



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC PETITION NO. E001 OF 2021**

**IN THE MATTER OF ARTICLES 40 (1), (2), (3), (4) and 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 75(1) and (2) OF THE REPEALED CONSTITUTION**

**AND**

**IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 295 (NOW REPEALED)**

**AND**

**IN THE MATTER OF THE LAND ACT, 2012, ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF SECTION 23 OF THE INTERPRETATION AND GENERAL PROVISIONS ACT, CAP 2**

**AND**

**IN THE MATTER OF THE COMPUSORY ACQUISITION OF LAND PARCEL**

**NO. KIMILILI/KIMILILI/2131 (ORIGINALLY PART OF KIMILILI/KIMILILI/72)**

**BETWEEN**

**HUSNAH MACCAH HASSAN**

**(Suing as the personal representative of the Estate of YUSUF HASSAN BAKARI).....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF BUNGOMA.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, BUNGOMA.....2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**J U D G M E N T**

1. Prior to his demise on 11<sup>th</sup> November 1995, **HASAN SAKARI** or **HASSAN SAKARI** (hereinafter the deceased) was the registered proprietor of the land parcel **NO KIMILILI/KIMILILI/72** measuring 1.05 Hectares. On 17<sup>th</sup> October 1974, a portion thereof measuring 0.30 Hectares was acquired vide Gazette Notice No 3093. That title was subsequently closed on 3<sup>rd</sup> February 1987 to create parcels **NO KIMILILI/KIMILILI/1197, 1198, 1199, 1200, 1321 and 1322** as per the Green Card herein. Following the acquisition by the Government of the 0.30 Hectares, the deceased was paid Kshs. 26,257/= being the value of the land but was not compensated for the permanent building thereon. Fearing that his remaining land would similarly be compulsorily acquired, the deceased wrote to the Ministry of Lands seeking protection and vide a letter dated 9<sup>th</sup> August 1990, the then Assistant Minister for Housing **HON E. K. BOMETT** appealed to the then **DISTRICT COMMISSIONER BUNGOMA** to ensure that the deceased's remaining property especially the land parcel **NO KIMILILI/KIMILILI/1197** would not be compulsorily acquired as it was the family's only source of livelihood. That parcels of land, according to paragraphs 9 of the supporting affidavit of **HUSNAH MACCAH HASSAN** (the Petitioner herein) was subsequently sub – divided to create land parcels **NO KIMILILI/KIMILILI/2131 and 2132**. That, however, is not the correct position as can be gleaned from the Green Card which shows that the land parcels **NO KIMILILI/KIMILILI/1197, 2131 and 2132** were all sub – divisions of the original land parcel **NO KIMILILI/KIMILILI/72**. What is important however is that the defunct **BUNGOMA COUNTY COUNCIL** compulsorily acquired the land parcel **NO KIMILILI/KIMILILI/2131** which it then handed over to the then **KIMILILI MUNICIPAL COUNCIL** for the construction of **KIMILILI MARKET** commonly known as “**SOKO YA JUMATATU**” without paying the deceased any compensation. Part of that land was also allocated to private individuals through a cartel of Mayors, Councilors and Town Clerks. The deceased passed away while still pursuing compensation for the compulsory acquisition of his land but without success although he had written several letters to the defunct **TRANSITION AUTHORITY**.

2. Having taken over the land parcel **KIMILILI/KIMILILI/2131**, the defunct **TOWN COUNCIL OF KIMILILI** erected a building thereon with several partitions used as market stalls for rent while another portion remains vacant but the Petitioner and her family have no access to it. Following the devolution, the 1<sup>st</sup> Respondent took over the building where it charges levies, fees and cess for all the market operators while the deceased's family continues to languish in extreme poverty and have been rendered squatters on their own land despite having the title deed thereof.

3. It is therefore within that background that by a Petition dated 12<sup>th</sup> march 2021 and filed on 5<sup>th</sup> may 2021, the Petitioner sought Judgment against the **COUNTY GOVERNMENT OF BUNGOMA**, the **COUNTY LAND REGISTRAR BUNGOMA**, the **CABINET SECRETARY MINISTRY OF LANDS** and the **ATTORNEY GENERAL** (herein the 1<sup>st</sup> to 4<sup>th</sup> Respondents respectively) and the **NATIONAL LAND COMMISSION** (the Interested Party). In the said Petition, the Petitioner seeks the following reliefs: -

a. A **DECLARATION** that the proprietary interest in the entire parcel of land **NO KIMILILI/KIMILILI/2131** absolutely vests in the Estate of **HASSAN SAKARI** (deceased).

b. A **DECLARATION** that the compulsory acquisition of the land parcel **NO KIMILILI/KIMILILI/2131** without consent or compensation violated Section 75 of the Independence Constitution and Article 40 of the Constitution of Kenya 2010.

c. An **ORDER OF MANDAMUS** to compel the 1<sup>st</sup> to 4<sup>th</sup> Respondents to jointly and/or severally pay the Estate of **HASSAN SAKARI** (deceased) mesne profits for the loss of user for the entire parcel of land **NO KIMILILI/KIMILILI/2131**.

d. A **MANDATORY INJUNCTION** directing the 1<sup>st</sup> Respondent and any other person or entity who might have encroached into it to immediately vacate and hand over vacant possession of the land parcel **NO KIMILILI/KIMILILI/2131** to the Estate of **HASSAN SAKARI** (deceased) or pay the Estate the equivalent market price failure upon which they be evicted after the expiry of a time to be specified, under the supervision of the Officer Commanding (OCS) **KIMILILI POLICE STATION**.

e. A **PERMANENT INJUNCTION** restraining the 1<sup>st</sup> Respondent whether by itself or through its employees, agents or any other person or entity claiming through it from whatsoever interfering with the Petitioner's and the Estate of **HASSAN SAKARI**'s quiet use, occupation and ownership of the entire parcel of land **NO KIMILILI/KIMILILI/2131** together with the developments thereon.

f. **Costs of the Petition be borne by the Respondents.**

The Petition is predicated on the provisions of **Section 75(1) and (2)** of the retired Constitution as well as **Articles 40(1) (3) and (4)** of the **2010 Constitution**. It is also supported by the Petitioner's affidavit contents of which I have already summarized above. The following documents are annexed to the said affidavit: -

1. A **Limited Grant of Letters of Administration** issued to the Petitioner on 10<sup>th</sup> September 2020 in respect of the Estate of **HASSAN SAKARI**.

2. A receipt No 185253 for Kshs. 16 issued to **HASANI SAKARI** on 14<sup>th</sup> July 1964 in respect of land parcel **NO KIMILILI/KIMILILI/72**.

3. The Green Card for the land parcel **NO KIMILILI/KIMILILI/72** showing approximate area as 1.05 Hectares.

4. An award issued by the Department of Lands on 15<sup>th</sup> November 1974 and addressed to HASANI BAKARI showing that he had been awarded the sum of kshs. 26,257/= being compensation for a portion measuring 0.30 Hectares out of the land parcel NO KIMILILI/KIMILILI/72.

5. A letter dated 9<sup>th</sup> August 1990 from HON E. K. BOMETT ASSISTANT MINISTER for LANDS and HOUSING and addressed to the DISTRICT COMMISSIONER BUNGOMA requesting that the land parcel NO KIMILILI/KIMILILI//1197 should not be acquired.

6. Title Deed issued on 8<sup>th</sup> December 1992 for the land parcel NO KIMILILI/KIMILILI/2131 registered in the name of HASSAN SAKARI.

7. A letter dated 16<sup>th</sup> June 2015 addressed to the CHAIRMAN TRANSITION AUTHORITY by the Petitioner seeking compensation for the land parcel NO KIMILILI/KIMILILI/2131.

When the Petition was mentioned before me on 30<sup>th</sup> November 2021 for directions, **MR KHAEMBA** Counsel for the Petitioner indicated that although he had served the Respondents and Interested Party six (6) months earlier, he had not yet been served with any responses. I notice from the record that the 1<sup>st</sup> Respondent had actually entered appearance on 17<sup>th</sup> June 2021 through the firm of **CYRIL WAYONGO ADVOCATE** but no response had been filed to the Petition.

4. I therefore directed that the Petition be canvassed by way of written submission to be filed and served upon the Respondents within 14 days. The Respondents would then have 14 days from the date of service to file and serve their responses and submissions. The Petition would then be mentioned virtually before the Deputy Registrar on 5<sup>th</sup> January 2022 to confirm compliance and take a date for Judgment. On that day however, the Petitioner's Counsel having filed submissions but having not filed an affidavit of service, the matter was fixed for a further mention on 12<sup>th</sup> January 2022.

5. On 12<sup>th</sup> January 2022, both **MR KHAEMBA** and **MS NYANGI** appeared for the Petitioner while **MR MASINDE** held brief for **MR CYRIL WAYONGO** for the 1<sup>st</sup> Respondent. There was no appearance by the other Respondents. No replies to the Petition nor submissions were filed. A request by **MR MASINDE** to be granted more time to file the 1<sup>st</sup> Respondent's reply was declined and Judgment was fixed for 21<sup>st</sup> February 2022.

6. I have considered the Petition, the supporting affidavit and annexures thereto as well as the submissions by Counsel. As neither of the Respondents or the Interested Party filed any replies to the Petition, it is not contested.

7. Notwithstanding the fact that the Petition is not contested, I must consider whether it meets the threshold set out in the case of **ANARITA KARIMI NJERU .V. R 1976 – 80 KLR 1272** and reiterated in **MUMO MATEMU .V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS 2013 eKLR**, where it was held that a party seeking redress in a matter involving reference to the Constitution must set out with reasonable precision the provisions which he alleges to have been infringed and the particulars of the alleged infringement. That is the route which Courts have continued to take in Constitutional Petitions. In the **MUMO MATEMU** case (supra), the Court of Appeal said: -

**“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a Court are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude ..... Yet, the principle in ANARITA KARIMI NJERU (supra) underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act Cap 21 and Section 3A and 3B of the Appellate Jurisdiction Act Cap 9. Procedure is also a hand maiden of just determination of cases.”**

This Petition has met that requirement. The Petitioner has clearly cited the provisions of **Section 75(1) and (2)** of the retired **Constitution** as well as **Articles 40(1) (3) and (4) and 259** of the **2010 Constitution** indicating the alleged infringements.

8. Secondly, the events upon which this Petition is grounded took place from 1974 when the Government first compulsorily acquired 0.30 Hectares out of the land parcel **KIMILILI/KIMILILI/72** for purposes of constructing the **KIMILILI – KITALE** road as has been deponed in paragraph 15 of the supporting affidavit. Thereafter, and following the sub – division of the land, parcel **NO KIMILILI/KIMILILI/2131** was compulsorily acquired by the defunct **BUNGOMA COUNTY COUNCIL** and was handed over to the then **KIMILILI MUNICIPAL COUNCIL** for the construction of a market while other parcels were allocated to private individuals. Among the documents produced by the Petitioner is a letter dated 9<sup>th</sup> August 1990 from the then **ASSISTANT MINISTER FOR LANDS AND HOUSING HON E. K. BOMETT** beseeching the **DISTRICT COMMISSIONER BUNGOMA** to protect the land parcel **NO KIMILILI/KIMILILI/1197** from compulsory acquisition. The Court is therefore dealing with a Petition seeking remedies over matters that occurred some thirty-one (31) years before the Petition was filed. However, both the retired and the **2010 Constitution** do not contain a provision limiting the time within which Petitions alleging a breach of fundamental rights should be filed. Ideally, however, such Petitions should be filed promptly so as not to appear to be an abuse of the process of the Court. Each case must however be considered on the basis of it's own peculiar circumstances. In this case, the Respondents have not filed any replying affidavits to rebut the averments contained in the Petitioner's supporting affidavit. Therefore, there is nothing to suggest that they have been prejudiced by the long delay. In any event, it is clear from the letter dated 16<sup>th</sup> June 2015 and which is annexed to the Petitioner's affidavit that she has been pursuing the claim for compensation. The Petitioner did not therefore go to sleep over this matter. She also only obtained the Limited Grant of Letters of Administration Ad Litem on 10<sup>th</sup> September 2020 and filed this Petition on 5<sup>th</sup> May 2021. It was not possible for her to approach the Court

before being clothed with the necessary locus standi.

9. I am therefore satisfied that the Petition meets both the test set out in the **ANARITA KARIMI NJERU** Case (supra) and the delay can be explained satisfactorily.

10. It is not in dispute that the deceased was the registered proprietor of the land parcel **NO KIMILILI/KIMILILI/2131** having been issued with the title deed thereto on 8<sup>th</sup> December 1992. As the registered proprietor of that parcel of land, the deceased was entitled to all the rights and privileges belonging and appurtenant thereto as is clear from the provision of **Sections 27 and 28** of the repealed **Registered Land Act CAP 300** under which the said title was issued. Similar provisions are found in the new **Land Registration Act 2012** being **Sections 25 and 26**.

11. It is the Petitioner's case that the then **BUNGOMA COUNTY COUNCIL** the precursor of the 1<sup>st</sup> Respondent compulsorily and without compensation acquired the land parcel **NO KIMILILI/KIMILILI/2131** which it then handed over to the then **KIMILILI MUNICIPAL COUNCIL** for the establishment of a market while other portions were allocated to private individuals. That by the time the deceased died in 1995; he was still pursuing compensation for the compulsory acquisition of that parcel of land. Indeed, that process had not borne any fruits because as recently, as 16<sup>th</sup> June 2015, the Petitioner addressed the **CHAIRMAN OF THE TRANSITION AUTHORITY** as follows: -

**“Dear Sir**

**RE: PARCEL NO KIMILILI/KIMILILI/2131.**

**The above mentioned parcel NO KIMILILI/KIMILILI /2131 was partly acquired by the Government in the year 1990. It was approximately 8½ plots, mango 11 trees, guavas 2 trees, lavguads 4 trees.**

**Currently the beneficiaries are the MUNICIPAL COUNCIL OF KIMILILI/BUNGOMA District as a market. The family was never compensated since 1990 upto now. Our father HASSAN SAKARI passed away on 11<sup>th</sup> November 1995.**

**On behalf of the family, I appeal to authorities concerned to compensate us.**

**I hereby enclose the necessary documents.**

**Thanking you in advance.**

**Yours faithfully**

**The daughter of the late HASSAN SAKARI**

**HUSNA MACCAH HASSAN**

**Enclosed – copy of title deed**

**Death Certificate**

**Photos taken before acquisition**

**The list of family members.”**

It is not clear if that letter was ever responded to. Then there is the letter referred to earlier by the **ASSISTANT MINISTER FOR LANDS AND HOUSING HON E. K. BOMMET** pleading with the **DISTRICT COMMISSIONER BUNGOMA** not to acquire any further land from the deceased. All these averments have not been rebutted by the Respondents by way of replying affidavits or in any other manner. This Court must therefore conclude, which I hereby do, that those averments are correct. In the case of **DAVID KIBET MUTAI & OTHERS .V. ATTORNEY GENERAL C.A CIVIL APPEAL No 95 of 2016 [2019 eKLR]**, the Court of Appeal stated as follows with regard to an affidavit which has not been controverted:-

**“The position before us is that the appellants averred to certain facts under oath in an affidavit. Those facts were not controverted by the respondents either through an affidavit in response or through cross- examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended, to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts averred in the affidavits sufficient to prove the appellant's claims?”**  
Emphasis added.

As I have already stated above, without replying affidavits or other rejoinders, this Court is entitled to conclude that the averments in the Petition are correct. And looking at those averments and the documents availed, I have no doubt that the deceased's land was compulsorily acquired without compensation. Infact the correct position, in my view, is that the land parcel **NO KIMILILI/KIMILILI/2131** was

grabbed illegally because the term compulsory acquisition presupposes that the law was partly followed but perhaps not fully completed which was not the case.

12. There was therefore an un – constitutional take over of the land parcel **NO KIMILILI/KIMILILI/2131** yet private property was protected both under the retired Constitution and also the 2010 Constitution. **Section 75(1)** of the retired **Constitution** provided thus: -

**75(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 interest 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 public benefit; and**

**b. The necessity thereof 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.”** Emphasis added

The protection of private property as guaranteed in the retired Constitution was carried over under **Article 40** of the **2010 Constitution** which provides in **Sub – Article (1) (2) (3) and (4)** that: -

**40(1) “Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –**

**a. of any description;**

**and**

**b. in any part of Kenya**

**(2) Parliament shall not enact a law that permits the State or any person –**

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

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

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

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five: or**

**(b) is for a public purpose or in 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 hold title to the land.”**

There is nothing to suggest that the then **BUNGOMA COUNTY COUNCIL** complied with the repealed **Land Acquisition Act** specifically **Sections 3, 4, 5 and 6** when it acquired the land parcel **NO KIMILILI/KIMILILI/2131** and handed it over to the **KIMILILI MUNICIPAL COUNCIL** for the Construction of a market and allocation of other portions to private individuals. **Sections 107 to 133** of the new **Land Act** also has provisions that govern how private land should be compulsorily acquired. In the case of **COMMISSIONER OF LANDS & ANOTHER .V. COASTAL AQUACULTURE LTD C.A CIVIL APPEAL No 252 of 1990 [1997 eKLR]**, the Court held that where it is intended to compulsorily acquire private land, the provisions of the Constitution and other relevant laws must be adhered to. In this circumstances of this case, and believing the Petitioner’s un – controverted evidence as I hereby do, I am satisfied that the Petitioner has established her case as required in law. There was a clear infringement of the Constitutional provisions pleaded in the Petition with regard to the manner in which the land parcel **NO KIMILILI/KIMILILI/2131** was acquired by the then **BUNGOMA COUNTY COUNCIL**.

13. What remedies are available to the Petitioner?

14. The first relief sought was a Declaration that the proprietary interest in the entire parcel of land **NO KIMILILI/KIMILILI/2131** absolutely vests in the Estate of **HASSAN SAKARI** (deceased). The title to the land parcel **NO KIMILILI/KIMILILI/2131** is still registered in the name of **HASSAN SAKARI** (deceased). There is no evidence to suggest that it was acquired by the deceased in an unlawful manner and therefore runs foul of **Article 40(6)** of the **Constitution**. It is protected by **Article 40(1)** of the **Constitution** as well as **Sections 25 and 26** of the new **Land Registration Act**. Prayer (a) is well merited. It is granted.

15. Prayer (b) seeks a Declaration that the compulsory acquisition of the land parcel **NO KIMILILI/KIMILILI/2131** without consent or compensation violated **Section 75** of the retired **Constitution** and **Article 40** of the new **2010 Constitution**. The Petitioner's evidence that the said land was acquired by the then **BUNGOMA COUNTY COUNCIL** which in turn handed it over to **KIMILILI MUNICIPAL COUNCIL** for the construction of a market has not been rebutted. Anything done in violation of the law cannot be allowed to stand. Prayer (b) of the Petition is also merited. I allow it.

16. Prayer (a) seeks an order of mandamus to compel the 1<sup>st</sup> to 4<sup>th</sup> Respondents to jointly and/or severally pay to the Estate of **HASSAN SAKARI** mesne profits for the loss of user for the entire parcel of land parcel **NO KIMILILI/KIMILILI /2131**. The term mesne profits is defined in **Section 2** of the **Civil Procedure Act** as: -

**“..... those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”**

A claim for mesne profits is a special damages claim which must be specifically pleaded and proved. In the case of **PETER MWANGI MBUTHIA & ANOTHER .V. SAMOW EDIN OSMAN 2014 eKLR**, the Court said as follows with regard to a claim for mesne profits: -

**“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits and it appears to us prima facie that there was no evidence to support the actual figure awarded.”**

In **SANDE .V. KCC (1992) LLR 314 (CAK)**, the Court of Appeal up – held the decision of the trial Court declining to award damages based on loss of profits on the grounds that the same should have been specifically pleaded and proved. That decision was followed with approval in **COSMOAIR .V. DIANI BEACH (1998) LL. R 757 (CAK)**. Mesne profits being a claim that is ascertainable and quantifiable, the Petitioner ought to have specifically pleaded it and placed evidence before the Court to prove the same.

17. It is clear from paragraph (a) of the Petition that the claim for mesne profits was not specifically pleaded and neither was any evidence adduced to prove it. That claim is not therefore available to the Petitioner.

18. In paragraph (d), the Petitioner seeks a mandatory injunction directing the 1<sup>st</sup> Respondent and any other person or entity who might have encroached into the land parcel **NO KIMILILI/KIMILILI/2131** to immediately vacate and hand over vacant possession to the Estate of **HASSAN SAKARI** or pay the equivalent market price failure upon which they be evicted after the expiry of the time specified under the supervision of the Officer Commanding (**OCS KIMILILI POLICE STATION**). Since the 1<sup>st</sup> Respondent took possession of the land parcel **NO KIMILILI/KIMILILI/2131** through unlawful means, then it, together with its servants agents employees or any other person who have encroached thereon are basically trespassers who ought to be evicted or compensate the Estate of **HASSAN SAKARI** the value of the land because the intrusion on the said land is a clear violation of the Constitutional right of the deceased's family to own property protected under **Article 40(1)** of the **Constitution**. There is nothing on record to suggest that the said property was obtained by the deceased through unlawful means.

19. That prayer is also granted.

20. In prayer (e), the Petitioner seeks a permanent injunction restraining the 1<sup>st</sup> Respondent whether by itself or through its employees, agents or any other person or entity claiming through it from interfering with the Petitioner's and the Estate of **HASSAN SAKARI**'s quiet use, occupation and ownership of the entire land parcel **NO KIMILILI/KIMILILI/2131** together with the developments thereon. As the registered proprietor of the land parcel **NO KIMILILI/ KIMILIL /2131**, **HASSAN SAKARI** was entitled to all the benefits that accrue to an absolute and indefeasible owner of the land. That includes not only ejecting trespassers therefrom but also permanently restraining them from re – entering the land. If there is need to procure the land parcel **NO KIMILILI/KIMILILI/2131** for any public purposes, both the repealed **Land Acquisition Act** and the new **Land Act 2012** have clear procedures on how such acquisition should be done.

21. Therefore, subject to (d) above, an order for permanent injunction shall follow as a matter of course.

22. With regard to costs, they follow the event. In the circumstances of this case, the 1<sup>st</sup> Respondent bears the greatest culpability. It should meet the Petitioner's costs since it was the one which drove the process that violated the Constitutional rights of **HASSAN SAKARI**.

23. The up – shot of all the above is that having considered the evidence herein, there shall be Judgment for the Petitioner as against the Respondents jointly and severally in the following terms: -

**a. A declaration that the proprietary interest in the entire parcel of the land NO KIMILILI/KIMILILI/2131 vests in the Estate of HASSAN SAKARI.**

**b. A declaration that the compulsory acquisition of the land parcel NO KIMILILI/KIMILILI/2131 without consent or compensation violated Section 75 of the repealed Constitution and Article 40 of the 2010 Constitution.**

c. The prayer (a) for mesne profits is declined.

d. A mandatory injunction directed at the 1<sup>st</sup> Respondent to immediately initiate, and together with the Interested Party, ensure that the process of compulsorily acquiring the land parcel NO KIMILILI/KIMILILI/2131 for public purposes and the payment of adequate and just compensation to the Estate of HASSAN SAKARI is completed within the next six (6) months from the date of this Judgment.

e. In default of (d) above, the 1<sup>st</sup> Respondents, its agents, servants or any other persons acting through it shall vacate from the land parcel NO KIMILILI/KIMILILI/2131 or be evicted therefrom in accordance with the law and should there be any resistance, the assistance of the Officer Commanding (OCS) KIMILILI POLICE STATION or any other authorized Officer be sought.

f. Upon vacating or being evicted from the land parcel NO KIMILILI/ KIMILILI/2131, the 1<sup>st</sup> Respondent, its agents, servants or any other persons claiming through it shall remain permanently enjoined from interfering with the Petitioner's and the Estate of HASSAN SAKARI's quiet use, occupation and ownership of the said parcel of land.

g. The 1<sup>st</sup> Respondent shall meet the costs of this Petition.

**BOAZ N. OLAO.**

**J U D G E**

**21<sup>ST</sup> FEBRUARY 2022**

Judgment dated, signed and delivered at **BUNGOMA** on this 21<sup>st</sup> day of February 2022 by way of electronic mail in keeping with the **COVID – 19** guidelines and with notice to the parties.

Right of Appeal explained.

**BOAZ N. OLAO.**

**J U D G E**

**21<sup>ST</sup> FEBRUARY 2022**