



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.113 OF 2009

(Consolidated with Petition No. 44 of 2009 and Petition No. 48 of 2012)

BETWEEN

CHARLES MURIGU MURITHII.....1ST PETITIONER

NEWTON MBUGUA.....2ND PETITIONER

PAUL MWANGI NGUGI.....3RD PETITIONER

AND

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioners' claims in the consolidated Petition have their genesis in the post-election violence that engulfed various parts of the Republic of Kenya following the results of the disputed presidential election conducted in December 2007. The Petitioners seek several reliefs including special and general damages for the alleged violation of their fundamental rights and freedoms guaranteed by both the Repealed Constitution and the Constitution of Kenya, 2010.

The Pleadings

2. In their respective Petitions, the Petitioners invoke **Sections 70 and 75 of the Repealed Constitution and Articles 27(5), 29, 31, 39 and 40 of the Constitution, 2010**. Their common complaint in that regard is that the State, represented by the Attorney-General, failed in its obligation to protect their homes and property situated within Eldoret Municipality when they were invaded by a gang of armed men who set their properties ablaze, vandalized and destroyed them, claiming that the Petitioners were Kikuyus from Central Province and had no right to reside in Eldoret.

3. In **Petition No.113 of 2009**, the Petitioner, **Charles Murigu Murithii**, in his Petition dated 11th February, 2009 stated that he was resting in his house within Eldoret Municipality on or about the 30th December 2007, when his home was allegedly invaded by a gang of men. That he made telephone calls to Eldoret Police Station for help, protection and security but no response came forth. As a result of the invasion, the following properties were allegedly burnt down and/or completely destroyed;

Item

Estimated Value

- | | |
|---|-----------------|
| (a) A four bedroomed tile roofed house with an area of 1736 square feet and facilities like piped water and electricity | Kshs.4, 500,000 |
| (b) Furniture, wall unit and other decorations | Kshs.306,000 |
| (c) Electronics and domestic appliances | Kshs.105,000 |

(d) Utensils	Kshs.70, 500
(e) Cattle Shed and fence	Kshs.500,000
(f) One semi-permanent house	Kshs.850,000
(g) Other property burnt	Kshs.455,000
(h) Two stores	Kshs.350,000
(i) One hundred and ten (110) bags of maize	Kshs.143,000
(j) Four (4) bags of beans	Kshs.16,000
(k) Building materials eg. Timber, steel windows etc	Kshs.304,000
(l) Other assorted goods like farm tools, equipment and animal feeds	Kshs.251,000
(m) Vandalized 3 phase power house	<u>Kshs.12, 400</u>
Total	<u>Kshs.8,075,900</u>

4. He has therefore sought declarations that;

(a) The Petitioner's fundamental rights and freedoms more so as set out in Sections 70 and 75 of the Constitution (right of security of person and protection of land and property) were violated.

(b) The Petitioner is entitled to compensation for all loss arising from the breach of his fundamental rights and freedoms from the Government of the Republic of Kenya for failing to give him protection.

(c) The Petitioner is entitled to General Damages.

(d) The costs of this Petition be awarded to the Petitioner.

(e) Or that such other orders as this Honorable Court shall deem just.

5. The Petitioner in **Petition No. 44 of 2009 Newton Mbugua**, alleged that he was in his home at Eldoret on 30th December 2007 when an armed gang descended on his properties and destroyed them by setting them ablaze. He listed the properties as follows;

<u>Item</u>	<u>Estimated Value</u>
(a) One stone house	Kshs.9,500,000
(b) One lockable garage	Kshs.350,000
(c) One maize store	Kshs.300,000
(d) 170 bags of maize	Kshs.300,000
(e) 34 bags of beans	Kshs.112,000
(f) Two toilets and bathrooms	Kshs.240,000
(g) Peugeot 504 Station Wagon (KAB 796 D)	Kshs.650,000
(h) Mitsubishi Pick up 4WD (KAA 807 Q)	Kshs.600,000
(i) Clothes for self, wife and children	(not provided.)
(j) Household goods including deep freezer, fridges, electrical and gas cookers	Kshs.970,000

(k) One semi-permanent house and store	Kshs.680,000
(l) 7 Dairy cattle	<u>Kshs.455, 000</u>
Total	<u>Kshs.14,157,000</u>

6. He has therefore sought the following declaratory orders;

- (a) That the Petitioner's fundamental rights and freedoms were violated.*
- (b) That the Petitioner is entitled to compensation for all loss arising from the breach of his fundamental rights and freedoms.*
- (c) That the Petitioner is entitled to General Damages.*
- (d) That the costs of this Petition be awarded to the Petitioner.*
- (e) Or that such other orders as this honourable court shall deem fit.*

7. In **Petition No.48 of 2012**, the Petitioner, **Paul Mwangi Ngugi**, in his Petition dated 4th February 2012, claimed that on 31st December 2007, a gang of about 400 men descended on his home, looted some of his properties and set the remainder ablaze. He identified the properties set ablaze as follows;

(a) Buildings-main house, shop and store	Kshs.5,280,000
(b) Households including furniture, beddings and kitchen	Kshs.975,000
(c) Clothing for the whole family	Kshs.120,000
(d) Livestock	Kshs.390,000
(e) Mixer machines	Kshs.720,000
(f) Vibrators	Kshs.120,000
(g) Trappers plates	Kshs.660,000
(h) Stores	<u>Kshs.70,000</u>
Total	<u>Kshs.8,335,000</u>

8. In his Supporting Affidavit, he deposed that the gang of men that invaded his home were armed with dangerous weapons like machetes and had passed a road block manned by six police officers without being questioned. That the six police officers stood by and did nothing to prevent or stop the looting and destruction of his aforesaid properties and that even after he made telephone calls to Eldoret Police Station for assistance, the police did not take any action to safeguard his life and property. He has therefore sought declaratory orders that;

- (a) The Petitioner's fundamental rights and freedoms were violated.*
- (b) The Petitioner is entitled to compensation for all loss arising from the breach of his fundamental rights and freedom.*
- (c) The Petitioner is entitled to general damages*
- (d) The costs of this Petition be awarded to the Petitioner.*
- (e) Or that such other orders as this Honourable Court shall deem just.*

Consolidation

9. By consent of the parties, on 27th September 2012, all the Petitions were consolidated and were heard together with **Petition No.113 of 2009** being the lead file. Hearing proceeded by way of both affidavits and oral evidence before us.

The Petitioners' Case

10. The Petitioners' case was as stipulated in their Petitions, affidavits and submissions made on their behalf by their advocate, Mr. Karanja. They also each gave oral evidence in support thereof.

11. In his oral testimony in Court, the 1st Petitioner, Charles Murigu Murithii, relied on his Affidavit and added that the sum of Kshs.8,075,900 which he has claimed was arrived at after his properties were valued by the firm of M/s Prime Valuers and also based on his personal knowledge of the properties. He claimed that he did not have receipts to authenticate any of the items listed above because they were all burnt during the raid aforesaid.

12. The 2nd Petitioner, Newton Mbugua, relied on his Affidavit and stated that when he was attacked, he called the OCPD Eldoret Police Division who promised to send help but none came through. He also produced the valuation done by the firm of M/s Prime Valuers for the property he had allegedly lost in the attack.

13. The 3rd Petitioner, Paul Mwangi Ngugi, testified that before he was attacked, he had spotted six policemen who were dropped by a police land-rover on the roadside. That the officers wore jungle green uniform and had rifles and that they did nothing as his house was burning even though they had assured him of protection. He also alleged that he called the police and his report was recorded in the OB Entry No.45 of 1st January 2008.

14. The last witness was James Kariuki Mbugua who is a licensed and registered valuer with M/s Prime Valuers. He testified that he inspected and valued each of the Petitioners' properties three years after the raid. He stated that the properties had been completely destroyed and there was a lot of debris at the scene of the alleged raid and he used the costing approach based on construction, current prices and estimates to arrive at the value of each of the destroyed properties.

15. In his submissions, Mr. Karanja Learned Counsel for the Petitioners, stated that it was the duty of the Government of Kenya, through the Police Service, and other security agencies, to protect the life and property of its citizens and that it had failed to do so in the case of the Petitioners, thereby depriving them of their fundamental right to equality and freedom from discrimination; freedom and security of the person; the right to privacy and the right to property. That owing further to the failure by the Police to perform their legal duty and responsibility of affording protection to citizens, the Petitioners had suffered material loss and damage as quantified elsewhere above.

16. He also contended that Kenya is a signatory to various international instruments which recognize the right to property and its security. In this regard, he placed reliance on **Article 14** of the **African Charter on Human and People's Rights** which guarantees the said right to property and provides that such a right can only be encroached upon in the interest of the public and in accordance with due process. He further submitted on behalf of the Petitioners that pursuant to **Article 2 (5) and (6)** of the Constitution, international law and rules form part of the laws of Kenya and that Kenya as a State was consequently liable to compensate the Petitioners for their loss under the "due diligence principle" which imposes responsibility on a State when non-state actors infringe on individual rights within its jurisdiction. In making that submission, he relied on the case of **Osman and Another vs Ferguson and Another (1993) 4 ALL ER** where the European Court of Human Rights held that a State has a positive obligation to take preventive operational measures to protect an individual whose life is at risk from criminal acts of another individual. They also relied on the Inter-American Court of Human Rights decision in the case of **Velaquez Rodriguez vs Honduras, Judgment of July 27, 1985** where it was held that the State has an obligation to prevent human rights abuses and to punish those responsible for such violations.

17. In the above context, Mr. Karanja submitted that the State was liable for the damage suffered by the Petitioners because it failed in its duty under the 'due diligence' concept for having neglected to take appropriate steps to prevent the eruption of post-election violence despite having information that it would occur; for failure of State agencies to respond when called upon or to take measures against individuals who were rioting; for failure to arrest any individuals involved in the contravention of the Petitioners' rights to property and for failure to investigate the alleged violation of their fundamental rights and freedoms.

18. The Petitioners thus urged the Court to find that they were entitled to a declaration that their fundamental rights and freedoms under **Sections 70 and 75** of the Repealed Constitution and **Articles 27(5), 29, 31, 39 and 40** of the Constitution of Kenya 2010 had been violated and to compensation by way of damages for the said violations. They further relied on the cases of **Rumba Kinuthia vs Attorney General, Misc. Appl. No.1408 of 2004, Pradhan vs Attorney General & Another (2002) 1 KLR and Marete vs Attorney General (1987) KLR 692** where all the Applicants were paid compensation for violation of their fundamental rights and freedoms.

The Respondent's Case

19. The Respondent, the Hon. Attorney General of the Republic of Kenya, filed a response in **Petition No.48 of 2012** by way of grounds of opposition dated 14th March 2012 and a Replying Affidavit sworn on 14th June 2012 by one **Kipkosgei Barmao**, a Senior Assistant Commissioner of Police. All the grounds of opposition were incorporated in paragraph 3 of the said Replying affidavit.

20. In his Replying Affidavit, Mr **Barmao** deposed that the Petition was unmerited and ought to be dismissed as the 3rd Petitioner, Mr. Paul Mwangi Ngugi, specifically, had not demonstrated that any of his constitutional rights had been infringed nor had he stated the manner of that infringement by the Respondent or the Police. On behalf of the Police Department, he denied that any distress call had been made to the Police at Eldoret Police Station and that the Police had failed or declined to respond to that call. He also disputed the allegation that six police officers had witnessed the destruction of Mr. Ngugi's properties by a gang of armed men as contended by the said Petitioner.

21. At paragraphs 7 and 8 of the Replying Affidavit, Mr. Barmao stated that the Police as a disciplined force had discharged its duties during the post-election violence of 2007/2008 diligently and professionally in accordance with their mandate of maintaining law and order and providing security to Kenyans and their property round the clock; that they did this by dispatching police officers to post election violence hot spots countrywide to disperse and arrest those who were burning and looting property and also those who were killing people; that they

did so despite the limited number of police personnel country wide and the limited resources at their disposal.

22. It was also the Respondent's contention that the Petitioners had failed to provide evidence that they had telephoned any Police Station as alleged and that the police had failed to protect them and their properties despite those distress calls. The Respondent further denied that the document marked exhibit **PMNV11** annexed to **Paul Mwangi Ngugi's** affidavit was a copy of an extract from the Police Occurrence Book (OB) where reports made to the police are usually recorded. He deponed that entries of reports to the police are usually handwritten in the OB by a police officer in the Report Office and are not typed as the exhibit was.

As regards the exhibits of photographs showing the properties the Petitioners claim were damaged or destroyed, the Respondent submitted that the Petitioners had failed to provide proof that the properties in the photographs actually belonged to them and not to any other person(s).

23. It was also the Respondent's submission that **Section 75** of the Repealed Constitution which is replicated in **Article 40** of the Constitution, 2010 placed an affirmative constitutional duty on the State and its agencies not to deprive any person of their property unless due process of the law, as provided for in the Constitution or other relevant statutes, was followed. That the said provision did not on the other hand place on the State and its agencies a positive constitutional obligation to protect private persons from harm or potential harm that may be visited upon them by other private persons; that to the extent that the Petitioners' claims were therefore grounded on the aforesaid provisions of the Repealed Constitution and the Constitution, 2010, they were unfounded as they did not reveal any cause of action or any constitutional violation by the State or the police as alleged.

24. For the above submissions, the Respondent, through Learned State Attorney, **Mr. Daniel Wamotsa**, relied on the persuasive authority of **De Shaney vs Winnnebago County Department of Social Services 109 S. Ct. 998(1989)** where the United States Supreme Court held that the "due process clause" in the Fourteenth Amendment of the United States' Constitution whose terms are almost similar to those of **Section 75** of the **Repealed Constitution** does not impose an affirmative obligation on the State to protect the life, liberty and property of its citizens against invasion by private actors but only forbade the State from depriving individuals of life, liberty or property without due process of the law.

25. While conceding that the Police owe a general duty to the public to maintain law and order and to protect property and lives, Mr. Wamotsa further submitted that the duty to protect property is owed to the public at large and not to any specific individual unless there was evidence that the police were the aggressors or there existed a special relationship between the police and the victim of the violence or crime. In that regard, he referred to the case of **Johnson vs City of Seattle 474 F. 3d 634, 639 (9th Cir. 2007)** where a group of plaintiffs claimed that the United States Government had violated their "due process rights" by failing to protect them from harm inflicted by third parties as they participated in a public celebration. The Ninth Circuit Court of Appeals of the United States in dismissing the claims held that the City of Seattle had no constitutional duty to protect the Pioneer Square Plaintiffs against violence from a riotous crowd.

26. Other authorities relied upon by the Respondent were **West Minster Investing Corp vs G.C Murphy Co. 434 F. 2d 521, 526** where the United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia had no direct legal obligation to protect Mr. Murphy's properties against destruction by rioters and that Mr. Murphy was not entitled to damages resulting from alleged failure of the Government or its officers to keep peace. Further, in **Daubenspeck et. al vs Commonwealth of Pennsylvania, 894 A. 2d 867 (Pa. Cmwlth. 2006)**, **Ancell vs McDermott (1993) 4 ALL ER 355**, **Alexandrou vs Oxford (1993) 4 ALL ER 328**, **Hill vs Chief Constable of West Yorkshire (1988) 2 WLR 1049** and **Osman vs Ferguson (1993) 4 ALL ER 344** similar findings were made as was also the case in **Attorney General of Jamaica & Others vs Dacres (Sheryl) Resident Magistrates Civil Appeal No. 2 of 2009** where it was held that it would be improper to impute any liability on the police when a third party whom they had no control over caused damage to a claimant.

27. The further submission by Mr. Wamotsa was that the general rule that the police only owe a duty of care to the public generally and not to specific individuals has two exceptions, namely; where the Petitioners show that the Government's or police action or inaction affirmatively placed the Petitioners in a position of danger which they would otherwise not have faced and where it is demonstrated that there exists a special relationship between the State and the claimant, for example in cases of persons in custody or where the Government or police have given a person special assurance of protection of their property and persons. That in such a situation, the special relationship creates a special duty on the State to protect the specific individual in those specific circumstances. For this submission, the Respondent relied on the cases of **Lockhart-Bembry vs Town of Wayland Police 404 F. Supp. 2d 373**, **West Minister Investing Corp(Supra)**, **Warren vs District of Columbia (Supra)** and **Government Liability and Public Duty Doctrine 32, Villanova Law Review 509 (1987)**,

28. It was the Respondent's further case that the Petitioners have failed to bring themselves into any of the aforesaid exceptions and that they had failed to prove that the Police knew about the violence but failed to do anything to protect them. That the Petitioners also failed to place any form of affirmative or positive conduct on the part of the Police that created, enhanced or exposed the Petitioners to danger which the police could be held responsible for. In addition, the Respondent contended that it had not been shown that a special relationship existed between the Petitioners and the Police and that the duty to protect property and lives are general duties owed to the public at large by police officers and that in any case, failure to protect the Petitioners' properties did not mean that the Police had failed in that general obligation unless the Petitioners could prove that the police discriminated against them by offering protection to other people and deliberately refused to protect their property, which was not the case in the present Petitions.

29. The Respondent also disputed the Petitioners' claim that the Police did not discharge their duty of law enforcement and maintenance of law and order during the post-election violence and insisted that they acted to quell riots and protect property in various parts of the Country, a fact also acknowledged in the Report of the Commission on Post-Election Violence popularly known as the Waki Commission Report despite the fact that the phenomenon of post-election violence presented great challenges to the Police in the areas of capacity, resource availability, operational decisions and priority questions. The Respondent further urged the Court to note that even in developed Countries, where the ratio of police officers to the population is within acceptable international standards and where there are adequate resources for police work, Courts have held that the police owe a duty to the public at large and not to individual citizens specifically.

30. On the Petitioners' reliance on the Waki Commission Report, the Respondent expressed the view that this Court cannot rely on such a report because Commissions of Inquiries are not Courts of law and their findings are not based on trial evidence but on a mere inquiry into

certain matters within its mandate. The Respondent submitted in that regard that the Report was only advisory to the appointing authority and was therefore not binding on this Court; that such a report cannot be taken at face value to aid a litigant's claim but that a Court should be guided by evidence availed to it. In any event, that the Waki Commission Report was generalized and did not apply to the Petitioners only.

31. As to the allegation that the Police had done nothing to bring the perpetrators of post-election violence to book, the Respondent submitted that there are cases either under investigation or cases in which some people have been charged in court leading to 258 convictions, 87 acquittals, 138 withdrawals and 50 cases which were pending hearing.

32. Another reason advanced by the Respondent as to why the Petitions must fail is that the damages sought by the Petitioners in their respective Petitions are in the nature of special damages and that the Petitioners have failed to satisfy the rules governing the grant of special damages that they must be specifically pleaded and proved; that whereas the Petitioners have pleaded their losses, they have failed to specifically prove the said losses by producing documentary evidence to prove that the items or buildings allegedly destroyed during the post-election violence existed or belonged to them and that the valuation reports were not itemized and were based on estimates. The Respondent thus submitted that the valuation reports were unreliable and could not be the basis for any payment of damages, even if the same were otherwise properly payable.

33. Mr. Wamotsa concluded his submissions by inviting this Court to find that the Petitioners had not established a cause of action against the Respondent for grant of the reliefs sought and therefore urged the Court to dismiss the Petitions as consolidated with costs.

Determination

34. Having considered the Petitions, the Affidavits on record, oral testimony and the submissions made on behalf of the parties, we find that three key issues emerge for our determination. They are as follows;

(i) Whether the State owed the Petitioners a specific duty under **Sections 70 and 75 of the Repealed Constitution** as well as **Articles 27(5), 29, 31, 39 and 40 of the Constitution, 2010** to protect their individual lives and property.

(ii) If the answer to the first issue is in the affirmative, whether that duty was breached and whether the breach, if any, led to the violation of the Petitioners' constitutional rights as alleged; and finally,

(iii) Whether the Petitioners are entitled to the reliefs sought.

Whether the State owed the Petitioners a specific duty to protect their property.

35. As stated earlier, these Petitions are anchored on the provisions of **Sections 70 and 75** of the Repealed Constitution and **Articles 27(5), 29, 31, 39 and 40** of the **Constitution 2010**. It is the contention of the Petitioners that the State, through its Police Service and officers, violated their constitutional rights by failing to protect their property against invasion by private actors in the Eldoret area during the 2007/2008 Post Election violence. The Respondent however argued that while the State and the Police in particular owed a general duty to the public, it did not owe a specific duty to the Petitioners with regard to the allegations made in their Petitions and that it did not therefore violate the Petitioners' constitutional rights as alleged.

36. Before proceeding any further, we think that it is important to reproduce the relevant provisions of **Sections 70 and 75** of the Repealed Constitution and some of the provisions of the Constitution 2010 on which the Petitioners placed reliance. In that regard, **Section 70** of the **Repealed Constitution** stated as follows;

Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of other and for the public interest, to each and all of the following, namely-

(a) Life, liberty, security of the person and the protection of the law;

(b) Freedom of conscience, of expression and of assembly and association; and

(c) Protection for the privacy of his home and other property and from deprivation of property without compensation;

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the right and freedom of others or the public interest. (Emphasis added)

37. **Section 75** then stated as follows;

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public

morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) The purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).....

38. It follows therefore that the gist of the provision of **Section 70** of the **Repealed Constitution** is that it afforded security of the person and protection of the law. As regards the protection of property, both **Sections 70** and **75** protected all persons against deprivation of property without compensation. As can be seen from the provisions of **Section 75**, it in particular provided for the circumstances in which property could be compulsorily acquired for public purposes and it afforded protection to citizens by requiring that an individual deprived of property in such circumstances had to be paid adequate compensation and the acquisition had in any event to be subjected to due process.

39. The provisions of **Section 75** of the **Repealed Constitution** with respect to the right to own property and the guarantee that no person shall be deprived of it through compulsory acquisition without compensation are now reproduced in **Article 40** of the **Constitution** of Kenya 2010. For avoidance of doubt **Article 40** states that;

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the state or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description: or

(c) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person; and

(ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may

not hold title to the land.

(5) The state shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

40. To our mind, it is obvious that the language used in **Article 40** as compared to the one employed in **Section 70** and **75** of the Repealed Constitution is wider in scope, tenor and import. It is also more specific in its articulation of the rights guaranteed therein and contemplates both vertical and horizontal application of the right to property.

41. The question that this Court must now answer is whether the State, through the Police, had a duty under **Sections 70** and **75** of the Repealed Constitution, to protect the life, liberty and the property of its citizens and specifically, the Petitioners.

42. It is not in dispute that the State generally provides protection to its citizens through the Police service. **Section 14(1)** of *The Police Act* (Chapter 84 Laws of Kenya), now repealed, and which was the law in force at the time the acts complained of occurred, provided for the duties of the Kenya Police Force as follows;

The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders and the enforcement of all laws and regulations with which it is charged. (Emphasis added)

43. As can be seen, **Section 14** above shows that the National Police Force was the organ of Government responsible for preventing crime, preserving peace, maintaining law and order and protecting its citizens' life and property. These obligations have also been provided for under the Constitution, 2010 which at **Article 243** establishes the National Police Service. The objects of the National Police Service are set out under **Article 244** in the following terms;

The National Police service shall –

(a) Strive for the highest standards of professionalism and discipline among its members;

(b) Prevent corruption and promote and practice transparency and accountability;

(c) Comply with constitutional standards of human rights and fundamental freedoms;

(d) Train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) Foster and promote relationships with the broader society. (Emphasis added)

44. **Article 245(8)** then empowers Parliament to enact legislation giving effect to the provisions of that Article and consequently, Parliament enacted the *National Police Service Act* as **Act No. 11A of 2012**. The functions of the police are found at **Section 24** of the Act, and are as follows;

(a) Provision of assistance to the public when in need;

(b) Maintenance of law and order.

(c) Preservation of peace;

(d) Protection of life and property;

(e) Investigation of crimes;

(f) Collection of criminal intelligence;

(g) Prevention and detection of crime;

(h) Apprehension of offenders;

(i) Enforcement of all laws and regulations with which it is charged; and

(j) Performance of any other duties that may be prescribed by the Inspector-General under this Act any other written law from time to time.

45. It is evident therefore that under both the **Repealed Constitution** and the **Constitution 2010**, the police have a general duty to protect

life and property but the question we must answer now is, what is the extent of that duty?

46. The High Court has had the opportunity to pronounce itself on that subject and in **Gullid Mohamed Abadi vs O.C.P.D Isiolo Police Station & 2 Others (2006) e KLR** Onyancha J when interpreting **Section 14(1)** of the Repealed **Police Act** stated as follows;

The duties of the police force in Kenya include the prevention and detection of crime and the apprehension of offenders. The police force is also to protect life and property. If it is asked, ‘which crime is to be prevented and detected?’ an appropriate answer would be that any crime committed within the Republic is targeted under the above law provision. That means that the police force has a duty to prevent or detect crimes as well as preserve life and property and apprehend possible offenders. The property and life to be protected must be the life and property of Kenyan citizens including that of the government and of those who at any given time claim the protection of the Kenyan law. Otherwise there is no other life or property in Kenya that the above law provision would be referring to except those found and living in Kenya. (sic).

47. We are in agreement with the learned judge in so far as the duty of the police is to protect life and property of citizens living in Kenya. It is therefore our finding that the State through its security agencies, including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction. This position is not entirely disputed by the Respondent. The Respondent’s point of departure from this position is that the said duty is a general one owed to the general public and not to specific individuals like the Petitioners. This therefore calls for an examination of the extent of that duty and thereafter we shall determine whether it was breached in the circumstances of this case.

48. The general duty rule was first enunciated in the **De Shaney case (Supra)**. That rule is to the effect that members of the public have no constitutional right to sue state actors who fail to protect them from harm inflicted by third parties. This principle of duty owed to the public at large has been frequently applied in cases involving complaints of inadequate protection during riots or mob violence in the United States of America and also in the United Kingdom. In many of these instances, the preparedness of the Police force to handle such riots and mob violence situations has been challenged. For instance, In **West Minster Investing Corporation (Supra)**, Murphy’s store was destroyed during a riot and it filed a claim contending that the District of Columbia Police Department had deliberately abandoned its policing obligations during the riots and thus permitted rioters to destroy its properties. The United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia had no direct legal obligation to the Plaintiff and that it had no substantive right to recover the damages resulting from alleged failure of the Government or its officers to keep peace. We are attracted to that finding.

49. The public duty concept has however not been without controversy and has drawn criticism for purportedly creating the rule that ‘because we owe a duty to everyone, we owe it to nobody’. That is why in **Riss vs City of New York 558, 293N.Y.S 2d at 901** Kneating J while dissenting stated;

“A duty owed to the public, however, is no less enforceable because it is owed to ‘everybody’. Public officials at all levels remain accountable to the public and the public maintains elaborate mechanisms to enforce its rights-both formally in the courts and less formally through internal disciplinary proceedings. Additionally, officers are answerable to the public through its representatives, for dereliction in their assigned duties”.

50. That is the law in the United States as it is our law that the Police owe a general duty to all citizens but the United States Courts have also held that the Police would be held to have a duty of care to an individual when a special duty to that individual can be demonstrated. In that regard, in **Carolyn Warren vs District of Columbia case (Supra)**, the Court stated that there are two instances where a finding of special duty may be made;

“First, there must be direct contact or some other form of privity between the victim and the police department so that the victim becomes a reasonably foreseeable Plaintiff. Second, there must be specific assurances of police services that create justiciable reliance by the victim. Without both of these elements, the duty to provide police services remains a general, non-actionable duty to the public at large”.

51. Further, the Supreme Court of the United States in the case of **Carolyn Warren (supra)** while determining a similar issue as the one before us held that;

“This uniformly accepted rule rests upon the fundamental principle that a government and its agencies are under no general duty to provide public services, such as police protection to any particular individual citizen. A publicly maintained police force constitutes a basic governmental service provided to benefit the community at large by promoting public peace, safety and good order. The extent and quality of police protection afforded to the community necessarily depends upon the availability of public resources and upon legislative or administrative determinations concerning allocation of those resources. Dereliction in the performance of police duties may therefore be redressed only in the context of a public prosecution and not in a private suit for money damages.”

The Court proceeded to conclude thus;

“Although recognizing the obligation of public employees to perform their duties fully and adequately, the law properly does not permit that obligation to be enforced in a private suit for money damages. Accordingly, the Court concludes that the Plaintiffs have failed to state claims upon which relief may be granted and accordingly the action is dismissed as to all defendants.”

52. As to the extent to which the police may be liable, in claims of lack of protection, the Court in **Hill v Chief Constable (supra)** expressed itself as follows;

“There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution. Further, a police officer may be guilty of a criminal offence if he wilfully fails to perform a duty which he is bound to perform by common law or statute. By common law police officers owe to the general public a duty to enforce criminal law. That duty may be enforced by mandamus at the instance of one having to sue.....This is not a situation where there can readily be inferred an intention of the common law to create a duty towards individual members of the public.”

53. It is clear from the persuasive authorities we have referred to above that under the common law and in the United States of America, for an applicant to succeed in a claim grounded on violation of constitutional rights to property owing to Police failure to offer protection, the applicant must demonstrate that the acts complained of were directly perpetrated against him by the Police; that the police had placed the applicant in danger he would otherwise not have faced or that a special relationship existed between the applicant and the police on the basis of which Police protection had been assured. The Respondent in that regard argued that since the Petitioners did not bring themselves into any of these exceptions, the Police did not owe them any duty of care as individuals and that therefore the State was not liable for their losses.

54. In response to this argument, the Petitioners contended in their further submissions that their claims were not based on the common law concept of the duty of care but were based on violation of their fundamental rights and freedoms.

55. We are in agreement with the Petitioners to the extent that they are entitled to their right to privacy, security of the person and right to property guaranteed under **Section 70** of the **Repealed Constitution**. Our reading of **Section 70** also shows that the protection of the rights enshrined therein was accorded to each and every person in the Republic of Kenya irrespective of where the person was resident or where the person's property was located within the country. The right to property generally guaranteed under **Section 70** of the Repealed Constitution was expanded and made more specific in **Article 40** of the Constitution 2010 which provides that every person has a right to acquire and own property of any description in any part of Kenya. To further expound our finding aforesaid, we wish to associate ourselves with the sentiments of **Khaminwa J** in **Roshanali Karmali Khimji Pradhan vs Attorney General Civil Case No. 276 of 1998** when she expressed herself as follows;

“The law of human rights and freedoms is founded on and inspired by the United Nations Charter; Kenya is a member of the United Nations. The guarantees made to every person in Kenya under Section 70 thereof are; (1) that every person is entitled to life, liberty and security of the person and the protection of law. To ensure this guarantee the Government is under the duty and obligation of actively taking measures to secure the life of individual by preserving public security in the Country and by ensuring there is maintained law and order.”

She further stated;

“Parliament has established law to enable the Government achieve these objectives imposed by the Constitution such as Preservation of Public Security Act and Parliament has also enforcement agents with the Attorney General as the main prime-mover; Parliament has established institutions such as the Police Force under the Police Act mandated to perform day to day duties of keeping law and order.... In Kenya Parliament has gone to great lengths to provide for the machinery to ensure order and security. It is the Government whose duty is to mobilize the said machinery for the benefit of every person in Kenya. The other guarantee given under the said Section 70 is that of protection for the privacy of house and other property. Similarly Parliament has provided sufficient machinery for the protection of individual home and property and it is the duty of the Government to enforce the protection granted for the benefit of the individual.”

56. We agree with the learned judge. In the circumstances of this case, and given the interpretation of the law by the United States Courts as can be seen in the authorities we have cited above, we are in agreement with the Respondent that for this court to find that the police owed a duty to the Petitioners to protect them and their property against violence and destruction caused to their property by private persons, they had to fit into the exceptions to the general rule. On our part, we find that the State's duty through its various security agencies, including the Police, to protect its citizens and their properties from violence is owed generally to the public at large and not specifically to each and every individual resident within Kenya as the Petitioners were in December 2007.

57. Having so said, we hasten to add that for the State to be liable for its failure to protect the lives and properties of its citizens, there must be a special duty activated by information made available to the State or the Police; that certain individuals or some members of the public were at the risk of being exposed to acts of violence so that the State could in turn take necessary measures to protect the lives and properties of those individuals in question.

58. We make this finding conscious of the fact that due to the poor ratio of police officers against the population in Kenya (a matter we take judicial notice of given its common notoriety), the police cannot be expected to be everywhere at all times or to be guarding individual person's homes or property on a 24 hour basis. The police can only be reasonably expected to offer protection if they have prior information that acts of violence are expected to be perpetrated in a certain area or against specific persons, homes or property so that they can organize to offer the required protection.

59. Having determined that the State has a legal duty and a positive obligation to protect each of its citizen's rights to security of their person and their property by securing peace through the maintenance of law and order, we have come to the inevitable conclusion that the State would in appropriate cases be held liable in cases where violations of the rights enshrined in the Bill of Rights are proved even when those violations are occasioned by non-state actors provided that the duty of care is properly activated. Such a liability would however have to be determined on the facts and circumstances of each case. The question we turn now turn to address is whether the Petitioners can invoke the special duty in the circumstances of this Petition.

Was the duty owed by the State to the Petitioners breached?

60. We have already made a finding that the State had a duty to facilitate and nurture an environment that ensured its citizens enjoyed their fundamental rights and freedoms and that the Police service was one of the primary organs of State responsible for ensuring that it fulfilled its obligations to protect those rights.

61. We have also determined that the State's duty to protect those rights would only be activated if it is demonstrated that the police or other State agencies had prior information that a section of the members of the public in a certain area, or specific individuals, were in danger of being subjected to acts of violence against their person or property and that the police, negligently or deliberately, failed to act on such information leading to a violation of the rights protected under the Constitution.

62. In the instant Petitions, it is the Petitioners' case that the State had prior information that post-election violence was likely to occur after the conduct of the 2007 general elections and that it failed to act on such information to prevent the violence. The 1st Petitioner, in his testimony stated that he is a retired police officer and he was a Senior Superintendent of Police (SSP) in Charge of intelligence in Nandi District. He claimed in his experience violence of such magnitude could not occur without the knowledge of intelligence service.

63. Further, in support of their contention, the Petitioners relied on the [Waki] Commission on Post-Election Violence Report and also claimed that when the violence erupted after the announcement of the presidential election results, they telephoned Eldoret Police Station to seek assistance in the form of protection for their persons and property but none was granted hence their losses.

64. Despite all the claims made, the Petitioners failed to adduce any tangible evidence to prove any of the above allegations. They did not produce as evidence the Waki Commission Report which, if produced, may have strengthened their case. What they produced was a document which was attached to their advocate's written submissions purporting to be a chapter extracted from the said Report. We are unable to accept the said document as evidence not because of the reasons cited by the Respondent but because of two different reasons. Firstly, it is purported to be part of a report which report is not before the Court and therefore its authenticity and accuracy is questionable. Secondly, having been attached to written submissions as opposed to an affidavit, it does not qualify to be treated as evidence.

65. In addition, the Petitioners did not also avail any evidence to substantiate their claims that any of them telephoned Eldoret Police Station at around the time their homes were about to be attacked or that there were six police officers in the vicinity of the attack who did nothing to help. Such proof was in our view important to enable the Petitioners prove their claims considering that those allegations were specifically denied by the Respondent in the Replying Affidavit sworn on his behalf on 14th June 2012. Such allegations ought to have been substantiated by disclosure of the identities of the police officers who were allegedly near the scene of the attack and production of extracts of police occurrence books where reports of matters reported to the police are usually recorded.

66. The Petitioner in **Petition No.48 of 2012** also claimed that he had annexed a copy of the Occurrence Book (O.B) showing the report he had made to Eldoret Police Station. We have looked at the said document marked as annexure "PMN V11" and we have no doubt in our minds that the same is not an O.B extract from any Police station. It instead appears to be a document made by the said Petitioner documenting how the attack on his home was allegedly executed. It bears no date or any endorsement from any police station and its authenticity is in doubt. We say no more on this point.

67. It may however be important to state at this juncture that had it been evident that the Petitioners' homes were in the same neighbourhood and that any of their homes was a short distance away from the Eldoret Police Station or any Police Station for that matter, we may have been able to hold that it would not have been necessary to call the police for assistance as the police, exercising due diligence in those circumstances, would have become aware of the said attacks and rushed to the Petitioner's respective compounds to protect their properties. The Petitioners unfortunately did not disclose, either in their Affidavits or oral evidence in Court, the approximate distance between their homes and that of any Police Station.

68. In concluding this aspect of the Petition, we reiterate that the availability of prior information to the Police and the existence of a special relationship is significant in determining whether the Police breached their duty to protect the Petitioners. That information is very important especially given the facts and circumstances surrounding the claims in the Petitions before us because we are unable to see how the Police could have foreseen the occurrence of post-election violence within the Petitioners' neighbourhood and its magnitude for them to take measures to counteract it if no prior information had been availed to them especially given the spontaneity and scope of the violence.

69. In any event, our interpretation of **Section 75** of the Repealed Constitution whose relevant provisions we have already reproduced elsewhere above, reveal that **Section 75** protected individual citizens from the deprivation of their property by the State without being offered adequate compensation. In **Gullid Mohammed Abadi v O.C.P.D (supra)** the learned judge stated as follows when interpreting this provision;

"Section 75 of the Constitution must have been intended to be read in such a way as to mean and to be limited to breaches committed by the Government against private individuals or known private individuals who can be pursued for compensation in civil suits such as this."

We are in agreement and we are also persuaded to agree with the submission by the Respondent that the protection accorded to a citizen's right to compensation and due process in the event of compulsory acquisition of land was meant to be a weapon to prevent abuse of power or use of it as a weapon of oppression by the State. The provision's sole intention was therefore to prohibit the State from depriving an individual of his property without paying adequate compensation.

70. Looking at the Petitions before us, none of the Petitioners has claimed that his property was compulsorily acquired. As such, we are satisfied that the Petitioners have failed to prove that their rights under **Section 75** had been violated by the State as alleged.

Violations of other Fundamental rights and freedoms

71. We wish to begin by noting that the Petitioner in **Petition No 40 of 2012** invoked some Articles of the Constitution 2010 being **Articles 27, 28, 29 and 31**. **Article 27** of the Constitution 2010 provides for equality and protects all persons against discrimination; **Article 28** provides for human dignity; **Article 29** guarantees the right to freedom and security of the person and **Article 31** provides for the right to privacy. Looking at these provisions (save for human dignity as provided for under **Article 28**) they did not create new rights as those rights had also been provided for and protected under **Sections 70 and 82** of the Repealed Constitution.

72. We must note that the events of the post-election violence giving rise to the claims in these Petitions occurred on or about 30th and 31st December 2007, before the promulgation of the Constitution, 2010 on 27th August 2010. As is provided for under the provisions of **Article 264**, the 1963 Constitution stood repealed on the promulgation day. The question is whether the 2nd Petitioner can lodge a claim for violation of his constitutional rights under the **Constitution 2010**, over acts that happened during the existence of the Repealed Constitution.

73. Our answer to that question is that this Court cannot enforce new rights created under the new Constitution unless those rights were recognized and protected under the previous Constitution. We make this finding because, in our view, the Constitution 2010 does not have retrospective effect. In this regard, we are in agreement with *Majanja J* when he stated the following in *Duncan Otieno Waga vs Attorney General Petition No 94 of 2012*;

“I do not read the provision of the sixth schedule as entitling the court to retrospectively apply the constitution. The rights and obligations referred to are preserved to the extent that they can be enforced but determination of the nature and extent of those rights and obligations are determined in accordance with the legal regime existing at the time the right or obligation accrued. The acts of the respondent in relation to the petitioner must therefore be construed by reference to the former constitution particularly section 82 which prohibits discrimination.

Counsel for the petitioner has also referred to the provisions of Article 23(1) and 165 which read together entitle any person to apply to the court for redress where his or her fundamental rights and freedoms are threatened, violated or infringed. These provisions entitle this court to adjudicate violation of the constitution but they do not empower the court to apply the constitution retrospectively.”

(See also this Court’s decision in *B.A & Another V Standard Group Limited & 2 Others (2012) eKLR*.)

74. We shall therefore proceed to determine the Petition on the basis of the rights and obligations of the parties as enshrined in the Repealed Constitution since it was the law in force at the time the alleged violations forming the subject matter of the Petitions now before us allegedly occurred.

75. In that context, equal protection of the law and security of the person as well as the right to privacy of the home and property were all provided for under **Section 70** of the **Repealed Constitution** as we have stated elsewhere above. On non-discrimination, **Section 82 (2)** of the **Repealed Constitution** also provided thus;

“Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority”.

76. The Court in *Peter K. Waweru v Republic [2006]eKLR* defined discrimination as follows;

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

77. In addition, the **United Nations Universal Declaration on Human Rights (UDHR)** provides at **Article 1** that;

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 7 of the UDHR further states that;

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

78. **Article 2** of the **African Charter on Human and People’s Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as on grounds of race, ethnic group, colour, or sex. **Article 28** goes further to state that;

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

79. We are duly guided and we shall apply the law as set out above in addressing the issue before us.

80. We shall start with the claim that the State's actions or inaction through its organs violated the Petitioner's right under **Section 82(2)** of the Repealed Constitution. That Section prohibited discrimination but limited it to a person acting in an official capacity.

81. In that regard, it is not disputed that the persons who attacked the Petitioners' home were non-state actors who were not acting in any official capacity and therefore **Section 82** is clearly not applicable in this case. However, having said so, we are quick to agree with the Petitioners that they had a right to live and own property anywhere in Kenya, including Eldoret, and therefore they should not have been targeted for attack just because of their ethnicity, a matter outside the purview of **Section 82** aforesaid. That is all there is to say in that regard.

82. The Petitioners also claimed that their right to dignity as provided for under **Article 28** was violated. No provision of the Repealed Constitution protected this right but we are alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights. See *Francis Coralie Mullin v Administrator, Union Territory of Delhi (1981) SCR (2) 516*. Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated. In the circumstances, it is our view that this right need not be pleaded for it to be enforced and even if pleaded, its application must be explained, a fact the Petitioners failed to address.

83. We now turn to determine the alleged violation of the right to privacy of the home and other property guaranteed under **Section 70 (c)** of the **Repealed Constitution**.

84. The Petitioners claimed that their right to privacy was violated through invasion by the gang which attacked their homes. Once we have held that non-State actors were responsible for the situation that the Petitioners found themselves in and that the police are not liable, it follows that we cannot find a violation of the Petitioners' right to privacy to the home and property and we have addressed that issue at length elsewhere above.

85. Before we conclude this issue of violation of the Petitioners' fundamental rights and freedoms, we recall that the Petitioners were also aggrieved with the fact that the State had failed to investigate the situations involving the alleged violation of their rights. We now turn to address ourselves to that submission.

86. In the *Velasquez Rodriguez* case (supra), the Court stated that;

“The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”.

88. We are in agreement that the State has a general duty to investigate human rights violations and in the instant case, the Respondent in his written submissions averred that the State actually investigated the post-election violence and took action in the form of arresting and prosecuting persons suspected to have participated in the violence although other cases were still under investigation. The Respondent stated that some persons had been charged in court leading to 258 convictions, 87 acquittals, while 138 cases had been withdrawn and 50 cases were still pending. This averment was not challenged by the Petitioners in their further submissions and we are unable to take the Petitioners' contentions as proved in the face of such a response by the Respondent. That is all there is to say on that aspect of the Petition.

Whether there is any remedy available in the circumstances

87. The Petitioners claimed that it is the duty of the State to provide a remedy for violation of fundamental rights and freedoms as was found by the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez* where it stated that;

“The international protection of human rights should not be confused with criminal justice. States do not appear before the court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for them reparation of damages resulting from the acts of the States' responsible.”

88. We wholly agree with that statement to the extent that it applies to international human rights law and whilst we also agree with the Petitioners that human rights violations must generally be accorded a remedy, we have already stated why the remedies sought cannot be granted in favour of the Petitioners in this case. As can be seen from our pronouncements and findings, we have not found a violation of the Petitioners' rights under **Section 70, 75** or any other relevant provision in the **Repealed Constitution** or in the **Constitution, 2010**.

89. In the event, we see no reason to grant the remedies sought and we so find and hold.

90. Before we come to an end of this judgment, we must distinguish the authorities referred to by the Petitioners. Our perusal of the said authorities, namely, *Rumba Kinuthia vs Attorney General (supra)*, *Pradhan vs Attorney General (supra)*, *Marete vs Attorney General (supra)* would show that they do not apply to the instant case. Those authorities were premised on claims of torture by agents of the State. The State in those cases was held liable for the reason that its servants or agents were the persons responsible for violating the Petitioners rights by subjecting them to torture and other inhuman and degrading treatment. In the present case, we have found that State agents were not responsible for the Petitioners' woes; unidentified non-state actors were the culprits. For that reason, we find that the said authorities cannot

come to the aid of the Petitioners.

Disposition

57. For all the foregoing reasons, we are inclined to find that the Petitioners have failed to demonstrate that the State in this case negligently or deliberately failed to protect them and their property from violence which led to destruction of their property. They have therefore, regrettably, failed to prove that the State was liable for their losses, painful as that decision may be. Consequently, we are satisfied that the Petitioners are not entitled to the grant of any of the reliefs sought in the consolidated Petitions.

58. We of course cannot be without sympathy for the Petitioners but this novel Petition as drafted and argued could not attract any favourable findings if the law and the facts are properly applied as we have done. In the event, we have no choice but to dismiss all the three Petitions.

59. There shall be no order as to costs.

60. Orders accordingly.

61. This judgment has taken far too long to deliver, a regrettable situation which was caused by circumstances beyond our control. We unreservedly apologise to the Parties and Counsel.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2015.

ISAAC LENAOLA

MUMBI NGUGI

CECILIA GITHUA

JUDGE

JUDGE

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Karanja holding brief for Mr. L. Karanja for Petitioner

Mr. Omburah for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE