



Gerishon v Commissioner of Lands & 4 others; County Government of Meru & 2 others (Interested Parties) (Environment & Land Petition 01 of 2017) [2022] KEELC 13725 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 01 OF 2017**

CK NZILI, J

OCTOBER 19, 2022

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE
22 AND 23 OF THE CONSTITUTION OF KENYA, 2010 FOR
ENFORCEMENT OF FUNDAMENTAL RIGHT AND FREEDOM 0020**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
40, 35 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 LAWS
OF KENYA (REPEALED) AND THE LAND REGISTRATION ACT
NO. 3 OF 2012; AND THE LAND ACT NO. 6 OF 2012 AND THE
LAND ACQUISITION ACT, CAP 295 LAWS OF KENYA (REPEALED)**

AND

**IN THE MATTER OF COMPULSORY ACQUISITION OF LAND
PARCEL NO. NTIMA/IGOKI/2963 AND IN THE MATTER OF
LAND PARCEL NO. MERU MUNICIPALITY BLOCK 11/298**

BETWEEN

JOHN NJOROGE GERISHON PETITIONER

AND

COMMISSIONER OF LANDS 1ST RESPONDENT

CYRUS NGANGA G NJIRU 2ND RESPONDENT

DISTRICT LAND REGISTRAR IMENTI NORTH 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT



ATTORNEY GENERAL 5TH RESPONDENT

AND

COUNTY GOVERNMENT OF MERU INTERESTED PARTY

MARETE MAINGI WA MUGAMBI INTERESTED PARTY

JOHN KAMAU INTERESTED PARTY

JUDGMENT

A. Pleadings

1. The petitioner in a petition dated February 9, 2017, describes himself as a resident of Meru County and the owner of LR No Ntima/Igoki/2963 (hereinafter the property) with effect from December 22, 1976, measuring approximately 0.14 ha, sued the respondents for unlawfully and unconstitutionally compulsorily acquiring his property vide Gazette Notice No 1263 of May 13, 1977, without notice or compensation and in violation of his right to fair administration, right to land ownership and for illegally compensating the 2nd respondent as if he was the real owner.
2. Further, the petitioner averred after the property was compulsorily acquired, it was allocated to the 1st interested party who leased it out to the 2nd interested party as LR Meru Municipality Block 11/298 and started fencing it.
3. The petitioner averred on January 26, 2016, the 3rd interested party invaded his property, started fencing it off claiming to have leased out the suit property from the 2nd interested party. He filed Meru CMCC No 49 of 2016 against the 2nd & 3rd interested parties who filed a defence based on Gazette Notice No 1263.
4. The petitioner averred the action of the 1st respondent in gazetting and compensating the 2nd respondent in respect of the suit property despite the fact it had control of the survey, registration and the record of titles rendered the said actions unlawful, unreasonable and unfair thereby breaching his right to fair administrative action which acts coupled with those of the interested parties have subjected him to indignity, disrespect, cruelty and treatment in a degrading manner contrary to his rights under Articles 28 & 29 of the Constitution, Articles 3, 12 and 17 of the Universal Declaration of Human Rights.
5. The petitioner prayed for; declaration that his rights under Articles 28, 29, 35, 40 and 47 of the Constitution and under Articles 3,12 and 17 of the Universal Declaration of Human Rights were violated by the Kenyan state; compensation for the value of his suit property as at the valuation date or at a rate the the court may determine and a further sum to 15%; general damages for the violation and in the alternative an order of certiorari quashing the acquisition of his land vide the Gazette No 1264, mandamus directing the 3rd respondent to rectify and re-do the relevant land register and or record or maps to indicate the petitioner as the owner of his land as it was prior to 1976, mandatory injunction directing the 2nd and 3rd respondents to vacate his land or be evicted; permanent injunction restraining the interested parties from interfering with his land and orders regarding the disposal of Meru CMC No 49 of 2016.
6. The petition was supported by an affidavit of John Njoroge Gerishon sworn on February 9, 2017 and attaching a copy of his title deed acquired on December 22, 1976, sketch map, demand letter dated



January 26, 2016, copy of plaint in Meru CMCC 49/16, defence by the 2nd & 3rd interested party, copy of gazette notice, certificate of lease and sketch map by the 2nd & 3rd interested parties and a copy of green card as annexures JNG 1-10 respectively. The petitioner also filed witnesses' statements dated May 21, 2018.

7. The 1st respondent opposed the petition through grounds of opposition dated November 29, 2017, stating that the petition was scandalous, frivolous, vexatious, time barred an abuse of the court process.
8. Further, the 1st respondent averred that there was no evidence that LR R Meru Municipality Block 11/298 and LR No Ntima/Igoki/2963 referred to one and the same parcel of land and lastly that there was evidence of the gazettement of relevant notices, being the notice of intention to acquire and a notice of inquiry which were sufficient notice of acquisition.
9. The 2nd respondent opposed the petition through a replying affidavit sworn by Cyrus Nganga G Njiru on July 17, 2017, stating that he bought LR No Ntima/Igoki/2963 from Maitima Njogu and became registered on December 18, 1976, took vacant possession and occupation thereafter. He denied being compensated out of any alleged compulsory acquisition except for his land, LR No Ntima/Igoki/2267.
10. The 2nd respondent confirmed that the gazette notice only referred to two of his Parcels No 1803 and 2267 even though out of the gazettement only one of his parcels was acquired and compensation paid. The 2nd respondent said even though the gazette notice indicated he was the owner of Parcel LR No 1363, he was never compensated for the same for the land belonged to the petitioner after he passed all his interests to him prior to gazettement. He attached the gazette notice and a copy of the award as annexure CN A '1' & '2' respectively and urged that he be discharged from the suit.
11. The 3rd & 5th respondents opposed the petition on account of the doctrine of laches; limitation of actions; that the acquisition was lawfully and procedurally done; the court was not the proper forum to hear the dispute under Article 67 (2) of the Constitution hence it should exercise constitutional restraint and avoidance since other remedies are available; the petition did not meet the threshold under the law; the burden of proof has not been discharged and the acts by the respondents were lawful.
12. The 1st interested party filed a replying affidavit sworn by Jeremiah Lenya Iringo on July 10, 2018 stating the petition lacked specifics on what rights had been violated; compulsory acquisition lay with the 4th respondent; the 1st interested party had not breached any of the alleged rights and that Parcel LR No Meru Municipality Block 11/298 was distinct from LR No Ntima/Igoki/2963.
13. Following directions and an order dated May 16, 2018 to hear the petition by way of viva voce evidence, the petitioner filed a paginated bundle of documents dated May 18, 2018.

B. Testimony

14. PW 1 adopted his witness statement dated May 21, 2018 as his evidence in chief and produced a title deed as P exh (1), sketch map as P exh (2), demand notice as P exh (3), court file in Meru Cm No 497/16 as P exh (4), gazette notice as P exh (5), green card as P exh (6), certificate of lease for Meru Municipality Block 11/298 as P exh (7), green card for LR No (298) as P exh (8), sketch map for LR No 298 as P exh (9), surveyors report mfi as Pe xh (10), letter to 4th respondents as P exh No (11) valuation report as Mfi (12) and a Gazette Notice No 1263 as P exh No (13).
15. PW 1 confirmed that he learned about the compulsory acquisition in 2016. He said he has always been on the subject property since 1977 and this was after someone came to fence his property claiming to be the owner. Even though PW 1 was seeking for compensation he told the court he did not bother



- to go and find out if his money was still available before filing the suit. He insisted that he was never paid any compensation.
16. PW 1 said he was aware parcels of land in the area were compulsorily acquired by the government for the town planning and expansion and were converted from freehold to leasehold titles. He said he did not complain because he has been having his original title deed all these years. Pw1 further insisted that the government never ordered him to vacate the land until the 2nd & 3rd interested parties came in on January 2016 and fenced part of his land. He said he was still using the remainder to date.
 17. PW 2 adopted her witness statements dated May 21, 2016 and confirmed she has been on the land since August 1979 undertaking farming activities with the consent of the petitioner. She confirmed the 2nd and 3rd interested parties attempted to enter the land in 2016. PW 3 produced as P exh 12, a valuation report for the suit property whose value was Kshs 70million and confirmed the land was wholly compulsorily acquired in 1977, for the 1st interested party's Meru municipality expansion based on the copy of records and search certificate attached to the report. He however clarified his report did not include plot NO Meru Municipality Block 11/298, its value and size.
 18. PW 3, a land surveyor produced P exh No (10) and confirmed that parcel No Ntima/Igoki/2963 and Meru Municipality Block II/298 were one and the same land on the ground location, based on the cadastral map and the part development plan. He clarified after the land was converted, the size was not the same so as to fit the standard of a municipality.
 19. The 1st interested party through Jeremiah Lenya M'Iringo adopted his affidavit in reply dated July 10, 2018 as his evidence in chief. He confirmed that LR No Meru Municipality Block 11/298 was acquired in 1977 in favour of the then Municipal Council of Meru now succeeded by the 1st interested party by the Commissioner of Lands now succeeded by the 4th respondent. He denied that there was infringement of the petitioner's rights by the 1st interested party.
 20. The 1st interested party told the court that upon the land being acquired it was given to the County Council for urban planning, conversion and for re-allocation purposes.
 21. On account of allocation the 1st interested party said the land was initially allocated to Sebastian Murungi and subsequently transferred to other parties and currently was in the name of the 2nd interested party. The witness confirmed once the land was allocated, a party was at liberty to dispose it to third parties upon request for consent from the head lessor.
 22. The 1st interested party clarified that it was not true the beneficiary of the land, the County Council was the one supposed to compensate the petitioner. In his view, there was nothing the petitioner had produced to show the process of the compulsory acquisition was improper or irregular.
 23. The 2nd respondent adopted his replying affidavit dated July 17, 2017 as his evidence in chief and produced a Gazette Notice No 1263 as D exh NO (1), notice of inquiry as D exh (2), and a copy of the green card as D exh (3). He confirmed he sold the land to the petitioner. Therefore, he was not compensated by the government after it was compulsorily acquired but was compensated for only LR No 2267.
 24. The 2nd respondent denied being summoned anywhere or receiving any letter to the effect that the petitioner's land was compulsorily acquired or for that matter seeking to pay him any compensation other than D exh (2) which only showed payments for LR No 2267. DW 1 clarified that he transferred the land to the petitioner who was his brother on December 22, 1976 and was certain that he never received any letter informing him that his land was due for compulsory acquisition or seeking to compensate him.



25. The 2nd respondent, also confirmed that the petitioner had been occupying the land throughout and a woman tenant was using the land until the interested parties invaded it in 2016.
26. In his view, the government was the one keeping the land records and knew the petitioner was the owner at the time of the acquisition and should have compensated his brother.
27. The 2nd interested party adopted his replying affidavit sworn on May 3, 2017 as his evidence in chief and stated he bought the land in 2011 from Imenti Millers Ltd for Kshs 5 million, took vacant possession by fencing off the land which was not occupied or developed at the time. He denied that the petitioner had interest on the land given his name did not feature in the green card. The 2nd interested party said he had put up a warehouse on the suit property. He told the court he was a third owner of the land after the title was converted from freehold to leasehold upon compulsory acquisition by the government. However, the witness could not confirm if the previous owner had been compensated by the government.

C. Written Submissions

28. With leave of court parties filed written submissions dated May 19, 2022, the 2nd respondent dated May 26, 2022, 3rd and 5th respondents dated July 6, 2022, and 1st interested party dated July 6, 2022.
29. The petitioner submitted he had pleaded the petition within the four corners of the law and case law of [*Anarita Karimi Njeru vs Republic \(1979\) eKLR*](#) as to the rights infringed, facts and prayers sought. The also petitioner submitted that whether or not the defunct County Council of Meru was responsible for the compulsory acquisition was immaterial so long as he had cited the violations with precision. Reliance was placed on [*Kipsiwo Community Self Help Group vs AG & 6 others \(2013\) eKLR*](#).
30. Regarding the violation the petitioner, submitted that his land was taken contrary to Article 40 (3) of the [*Constitution*](#), without compensation which fact had not been denied by the respondents, safe to say they compensated the 2nd respondent.
31. The petitioner further submitted that under Sections 3 of the Land Acquisition Act and 5 of the Government [*Land Act*](#) (repealed) the registered owner had to be notified before any compulsory acquisition could occur.
32. Further, the petitioner submitted that land acquired should be for public purpose or in public interest, but in this instance his land was allegedly taken and given out to the 1st interested party and later on transferred to the 2nd and 3rd interested parties contrary to the [*Constitution*](#). Reliance was placed on [*AG vs Zinj Ltd \(2021\) eKLR*](#).
33. On the right to fair administrative action, the petitioner submitted that he was never served with the notice to acquire or inquiry from the respondents and only came to know of the same in 2016, which notice was wrongly listing his land as owned by the 2nd respondent. It was submitted the notice of inquiry contravened Section 9 of the Land Acquisition Act and Section 75 of the retired Constitution for the notice of inquiry could not have happened earlier than 30 days after the publication of the notice.
34. The petitioner submitted the respondents had not adduced evidence to the contrary on whether the notice was served on him and Section 33 (c) of the Land Acquisition Act followed before the compulsory acquisition and any compensation was paid
35. On the question of rights to dignity, information, the petitioner submitted he was not notified of the process in 1977, the leasing in 1991 by the 1st interested party to the 2nd interested party. Further, the



- petitioner submitted that even though the acquisition was done under the retired Constitution any rights and obligations thereunder under Schedule (Vi) of the Constitution of Kenya 2010 were carried over.
36. As to occupation, the petitioner submitted that the respondents and interested parties had not denied the occupation until 2016.
 37. Reliance was placed on Muthatari Ltd vs Commisisoner of Lands and 5 others (2013) eKLR on non-service of notice under Section 33 of the Land Acquisition Act, and Attorney General vs Zinji Ltd (supra) on grant of a lease without compensation.
 38. On the issue of a time barred claim the petitioner relies on Vekariya Investments Ltd vs Kenya Airports Authority & 2 others (2014) eKLR. The petitioner submitted his claim could not be time barred for he has been in occupation, he holds the original title deed which has not been cancelled and no notice was made to take up his land after the alleged take over by the 1st interested party until 2016 and lastly that compulsory acquisition was not subject to Section 7 of the Limitations of Actions Act, Land Acquisition Act and the Current Land Acts. Reliance was placed on Pius Kibet Tott vs Uasin Gishu County Government and 9 others (2018) eKLR on the proposition that a violation of right has no time limitation.
 39. On compensation the petitioner submitted that based on the valuation report which had not been challenged he was entitled to this relief. Reliance is placed on KPLC vs Amburusina Makena Kiulio (2020) eKLR & AG vs Zinji Ltd (supra) & Vekariya Investment (supra). The court was asked to grant Kshs 10,000,000/= as general damages since the 2nd interested party remains a trespasser.
 40. The 2nd respondent submitted that after selling and transferring the land to the petitioner in 1976, nothing was claimed on the ground and if there was any compulsory acquisition, the petitioner was never compensated by the government and the alleged compensation to him would not have been possible since he was not the registered owner, hence the gazette notice was false, mistaken and impossible to list him as the beneficiary. He therefore supported the petition but urged this claim against him be rejected.
 41. The 3rd & 5th respondents submitted that the alleged unlawful conduct against them based on a cause of action extinguished by the doctrine of laches was wrong, unreasonable, negligent and warranting a presumption that the petitioner either abandoned his rights or declined to assert them so that the claim became stale. Reliance was placed on Republic vs Philippines Court of Appeal GR No 11611 January 21 1999 301 SCRA 366, 378 – 79,
 42. It was submitted the claim was an afterthought, brought by a party who slept on his rights, acquiesced to the alleged claim for thirty years and had not given a reasonable explanation for the long delay to an extent of prejudicing the respondents since most of their witness were either dead or had retired from the public service. Reliance was placed on Republic vs AG & 3 others Exparte Kamlesh Mansukhlal Damji Pattni (2013) eKLR.
 43. The 3rd & 5th respondents submitted that as a result of the delay there had been institutional; and structural change in the administration and management of land in Kenya hence the claim would prejudice them because witnesses had either died, retired or could not simply be traced due to dynamics of life.
 44. Further, it was submitted that the petition came by way of a constitutional petition since he knew filing otherwise would be caught by limitation.



45. Relying on *Durity vs AG (2002) KPC 20*, the 3rd & 5th respondents submitted that the court should consider if the delay amounted to an abuse of the court process to and the reasoning in *Johnstone Ogechi vs the National Police Service (2017) eKLR Ltd Co [Peter Ngari Karume & others vs AG \(2009\) eKLR](#)*, that Article 259 (8) of the [Constitution](#) and Section 7 of the Limitations of Actions Act that 12 years lapsed in 1989.
46. Relying on *Kimani Ruchine & another vs Swift Rutherford & Co Ltd and another (1980) KLR 10*, the 3rd and 5th respondents submitted even though the period of limitation started running afresh whenever there were changes in the title, there was no application for leave to extend time made as was held in *Bridges vs Mees (1957) ch 475*. Further the 3rd & 5th respondents submitted relying on *Rodgers Mwema Nzioka vs AG & others (2006) eKLR* that a party who had failed to pursue a statutory remedy for compensation and invoked the [Constitution](#) would be said to abuse the court process and trivialize the constitutional jurisdiction.
47. Relying on *Bosire Ogero vs Royal Media Services (2015) eKLR*, the 3rd & 5th respondents submitted that the issue of limitation of time went to the jurisdiction of court vide *Owners of The Motor Vessel Lillian 'S' vs Caltex oii (K) Ltd (1989) KLR 1*.
48. On the procedures under the Land Acquisition Act, the 3rd and 5th respondents submitted that Sections 6 and 9 thereof required a notice to the affected parties which was complied with by the publication of Gazette Notice No 1263 of May 13, 1977 and later on issued a notice of inquiry which was confirmed by the evidence of the 2nd respondent.
49. Reliance was placed on *Patrick Musimba vs NLC & 4 others (2016) eKLR*, *Adan Abdirahman Hassan & 2 others vs the Registrar of titles, Ministry of Lands and another (2013) eKLR* on the proposition that after the compulsory acquisition, the petitioners title deed was not fool proof, was taken for public purpose and there was an overriding interest under Section 25 (1) of the [Land Registration Act](#) as held in *Cycad Properties Ltd vs AG & others (2013) eKLR*, that Public interest supersedes private claims of an individual as held in *Kenya guard & Allied Works Union Vs Security Guard & 38 Others and Kenya Bus Services Ltd And 2 Others Vs AG*.
50. It was submitted by the 3rd & 5th respondents that the issue fell under the 4th respondent if it was an historical injustice and not this court under Article 67 (2) of the [Constitution](#) as held in *Ledidi Ole Tanta and others vs AG and 2 others (2015) eKLR*.
51. On the prayer for mandamus, the 3rd and 5th respondent urged the court to be hesitant to grant such an order because of the existence of alternative avenues including filing a complaint with the 4th respondent. Reliance was placed on *Regina vs Dudsbeath Exparte Meredith (1950) 2 ALL ER 741*, *Lucy Mirigi & 55 others vs Minister for Land & 4 others (2011) eKLR*.
52. On the issue of lack of precision in pleadings, the 3rd and 5th respondents urged the court to find the same lacking contrary to *Anarita Karimi Njeru vs Republic (1979) 1KLR 54*, *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*, *Kiambu County Tenants Welfare Association vs AG & another (2017) eKLR*, *David Ramogi & 4 others vs CS ministry of Energy and petroleum and 7 others (2017) eKLR*.
53. The 3rd & 5th respondents urged the court to find the petitioner had failed the burden of proof standards under Sections 107 of the [Evidence Act](#) as held in *Raila Odinga & another vs IEBC & 2 others (2017) eKLR* and on the presumption of regularity *Wareham & 2 others t/a Kenya Post Office Savings Bank (2004) eKLR 91*, *Akashambatwa Lewanika & 2 others vs Fredrick Chiluba (1999) 1 LRC*, *Buhari vs Obasanjo (2005) CLR 7K*.



54. On the issue of damages, the 3rd & 5th respondents submitted that there must be certainty and particularity on pleadings and proof of damages. It was submitted that the valuation report produced by the petitioner lacked material particulars, on the manner of arriving at the sum, reasons in support of the figures, expertise and qualifications.
55. On whether the actions of the 3rd respondent were lawful the court was referred to Sections 7 & 12 of the [Land Registration Act](#), which defines the statutory duties of a land registrar hence it was irregular to sue the 3rd respondent who had no role or knowledge as to the land acquisition and he merely issued the certificate of title to the proprietor and recorded the same in line with the law.
56. Relying on Prof Sir William Wade; Administrative law, the 3rd & 5th respondent submitted that in line with the law a private person who had absolute power to make a will and dispose his property in law but a public authority must act reasonably, in good faith, lawfully and in public interest. Therefore, the land registrar acted within the law and urged the court to do justice and prevent an abuse of the court process guided by *Stephen Somek Takwenyi & another vs David Mbutia Githare & others (2009) eKLR*.
57. The 1st interested party submitted the petitioner failed to prove any breach of right on its part, more so since under Cap 284, the Land Acquisition Act and Part VIII of the [Land Act](#), its role in land acquisition did not exist and any liability for acquisition rested on the 4th respondent under Section 31 of the [National Land Commission Act](#) as read together with the [Land Act](#) 2012. Reliance was placed on Muthatani Ltd (supra).
58. On the burden of proof of if the two parcels referred to one and same land, the court was urged to find the evidence of PW 4 produced by an unqualified expert, lacking vital documents such as qualifications, certificate and valid license as well as the Index Map on the locality of the land. The court was asked to find the evidence offensive of Section 48 of the [Evidence Act](#).
59. On the value of the land the court was urged to find a figure of Kshs 70,000/= lacking quantifiable remarks, a mere opinion not binding to the court since the report lacked a stamp duty, declaration on land agreement was not based on the government valuation index for market value comparison on land within the area and or previous value records.
60. Further, the court was urged to take notice of the white card produced as P exh no 7 showing the land was bought at Kshs 5 million on November 14, 2011.
61. The 2nd & 3rd interested parties submitted they were an innocent purchaser whose title deed was protected by Sections 25 & 26 of the [Land Registration Act](#) and no evidence had been produced to the contrary that they were involved in any fraud, illegality and or impropriety during the compulsory acquisition in 1977 or at the time of purchase in 2011 hence the reliefs sought against them should not issue for lack of evidence in support.
62. The issues for the court's determination are:
 - i. Whether the petition has met the threshold of a constitutional petition.
 - ii. If the petitioner has raised a constitutional question.
 - iii. If the petition is time barred.
 - iv. If the petition exhausted the internal mechanism available under the law.
 - v. If the petitioner has pleaded and proved any breach of his constitutional rights.



- vi. Whether the petitioner is entitled to the reliefs sought.
- vii. What is the order as to costs.
63. A party moving a court through a constitutional petition is required under the Constitution of Kenya {Protection of Fundamental Rights and Freedoms} (Practice and Procedures Rules 2013) to disclose his capacity in bringing the petition, set out specific rights and freedoms infringed, threatened or breached, particulars of breach or threats, nature of injuries or damage, pending or previous civil or criminal proceedings over the matter and the reliefs sought.
64. While determining the scope of the Rules the court in *Mumo Matemu vs Trusted* (supra) emphasized the need for precision of legal and factual claims so as to define the dispute to be decided by the court. The court emphasized the need for parties and the court to know the issues in controversy through pleadings which are the tenets of substantive justice as they give the other party a fair notice; diminish expense and delay.
65. In the petition before the court dated February 9, 2017, the petitioner has set out the descriptive parts, facts relied upon, particulars of violations of the rights to access to information under Article 35, Fair Administrative Action under Article 47, dignity under Article 28 and 29, right to property under Article 40 and has set out the reliefs sought. The petition is also supported by affidavits, witness statements and list of documents.
66. In my considered view the petition meets the basic minimum requirements under the law which the respondents and the interested parties have been able to respond to.
67. Coming to the second issue, a constitutional question has been said to one whose resolution falls within the Constitution and not a statute. In *Gabriel Mutava vs KPA* (2016) the court held where there exists other sufficient and adequate avenues to resolve a dispute, party ought not to trivialize the jurisdiction of a constitutional court by bringing actions that could very well and effectively be dealt with in that other forum. The court cited with approval *Harrikson vs AG (1980) AC 265* where the court held a constitutional court should not be misused as a general substitute for normal proceedings and *Daniel N Mugendi vs Kenyatta University & 3 others (2013) eKLR* and *Speaker of National Assembly vs James Njenga Karume (1992) eKLR* on the strict compliance with a particular grievance redress mechanism set out by the statute. The court said invoking a constitutional route must be on more serious issues than the violation of statutory or contractual rights, but not to turn a Constitution into a throughfare for resolution of every kind of common grievance.
68. The court said that a party may however sue under the Constitution only if there is an alternative remedy and or other mechanism for resolution of the dispute may be inadequate and that a constitutional litigation was a serious matter that should not be sacrificed on the alter of all manner of frivolous litigation christened constitutional when they were not and could otherwise be legally handled in other forums.
69. In *CCK vs Royal Media Services Ltd (2014) eKLR*, the Supreme Court said that a court will not determine a constitutional issue when a matter can properly be decided on another basis. The court reiterated that the first point of call should always be the suitable statutory under pinned forum for the resolution of such disputes.
70. Applying the foregoing principles, the respondents take the view that the dispute before the court is both time barred, premature and ought to have been lodged under Article 67 (2) of the Constitution with the 4th respondent before resorting to court.



71. On the other hand, the petitioner stated and pleads he was not notified under Sections 3 & 7 of the Land Acquisition Act as read together with Section 75 of the retired Constitution and only realized about the compulsory acquisition in 2016 when he sued the 2nd and 3rd interested parties after they trespassed into his land. Further he pleaded there was no notice to take over the land by the government after the compulsory acquisition, his title deed was not cancelled and or revoked and more importantly, his land was taken without compensation hence his claim is not time barred.
72. The 4th respondent by grounds of opposition dated November 24, 2017 opposed the petition for being scandalous, frivolous, vexatious, an abuse of the court process, denied there was any evidence that the two-parcels refer to the same land, and urged the court to find the claims statute boarded the notice of inquiry having been sufficiently issued.
73. The *Chief Land Registrar and 4 others vs Nathan Tirop Koech and 4 others (2018)*, the Court of Appeal while dealing with an alleged acquisition, seizure and subsequent subdivision of the respondent's land without due process under the retired Constitution made definite findings on the doctrine of laches, delay and acquiescence of over 35 years. Citing with approval *Kariuki Dominic Kiboi vs AG (2017) eKLR*, *Aron Amolo vs Ag (2010) eKLR* it is clearly stated there was no time limit for filing a constitutional petition as the *Constitution* has not expressly state so and therefore *Limitation of Actions Act* (Cap 22) was inapplicable to a constitutional petition and that the only limitation was Article 24 of the *Constitution*. The court said the only caveat was observed in *Johnstone Ogechi vs the National Police Service (2017) eKLR*.
74. Regarding estoppel and acquiescence, the court held there can be no estoppel against the *Constitution* was the paramount law of the land and that one could neither acquiesce nor waive the fundamental rights and freedoms which were as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver could not unequivocally be applied as a bar.
75. In this matter, the petitioner explained the circumstances leading to the delay. He continued to occupy the land until 2016 when he was partially evicted by the 2nd and 3rd interested parties. The petitioner produced an original title deed before the court, which the respondents and the 1st interested party did not say was invalid or cancelled.
76. There was no evidence by the respondents as well as the 1st interested party if the petitioner was formally notified of the compulsory acquisition and requested to surrender his original title deed for cancellation. He was also not asked to hand over vacant possession. In *Peter Ngari Karume (supra)* Nyamu J held in absence of an explanation for the inordinate delay of 24 years, the petition was an abuse of the court process. In *Chief Land Registrar (supra)* the court guided by Articles 20 & 159 (8) of the *Constitution* held it was a mandatory obligation on the state and all state organs to respect fundamental rights and freedoms and a citizen could not by his act or conduct relieve the state or state organs such an obligation to respect the bill of rights.
77. The court found property and land rights were the foundation of the socio-economic relationship in Kenya and no individuals could barter away and acquiesce to the violation of his rights.
78. Coming to the question of an historical injustice and the National Land Commission as the first port of call under Article 67 2 (e) of the *Constitution*, Section 15 (2) of the *National Land Commission Act* and Section 38 of The *Land Act*, the court in *Nelson Tirop (supra)* held; there was nothing in the *Constitution* or the *National Land Commission Act* ousting the jurisdiction of the court to entertain a petition on historical injustice particularly under the retired Constitution Section 75 and that in any event a respondent could not dictate a party on how to frame its claim.



79. In this petition the petitioners, as in *Tirop* matter has not pleaded any historical injustice. In my considered view and guided by the binding decisions of superior courts, I find the petition raises a constitutional controversy as to the implications of compulsory acquisition of land without compensation or notification. Similarly, I make the finding that the claim are not time barred nor can the doctrine of constitutional avoidance be invoked.
80. On issues number (v) & (vi), other than the grounds of opposition and the written submissions by the 3rd, 4th and 5th respondents, no replying affidavits and an iota of evidence was tendered to counter the assertions of facts by the petitioner.
81. In *Wareham* (*supra*) the court held cases are tried and determined on the basis of pleadings made and the issues of fact or law framed by the parties or court on the basis of pleadings, with the burden of proof being on he who asserts and if evidence does not support the fact pleaded, the party with the burden of proof should fail.
82. In this petition the petitioner pleaded lack of information of the notice to compulsory acquire his land, notice of inquiry, lack of compensation, unfair treatment to his dignity contrary to Articles 28, 29, 35, 40 and 47 of the *Constitution*.
83. The 3rd, 4th & 5th Respondents the other hand stated there was a notice to compulsory acquisition and inquiry which was adequate, sufficient and that the compensation was paid to the 2nd respondent.
84. On his part the petitioner pleaded and produced his title deed, sketch map, demand notice, lower court file, Gazette Notice No 1264, green card, certificate of lease, green card sketch map, letter to the 4th respondent, valuation report and Gazette Notice No 1263 as P exh no's 1-13 respectively.
85. The 2nd respondent also testified in support of the petition and confirmed he actually received the gazette notices but was only compensated for his property and could not have been paid for the petitioner's parcel of land since he had already transferred the same to his brother in 1976 and that the respondents knew of the new owner as at 1977 for they hold the records of all the registered owners.
86. The manner in which a notice to compulsory acquisition is issued was governed by Sections 3, 6 & 9 of the land Acquisition Act as read together with Section 75 of the retired Constitution. Section 9 (1) (b) thereof required service of the notice on every person with an interest on the intended land. Timelines were also required to be adhered to. The respondents submitted that the notice was sufficient. However, there was no evidence of service upon the petitioner in person over and above the notice tendered in support of such assertion. The respondents invited the court to invoke the doctrine of regularity unless petitioner proves otherwise. The petitioner's copy of the records was clear he was the registered owner at the time the notice was issued.
87. Under Section 97 (1) of the *Evidence Act*, any terms of a grant or any other disposition of property reduced into writing in form of a document is to be taken as proof of such grant.
88. In my view therefore, the notice of compulsory acquisition was contrary to the entry of records in so far as it misdescribed the registered owner of the suit land.
89. In *Mathatani* (*Supra*) the court held that there was no evidence of service by any other method of service as provided under Section 33 (2) of the Land Acquisition Act and that the burden of proof fell on the Commissioner of Lands now National Land Commission to prove compliance with the section.
90. The court also held the gazette notice had failed to identify the petitioner as the registered owner as required of Sections 9 (1) of the Land Acquisition Act.



91. The court cited with approval the *Commissioner of Lands and Another Vs Coastal Aquaculture Ltd CA 256/96* where the court held unless a notice reflected the necessary ingredients of the certificate, the person interested in the land had no means of knowing.
92. In this petition, the 3rd, 4th and 5th respondents have failed to discharge the burden of proof on compliance with the law and in particular, on who exactly was paid for the land if not the petitioner, given the glaring anomalies in the notice as to the correct owner of the land at the point of compulsory acquisition.
93. The entry on the copy of records is against the name of the petitioner and not the 2nd respondent. It could not therefore be possible for the 4th respondent to get the gazette notice wrong and purport to proceed to make an entry against the name of the interested parties as the new registered owners without notifying him and or compensating him for his land .
94. In *Republic vs Commissioner of Lands and Another exparte Shabid Perves Butt and another (2013) eKLR*, the issue was whether the notice to taking possession and vesting was valid and precise. Citing with approval Coastal Aquaculture (supra) where the court held the *Constitution* intended that compulsory acquisition be treated with caution and the seriousness it deserves by complying with the law and the *Constitution*, the court granted orders of certiorari and prohibition.
95. In *Elizabeth Wambui Githinji & 29 others vs KURA 7 4 others (2019) eKLR*, the issues were on lack of inquiry, compensation and taking possession and the surrender of lands under Sections 9, 19 & 20 of the Land Acquisition Act.
96. The court held that the respondent had failed to demonstrate that the requisite notices were served under Sections 19 (1), 20 after the final survey under Section 17 thereof, before the government took possession of the land and final survey maps signed as per Sections 30 and 32 of the *Survey Act*.
97. The court held, citing with approval *Virenda Ramji Gudka & 3 others vs AG (2014) eKLR*, *Shalein Masood Mughal vs AG & 5 others (2014) eKLR*, *Mutunga Angaine vs M'Marete M'Muronga* that critical steps precedent to compulsory acquisition of the properties in question were not strictly followed or completed before the persons were deprived of their properties.
98. The court citing with approval *Chemey Investment Ltd vs AG & 2 others (2018) eKLR* and *Moses Lutomia Washiali vs Zephania Ngaira & another (2018) eKLR*, held a bonafide purchaser will not be bound by any interests on which he or she does not have actual constructive or filed notice.
99. In this petition, the petitioner has testified he was not notified of the elementary processes until his land was taken without compensation and title reissued to other persons is without due process.
100. Unfortunately, and regrettably the said title deed was extinguished upon the entry of compulsory notice in 1977. His title deed by operation of law was invalidated and the land later on changed from freehold to leasehold. None of the respondents and the interested parties have explained why he was not notified of the changes and a notice to take vacant possession issued.
101. In my considered view, there cannot be any justification for a party whose right to fair hearing, Fair Administrative Action and right to land to be violated without due process.
102. The 4th respondent as the successor to the Commissioner for Lands failed to attend court and ventilate any response to the petition. Failure to do so made the grounds of opposition remain mere statements of facts unsupported by evidence. The same situation obtained with the 3rd & 5th respondents. They did not file any replying affidavits to rebut the petition.



103. Submissions however powerful and convincing cannot replace evidence. See [Daniel Toroitich Arap Moi vs Stephen Murithi \(2014\) eKLR](#).
104. In [Daniel Kibet Mutai and 9 others vs AG \(2019\) eKLR](#), the court citing with approval [Philip Tirop Kitur vs AG \(2018\) eKLR](#), [Peter vs Nyakundi and 68 others vs Principal Secretary state department of planning, ministry of devolution and planning and another \(2016\) eKLR](#) held that an affidavit is sworn evidence which occupies a higher pedestal than grounds of opposition that are basically issues of law. The court said by mere fact of the affidavit not being controverted, an assumption existed that what was averred was factual evidence, which must also be tested on its weight and probative value.
105. The court proceeded to find affidavit evidence as occupying the same place as any other evidence that was admissible in a court of law. Rule 20 of the Mutunga Rules allows constitutional petitions to be determined through affidavit evidence or oral evidence.
106. In this petition, parties agreed to proceed with this matter by way of oral evidence. Even after the respondents were granted an opportunity to call oral evidence they did not avail such witnesses or file documents to justify their grounds of opposition.
107. The 3rd and 5th respondents cross examined the petitioner and the 2nd respondent who were emphatic that there had been no compensation paid and a proper notification of the compulsory acquisition, notice of inquiry, the recall of the petitioner's original title for cancellation and notice to vacate or hand over the land.
108. It was the 3rd respondent, whose mandate the cancellation and registration of the title deed falls. It owed the petitioner a legal duty to notify him of the changes. It cannot therefore be true its role was merely cosmetic. The petitioner's evidence both in sworn affidavit and in open court remained unshaken or unchallenged, cogent, clear, sufficient and tangible.
109. The 3rd and 5th respondents have submitted the claim became stale and were prejudiced for their witnesses might be alive, available and or traceable.
110. In this petition the 3rd and 5th respondents never sought to produce any documentation relating to the suitland through secondary evidence or by witnesses other than the makers of those documents. No specific requests was made that the original inquiry file on payments could not be traced and or the makers of the documents were unavailable. There were no request made for the documents to be traced or availed from the Kenya National Archives.
111. The 3rd – 5th respondents as state organs have a higher responsibility of protecting the rights of the petitioner especially on land hence the failure to respond to the petition by way of documents left the court with no option but to find the petitioners facts as proved, admitted and uncontroverted.
112. As regards the 1st interested party again it was the beneficiary of the suitland. Being the custodian of the documents relating to the manner in which the land came to bear different parcel numbers and its re-allocation to individuals. The petitioner was consistent that if the land was taken from him for public interest, private interest of the 2nd & 3rd interested parties could not supersede his interests.
113. The evidence by Jeremy Leenya was inconsistent and unsupported by documents on the manner of acquisition, subsequent minutes of reallocation and notices to the affected parties. The Petitioner insisted the land on the ground the same one which the petitioner has held a title deed and which has now been given a new parcel number by the 1st interested party.



114. Therefore, it was the 1st interested party who should have produced what was in its custody to confirm if elementary procedures under the [Survey Act](#) and the [Land Act](#) were followed, beacons effected and the final survey done in tandem with the respondents and the 1st interested party under the said laws.
115. In absence of the production of the elementary procedures and documentation, the inference is that the evidence would have been prejudicial to the respondents and the 1st interested party.
116. The respondents and the interested parties cannot therefore benefit from irregularities and illegalities in their acts of omission and commission to the detriment of the petitioner. See Pius Kobett Tott (supra).
117. The petitioner has prayed for inter alia compensation for the value of LR No Ntima/Igoki/2963 as at the valuation date or as the court may determine, a further sum of 15% of sum awarded in clause Number 3, general damages for violation and in the alternative orders of certiorari to quash the acquisition; mandamus to the 1st respondent to rectify and re-do the record and indicate the petitioner as owner of LR No Ntima/Igoki/2963, vacant possession or eviction against the 2nd and 3rd interested parties from interfering with LR NO 2963 and directions as to the disposal of the lower court suit.
118. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. It is not in dispute that the petitioner pleaded that LR No Ntima/Igoki/2963 was allegedly compulsorily acquired on May 17, 1977 by the 4th respondent, then the Commissioner of Lands in favour of the 1st interested party who proceeded to lease the land as Meru Municipality Block II/298 to the 2nd and 3rd interested parties.
119. The petitioner produced a copy of the records showing indeed the entries to that effect. There is nowhere in the pleadings the petitioner has stated the value of the said land before the acquisition and at the time the 2nd & 3rd interested parties started interfering with his quiet possession on January 26, 2016.
120. Similarly, the petitioner did not plead any particulars of loss and damages and in particular the amount of compensation he would have been entitled to at the time the land was taken up by the 4th respondent and acquired by the 2nd and 3rd interested parties. The petitioner did not also plead the nature of benefits or mesne profits he was deriving from the suit land including the nature of his developments thereon.
121. Even through the petitioner called evidence by way of valuation report dated August 22, 2018 as MF1 12 the petition was never amended to incorporate the said valuation report. It is trite law that special damages must be pleaded and strictly proved. It was not enough for the petitioner to produce the valuation report. He ought to have pleaded specifically to the nature of loss, injury and damages. See [Zachariah Waweru Thumbi vs Samuel Njoroge \(2006\) eKLR](#).
122. The petitioner has not laid the basis for this court to grant him the said amount. Further, it is admitted that LR No 2963 was compulsorily acquired by the 4th respondent in favour of the 1st interested party. The petitioner has alleged he was denied access to the information. There is nowhere the petitioner has pleaded or proved that upon discovery in 2016, he sought for all the relevant information from the respondents and was denied such information from relating to how much the land at the time of acquisition had been valued at and the government rates for compensation at the time to form a basis of the value of the property as at the time it was transferred and registered in favour of the 2nd and 3rd interested parties.
123. It is trite law that once the property was compulsory acquired and converted from freehold to leasehold, it ceased to exist at least in the nature of freehold title.



124. In my considered view, once the petitioner discovered the developments he ought to have invoked the [Access to Information Act](#).
125. In *AG vs Zinji Ltd (2021) eKLR* the Court of Appeal held it is trite law that any injury or loss suffered by a person out of tort, breach of contract or violation of rights attracts redress in a court of law which may include damages, whose extent and quantum has to be determined by the court and that under Article 23 (3) (e) of the [Constitution](#) it includes compensation.
126. In this matter the petitioner ought to have pleaded and proved the rights violated, extent of violation and the gravity of the injury caused. In *Zinji case supra* the court stated the main basis upon which special damages may be granted for the deprivation of property was the market value of the said property and that in general damages, the court of law is guided by the circumstances of each case.
127. The petitioner herein has said he has all along been in occupation of the suit land which he allowed PW 2 to utilize. The nature of profits or income he derived from the land was not been pleaded and or proved.
128. Even though the petitioner has produced a valuation report the same is lacking vital information including the basis of arriving at the figure of Kshs 70,000,000/=. The maker of the documents during cross examination admitted to have omitted vital particulars and credentials to the report as to his qualification and competence to make the report.
129. Again, it is not lost to this court that the title deed held by the petitioner technically and legally stands extinguished by virtue of compulsory acquisition. The 2nd & 3rd interested parties are now legally holding a certificate of lease but the petitioner did not plead any claim against them on fraud, illegality and or corrupt scheme in obtaining the certificate of lease.
130. The 2nd interested party has pleaded and proved that he was a third owner of the land. Consequently, my finding is that no evidence has been produced that he was a party to the compulsory acquisition. See *Peterson Kiengo & 2 others vs Kariuki Thuo (2012) eKLR*.
131. In [*Gitwany investment Ltd vs Tajmal Ltd & 3 others \(2006\) eKLR*](#) the commissioner of lands was ordered to pay damages to the 2nd title holder for incompetence and negligence in the issuance of a title deed without cancelling the prior title.
132. In *Vekariya investment ltd (supra)* the court found the petitioners title had been issued without regard to the respondent rights and given the proceedings were not instituted for compensation for issuing a fake title the court declined to issue the prayers sought.
133. In *Peter Kibet Tott (supra)*, the petitioners were holding an un surrendered original title despite conversion of their land. The court declared the petitioner had proprietary interest on the and the compulsory acquisition was unconstitutional. Despite the unconstitutionality of the process the court held it was in the interest of justice to order the petitioner to be compensated with a figure of Kshs 4.5 billion payable by the successor in title.
134. In this petition the petitioner asked the court to grant Kshs 10,000,000/= for general damages for infringement of rights, Kshs 10,000,000/= for trespass and Kshs 71,790,000/= for the land and valuation report given there was no rival report to disapprove or rebut the valuation report by the respondents and interested parties as held in *KPLC vs Abrusina Makena (supra)*.
135. In *Zinji Ltd (supra)* the Court of Appeal held an assessment of compensation should be in line with the Land Acquisition Act and cited with approval *Dhalay vs Republic (1995-1998) EA 29* where it was held an expert properly qualified in his field gives an opinion and reasons upon which his opinion



is based and a court in absence of a rival opinion if satisfied on good and cogent grounds and if not biased is under a duty to reject.

136. As indicated above the valuation report herein was prepared by a person lacking vital information and credentials. As held in *Kamiro African Ltd vs Kubia & another (1987) KLR 30*, the report seemed generalized and based on assumption. The valuer did not factor in that land was sold to the 2nd & 3rd interested parties in 2011 at Kshs 5,000,000/= which was the basis of the government valuer in assessing the stamp duty. The valuer noted some developments on the land but did not assess them.
137. In the premises and for the above reasons, I find the petitioner has proved that the compulsory acquisition of LR No Ntima/Igoki/2963 by the predecessor of the 4th respondent alongside the 3rd & 4th respondents in favour of the predecessor of the 1st interested party was unconstitutional. Therefore, the petitioner is entitled to general damages for the breach of his constitutional right to land, fair administrative action and access to information. I find him entitled to Kshs 10,000,000/= general damages and compensation of the land at the value of Kshs 5,000,000/=.
138. The claim for damages for trespass against the 2nd & 3rd interested party is rejected as they hold valid title deeds.
139. The sums shall be paid by the 3rd respondent out of the Consolidation Fund. Costs and interests to the petitioner to be paid by the 3rd, 4th and 5th respondents and the 1st interested parties jointly and severally.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Ngunjiri for petitioner

Kieti for 3rd and 5th respondents

Thangicia for 2nd respondent

Maiyo for 4th respondent

D. Kimathi for 1st Interested party

E. Gikunda for 2nd & 3rd Interested parties

HON. C.K. NZILI

ELC JUDGE

