



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

PETITION NO.248 OF 2013

BETWEEN

ARNACHERRY LIMITED.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. This judgment is in relation to a Petition by Arnacherry Limited, a Limited Liability Company which was incorporated as a private company by the Honourable Mr. Justice (Rtd) Benna Wamukoya Lutta (hereinafter “Justice Lutta”) and his family. The Petitioner at some point acquired, through purchase, from the Government of Kenya, two pieces of land, LR No.5712 and LR No.6136 which are comprised in Certificates of Titles Registered in the land Titles Registry at Nairobi as Number I.R No.1399/1 and I.R No.2176/1, respectively (hereinafter “the suit Land”). The two parcels of land are situate to the West of Kitale Township at Endebess in Trans-Nzoia County and comprise by measurement, one thousand seven hundred and fifty six acres or thereabouts (with L.R No.5712 IR No.1399/1 measuring 842 acres while L.R No.6136 IR No.2176/1 measures 914 acres). Apart from serving as a commercial farm, the suit land also served as the Lutta family residence and home.
2. Sometime in December 1983 while the Petitioner’s employees proceeded with their normal activities, the farm was invaded by alleged thugs and goons who forcefully ejected the farm manager, employees and members of the Lutta family. The invaders looted the farm of its equipment, animals, and crops and destroyed the family and workers’ residences. Additionally, the invaders settled on the said property.
3. Subsequently, it is alleged that the Petitioner protested both orally through its Director and in writing to, among, others, the Provincial Administration and the District Criminal Investigations Officer (DCIO), Kitale as well as the Provincial Criminal Investigations office in Nairobi but the complaints neither elicited any arrest nor recovery of the land or other properties, nor was there any apt reaction from the State. The Petitioner later learnt that the Government had converted the land into public use by erecting a Police camp and Government offices, had appointed a chief and sub-chief for Chorleim sub-location and built public schools namely Kitum Primary School and Secondary School. The said buildings and institutions still stand on the property to date.

4. The Petitioner then filed a suit in the High Court of Kenya at Nairobi being **HCCC No 690 of 1984 – Arnacherry Limited vs Lands Limited, J.W Raphael Kubende and Saboot Cooperative Society** which case was determined in the Petitioner’s favour on 13th March 1985 by way of a consent judgment and an eviction order was subsequently issued against the unlawful occupants of the Petitioner’s property. The Court in the aforesaid case issued another order on 2nd December 2000 directed to the Commissioner of Police and Provincial Administration compelling the said offices to enforce the Court’s eviction Order. The said eviction Orders were not enforced nor did they result in the Police ensuring the Petitioner’s repossession of its property. The Orders were in fact blatantly and contemptuously disregarded by the Police and the Provincial Administration, according to Justice Lutta.
5. Further, by a letter dated 24th December 1999 written by Mr. P.M.M Alubale for the Permanent Secretary, Office of the President Ministry of Provincial Administration and Internal Security and addressed to the Petitioner’s Director, Justice Lutta, the said Mr. Alubale stated that the matter had been referred to a Mr. Japheth Mwanja, Senior Deputy Commissioner of Police, who had been directed to “expedite the execution of the Order”. The Permanent Secretary in the Office of the President, Provincial Administration and National Security, Mr. D.M Mwangi, later also wrote to the then Police Commissioner by way of a letter dated 24th June 2003 asking the latter to “evaluate and take the necessary action” with regard to the Petitioner’s farm but to date no action has been forthcoming from the Commissioner of Police or at all.
6. The Petitioner through Justice Lutta also stated that the former Minister for Lands, Hon. James Orengo, after hearing the Petitioner’s complaint wrote a letter dated 3rd March 2010, and expressly acknowledged that the Government had “constructively or indirectly acquired the land” owned by the Petitioner and recommended to the then Minister for Finance, Hon. Uhuru Kenyatta to proceed, with speed and process the compensation due to the Petitioner. The Minister stated that his ministry would have made the payment had it not been for budgetary constraints which fact had left the Ministry with no funds to make payments in the financial year in question.
7. Additionally, by way of a letter dated 4th May 2010, former Prime Minister, Hon. Raila Odinga concurred with Hon. James Orengo’s recommendation above stated and directed Hon. Uhuru Kenyatta to expedite the compensation due to the Petitioner. Mr. Njee Muturi, the Principal Liason Officer and Personal Assistant to the said former Minister for Finance and now President of the Republic of Kenya, then telephoned Justice Lutta on 25th September 2010 on behalf of the said Minister and requested that the Petitioner provides a valuation report to the Minister for preparation of payment following the letters by the said Minister for Lands and the Prime Minister. By way of a letter dated 23rd October 2010, the Petitioner forwarded to the Minister of Finance a valuation of its property and losses as prepared by M/s. Syagga and Associates Limited including the land, fixtures thereto and moveable chattels on the land. No payment was made and none has been made to date and it is from the foregoing that the Petitioner decided to file this Petition.

Case for the Petitioner

8. The Petitioner’s case is contained in its Petition dated 17th January 2013 with a Supporting Affidavit sworn by Justice Lutta on the same date, its written submissions dated 22nd March 2013 and its Reply to the Respondent’s Submissions dated 30th April 2014. Mr. Lubullelah, learned Counsel also made oral submissions on its behalf which can be summarized thus;
 - i. That the Respondent did not file a Defence, Replying Affidavit or at least Grounds of Opposition and therefore the Petitioner’s case is uncontroverted and unchallenged both in terms of facts and the law and so the Court should proceed to evaluate the Petitioner’s case for the effect of the said uncontroverted evidence and it relies on the decision in **Mohamed Balala and 11 Others v Attorney General and 7 Others (2012) eKLR** for this proposition.

- ii. That the Government's acquisition of its land constitutes illegal acquisition of private property without prompt and full compensation or at all since buildings and government institutions put up after the invasion still stand on the land. Therefore, by these acts, the Government had purported to acquire the Petitioner's land without due or proper administrative process, full, fair and prompt compensation as was required of it under **Sections 75 and 77 of the Repealed Constitution, Article 40** of the Constitution 2010, the provisions of the **Land Acquisition Act Cap 295** Laws of Kenya (now repealed), the **Lands Act 2012** and under International Covenants for Civil Property rights to which Kenya is a signatory.
- iii. That the eviction Orders that were granted in **HCCC No.690 of 1984** were blatantly and contemptuously disregarded by the Police and Provincial Administration who did not give effect to them citing strong political interference and the fear of reprisals by the political powers of the day and furthermore that in a letter dated 4th July 2001, the then Provincial Commissioner for Rift Valley Province, Mr. P.O Raburu, in reply to the Petitioner's letter dated 2nd July 2001 advised the Petitioner to seek the Court's intervention for the inaction of the police in effecting the Court Orders and this therefore amounts to express admission of the State's failure to observe the rule of law, enforce lawful Orders and a covert admission of its complicity in the woes that befell the Petitioner.
- iv. That the Petitioner, its shareholders and Directors have invested financially, emotionally and have sentimental attachment to the suit land which also served as their home. The Petitioner's Directors, shareholders, managers and employees also eked a living exclusively from the said farm and the farm averagely made a profit of approximately Kshs. 2.1 million per annum and therefore factoring inflationary pressures and the potential for growth, the earnings would currently stand at approximately Kshs. 50 million per annum which the Petitioner seeks to recover with interest thereon at commercial bank rates from December, 1983 to the date of payment in full.
- v. That the invaders, without any colour of right, unlawfully settled on the said property with apparent encouragement by officers of the Government of Kenya and it alleges loss of properties listed below:
 - a. 6 Pedigree Bulls (3 friesland and 3 simentalfleckries)
 - b. 380 dairy cows of which 215 were pure-bred frieslands and 165 were fleckries or simmentals, i.e progenies of imported cattle
 - c. 600 corriedel sheep
 - d. 1 John Deere 3130 tractor
 - e. 1 John Deere 2020 tractor
 - f. 1 John Deere 2020 tractor
 - g. 3 Massey-Ferguson 375 tractors
 - h. 1 Dania 900 combine harvester
 - i. 1 Lister 5 horse power engine for lighting up
 - j. 1 Lister (Petter) engine for water pumping
 - k. 1 Lister engine for coffee pulping
 - l. 3 Four-row maize planters
 - m. 2 Maize cultivators
 - n. 4 Three - disc Massey - Fergusson ploughs
 - o. 1 three disc-mould board plough
 - p. 1 Drier (on PTO)
 - q. 2 Seed drills (wheat planters)
 - r. 2 new John Deere disc harrows with 10 and 20 plates respectively
 - s. 1 Hammer mill for grinding posho
 - t. 1 Spraying tank
 - u. 1 Winnower
 - v. 2 Road graders
 - w. 1 Green coffee sprayer
 - x. 1 New water pump no. 86616-46B

- y. 1 Big saw
- z. 1 Super grader (scraper)
- a. 1 Aver 100-kg scale;
- b. 1 Gyromower
- bc.1 Ford 700 series D6 lorry of Registration No KKM 656
- cd.1 Suzuki car of registration No KUA 115
- de.1 Mazda pick-up
- ef. 1 Three-ton trailer
- fg. 1 Five-horsepower lister coffee engine
- gh.1 Three-disc pulper plus 1 repasser
- hi. 30 Coffee trays
- ij. 260 Bags of grade one coffee in the stores
- jk. 200 bags of ungraded Mbuni coffee
- kl. Workshop with tools, spanners and fittings
- lm. Dairy with complete equipment and fittings
- mn. 20,000 meters of premier fencing
- no. 1500 meters of paddocks fencings
- op. House furniture, fittings, cutlery and crockery and one set of wine glasses
- pq. Water storage tanks

9. It estimates the value of the above farm tools, equipment, animals, crops and inputs at about Kshs.30,000,000/- as at December 1983 and additionally it is urged that because of the vicious and abrupt invasion of the suit land, all records of purchase and stores inventories were lost or destroyed and therefore the Petitioner properly claims the said amount plus interest thereon at Commercial Bank Rates from the said date until payment in full.
10. Additionally, the Petitioner relies on the Valuation Report prepared by M/s. Syagga and Associates Limited of its property, the subject matter hereof, as being **Kshs.1,078,184,000/-** (One Billion, Seventy Eight Million One Hundred And Eighty Four Thousand) and rental value of **Kshs.7,024,000/-** (Seven Million Twenty Five Thousand) per annum as at the 17th day of September 2010 for the *solum*, fixtures and chattels thereon, on the basis of the doctrine of *cuius est olum est usque ad coelom et ad inferos (whoever owns [the] soil [it] is theirs all the way to Heaven and [down] to hell)* and the exception thereto and the said value also said to be subject to adjustments with the factoring in of inflation from the date of the valuation.
11. It is further submitted that **Articles 3, 12 and 17** of the **Universal Declaration of Human Rights, 1948** provide for a State's obligation to respect and protect of private property as well as safety of the person and in addition, **Article 2 (5)** of the **Constitution** recognizes international law as forming part of our domestic law or sources of law and therefore those Articles properly apply to Kenyan Law. It is the Petitioner's contention in that regard that the State sanctioned invasion of the suit land and its failure to protect property and the security of the persons thereon was a foul or in contravention of **Articles 3, 12 and 17** of the **Universal Declaration of Human Rights 1948** aforesaid. Further, the Kenya Police and Provincial Administration's failure to arrest the trespassers or to enforce a lawful Court decree and Orders smacks of impunity, is a breach of the international law principle of the State's duty to protection of private property and security of its citizens and is also an indictment of the State's complicity in the non-adherence to the rule of law and is a gross violation of the rights of the Petitioner's Directors, members and beneficiaries.
12. Further, that **Articles 3, 5 and 14** of the **African Charter on Human and Peoples Rights** enacted under the auspices of the Organisation of African Unity (OAU) now African Union i.e. (AU) Charter and as read with **Article 1** of the **AU Charter** and the AU constituting instrument places responsibility on a state party to protect and enact legislation that secures equal protection of its citizens before the law, secures dignity or security of the person and the right to property.
13. In addition, that **Articles 28, 29, 40 and 64** of the **Constitution** of Kenya, 2010 protect the right to ownership of private property, dignity of the person and obligates the State to use its coercive

instruments such as the Police and Provincial Administration to protect private property and the dignity of the individual, and further that **Article 40** of the **Constitution** provides for prompt payment in full and just compensation for the private property acquired by the Government for public use. It is its contention therefore that its rights to ownership of the property, security thereof and right to full, fair and prompt compensation upon compulsory acquisition of its land has been breached by the acts and/or omissions of the State and its officers or institutions. Further, it is submitted that statutorily, the sanctity of title to land is assured and protected under **Section 21** of the **Land Titles Act, Cap 282** (now repealed by the **Land Registration Act No.3 of 2012**) and **Section 23 (1)** of the **Registration of Titles Act** (now repealed by the **Land Registration Act No.3 of 2012**) and additionally, that while the foregoing provisions of law may have been repealed by the **Lands Act 2012** and **Land Registration Act, 2012**, the same are quoted as the law subsisting as at the time of accrual of the cause of action herein and in any event as things stand now, **Section 24, 25 and 26** of the **Land Registration Act 2012** still provide for sanctity of title. The Petitioner also relies on the decision of **Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR** for this proposition.

14. It is its further contention that **Section 111** of the **Lands Act** seems to borrow from the repealed **Land Acquisition Act** which is to the effect that if land is acquired compulsorily under the Act, just compensation shall be paid in full to all persons whose interest in the land have been extinguished.
15. That **Article 48** of the **Constitution** secures the right of every Kenyan citizen, juridical or natural person to access to justice and fair administrative action and that access to justice goes beyond ability to file suit and includes the ability to access the police, with the legitimate expectation of fair, expeditious and prompt investigations of one's complaint, prosecution of suspects, enforcement of Decrees and Orders issued by a Court and prompt and fair compensation by Government upon compulsory acquisition of one's property for public use. In addition, **Article 47** of the **Constitution** also provides for fair administrative action which includes the expeditious disposal of complaints, petitions and applications for compensation by lawful administrative and quasi-judicial authorities.
16. The Petitioner for the aforesaid reasons also implores the Court to invoke and have regard to international obligations which Kenya has undertaken, whether or not domesticated, for the purpose of clarifying the Petitioner's rights in accordance with the Bangalore Principles on Domestic Application of International Human Rights Norms. Further, **Article 23 (3) (e)** of the **Constitution** empowers the Court to award damages in compensation where breach of a Constitutional right is established and further, it is its submission that **Section 84** of the former **Constitution** has set out the High Court's jurisdiction to enforce rights and fundamental freedoms while **Section 75 (2)** thereof gave the High Court jurisdiction to determine rights with respect to compulsory acquisition of private land.
17. The Petitioner further relies on the decision of the South African Constitutional Court in **President of the Republic of South Africa and Minister of Agriculture and Land Affairs vs Modderklip Boerdry (pty) Limited CCT 20/04** which it argues is in all fours with the current Petition in that **Section 25** of the **South African Constitution** is *pari materia* and substantially similar to **Section 75** of the **Repealed Constitution** and **Article 40** of the **Constitution, 2010**.
18. It also contends that the dispute in this Petition first started in December 1983, continued accruing thereafter and subsists to date and invasion of the Petitioner's land and the admission of acquisition by the State spans from the year 1983 to 2012 and therefore, the alleged infractions of the Petitioner's Constitutional rights cut across the two regimes, the old and the new Constitution, and so there is an interplay between the former and the current Constitution. It relies on the decision of the Court in **E.T vs Attorney General and Another (2012) eKLR** for this position and adds that its claim should be viewed through the prism of the provisions of the former Constitution, current Constitution and International Law Conventions.

19. It is also the Petitioner's averment that it has not only specifically pleaded to the claim for special damages, but it has also strictly proved them and additionally, the valuation reached for **Kshs.1,078,184,000/-** with a rental value of **Kshs.7,024,000/-** as at September 2012 was professionally done by an expert firm of Land Economists of high regard, M/s. Syagga and Associates Limited, whose principal Director and who signed the Valuation Report, **Dr. W.H.A Olima** is not only an acclaimed Land Economist, but also a holder of a Doctor of Philosophy degree in land economics and a Professor of land economics at the University of Nairobi and further that the report was prepared on the request of the then Minister for Finance for purpose of preparation of compensation due to the Petitioner which facts cannot be denied. In addition, it relies on the decision in **Orbit Chemical Industries Limited vs The Attorney General (2012) eKLR** for the proposition that the Respondent is estopped from repudiating, recanting, resiling or taking any other position than that which recognizes the promises to pay the full value of the suit land and losses related to its unlawful acquisition since the Respondent made representations through the former Prime Minister, the former Minister for Lands and the former Minister of Finance that the Petitioner would be compensated for loss of his land, its use and his chattels thereon.
20. With regard to general damages, it is submitted that quite apart from being compensatory, they may also be paid for deterrent effect or to assuage the aggrieved party who has suffered deep scars from the infractions of its Constitutional rights and fundamental freedoms and it relies on the decision in **Macharia vs Mwangi (2001) 1EA 110** for this proposition and also for the argument that an adjudication on the quantum of general damages to be awarded is in the discretion of the judicial officer. Further, the golden thread that runs across the authorities/precedents strewn in Common Law is that a Court shall award aggravated damages, beyond what is ordinarily awarded, if it is demonstrated that militating circumstances such as failure to apologize, contumacy, delay in settlement, the offending party having gained financially from the injury and such other factors as are shown to exist. It therefore follows that the present case is a good one for award of general and aggravated/punitive damages considering that the Respondent has long delayed in settling the matter, and that the invaders have gained from and continue to use the suit land, necessitating this Petition. Further, that the Petitioner's rights continue being trampled upon and have been for over 30 years and therefore this case deserves the Court's attention in condemning impunity and its effects of infringement, denial or violation of Constitutional rights.
21. The Petitioner relies on the decision in **Attorney General vs Ramanpoop (2005) 4 LRC 301** for the proposition that Constitutional damages go further on to play a public interest role of emphasizing the importance of Constitutional rights and underscoring the gravity of the breach and to deter further breaches. The Petitioner also cites the cases of **Otieno Mak'Onyango vs Attorney General (2012) EKLR** and **Mwangi Stephen Mureithi vs Daniel Toroitich Arap Moi (2011) eKLR** for the principles on award of damages for infringement of Constitutional rights and where special damages were awarded with interest thereon from the date of expropriation until payment in full. The Petitioner specifically relies on the decision in **Mwangi Stephen (supra)** and urges the Court to award the sum of **Kshs. 200, 000, 000** on the head of general damages as prayed and interest on the said amount being awarded from the date of the deprivation of the Petitioner's property.
22. Further, that the aspect of interest on the liquidated claim is thus proved and commercial losses are compensable by interest at Commercial Bank Rates and additionally, that interest on the compensation value is guided by **Section 16** of the **Land Acquisition Act** (now repealed) which provides for interest at the rate of **6 percent per annum** from the date of compulsory acquisition and a further 6 percent is provided as the interest payable from the date of possession of the land and so this makes a total of **12 percent** from the date of acquisition in 1983. That for those reasons, the Petitioner urges the Court to award interest at the Commercial rates of an average of **25 percent per annum** as prayed for in the Petition and at Court rates for general damages and costs thereon.
23. The Petitioner also specifically prays for costs of this Petition on a higher scale with interest

thereon, to be assessed for two Counsel, and that a certificate to that effect be issued. The justification for all this being that the case involved numerous documents on complex areas of law including Constitutional Law and Property Law, invited researchers and comparative Law beyond the Kenyan Court's jurisprudence. That the dispute also involves substantial sums of money and placed a great responsibility upon the Advocates and further that the preparation of the case took many days and the engaging of a Senior Counsel along with a partner in the Petitioner's Advocate's law firm. It also relies on the decision in **Atsango Chesoni vs David Morton Silverstein (2009) eKLR** for the proposition that the award of costs is at the judge's discretion and also submitted that this case meets the test or threshold set out in the case of **Atsango Chesoni** with regard to substance and complexity of the subject matter, and the conduct of the judgment-debtor since he has delayed for over 30 years to effect payment due to the Petitioner despite conceding such liability.

24. The Petitioner in addition to all the above, contends that the Respondent's submission to the effect that the Petitioner's case is an abuse of the Court process is entirely misplaced because matters in a suit said to be sub-judice or *res-judicata*, must be similar in terms of parties, nature, cause of action and relief sought and therefore the Petitioner's earlier suit is in no way similar to the current suit for the reasons that;

- i. In **HCCC No 690 of 1984** the State was not a party.
- ii. In **HCCC No 690 of 1984** the Order sought was eviction of the Defendants therein and did not involve the State's infringement of the Petitioner's Constitutional rights and further that the said case was not and could not be predicated upon the Constitution 2010 which was not in existence at the time.
- iii. In this Petition, the Petitioner complains of the State's acquisition of its property without compensation, a complaint which was never germane in **HCCC No 690 of 1984**.
- iv. The Petitioner has demonstrated and the State has admitted, through its then Minister for Lands and Prime Minister that it had acquired the Petitioner's land and was willing to pay compensation save for the immediate absence of funds and that the character of the suit (**HCCC No 690 of 1984**) is not the same as the current Petition and the same is cited only to show the breaches by the State, inter alia, of the Petitioner's fundamental Constitutional rights to property and fair administrative action.

25. It is further submitted that the argument by the Respondent that the Petitioner should have instead commenced contempt of Court proceedings against Government officers is tantamount to the State seeking refuge in its own failings, breaches and illegalities, and a Court of law and equity cannot countenance such a defence. In addition, the said submission is without merit in light of the damning admissions by the State and its offer to compensate the Petitioner for its unlawful occupation of the suit land and the request by the State for the Petitioner to present a valuation report for compensation therefore debars the State from approbating and reprobating on its undertaking to pay and which was delayed by its own officer's allegations of lack of funds. That the State's submission that its officers should have been held in contempt of Court Orders is indeed a covert admission of the breaches of Petitioner's rights as pleaded in this Petition and from the foregoing, the Respondent's suggestion that the Petitioner should evict the occupants of the suit land including those in a Police Station, schools and a whole Sub-location of people is absurd, impractical and indeed outrageous.

26. On special damages, it is further submitted that:

- i. The fact that the Petitioner owned machinery, equipment, tools and household goods on the farm which are listed in Paragraph 12 of the Petition is not controverted by any pleadings or evidence by the Respondent and is deemed a proven fact.

- ii. The Respondent's own officers have confirmed, in writing, the Petitioner's loss of moveable items.
- iii. The Petitioner relies on his letter dated 23rd May 1994 in which he sets out the equipment, tools, machinery and assets with particularity and the value of Kshs.105 Million attached thereto the said letter is not controverted at all and the facts or contents thereof should be deemed proven.
- iv. The Petitioner also relies on the inventory of the moveable properties as valued by the Ministry of Agriculture on 24th April, 1987 in the report produced in Court on 6th March 2014 and admitted in evidence and that the same Report also confirms the number of cattle and the area of land under maize, seed and wheat.

27. On the valuation Report, it is further submitted that the Respondent's attempt to impeach the Report of M/s. Syagga and Associates Limited fails on the grounds that;

- a. The Report was prepared pursuant to the request of the State for purpose of processing payments and that the same was required of the Petitioner by the Ministry of Finance and for the State to now disown it is a demonstration of bad faith.
- b. The Respondent has not filed its own valuation Report despite having a valuation department in the Ministry of lands, a fact this Court should take judicial notice of.
- c. The Report is a product of a limited liability company which acts through its officers, Mr. Willis Odede who explained to Court in his evidence that he was a qualified and registered valuer working in the firm of M/s. Syagga and Associates Limited and that he was working under the instructions of Professor W.H.A Olima who is the principal officer in the said company. He also candidly stated that he is the one who visited the land and prepared the valuation Report which was owned by the company by signature of the principal, Prof. Olima and further Mr. Odede explained, that happens as in many organizations, documents are originated by persons within the employment of the organization but are signed by the mandated signatory and therefore this does not take away the value of the document but it remains the property of the company and so its officer (the maker) has produced it and hence there was full compliance with **Section 35 (1) of the Evidence Act**.

28. On the applicability of the current Constitution, it is further submitted that the Respondent's argument is wholly in error both in law and fact for the reasons that:

- i. The matters forming the subject matter of the current Petition and the infringements complained of still subsist to date although the dispute started in 1983.
- ii. The principal complaint that prompted the current Petition was the admission by the State of its compulsory acquisition and occupation of the Petitioner's land and its willingness to compensate the Petitioner for the illegal occupation by known persons with its sanctioning and protection, which occupation subsists even under the current Constitutional dispensation.
- iii. The Respondent's submissions seem to be oblivious of the true legal position as to the application of the current Constitution and the Petitioner relies on the decision in the case of **JWI vs Standard Group and Another (2013) eKLR** in support of that position.

29. From all the above, the Petitioner prays for;

“(1) A declaration that the Petitioner's rights under Article 40 of the Constitution of Kenya 2010 relating to the protection of the right to ownership of property and prompt, full, fair and just compensation in the event of compulsory acquisition for public use or appropriation have been violated by the Kenya State.

(2) A declaration that the Petitioner's rights under Article 31, 12 and 17 of the Universal Declaration of Human Rights, 1948 relating to the protection of private property under the Law have been violated by the Kenya State.

(3) A declaration that the Petitioner's rights to Human dignity, freedom and security of the persons guaranteed under Articles 28 and 29 of the Constitution of Kenya 2010 have been violated by the Kenya State.

(4) A declaration that the Petitioner's rights to access to justice guaranteed under Article 48 of the Constitution of Kenya 2010 have been violated by the Kenya State.

(5) A declaration that the Petitioner's rights and legitimate expectation to fair Administrative action under Article 47 of the Constitution of Kenya have been breached by the Kenyan State.

(6) Special Damages;

- a. **Special Damages under Article 23 (3) of the Constitution of Kenya 2010 of Kshs. 1,078,184,000 (One Billion Seventy Eight Million One Hundred and Eighty Four Thousand) being compensation for the land L.R No 5712 and L.R No 6136 as at 17th September 2010 (date of valuation) plus interest thereon at average Commercial Bank rates from the said date until payment in full.**
- b. **Special Damages under Article 23 (3) (e) of the Constitution of Kenya 2010 in respect of:-**
 - i. **The average cost of 118 Acres of Mature Coffee (Blue Mountain); and**
 - ii. **The average cost of 15 Acres of Mature Eucalyptus trees.**
- c. **Special Damages under Article 23 (3) (e) of the Constitution of Kenya of Kshs.2,100,000.00/- (Two Million One Hundred Thousand) per annum based on the Kshs.2.1 million Profit per annum (currently about Kshs. 50 million per annum) being compensation for the loss of use of the property known as L.R Nos.5712 and 6136 together with interest thereon at average commercial Bank rates from December 1983 until payment in full.**
- d. **The value of the destroyed equipment, tools, animal's and farm inputs listed under paragraph 12 above at Kshs.30,000,000/- plus interest thereon at Commercial Bank Rates from December 1983 until payment in full.**
- e. **In the alternative to Prayer 8 above, an award of special damages of Kshs.7,024,000/- per annum from December 1983 plus interest thereon at average commercial bank rates until payment in full currently Kshs.210,720,000/- (as at December, 2012)**
7. **A declaration that the Petitioner's rights under Article 3, 12 and 17 of the Universal Declaration of Human Rights 1948, applicable to Kenya by dint of Article 2 (5) and (6) of the Constitution of Kenya 2010 have been violated.**
8. **General damages of at least Kshs.200,000,000 under Article 23 (3) (e) of the Constitution of Kenya 2010 in favour of the Petitioner as against the State being compensation for the State's violation of the Petitioner's rights under Articles 28, 29, 40, 47, 48 and 64 of the Constitution of Kenya and Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948.**
9. **Interest on all monetary awards, at Court rates from the date of judgment until payment in full.**
10. **General Damages for the deliberate and inordinate delay in settling the sums owing to the**

Petitioner.

11. ***Costs of the suit and interest thereon at Court rates from the date of filing suit until payment in full.***
12. ***Any other or further relief that the Court may deem apt in the circumstances.”***

The Respondent’s Case

30. The Respondent’s case is contained in his written submissions dated 23rd April 2014. It is worth noting from the outset that the Respondent did not file a formal response to the Petition but cross-examined Justice Lutta in regard to the claim by the Petitioner.
31. It is submitted by the Respondent in any event that while it is true that the Petitioner obtained Orders for eviction of the invaders of the suit land and that the eviction was to be carried out with the assistance of government officials specified in the order, the evictions were not carried out as directed and that the persons who were to assist in carrying out the evictions are subject to obey those orders and are also compellable by this Court to do so. Additionally, the eviction orders are still in force and can be enforced if the Petitioner so wishes.
32. Further, that when a person, subject to the jurisdiction of the Court fails to comply with Court orders, the remedy does not lie in filing a separate law suit but in commencing contempt of Court proceedings to compel the person(s) to comply with the order. Furthermore, there was no attempt by the Petitioner to have the persons directed by the Court to assist in the eviction compelled to do the same.
33. The Respondent further submits that the Petitioner is to blame for its failure to move the Court appropriately for the orders to be enforced and relies on the dictum of Justice Majanja in **Fleur Investment Ltd vs Permanent Secretary Ministry of Roads and 4 Others (2012) eKLR** where the learned Judge opined that;

“I think the failure to pursue contempt proceedings by an officer of the Court as and when the contempt occurs tends to bring administration of justice in disrepute. The impression created in the public mind is that the Court is powerless yet it is the officers of the Court who fail in their duty to ensure that the matter is brought to the Court’s attention by moving the Court appropriately...it is an abuse of the Court process to file a multiplicity of suits seeking similar reliefs in respect of the same subject matter.”

34. It is additionally submitted that in this case, although special damages have been pleaded, they have not been strictly proved and further that it has been held in many past decisions that special damages must not only be pleaded but must be specifically proved and he relies on the case of **Zacharia Waweru Thumbi vs Samuel Njoroge Thuku, Civil Appeal 445 of 2003** for this proposition. Additionally, that a cursory look at the items listed as having been destroyed would show that they are registerable by Government bodies, for example, the Kenya Revenue Authority and there is no evidence that any of the machineries claimed to have been destroyed by the invaders were ever owned by the Petitioner and indeed no evidence of the efforts made to get such documentation from relevant Government bodies has been tendered and therefore, their existence remains in doubt. Further, that there is no audit or other expert report to show that the farm was generating the profits claimed or the rental value is as claimed and all that exists on record is the word of the Petitioner and so that claim lacks probative or evidentiary value.
35. The valuation report signed by **W.H.A. OLIMA, PHD, MISK, RV Registered and Practicing Valuer** is also contested and it is argued that during the hearing, it emerged that the said signatory is not the one who prepared the report or visited the suit land for the purposes of valuation and therefore, that fact in itself puts the valuation in doubt. In addition, the methodology used to arrive at the figures in the report is not shown and the figures seem to have been plucked from nowhere

and therefore to give the valuation some probative value, the signatory himself should have produced the report in Court. The Respondent further submits that the report should be rejected since none of the requirements of **Section 35 (1)** of the **Evidence Act** with regard to the production of documents have been met for the report to be used by the Court.

36. It is also submitted that the Petition is brought under the provisions of the Constitution of Kenya, 2010 while the acts complained of happened many years before the promulgation of the current Constitution and therefore, the remedies now being sought should have been predicated on the Repealed Constitution and that the filing of this Petition is unprocedural and wrong provisions of the law have been invoked. Additionally, that the Constitution of Kenya, 2010 does not have retrospective application and reliance is placed on the dictum of Justice Majanja in the case of **Duncan Otieno Waga vs Attorney General (2012) eKLR** in support of that submission.

37. Lastly, the Respondent urges the Court to strike out this Petition with costs so that **HCCC No.690 of 1984** can be brought to its logical conclusion by means other than the present proceedings.

Determination

38. From the foregoing, the issues that I am supposed to determine are the following:

- i. Whether the current Constitution applies to this dispute and Petition.
- ii. Whether the valuation Report submitted in this case is admissible.
- iii. Whether the Petitioner's constitutional Rights have been violated in any way.
- iv. Whether the Petitioner deserves the prayers in the Petition and specifically an award of General and Special damages as pleaded.

Applicability of the Current Constitution

39. In answer to the above issue, **Article 263** of the **2010 Constitution** provides that;

“This Constitution shall come into force on its promulgation by the President or on the expiry of a period of fourteen days from the date of the publication in the Gazette of the final result of the referendum ratifying this Constitution, whichever is the earlier.”

40. **Article 264** of the **2010 Constitution** then states that;

“The Constitution in force immediately before the effective date shall stand repealed on the effective date, subject to the Sixth Schedule.”

41. Further, **Article 6** of the **Sixth Schedule** of the **Constitution** provides for rights, duties and obligations of the State and states that;

“Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.”

42. In the above context, in the case of **Duncan Otieno Waga vs Attorney General Petition No.94 of 2011** the Court was faced with a similar issue of having to determine whether the **Constitution 2010** applied retrospectively. The Court noted as hereunder;

“... [37] This matter concerns the enforcement of fundamental rights and freedoms

under the Bill of Rights. The Petitioner also seeks to enforce certain provisions of the Persons with Disabilities Act. The facts relied upon by the petitioner took place between 2004 and 2008. It is therefore necessary to determine the applicability of the Constitution in determining the claim as a preliminary issue...[39] The effect of Articles 263 and 264 is that the Constitution is not retrospective, it cannot invalidate, except by express provision, what was otherwise legal during the currency of the former Constitution...The Constitution is only prospective and the acts occurring prior to the Constitution are, unless otherwise stated by the Constitution itself, to be judged by the existing legal regime that is, the former Constitution...[42]I do not read the provisions 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 violations of the Constitution but they do not empower the court to apply the Constitution retrospectively...”

43.The Supreme Court also discussed retroactive application of legislation and the Constitution in Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others, Supreme Court Application No.2 of 2011 and expressed itself as follows;

“...At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights that legitimately occurred before the commencement of the Constitution.”

44.This Court in the case of Kenya Small Scale Farmers Forum and 6 Others vs Republic of Kenya and 2 Others, Petition No.1174 of 2007 had this to say with regard to applicability of the former Constitution in that case;

“...The second preliminary matter regards the applicable law. It is notable that this matter was initiated in the year 2007 long after the initial phase of the negotiations had began and when the negotiations were ongoing and before the promulgation of the Constitution of Kenya, 2010. We shall thus confine ourselves to the repealed Constitution save that the provisions of the current Constitution will be evoked where necessary especially in view of the fact that the negotiations continue to take place post the promulgation period. For the proposition that the Constitution does not operate retrospectively...As observed earlier on in the judgment, the old Constitution did not provide for public participation. Further this Court as already stated is not concerned about the merits or quality of the impugned negotiation agreements but is assessing breach of the fundamental rights and freedoms which in any case, have not been pleaded with the particularity that they deserve by the Petitioners. The Petitioners also

rely primarily on international instruments including the UDHR, the ICCPR and the Cotonou Agreement to couch the State's responsibility to allow public participation but it is to be noted that there was no express provision assimilating these international agreements directly into national legislation under the old constitutional regime..."

45. In addition to the above, in the case of **JWI vs Standard Group and Another Petition No.466 of 2012**, this Court was faced with an issue where it had to determine the applicability of the Constitution 2010 on enforcement of the Bill of Rights. This Court stated thus;

"... [23] It is obvious to me that Article 31 is wider in language, tenor and import than Section 76 aforesaid but the rights conferred by both are borne of Article 12 of the Universal Declaration of Human Rights which provides as follows; "No one shall be subjected to arbitrary interference with his privacy, family home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks." [24] I have no doubt in mind that looking at the law as set out above, the right conferred by Article 31 has been properly invoked by the Petitioner and the same is not retroactive as it existed prior to the Constitution, 2010 and was certainly saved by Section 19 of the Schedule 6 of the Constitution." (emphasis mine)

46. Turning on to the case before me, with the above authorities as my guide, it is my view that the acts complained of and which have led to the filing of this Petition transpired prior to the promulgation of the Constitution 2010 and have extended further after the promulgation of the Constitution. The invasion of and unlawful occupation of the suit land has therefore been continuing and to argue that it is a one off event is a misguided submission. It is also my view that this Petition was filed for breaches of fundamental rights especially with regard to private property and it is obvious to me that the violations complained of are continuing and transcend both constitutional regimes. To argue that the issues raised are barred by the doctrine of non-restrospectivity is an error and in saying so, I am guided by the decision of the Supreme Court in **Samuel Kamau Macharia (supra)**.

47. Even if I am wrong in my findings above, **Section 75 of the Repealed Constitution** provided that;

"(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 therefor 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 a matter referred to in 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).

(4) and (5) (Deleted by 13 of 1977, s. 3.)

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2)—

- a. *to the extent that the law in question makes provision for the taking of possession or acquisition of property—*

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

- v. *in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;*

vi. *in consequence of any law with respect to the limitation of actions; or*

vii. *for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or*

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of—

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein (iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(7) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament.”

46. **Article 40** of the **Constitution 2010** then provides 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

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

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

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

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

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

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

d. 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.

e. The State shall support, promote and protect the intellectual property rights of the people of Kenya.

f. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

47. Juxtaposing the above provisions, it is quite clear to me that the two provisions i.e. **Section 75** of the **Repealed Constitution** and **Article 40** of the **Constitution 2010** are both aimed at securing and protecting property rights, allowing persons whose property rights have been

violated a right of access to Court and furthermore, they all provide for prompt payment as just compensation for compulsory acquisition of land. This therefore means that those rights were merely transferred from the old constitutional regime to the new regime and so they are not new rights that did not exist prior to 2010. Additionally, **Article 17** of the **Universal Declaration of Human Rights 1948** is to the effect that;

“(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property”.

48. The importance of the said right has been acknowledged by Courts generally and by dint of **Article 2(5)** and **(6)** of the **Constitution 2010**, the Universal Declaration of Human Rights has the force of law in Kenya. In the case of **R vs Chief Immigration Officer (1976) 3 AER 843** Lord Denning stated thus regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”

49. I am in total agreement and would only that it is my view therefore and I do hold that, the Constitution 2010 applies to this case as the violations complained of still subsist up to date and the rights provided for in the Repealed Constitution still exist in the Constitution, 2010 as they did prior to 2010.

Whether the valuation Report submitted in this case is admissible.

50.As the above issue relates to admissibility or otherwise of a document, **Section 35** of the **Evidence Act** provides that;

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say-

(a) if the maker of the statement either-

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters: and

(b) if the maker of the statement is called as a witness in the

proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as it mentioned in sub-section (1) shall be admissible or may, without any such order having been made, admit such a statement in evidence –

(a) Notwithstanding that the maker of the statement is available but is not called as a witness;

(b) Notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

.....

.....”

51. In the above context, the Court in the case of Stephen Kilonzo v Hellen Wangari and Another Civil Suit 791 of 2009 stated thus;

“...[4] Section 35(1) of the Evidence Act provides that any statement made by a person in a document and tending to establish a fact shall, on production of the original document, be admissible as evidence of that fact if two conditions are met, namely, if the maker had personal knowledge of the matters dealt with by the statement, and, secondly, if the maker of the statement is called as a witness in the proceedings. The only proviso to these conditions is where the maker is dead, or cannot be found or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

52. In evidence before me, the witness who testified on the making and validity of the Valuation Report was one, Willis Odede. He testified that he is the one who on behalf of M/s. Syagga and Associates conducted the valuation after visiting the suit land. The Report was later signed by Prof. Olima as the person authorized to sign documents on behalf of the said firm.

53. To my mind, the explanation given is not unreasonable neither is it unlawful because the person producing it had “personal knowledge of the matters dealt” in it, within the meaning of **Section 35** of the **Evidence Act**. I am not satisfied therefore that there is any reason why the valuation Report should be excluded as is sought by the Respondent and that is all there is to say on the issue under consideration.

Whether the Petitioner’s Constitutional Rights have been violated

54. In submissions, the Petitioner alleged that his rights under **Articles 28, 29, 40, 47, 48** and **64** of the **Constitution** have been violated. What is interesting is that in submissions, little was said by the Respondent on these specific allegation but even then, the Petitioner is obligated to prove any claim made along those lines.

55. In that regard, it must be remembered that in **HCCC No.690 of 1984**, the Petitioner obtained orders of eviction of all those persons that invaded the suit land. In his oral evidence, Justice Lutta stated that his attempts at getting the said Court orders enforced did not succeed hence the present Petition. The Respondent on the other hand has submitted that the only remedy available to the Petitioner is to revisit those orders and have them enforced by way of contempt orders against those who have refused and/or declined to enforce them.

56. To my mind, the issue whether only contempt orders against the Defendants in **HCCC No.690 of 1984** are the only remedy available to the Petitioner can only be answered in the negative. I say so because the present Petition is predicated on alleged violations of the Petitioner's rights and in that case, **Article 23(3)** obligates this Court to grant "appropriate relief" should such violations be proved. Later in this judgment, the meaning of that phrase will become clear when the case of **Ntandazeli Fose vs Minister of Safety and Security CCT 14/96 (1997) ZACC 6**, is quoted in *extenso*. Suffice it to say however that the proceedings in **HCCC No.690 of 1984** are different in nature and so are remedies sought although they relate to the same suit land. The invocation of the doctrine of *res judicata* or even *sub judice* is a misguided approach as nowhere in **HCCC No.690 of 1984** was the issue of violation of fundamental rights ever pleaded or resolved and I completely agree with the submissions of the Petitioner on this issue as reproduced elsewhere above. In fact that suit is only of evidential value in the present proceedings and that is all there is to say about that matter.

57. Turning back to the allegation of violation of constitutional rights, the core right at the centre of this dispute is the right to property under **Article 40** of the **Constitution**, which has been reproduced elsewhere above. The facts in support of the allegation have not been contested and it is by now obvious that whereas the initial invaders of the suit land were civilians, the Government of the Republic of Kenya joined them and proceeded to establish a police station therein and also built schools and posted teachers to the said schools. It also set up its offices on the suit land including those of a Chief and Sub-Chief. What other conclusion can be reached in the circumstances other than that the State has, without lawful process, compulsorily acquired the said parcel of land? Acquisition is ordinarily direct and by processes known to the **Land Acquisition Act (Repealed)** and now the **Lands Act, 2012**. Constructive acquisition however may well occur in circumstances such as the ones obtaining in the present Petition and there is no doubt that **Article 40** was thereby violated.

58. As for **Articles 28(human dignity), 29(freedom and security of the persons), and 48(access to justice)**, I am certain that important as they are, no proof was given that they were violated as regards the Petitioner company. Justice Lutta as its representative and Director may well feel that he has been mistreated in his quest to ensure that right is done for the company that he set up from scratch but I see no nexus thereby between those rights and the company. In fact, the Petitioner obtained a favourable judgment from the High Court and cannot say that it was denied access to justice. Similarly, although its Directors and Staff were chased away from the suit land, their claim was vindicated in **HCCC No.690 of 1984** and I need not repeat that fact.

In the end, I am satisfied that only **Article 40** of the **Constitution** was violated as against the Petitioner and I so find.

Whether to grant the prayers in the Petition and specifically the General Damages and Special Damages as pleaded by the Petitioner

59. I will first address the issue of the damages specifically sought and in its prayers, the Petitioner has sought special and general damages as follows;

- a. Special damages of Kshs.1,078,184,000 being the value of the land, and equipment thereon of Kshs.7,024,000/- being its rental value plus interest thereon at average commercial bank rates assessed at Kshs.210,720,000/- as at December 2012.

- b. Kshs.2,100,000/- per annum as loss of use of the suit land.
- c. Kshs.30,000,000/- for destroyed equipment and tools.
- d. An unclear amount for destroyed coffee, wheat and eucalyptus trees.
- e. General Damages of at least Kshs.200,000,000/- for violation of the Petitioner's constitutional rights.
- f. General damages for deliberate and inordinate delay in settling the sums owing to the Petitioner.

60. In that regard, in the case of **Raticliffe vs Evans [1892] QB 524** with regard to damages, the Court stated that;

“...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency...”

61. In the Ugandan case of **Jephtar & Sons Construction & Engineering Works Ltd vs The Attorney General HCT-00-CV-CS-0699-2006**, the Court held that;

“...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably Sietco vs Noble Builders (U) Ltd SCCA No. 31 of 1995 is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit...”

62. Further in the Lesotho case of **Mosisili vs Editor, Mirror Newspaper and Others Case No CIV/T/275/2001** the Court pointed out that;

“...it has been said that generally, it serves little purpose to refer to other cases where damages have been awarded since seldom is one case similar to another. What the cases offer are general guiding principles which by no means are exhaustive either. In the final analysis a judge makes an award that he thinks meets the justice of the case.”

63. In addition, and specifically with regard to special damages, the Court in the case of **Zacharia Waweru Thumbi vs Samuel Njoroje Civil Appeal No 445 of 2003** stated that;

“...The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held: “Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts

themselves.”...If I were to explain, or define, special damages to a layman, I would say “they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortious act (s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test...I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can’t be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid 2001, I find no sufficient reason to interfere with the Learned Magistrate’s award of K.Shs.180,000/- under the head of general damages. Accordingly, I uphold the lower court’s award...”

64. In the Ugandan case of Mawenzi Investments Ltd vs Top Finance Co. Ltd & Anor HCCS NO 02 OF 2013, the Court stated thus;

“... Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury’s Laws of England, 4th ED Vol. 12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of Kyambadde v. Mpigi District Administration [1983] HCB 44, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly... Assessment for general damages is based on the principle of restitutio in integrum according to East African Court of Appeal in the case of Dharamshi vs. Karsan [1974] 1 EA 41. The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury’s laws of England fourth edition (reissue) volume 12 (1) and paragraph 802 thereof damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered...” (see also Robert Cuossens v Attorney General Civil Appeal No 8 of 1999)

65. Similarly, in Haji Asuman Mutekanga vs Equator Growers(u) Limited (Civil Appeal No.7 Of 1995) the Court noted thus;

“...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter parties or exparte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less. As the learned author stated in MC Gregor on Damages 4th Edition page 1028, the evidence in

special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in Monarch S.S. Co. V Karlshanus Oliefabriker (1949) AC, 196 at 221 as being: “damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event it is laid down that the special fact must be communicated by and between the parties.”

66.As for damages payable in constitutional Petitions and with regard to the term “appropriate relief”, and I deem it proper to quote the Court’s findings in extenso, in the South African case of Ntandazeli Fose vs Minister of Safety and Security (supra) the Court noted that;

“...[17] In their helpful arguments, counsel for the respective parties followed substantially the same lines as in the court a quo, although much elaborated. The plaintiff’s argument can be summarised as follows. Section 7(4)(a) of the interim Constitution establishes a separate cause of action, a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of Constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a Constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff’s rights entrenched in Chapter 3. The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfill the purposes of constitutional law. Hence the necessity, so the argument concludes, for a specific and separate public law constitutional damages remedy...

The Court went on to add that;

[18] In essence the issues raised by the plaintiff turn on the proper construction of Section 7(4) (a) of the interim Constitution which entitles any (relevant) person “to apply to a competent court of law for appropriate relief, which may include a declaration of rights”. The interim Constitution is the supreme law. It confers rights on persons and tells them that they may look to the Courts for the protection and enforcement of such rights... [19] Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights...

As for the term “appropriate relief”, the Learned Judge stated thus;

[60] Notwithstanding these differences it seems to me that there is no reason in principle why “appropriate relief” should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed... [68] I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of Constitutional damages in order to vindicate the right would be appropriate for purposes of section 7(4). The sub-section provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff’s right even in the absence of an award of damages... For awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude...”

Kriegler J in his judgment in this case, then emphatically stated;

“... [94] Although imperfectly drafted, the core meaning of Section 7(4) (a) is clear: violations of chapter three rights must be remedied. The provision states in the context of chapter three that persons who have standing “shall be entitled to apply to a competent court of law for appropriate relief”. The provision does not provide relief “where appropriate” but “appropriate relief” per se. We did not need Section 7(4) (a) to tell us that infringements of Constitutional rights must be remedied. Section 4(1) makes unconstitutional conduct a nullity, even before courts have pronounced it so. When Courts give relief, they attempt to synchronise the real world with the ideal construct of a Constitutional world created in the image of Section 4(1). There is nothing surprising or unusual about this notion. It merely restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law. The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies ... [95] if constitutional rights have complementary remedies, the question is what these remedies should be.

He then continued as follows;

“I would suggest that the nature of a remedy is determined by its object. I agree with the contention advanced on behalf of the appellant that the object of remedies under Section 7(4) (a) differs from the object of a common law remedy... I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our Constitutional promise... [96] Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference”. It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution - its vindication - is a burden imposed not exclusively, but primarily on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a Constitutional

infringement, and strike effectively at its source...When something is appropriate it is “specially fitted or suitable”. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in Chapter three. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific.”

The learned Judge then concluded thus;

“The facts surrounding a violation of rights will determine what form of relief is appropriate. [98] I have argued that “appropriate relief” vindicates the Constitution and deters further violations of it. I see no reason in principle why common law and statutory remedies can never be suitable for this purpose...”

67. I entirely associate myself with the above holdings as correctly stating the approach and the principles that I should bear in my mind with regard to any award of damages that I may be inclined to grant in this particular case.

68. Turning back therefore to the Petition before me, I have already found that the Petitioner’s right to property under **Article 40** of the **Constitution** had been violated. One of the remedies in that regard as found in **Article 23(3)(c)** of the **Constitution** is an order for compensation including by an award of damages.

69. Has the claim for Kshs.1,078,184,000/- been proved? That claim is predicated upon the valuation Report by M/s. Syagga & Associates and which I have said is admissible. The Report however has three Valuations of the suit land viz;

- i. Kshs.1,078,184,000 as the open market value.
- ii. Kshs.850,000,000/- as the forced sale value.
- iii. Kshs.7,024,000/- as rental value per year.

70. In that context, it has been expressly admitted by the Respondent on behalf of the State, both by the letters from the then Minister for Lands and former Prime Minister, that the Petitioner is entitled to compensation as a matter of fact and by law; I have also shown that it is so entitled. Before me, I have no evidence that the valuation made by M/s. Syagga & Associates is inordinately high or unreasonable. The Respondent not only declined to respond to the specific issues of fact arising in this Petition but also failed to introduce a counter-valuation of the suit land.

71. In the circumstances, I can only agree with the Petitioner’s valuation and of the three valuations set out above, the forced sale valuation is reasonable in the circumstances and so I shall award the Petitioner Kshs.850,000,000/- as the value of the suit land. As for interest thereof, I see no justification for commercial bank rates to apply. Let the Court rates apply in the circumstances.

72. On the claim for lost coffee and eucalyptus trees, I am unable to make any award in that regard as I have seen no specific evidence pointing me to a specific sum in that regard.

73. Regarding the claim for loss of user of the suit land, the sum of Kshs.2,100,000/- per annum has been claimed. With respect and based on the principle that special damages must be specifically pleaded and proved, I saw no basis for the above claim and I will politely dismiss it.

74. The claim for Kshs.30,000,000/- for destroyed equipment, tools, animal and farm inputs was however specifically pleaded at paragraph 12 of the Petition and elsewhere above. I have also seen a letter dated 23rd May 1994 and an Inventory prepared by the Ministry of Agriculture on 24th April 1987 with regard thereto. I see no reason to deny the fact that those items existed and I take the explanation that supporting documents were destroyed during the invasion of the farm as

reasonable. In the circumstances, I will award the Kshs.30,000,000/- as prayed.

75.Regarding general damages for breach of the right to property under **Article 40** of the **Constitution**, I agree that by dispossessing the Petitioner of its land, some compensation is awardable under **Article 23(3)** of the **Constitution** which provides as follows;

“(1) ...

(2) ...

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a a declaration of rights;

(b an injunction;

(c a conservatory order;

(d a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e an order for compensation; and

(f an order of judicial review.”

76.In invoking the above Article of the Constitution and the authorities cited, above I am satisfied that an award of Ksh.3 Million is reasonable taking into account the fact that the full value of the land has been ordered to be paid to the Petitioner.

Conclusion

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

78.I watched Justice Lutta testifying in Court. A man whose judgments and fingerprints dot our Law Reports now looks dejected and broken. His advanced years show more than they should, all because what he worked for in his youth was stolen by conniving civilians with Government protection. No Kenyan should ever again be so treated and the State must draw lessons from this judgment.

79.Although I have declined to make any orders as are favourable to him directly as opposed to the Petitioner Company, no doubt he is deserving of more than this judgment will ever attempt to give him.

80.In the end, judgment must and is hereby ordered in favour of the Petitioner against the Respondent in the following terms;

“(1) A declaration that the Petitioner’s rights under Article 40 of the Constitution of Kenya 2010 relating to the protection of the right to ownership of property and prompt, full, fair and just compensation in the event of compulsory acquisition for public use or appropriation have been violated by the Kenya

State.

(2)

a. ***Special Damages under Article 23 (3) of the Constitution of Kenya 2010 of Kshs. 850,000,000/- (Eight Hundred and Fifty Million being compensation for the land L.R No 5712 and L.R No 6136 as at 17th September 2010 (date of valuation).***

(b) The value of the destroyed equipment, tools, animal's and farm inputs listed under paragraph 12 of the Petition at Kshs.30,000,000/-

3. ***A declaration that the Petitioner's rights under Article 3, 12 and 17 of the Universal Declaration of Human Rights 1948, applicable to Kenya by dint of Article 2 (5) and (6) of the Constitution of Kenya 2010 have been violated.***

4. ***General damages of Kshs.3,000,000(Three Million) under Article 23 (3) (e) of the Constitution of Kenya 2010 in favour of the Petitioner as against the State being compensation for the State's violation of the Petitioner's rights under Article 40 of the Constitution of Kenya and Articles 3, 12 and 17 of the Universal Declaration of Human Rights, 1948.***

5. ***Interest on all monetary awards, at Court rates from the date of judgment until payment in full."***

81.As for cost, while I award costs to the Petitioner as against the Respondent I do not agree that costs should be ordered for two Counsel as that issue should be canvassed before the Deputy Registrar as Taxing Master.

82.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Kariuki – Court clerk

Mr. Lubullelah for Petitioners

Mr. Maimbo for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE