that it would be expected that relevant notices be served upon the parties and compensation paid promptly.

66. The Honourable Attorney General submitted that the entire 17.44 acres was part of the acquisition; that there was no reason to believe that 3.2 acres of the suit land had been surrendered and that neither the 1st Defendant nor the Plaintiff indicated that they had at any particular point surrendered 3.2 acres of the suit property.

67. With respect to compensation, the Attorney General submitted that the term 'interested person' may not necessarily refer to the registered proprietor; that in accordance with Section 2 of the Land Acquisition Act and Section 112 of the Land Act, 'interested person' refers to a person with an interest over the suit land and that in this case, the Interested Party for the purpose of compensation is the Plaintiff.

4th Defendant's Submissions

68. The 4th Defendant's advocate submitted that the 4th Defendant herein, Kenya National Highways Authority, is a State Corporation, established under the Kenya Roads Act, 2007 with the responsibility for the management, development, rehabilitation and maintenance of national trunk roads within the Republic of Kenya.

69. Counsel submitted that sometimes in the year 2006, the 4th Defendant's predecessor, the Ministry of Roads, began the process of acquiring the suit property for development of Embakasi- Machakos Turnoff and Machakos Turnoff – Sultan Hamud Road being part of the Northern Corridor Transport Improvement Project and that on 1st March, 2006, the 1st Defendant, National Social Security Fund Board of Trustees, accepted a request by the Ministry of Roads (then) to surrender 50 acres of L.R No. 11895/24 at the cost of Kshs. 41 Million,

which offer was accepted and thereafter the 4th Defendant took possession of the land. It was submitted that at the time of surrender, the 1st Defendant was the registered owner of the land.

70. The 4th Defendant's advocate submitted that the 2nd Defendant published gazette notice number 3577 dated 19th May, 2006 to acquire the 50 acres of L.R No. 11895/24 on behalf of the Ministry of Roads (the 4th Defendant's predecessor); that the 2nd Defendant later subdivided L.R No. 11895/24 into smaller portions including L.R No. 11895/24/14 (L.R No. 11895/90) now occupied by the school and L.R No. 11895/24/13).

71. It was submitted by the 4th Defendant's advocate that L.R No. 11895/24/14 and L.R No. 11895/24/13 were gazetted again for acquisition by the 5th Defendant, the National Land Commission through gazette Notice No. 6600 of 19th August, 2016.

72. Counsel submitted that the 1st Defendant is the registered owner of the suit land; that the doctrine of sanctity of title is central to property law; that section 24 and 25 of the Land Registration Act provides for the rights of a registered owner of land and that the 1 stDefendant herein being a registered owner of the property decided on its own volition to surrender the suit land to the Ministry of Roads (then) for a consideration.

73. It was submitted that the 4thDefendant is a stranger to the Plaintiff and is not privy to any agreements entered into by the Plaintiff in relation to the suit property and that the acquiring entity such as the 4th Defendant has no role whatsoever in the acquisition process of land which was to be carried out by the 2nd Defendant and completed by the 3rd Defendant as per the **Land Acquisition Act** (repealed), and by the 5th Defendant National Land Commission as per the Land Act, 2012.

74. It was submitted that the National Land Commission conducted inquiries in 2016 aimed at determining the issue of proprietorship and claims for compensation; that **section 112** of the **Land Act** involves the landowners directly for purposes of determining proprietary interests and compensation and that the section has an elaborate procedure which requires the National Land Commission to gazette an intended inquiry and the service of the notice of inquiry. It was submitted that the inquiry hearing determines the persons interested in the land and the person to be compensated.

75. It was submitted that looking at the Amended Plaint, it is evident that the Plaintiff is seeking for prompt compensation from the 5th Defendant (National Land Commission) and that no party in this case has disputed the fact that compensation for compulsory acquisition of land can only be made by the National Land Commission, the 5th Defendant herein.

76. The 4th Defendant's counsel submitted that there is enough evidence on record indicating that the 1st Defendant accepted a request by the Ministry of Roads to surrender 50 acres of its land; that the 2nd Defendant gazetted for acquisition the aforesaid parcel of L.R No. 11895/24/14 on behalf of Ministry of Roads which took possession of land for development of road and other related purposes and that it is clear from the record that the land occupied by the school, L.R NO. 11895/24 was gazetted for acquisition together with L.R NO. 11895/24/13 through gazette notice of No. 6600 of 19th August, 2016.

77. Counsel submitted that the 4th Defendant in this case cannot compensate the Plaintiff who had no registrable interest when the Government expressed its interest to acquire the land for public related purposes; that the 4thDefendant notified the National Land Commission of the need to acquire land for a public purpose and that they conducted valuation and inquiries aimed at determining the issue of propriety and claims of compensation in respect of the suit land.

78. It was submitted that in the Notice of Indemnity, the 4th Defendant's claim against the 1st Defendant is for judgment to the effect that should any damages be found to be payable to the Plaintiff, the sum awarded be borne by the 1st Defendant and that the said 1st Defendant do indemnify the 4th Defendant from any claim whatsoever arising from the suit.

Analysis and Determination

79. The following are the issues for determination before this court:

a. Whether L.R No. 11895/924/14 and L.R No. 11895/24/13 measuring 17.44 Ha were compulsorily acquired by the 4th Defendant or at all.

b. Whether the Plaintiff should be compensated for L.R No. 11895/24/14 and L.R No. 11895/24/13 measuring 17.44 Ha.

c. Who should compensate the owners of the suit property and for how much.

d. Who should bear the costs of the suit.

80. The law on compulsory acquisition in Kenya is set out in the Land Acquisition Act (repealed), the Land Act 2012 and the Constitution of Kenya 2010. Though repealed, the Land Acquisition Act applies in instances where compulsory acquisition was initiated before the enactment of the **Land Act 2012.** In this case, the process of compulsory acquisition was initiated in 2006 and later in 2016. The first notice thus falls under the ambit of the Land Acquisition Act while the second notice of the intention to acquire LR No. 11895/24 falls within the ambit of the Land Act 2012 and the Constitution of Kenya.

81. In the **Land Acquisition Act**, **Sections 3** and **6** provide for the publication of a preliminary notice to acquisition of land in the Kenya

Gazette by the Commissioner of Lands. **Section 8** provides for prompt compensation to all persons interested in the land while **Section 9** outlines the 24-month timeline within which an inquiry as to compensation should be held. Critically, **Section 9 (4A)** of the Act provides as follows:

> ***"Where an inquiry is not held within the time prescribed under this section the Minister shall be deemed to have revoked his direction to acquire the land and section 23 shall mutatis mutandis apply."***

82. Section 23 of the Act provides for the withdrawal of acquisition, which may be at the direction of the Minister or by operation of the law under **Section 9 (4A)** due to failure to hold an inquiry within the prescribed time. **Section 19 (1)** of the Act provides for the taking possession of the acquired land and vesting by the Government after payment of the award.

83. Section 19(2) of the **Land Acquisition Act** provides that in cases of urgency, the Government may take possession of the acquired land even before payment of the award. **Subsection (4)** provides that upon taking of possession, the land vests in the Government absolutely free from encumbrances.

84. Article 40(3) of the Constitution provides for the criteria for compulsory acquisition as follows:

> ***"(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."***

85. Under the **Land Act 2012**, the National Land Commission is mandated to conduct the process of acquisition of land and the award of compensation. **Section 107** of the Act provides for the publishing of a Preliminary Notice of acquisition while **Section 111** provides for the award of compensation. A proviso to **Section 111 (1B)** provides for the lapse of acquisition where the process is not completed within 24 months:

> ***'Provided that regardless of the form of compensation under this section, where an acquisition process is not completed within twenty-four months from the date of publication of the notice of intention to acquire the land, the acquisition shall lapse'***.

86. Section 112 of the **Land Act** restates the provisions of **Section 9** of the **Land Acquisition Act** with respect to the conduct of an inquiry as to compensation. Similarly, **Section 113** of the **Land Act** sets out the substantive law as to award of compensation as captured in **Section 10** of the **Land Acquisition Act.** Formal taking of possession is provided for under **Section 120** of the **Land Act**. This provision is similar to Section 19 of the Land Acquisition Act, save for **subsection (4)** which states that land shall only vest in Government upon gaining possession and payment of the compensation: **Section 113(4)** provides as follows:

> **"(4) Upon taking possession and payment of just compensation in full, the land shall vest in the national or county Governments absolutely free from encumbrances.**

87. The Courts have held that the elaborate process of compulsory acquisition set out in the law must be adhered to. In ***Commissioner of Lands & Another v. Coastal Acquaculture Limited [1997] eKLR*** the court stated:

> ***"In Kenya where the statutory power to compulsorily acquire a person's land against his will is first derived from the carefully worded provisions of the Constitution itself; where land is a most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry."***

88. Similarly, Mutungi J. in ***Eunice Grace Njambi Kamau & another vs Attorney General & 5 others [2013] eKLR*** articulated the obligations of the Commissioner of Lands under the Land Acquisition Act as follows:

> ***"In my view and having regard to the provisions of the Land acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The commissioner of Lands and the Land Registrars as regards land acquired by the Government compulsorily have duties and obligations which they are required to execute to ensure such land is properly documented and protected. I believe that was the intention for the elaborate process and procedure set out under the Land Acquisition Act (repealed) and now reproduced under part VIII of the Land Act NO. 6 of 2012 sections 107 to 133 …."***

89. In ***Virenda Ramji Gudka & 3 others vs Attorney General [2014] eKLR***, the Judge held that the gazette notice of the intended acquisition

cannot in itself effectuate a compulsory acquisition:

> ***"The fact is there were no records of the acquisition at the Lands registry and/or with the Director of Surveys. In my view a Gazette Notice for the intended acquisition alone cannot effectuate a compulsory acquisition and in order to effectuate the acquisition the procedure for acquisition as under the Act has to be adhered to. The Gazette Notice for the acquisition and the Gazette Notice notifying the payment of the compensation can only affect the parties directly affected such as the registered proprietors at the time the notice of compulsory acquisition is given. Third parties dealing with the acquired land can only be put on notice if the process of acquisition is completed and the provisions of sections 19 and 20 of the Act complied with."***

90. The evidence before this court shows that land known as L.R. No. 11895/24 is a sub division of L.R. No. 11895/19 which at all material times was registered in the name of the 1st Defendant. According to the evidence produced in this court by both the Plaintiff and the 1st Defendant, the 1st Defendant and the Plaintiff entered into a sale agreement dated on 18th January 2005 for the sale of a portion of L.R. No. 11895/19 measuring 220 acres at a consideration of Kshs. 187,780,000. The said agreement was varied on 27th April, 2005, in which the Plaintiff agreed to purchase 259 acres of a portion L.R. No. 11895/19 for Kshs. 212,380,000.

91. In its Statement of Defence and Cross- claim against the 2nd and 4th Defendants, and the evidence of DW 1, the 1st Defendant admitted that it entered into a sale agreement with the Plaintiff and that while the Plaintiff made full payment and acquired beneficial ownership of the land measuring 20.235 hectares (50 acres), the delivery of the 50 acres was frustrated by the unforeseen acquisition, possession and vesting of a portion of the land by the Government absolutely, albeit contrary to the mandatory process and requirements of the Land Acquisition Act.

92. DW1 informed the court that the Ministry of Roads initially requested the 1st Defendant to surrender a portion of its land measuring 50 acres; that an agreement was reached that the surrender of a portion of its land would be for a consideration of Kshs 41 million; that an agreement between the 1st and 4th Defendants was to be entered into to adequately safeguard the Plaintiff's beneficial interest and that the 4th Defendant abandoned this agreement in favor of compulsory acquisition, leading to gazettement of the Government's intention to compulsorily acquire the land vide gazette notice No. 3577 of 19th May 2006.

93. Indeed, a perusal of gazette notice No. 3577 of 19th May 2006 shows the Government's intention to acquire L.R. No. 11895/24 measuring 20.235 ha (approximately 50 acres). It is not in dispute that despite the intention by the 4th Defendant's predecessor to acquire L.R. No. 11895/24 measuring 20.235 ha (approximately 50 acres), the Commissioner of Lands failed to hold an inquiry within 24 months as required by the Land Acquisition Act (repealed).

94. In her evidence, the 4th Defendant's witness, DW 1, admitted that the acquisition process of the land commenced in 2006; that the 1st Defendant was the registered owner of the suit property and that the 4th Defendant took possession of the suit property for the expansion of the road, the road reserve and other related public purposes, including the relocation of public schools to the land.

95. According to the evidence of DW2, the 4th Defendant's Board of Management sought the Attorney General's advice on the issue of acquisition of the suit property; that the Attorney General advised them to seek valuation of the land where the school is built; that the 4th Defendant determined that it only required 17.44 acres, which the Government valuer valued at Kshs. 165 million in 2013 and that thereafter, the 17.44 acres was sub divided into L.R. No. 11895/24/14 measuring 14.83 acres, occupied by public schools and L.R. No. 11895/24/13 measuring 3.2 acres, which is an access road to the old Mombasa Road.

96. When the process of compulsorily acquiring 17.44 acres of the land registered in favour of the 1st Defendant and sold to the Plaintiff failed, the Attorney General vide its letter dated 11th December, 2012 informed the 4th Defendant as follows:

> ***"The legal position remains the same as the process of compulsory acquisition of the disputed property was not legally completed and the land was not transferred to your organisation, NSSF as the legal owner was entitled to transact the land. Your organization can only acquire interest in the land by engaging the registered owner…"***

97. The fact that indeed the 4th Defendant should pay for the 17.44 acres it acquired was further confirmed by the Attorney General in his submissions where he submitted that the process of compulsory acquisition which was commenced in 2005 was not completed as the steps of inquiry, compensation and surrender of title were not all undertaken. The Attorney General submitted that he advised the 4th Defendant to amicably resolve the matter by compensating the owners of the suit land.

98. The Attorney General submitted that the parties had sought to settle the matter out of court by compensating the Plaintiff for the suit land at the market rate of Kshs. 165 million in 2013; that a further gazette notice was published in 2016 varying that of 2005 but the process of compulsory acquisition was again not completed and that the 4th Defendant is already in possession of the suit land, yet compensation for the land has not been made.

99. The evidence produced shows that vide an internal memo dated 17th December, 2013, the Cabinet Secretary in charge of The Ministry of Transport and Infrastructure informed the Principal Secretary in the Ministry as follows:

> ***"I have no objection to the acquisition of the land required for the Mlolongo Schools. KeNHA may therefore proceed to acquire the land in accordance with the advise given by the Attorney Genearal and as valued by the Government Chief Valuer."***

100. Other than the internal memo by the Cabinet Secretary agreeing to pay for the land, the 4th Defendant's advocate informed the

Plaintiff's advocate vide his letter 30th January, 2013 that the 4th Defendant was ready and willing to pay for the 17.44 acres. In the said letter, the 4th Defendant's advocate informed the Plaintiff's advocate as follows:

> ***"Our client has established that it requires 17.44 acres. In exchange therefore, our client proposes to pay yours the value ascribed to it by the Government valuer…"***

101. It will appear that despite the 4th Defendant taking possession of LR No. 11895/24/14 and LR No. 11895/24/13 measuring 17.44 acres way back in 2006, and receiving the advice of the Attorney General that that it should purchase the suit property by way of private treaty, which advise the Cabinet Secretary agreed upon, the 4th Defendant sought to have the land acquired on its behalf by the National Land Commission. In its letter dated 29th May, 2014, the 4th Defendant informed the 5th Defendant as follows:

> ***"Some 20.235 ha of LR No. 11895/24 was gazetted for acquisition in Gazette Notice number 3577 of 19th May, 2006 as an addendum to Gazette Notice numbers 7570 & 7571 of 2005. This land was required for construction of Mlolongo Public schools and a U-Turn to old Mombasa road. The acquisition was however not completed, and L.R No. 11895/24 has since been sub divided into LR No. 11895/24/14 and LR No. 11895/24/13 among others. We now propose to acquire only the area occupied by the schools and the proposed U-Turn to Mombasa Road."***

102. Despite the second gazette notice number 6600 dated 19th August, 2016 by the National Land Commission of its intention to acquire 20.235 ha of LR No. 11895/24, no evidence was presented to show the finalization of the process of compulsorily acquiring the land. **Section 111 (1B)** of the **Land Act** provides as follows:

> ***"(1B)Compensation for compulsorily acquired land may take any one or more of the following forms—***
>
> ***(a) allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired;***
>
> ***(b) monetary payment either in lump sum or in instalments spread over a period of not more than one year;***
>
> ***(c) issuance of Government bond;***
>
> ***(d) grant or transfer of development rights as may be prescribed;***
>
> ***(e) equity shares in a Government owned entity; or***
>
> ***(f) any other lawful compensation Provided that regardless of the form of compensation under this section, where an acquisition process is not completed within twenty-four months from the date of publication of the notice of intention to acquire the land, the acquisition shall lapse."***

103. The process of compulsory acquiring the suit property initiated by way of the gazette notice dated 19/08/2016 lapse after the expiry of 24 months. ***The 4th Defendant's advocate submitted that*** compensation for compulsory acquisition of land can only be made by the National Land Commission(NLC) , the 5th Defendant herein. That is not true.

104. In the land acquisition process, the NLC acts as an agent of the national or county body acquiring the land. It does not act in its own right or interests. The process of compulsory acquisition is set out in Part VIII of the Land Act. The following provisions of the law shows that the NLC acts as an agent in the compulsory acquisition process:

> ***a. Firstly, the NLC acts upon the request of a Cabinet Secretary or County Executive Member in acquiring any particular land on behalf of the national or county government.***
>
> ***b. Secondly, Section 111(1A) of the Land Act, provides that compensation for compulsory acquisition of land is to be catered by the acquiring authority. The section provides that the acquiring authority shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.***
>
> ***c. Thirdly, Section 110 (2) of the Act provides that in the instance that the public purpose for which the land was acquired fails or ceases, the NLC offers its previous owners the pre-emptive rights to re-acquire the land upon restitution of the compensation to the acquiring authority.***
>
> ***d. Lastly, upon taking formal possession and payment of full compensation under Section 120 of the Land Act, the land vests in the national or county governments absolutely free from encumbrances.***

105. It is clear from the above provisions of the law that with respect to compensation, the role of the NLC is limited to channeling such funds, as deposited to itself by the acquiring authority

106. The powers of the NLC are limited to those enabling it to conduct the compulsory acquisition process. These include mapping and valuing the land; publishing and serving notices; authorizing persons to enter and inspect the land; payment of just compensation; making rules to regulate the assessment of just compensation; conducting an inquiry as to compensation; conducting a final survey; taking possession

of the acquired land; revocation of a direction to acquire land; compensation for damages and reference of matters to court for determination.

107. In accordance with **Section 111(1B)** of the **Land Act,** the acquisition process of LR No. 11895/24 published in the gazette notice number 6600 dated 19th August, 2016 was not concluded within 24 months of 19th August 2016 lapsed. As correctly submitted by the Attorney General, the 4th Defendant was to amicably resolve the matter by compensating the Plaintiff for the suit land.

108. The Plaintiff having purchased the entire L.R No. 11895/24 from the 1st Defendant, and the Plaintiff having caused the said land to be sub divided at the behest of the 4th Defendant to hive 17.44 acres, there was no evidence to show that 3.2 acres of the 17.44 acres had been surrendered to the 4th Defendant, by either the Plaintiff or the 1st Defendant.

109. The courts have held that where a party to a sale agreement pays the full purchase price, they gain an equitable beneficial interest in that land. This was the position that was taken by the Court of Appeal in ***Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR*** where it was held as follows:

> ***"It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property."***

110. In this case, while the Plaintiff had paid the full purchase price, it was unable to take possession of 17.44 acres after the 4th Defendant unlawfully put up public schools and a road of access on the land. The Plaintiff's beneficial interest has been consistently acknowledged and upheld by the 1st Defendant, 2nd and 3rd Defendants.

111. The acquisition and use of a portion of L.R. No. 11895/24 measuring 117.44 acres owned by the Plaintiff by the 4th Defendant for the benefit of the public does not sanitize the actions of the 4th Defendant which has continued to infringe on the Plaintiff's right to property as enshrined under **Article 40** of the Constitution. Since the year 2006, which is 15 years ago, the 4th Defendant has continued to deprive the Plaintiff of ownership and use of its land measuring 17.44 acres.

112. The words of Lenaola J (as he was then) in ***Arnacherry Limited vs Attorney General [2014] eKLR*** aptly captures the circumstances that have prevailed in this suit:

> ***"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."***

113. The take-over of a portion of L.R. No. 11895/24 measuring 17.44 acres owned by the Plaintiff by the 4th Defendant has lasted 15 years. This sad situation is even more disturbing considering that the Cabinet Secretary in the Ministry of Transport and Infrastructure informed the Principal Secretary in the Ministry vide an internal memo dated 17th December, 2013 to acquire the land as advised by the Attorney General. However, no action was taken by the 4th Defendant to actualize the said directive.

114. Considering that the 4th Defendant has admitted by way of correspondences that indeed the owner of the portion of L.R. No. 11895/24 measuring 17.44 acres should be compensated, and this court having found that the said land is owned by the Plaintiff and not the 1st Defendant, it is the finding of this court that the Plaintiff should be compensated for the said land at the current market value.

115. That being the case, it is the finding of this court that the 4th Defendant should promptly compensate the Plaintiff for the breach of their right to property in respect of the 17.44 acres. The 1st Defendant's counsel submitted, and rightfully so, that the current Valuation Report produced by the Plaintiff should guide this court in assessing the compensation that is due and owing to the Plaintiff.

116. In the Valuation Report dated 24th June, 2021, the Transnational Valuers have started that the open market value of the 17.44 acres which was sub divided at the behest of the 4th Defendant to create L.R No. 11895/90 (L.R. No. 11895/24/14) and LR No. 11895/24/13 on which public schools and a road are situated is Kshs. 730,000,000 made up as follows: LR No. 11895/90 – Kshs. 600, 000,000 and LR No. 11895/24/13 – Kshs. 130,000,000.

117. The Plaintiff also produced in evidence a receipt showing that it paid Geoland Surveys Kshs. 9,459,412 to sub-divide L.R No. 11895/24 to create L.R No. 11895/90 and LR No. 11895/24/13, amongst other parcels of land, at the behest of the 4th Defendant. This amount should be refunded to the Plaintiff by the 4th Defendant.

118. As regards the Plaintiff's claims for loss of profits, the Plaintiff failed to tender evidence of such loss. The Plaintiff did not tender evidence of the proposed use of the land and the purported loss thereof. Although the Plaintiff sought for injunctive orders as against the 1st and 2nd Defendants restraining them permanently from dealing with the land, it is the finding of this court that the suit property has already been utilized for public utilities. That being the case, the Plaintiff can only be compensated for the loss of its land at the current market rate.

119. For the reasons I have given above, the Plaintiff's claim is allowed as against the 4th Defendant, Kenya National Highways Authority, as follows:

a) A declaration be and is hereby issued that the 4th Defendant's occupation and use of L.R No. 11895/90 (L. R. No.

11895/24/14) and LR No. 11895/24/13 measuring 17.44 acres without compensating the Plaintiff for the land is illegal, unlawful and in breach of the Plaintiff's constitutional right to ownership of property.

b) The 4th Defendant be and is hereby ordered to pay the Plaintiff Kshs. 730,000,000 being the current open market value of L.R No. 11895/90 (L.R. No. 11895/24/14) and LR No. 11895/24/13 both measuring 17.44 acres.

c) The 4th Defendant is hereby ordered to pay the Plaintiff Kshs. 9,459,412 being the amount that was paid by the Plaintiff to the Surveyor for the sub-division of L.R No. 11895/24 to create L. R. No. 11895/90 (11895/24/14) and L. R. No. 11895/24/13.

d) The 4th Defendant be and is hereby ordered to pay the Plaintiff interest on the above amount at the rate of 14% per annum from the date of this Judgment until payment in full.

e) The 4th Defendant to pay the Plaintiff the costs of the suit.

Dated, signed and delivered in Machakos virtually this 20th day of January, 2022.

O. A. Angote

Judge

In the presence of:

No appearance for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

No appearance for the 4th Defendant

No appearance for the 5th Defendant