



REPUBLIC OF KENYA



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**Singh v Kenya Ports Authority & 3 others (Environment and Land Constitutional  
Petition E027 of 2022) [2025] KEELC 5247 (KLR) (9 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5247 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E027 OF 2022**

**LL NAIKUNI, J**

**JULY 9, 2025**

**IN THE MATTER OF: CONTRAVENTION OF THE BILL OF RIGHTS  
UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**BALJEET SINGH ..... PETITIONER**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to the filed Constitution Petition dated 12<sup>th</sup> July, 2022 instituted by Baljeet Singh, the Petitioner herein. It was against the Kenya Ports Authority, the Land Commission, Kenya National Highways Authority and Kenya Railways Corporation, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents herein. *The Constitution* Petition was brought under the dint of the provisions of Articles 10, 19, 20, 21, 22, 23, 40, 47, 162, 165 and 258 of *the Constitution* of Kenya 2010, Sections 107,111,112,113,115 and 117 of the of the *Land Act*, No. 6 of 2012. The Petition was accompanied by an affidavit in support.
2. Upon service of the Petition, the 1<sup>st</sup> Respondent entered their appearance through a Memorandum of Appearance and responded through a Replying Affidavit dated 17<sup>th</sup> February, 2023, the Petitioner filed a further affidavit sworn on 22<sup>nd</sup> February, 2023.



## II. Description of Parties

3. From the filed pleadings, the Petitioner was described as an adult male of sound mind and a Citizen of Kenya; the 1<sup>st</sup> Respondent was described as a statutory body established through an Act of Parliament, with capacity to sue and be sued, having its principal place of business in Mombasa within the Republic of Kenya. The 2<sup>nd</sup> Respondent was described as an independent commission, a body corporate with succession and a seal, capable of suing and being sued and established under Article 67 as read together with Article 253 of *the Constitution* of Kenya.
4. The 3<sup>rd</sup> Respondent was described as a statutory body established through an Act of Parliament, with capacity to sue and be sued, having its principal place of business in Mombasa within the Republic of Kenya. The 4<sup>th</sup> Respondent was described as a statutory body established through an Act of Parliament, with capacity to sue and be sued, having its principal place of business in Mombasa within the Republic of Kenya.

## III. Court directions before the hearing

5. Nonetheless, in the course of time, the Honourable Court fixed the hearing dated on 5<sup>th</sup> December, 2022 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Petitioner’s witnesses testifying in Court. Subsequently, they marked their case closed. Thereafter, the Respondents called their witness and marked their case closed on the same day.

## IV. The Petitioner’s case

6. The brief facts of the case were that the Petitioner was the registered proprietor of all that parcel of land known as L.R. No. MN/VI/2444 measuring approximately 0.7446 Hectares and situated in Mombasa County within the jurisdiction of this Honourable Court [Hereinafter referred “the Suit Property”]. Sometimes, in the year 2012, the 1<sup>st</sup> Respondent, without publishing and/or causing to be published by the 2<sup>nd</sup> Respondent a notice of the Government of Kenya’s intention to acquire 0.102 Ha of the property MN/VI/2444, for and on behalf of the 1<sup>st</sup> Respondent, and/ or its contractor through their respective servants/employees/agents, unlawfully and unprocedurally encroached on the parcel of land known as L.R. No. MN/VI/2444 so as to implement the Mombasa Port Area Road Development Project [Hereinafter referred to as “The MPARD”] and in the process a road [Mombasa Port Access Road] and Container Terminal construction activities took off.
7. Later on in the year 2013, while the 1<sup>st</sup> Respondent was still continuing with the illegal encroachment, a fence and a temporary weighbridge were placed on part of the suit property without due regard to the petitioner’s right to property and in particular on beacons “S3” and “S2” bringing the total area encroached by the 1<sup>st</sup> Respondent to be 0.102 Hectares. Sometimes in the year 2015, the Mombasa Port Access Road was tarmacked over beacon S2 and the road was in immediate use with an upgraded fence erected across the suit property, where a common boundary is shared by the petitioner and the 1<sup>st</sup> Respondent’s gate no. 24.
8. The road that was completed sometime in 2015, which cuts across the Petitioner’s suit property, was only beneficial to the 1<sup>st</sup> Respondent as heavy commercial vehicles entering the 1<sup>st</sup> Respondent through gate number 24, pass through the suit property. The Petitioner stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to follow the requisite procedure with regard to compulsory acquisition of land. Pursuant to the provision of Section 113 of the *Land Act*, No. 6 of 2012, he was entitled to an award certificate showing



- the compensation awards to the paid for the encroached area of the property and further pursuant to Section 111[1] of the Land Act, No. 6 of 2012, he was entitled to just payment and to be paid promptly.
9. Since the Petitioner had not been paid prompt, adequate, just and full compensation by the Government of Kenya as required by the Constitution of Kenya and the Land Act, No. 6 of 2012, the 1<sup>st</sup> Respondent and/or its contractor through their respective servants/employees/agent's entry onto the Petitioner's property was a breach of the Petitioner's rights to property under Article 40 of the Constitution of Kenya, 2010.
  10. Therefore, the Petitioner had been deprived of his right to property without "inter alia" the payment in full of just compensation, therefore. Further the failure by the 2<sup>nd</sup> Respondent to compensate and pay in full the Petitioner while the 1<sup>st</sup> Respondent, its contractors, agents, servants and/or employees entered onto the Suit Property and implemented the Government of Kenya's project, constitutes a blatant breach of the Petitioner's right to fair administrative action under the provision of Article 47 of the Constitution of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. The 1<sup>st</sup> Respondent had fenced the portion of the Petitioner's property that shares a boundary thus causing trespass by trucks and open-air canteens that emerged because of the encroachment. In addition to the above, the continued unlawful occupation of the Petitioner's property by the 1<sup>st</sup> Respondent without relinquishing its right or returning it to the Petitioner should be interpreted as trespass and forced acquisition on the Petitioner's property and was without a doubt a breach of the Petitioner's rights. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent's aforementioned actions and/or inaction have defrauded and/or disenfranchised the Petitioner's right to property and to wit the Petitioner demands immediate eviction. The Petitioner stated that pursuant to Section 117 [1] of the Land Act, No. 6 of 2012, it was entitled to interest on any compensation award not paid.
  11. According to the Petitioner, it was an unreasonable and clearly inefficient administrative action for the Government not to publish its intention to acquire the property, not invite the Petitioner to make submissions on its claim for compensation nor proceed to make an award, enter the suit property, commence construction, complete construction of a Government project and without paying the Petitioner his compensation or at all. Before filing this Petition, the Petitioner wrote several letters to the 1<sup>st</sup> Respondent herein demanding procedure to be followed in acquisition of the property but had not received any useful response from either of the Respondents. The Petitioner therefore prayed to this Honourable Court to intervene and remedy the blatant breach of your Petitioner's constitutional rights.
  12. The Petitioner prayed for the following reliefs:-
    - a. A declaration that the Petitioner's rights to acquire and own property guaranteed under Article 40 of the Constitution of Kenya and Section 111 [1] and 115 [1] of the Land Act, 2012 have been contravened by the, the 1<sup>st</sup> Respondent and/or the 2<sup>nd</sup> Respondent;
    - b. A declaration that the Petitioner's rights to fair administrative action guaranteed under Article 47 of the Constitution of Kenya have been contravened by the Respondents;
    - c. A Declaration that the Petitioner is entitled to compensation for General Damages for infringement of his rights.
    - d. A Declaration that the 1<sup>st</sup> Respondent has compulsorily acquired the Petitioner's property known as L.R. No. MN/VI/2444 without compensation.



- e. An order that the 2<sup>nd</sup> Respondent initiates and concludes the process of compulsory acquisition of the Petitioner's entire property known as L.R. No. MN/VI/2444 within 90 days.
  - f. An order for payment of the award upon conclusion of the process of compulsory acquisition of the property known as L.R. No. MN/VI/2444 within 90 days.
  - g. A declaration that the Petitioner is entitled to interest on the compensation award for the property known as LR NO. MN/VI/2444 at the prevailing market interest rate or as such a rate as this Honourable Court shall deem just with effect from the year 2012 and/or from the date when the 1<sup>st</sup> Respondent, its agents/servants/employers and/or its contractors entered upon the Suit Property or such other relevant date as this Honourable Court shall deem fit immediately:
  - h. Mesne profits calculated at Kshs. 3,600,000 per month for the unlawful continued occupation of the Petitioners property being MN/V1/2444 from the year 2012 till payment in full.
  - i. The costs of this Petition and interest; and
  - j. Such other or further orders or directions as the Court may deem fit to grant so as to meet the interest of justice.
13. The Petition was supported by a 28 Paragraphed affidavit sworn by BALJEET SINGH, the Petitioner herein on the same date as the petition with Nine [9] annexures marked as "BS - 1 to BS - 9" where he averred that: -
- a. The Petitioner was the registered proprietor of the suit land. Annexed in the affidavit and marked as exhibit "BS – 1" was a copy of the Certificate of Title and a Certificate of Search].
  - b. Sometimes in year 2012, the 1<sup>st</sup> Respondent without publishing and/ or causing to be published by the 2<sup>nd</sup> Respondent a notice of the Government of Kenya's intention to acquire 0.102Ha of the property MN/VI/2444, for and on behalf of the 1<sup>st</sup> Respondent, and/or its contractor-through their respective servants/employees/agents, unlawfully and unprocedurally encroached on the parcel of land known as L.R. No. MN/V1/2444 so as to implement the MPARD and in the process a road [Mombasa Port Access Road] and Container Terminal construction activities took off. Annexed in the affidavit and marked as "BS – 2" were photos from google earth image for the year 2012.
  - c. Later on in the year 2013, while the 1<sup>st</sup> Respondent was still continuing with the illegal encroachment, a fence and a t without due regard to his right to property and in particular on beacons "S3" and "S2" bringing the total area encroached by the 1<sup>st</sup> Respondent to be 0.102 Hectares. Annexed and marked as "BS – 3" are photos from google earth image for the year 2013.
  - d. Sometime in the year 2015, the Mombasa Port Access Road was tarmacked over beacon "S2" and the road was in immediate use with an upgraded fence erected across the suit property, where a common boundary was shared by him and the 1<sup>st</sup> Respondent's gate no. 24. Annexed and marked as "BS – 4" were photos from google earth image for the year 2015.
  - e. The road that was completed sometime in 2015, which cut across his suit property, was only beneficial to the 1<sup>st</sup> Respondent as heavy commercial vehicles entering the 1<sup>st</sup> Respondent through gate number 24, pass through the suit property. Annexed and marked as "BS – 5" was a copy Land Surveyor's report dated 18<sup>th</sup> February 2022.



- f. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to follow the requisite procedure with regard to compulsory acquisition of land.
- g. Pursuant to the provision of Section 113 of the Land Act, No. 6 of 2012, he was entitled to an award certificate showing the compensation awards to be paid for the encroached area of the property and further pursuant to Section 111[1] of the Land Act, No. 6 of 2012, he was entitled to just payment and to be paid promptly.
- h. Since he had not been paid promptly, just and fully compensated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as required by the Constitution of Kenya and the Land Act, 2012 the 1<sup>st</sup> Respondent and/or its contractor through their respective servants/employees/agent's entry into his property was a breach of his rights to property under Article 40 of the Constitution of Kenya, 2010.
- i. The Affiant had therefor been deprived of his right to property without, inter alia, the payment in full of just compensation, thereof.
- j. Further, the failure by the 2<sup>nd</sup> Respondent to compensate and pay him in full while the 1<sup>st</sup> Respondent, its contractors, agents, servants and/or employees entered onto the Suit Property and implemented the Government of Kenya's project, constituted a blatant breach of his right to fair administrative action under Article 47 of the Constitution of Kenya which required any administrative action to be inter alia, fair, expeditious, efficient and reasonable.
- k. The 1<sup>st</sup> Respondent had fenced the portion of his property that shared a boundary thus causing trespass by trucks and open air canteens that emerged because of the encroachment.
- l. In addition to the above, the continued unlawful occupation of his property by the 1<sup>st</sup> Respondent without compensation to him or returning it to the Petitioner should be interpreted as trespass and forced acquisition on his property and was without a doubt a breach of his rights.
- m. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' aforementioned actions that pursuant to Section 117[1] of the Land Act, No. 6 of 2012, the Affiant was entitled to interest on any compensation award not paid.
- n. It was an unreasonable and clearly unfair administrative action for the Government not to publish its intention to acquire the property, not invite me to make submissions on my claim for compensation nor proceed to make an award, enter the suit property, commence construction, complete construction of a Government project and without paying me compensation or at all.
- o. It was trite law that compensation ought to take place before acquisition and not after.
- p. He had numerous correspondence via E – mails with the 1<sup>st</sup> Respondent's office demanding compensation for the illegal encroachment, where he had been passed from officer to officer without any positive response. Annexed and marked as "BS – 6" were several copies of Correspondences between the Affiant and the 1<sup>st</sup> Respondent.
- q. After the correspondences bore no fruits, he engaged his advocates herein who wrote a demand letter on 7<sup>th</sup> April, 2022 and served all the Respondents herein, but as at the time of filing this suit, no response to the letter was made. Annexed and marked as "BS – 7" was a copy of the demand letter dated 7<sup>th</sup> April, 2022.



- r. The Petitioner incurred losses because of the Respondent's actions as he could not lease or sell this suit to any other person and that potential buyers had been scared off by the 1<sup>st</sup> Respondent's encroachment. Annexed and marked as "BS – 8" were several offer letters from potential buyers.
  - s. The suit property's value was high and kept on appreciating due to its location but the Petitioner could not sell it or lease it to a 3<sup>rd</sup> Party because of the 1<sup>st</sup> Respondent's continued illegal encroachment. Annexed and marked as "BS – 9" was a copy of valuation report dated 8<sup>th</sup> April, 2022.
  - t. It was only the 1<sup>st</sup> Respondent who could be forced to buy off the entire property by an order of the Court for it had already encroached on his property and earning from it.
  - u. He had been left with no choice but to seek redress from this court to compel the Respondents to follow the law and compensate him accordingly.
  - v. The Petitioner asked the Court to make an award for interest as he was entitled to the same from the time of the illegal encroachment until conclusion of the payment award.
  - w. He also prayed that the Court similarly made an award for payment of General Damages for the illegal and continued trespass and unlawful possession by the Respondents herein which was a violation of his right to property as provided for in *the Constitution* of Kenya and other relevant laws governing the Republic of Kenya.
  - x. The Petitioner prayed that he be awarded mesne profits for the loss incurred because of the Respondent's illegal occupation on his property.
  - y. The Affidavit was made in support of the Petition filed herewith.
14. Counsel for the Petitioner, Mr. Matheka commenced the suit through presentation of an opening remark. He informed the Court that the Petition was a result of some careless and don't care attitude depicted by the Respondents against an old man – the Petitioner herein. He was robbed of his proprietary rights for the last 12 years. Despite making demands and begging the 1<sup>st</sup> Respondent, there was no response; the Petitioner was ignored, disregarded and sent away to do whatever he wanted. This was because the 1<sup>st</sup> Respondent forcefully entered into the Petitioner's land and fenced it off, put security guards, started operating and never paid a single cent to the Petitioner despite the land having been acquired by compulsory acquisition. He stated that that was their case.
15. The Petitioner called his witnesses on 23<sup>rd</sup> May, 2024 who testified as follows:-

**A. Examination in Chief of PW – 1 by Mr. Matheka Advocate.**

16. PW - 1 was sworn and testified in the English language. He was identified as BALJEET SINGH, a Citizen of Kenya and bearing all the particulars indicated in his National Identity Card as shown to Court though he resided in Canada. He was a retired Electrical Engineer. He was aware of why he was in court. He recalled swearing an affidavit dated 28<sup>th</sup> June, 2022 and a list of bundles of documents – Petitioner Exhibit Numbers 1 to 9 and which he produced as his evidence in support of his case. PW - 1 told the court that on 30<sup>th</sup> March, 2023 he filed a supplementary document – Petitioner Exhibit Number 10. Further Affidavit was in response to the KPA's response on 23<sup>rd</sup> February, 2023 which the witness relied on as his evidence in chief. He told the court that there were two annexures attached as Petitioner Exhibit Numbers 11 and 12 which were also admitted.



17. PW - 1 told the court that there was a further further affidavit sworn on 9<sup>th</sup> May, 2024 which he relied on. He told the court that his land was LR No. MN/IV/1444/MOMBASA measuring 1.84 acres; located at gate 24 of KPA – Port Reitz; 2 years earlier the value of the land was a sum of Kenya Shillings Two Hundred and Thirty Million [Kshs. 230,000,000/-]. Its proximity to KPA was 150 meters to Gate 24. He was the owner of the Plot from the Official Search and the title deed – Petitioner Exhibit Number 1. He brought the Plot, 34 years ago in the year 1991.
18. On being referred to the land survey report – Petitioner Exhibit Number 5, the witness told the court that it showed the proximity to gate 24 – Pages 8 to 10 by Seline Consultants Limited dated 18<sup>th</sup> February, 2022 – under location on page 9. The property was valued at a sum of Kenya Shillings Two Hundred and Thirty [Kshs. 230,000,000/=] as per the valuation report [Petitioner Exhibit Number 9] at pages 27 to 29 by the M/s Seline Consultants Property dated 8<sup>th</sup> April, 2022 on page 35. In the year 2012, the Construction started on the property. He saw heavy machinery and damaging his property. He had google maps – [Supplementary list of documents of 30<sup>th</sup> March, 2023].
19. PW - 1 referred the Court to the google maps stating that the constructed barriers by KPA and the placed security on it; he was not allowed to go near the property. The google was done by the land surveyor. They put the chains unit wire; when it was happening; he was around. He wrote to KPA – a letter dated 24<sup>th</sup> May, 2014 at page 15 of the Petition; he was asked what they were doing on his land; the witness even offered them to buy but there was no response – the witness further wrote to the 1<sup>st</sup> Respondent via email at page 16 and 17.
20. PW - 1 stated that with responses by KPA, by Mr. Mosop and Mr. Songoro. Other communication being on page 18 were email between himself and one Mr. Songoro. At page 19, the email by C. Mwangi of KPA. The witness provide them with the ownership documents of the suit property. At page 20 the witness told the court that another email dated 5<sup>th</sup> April, 2021. The witness told the court that despite all these communications they never responded to his request. They took 0.25 acres of his property [page 35 of the valuation report]. KPA never wrote to him showing that they wanted to take the property.
21. PW - 1 told the court that KENHA and Kenya Railways called him for inquiry as they had wanted to utilize his property; eventually they never utilized it. From the responses by KPA they had admitted they took his report but they never paid him. KENHA had clarified that from the Replying Affidavit by the 1<sup>st</sup> Interested Party. They had confirmed that the access road was constructed by KPA. He had lost a lot, the witness wanted to sell the property and there was an offer at pages 24 and 25 i.e. potential purchasers of the Plot for a sum of Kenya Shillings Two Hundred and Thirty Million [Kshs. 230,000,000/-] and also at page 26. None of the potential purchasers were converted because they were scared off by the presence of KPA. KENHA and Kenya Railways were in this suit brought to it by KPA.
22. The witness told the court that he did not have any claim against KENHA and Kenya Railways. He stated that he had sued KENHA and Kenya Railways in different suit for lifting of the encumbrances. He never brought this suit pre – maturely. He filed it in July 2022 after 10 years. It was KPA who had claimed that he filed the case prematurely. The witness had been writing demand letters to KPA and NLC but they never gave them any positive responses. This court had powers/ jurisdiction to determine the matter. He urged the Court to grant him the prayers sought from the filed Petition.

#### **B. Cross examination of PW - 1 by Mr. Amakobe Advocate.**

23. PW - 1 confirmed that its only a portion taken by KPA; the witness was aware that the property had been earmarked for Compulsory acquisition by these State Corporations. He did not know



- why there had been delays in the payments/compensation. The witness was aware of the registration of encumbrances. They were for the intention to acquire for construction of the road and by the Mombasa Port Access Road; KPA had never published a gazette notice for the acquisition of the land. If KPA were to acquire land they had to publish in the gazette notice.
24. The witness told the court that he attended to inquires by KENHA and Kenya Railways and he was also given a certificate of award but they later on deleted the same. On the notices, the witness told the court that he understood that KPA could not pay him without National Land Commission's approval. They received a Judgment against KENHA made for them to pay a sum of Kenya Shillings Five Hundred Thousand [Kshs. 500,000per month/-] for encumbrances. The witness was claiming mesne profit of Kshs 45/- per square feet hence a total of Kenya Shillings Three Million Six Hundred was accrued from March 2012. From the year 2012; he had never written to KPA; in 2021 KPA asked for the documentation after the deletion which was in 2019.
  25. With reference to KPA Exhibit 4 – the survey report, the witness told the court that he was not aware of the survey. From the letter – 2011 to 2021 his property was one of the properties forwarded to the Cabinet secretary for approval of the ones to be acquired for compulsory acquisition. He agreed that it's the National Land Commission to approve for the payment to be done. But KPA had always been on his land for time in memorial. His property was among the ones for consideration. KPA had to go through the legal process. The witness had produced potential purchasers for the property. The Petitioner closed its case.

## V. The Respondents' response

### SUBDIVISION - A. The 1<sup>st</sup> Respondent's response to petition

26. The 1<sup>st</sup> Respondent opposed the Petition through a 35 Paragraphed response to the filed Petition where the 1<sup>st</sup> Respondent contended that:-
  - a. .The Petition herein was premature, bad in law and an abuse of the Court process as the Petitioner has failed to exhaust all statutory mechanisms and legal remedies envisaged under the provisions of Article 159 2 [c] of *the Constitution* of Kenya, 2010; Section 20 [2] of the Environment and *Land Act*, 2011; and Section 62 of the *Kenya Ports Authority Act* Cap. 391 Laws of Kenya before approaching the Honourable Court for redress.
  - b. The Petition ought to be struck out or stayed to pave the way for the parties herein to explore and exhaust the alternative dispute resolution mechanisms available under the law and which mechanisms are condition precedent to any proceedings before the Honourable Court.
  - c. Without prejudice to the foregoing, vide the Petition herein the Petitioner seeks various orders in respect of a portion of the parcel of land known as Plot Number MN/VI/2444 – the suit property and the issue of payment of compensation thereof.
  - d. On various dates in the years 2008 and 2011, the 1<sup>st</sup> Respondent in conjunction with other State agencies and stakeholders undertook measures to commence the construction of the MPDP aimed at expanding and increasing the container handling capacity of the Port of Mombasa.
  - e. In planning for the MPDP project, the Kenya Railways Corporation [KR] made a request to the Kenya National Highways Authority [KENHA] to revise the initial design for the MPDP project in order to put up further construction ancillary to the Standard Gauge Railway. The proposed revision of the MPDP project occasioned an increase in the project affected persons entitled to compensation for acquisition of their properties for the project.



- f. However, the proposed revision of the initial design of the MPDP project was vetoed by the project consultants who reverted to the project's initial design with several adjustments to mitigate the number of projects affected persons entitled to compensation.
- g. Consequently, several owners of the plots affected by the MPDP project including the Petitioner were not compensated under the then KENHA compensation programme.
- h. At the time of the foregoing, the 1<sup>st</sup> Respondent had already finalized payment of the claims for compensations of the Project Affected Persons for the main component of the MPDP project being the construction of a new container terminal. Thus, any emerging claims of compensation were unforeseen and not budgeted for by the 1<sup>st</sup> Respondent.
- i. The final design of the project included inter alia development of the Port Access Road to Kipevu West Container Terminal, resulting in several plots adjacent to the MPDP project area and the Port of Mombasa boundary being affected. The various persons whose plots were affected brought claims for compensation to the 1<sup>st</sup> Respondent who subsequently undertook a joint survey of the MPDP project area involving the said Project Affected Persons, KENHA and the Government Surveyor.
- j. As a result of the joint survey, a portion of the suit property measuring approximately 0.7254 acres was identified amongst other plots as having been partially affected by the MPDP project. Therefore, the Petitioner became identified and recognized as part of the emergent claims of compensation arising from the implementation of the MPDP project.
- k. By way of a letter dated 20<sup>th</sup> January, 2021, the 1<sup>st</sup> Respondent requested the Cabinet Secretary National Treasury to formally submit a request to the 2<sup>nd</sup> Respondent to commence the compulsory acquisition process of the portion of the suit property provisions of Section 107 of the Land Act, No. 6 of 2012.
- l. While making reference to a letter dated 14<sup>th</sup> June, 2022 from the Cabinet Secretary of Finance at the National Treasury requesting the acquisition of the plots affected by the MPDP project, the 2<sup>nd</sup> Respondent vide their letter dated 29<sup>th</sup> June, 2022 called for the 1<sup>st</sup> Respondent to submit additional information to facilitate and fast-track the land acquisition process over the portion of the suit property pursuant to the provisions of Section 107 [2] of the Land Act, No. 6 of 2012.
- m. From the above, it was evident that despite the inadvertent administrative delays occasioned in the implementation of the MPDP project information to facilitate and fast-track the land acquisition process over the portion of the suit property pursuant to the provisions of Section 107 [2] of the Land Act, No. 6 of 2012.
- n. From the above, it was evident that despite the inadvertent administrative delays occasioned in the implementation of the MPDP project, the 1<sup>st</sup> Respondent through its parent Ministry had managed to request the 2<sup>nd</sup> Respondent to commence and progress the compulsory acquisition process over the portion of the suit property and payment of compensation thereof to the Petitioner.
- o. The process of compulsory acquisition was ordinarily undertaken by the 2<sup>nd</sup> Respondent, who was obliged to ensure that all the procedures related to compulsory acquisition of the portion of the suit property are complied with.



- p. By the time the 2<sup>nd</sup> Respondent arrived at and/or reached a conclusion in respect to the compensation payable to the Petitioner herein for the acquisition of the portion of the suit property, all the aforesaid State agencies ought to be involved and integrated with the said compulsory acquisition process to avoid a similar situation in which further emergent claims of compensation arising from the project keep recurring in future.
- q. The adequate platform for holding such multi-agency consultations exists in other alternative dispute resolution mechanisms not in the suit herein by the Petitioner. Such alternative dispute resolution mechanisms are available under the provisions of Section 62 of the [Kenya Ports Authority Act](#), and failure by the Petitioner to consider, explore and exhaust such mechanisms renders the Petition dated 12<sup>th</sup> July, 2022 an abuse of the Court process.
- r. In particular response to the Petition dated 12<sup>th</sup> July, 2022 and the Affidavit in Support of the Petition dated 28<sup>th</sup> June, 2022, he wished to reiterate the contents of Paragraphs 4 to 19 hereinabove and further state as follows:
- s. The contents of Paragraphs 1 and 2 of the Affidavit in Support of the Petition were not contested in so far as the same lay basis for the Petitioner's case before the Court.
- t. In response to Paragraphs 3, 4, 5 and 6 of the Affidavit in Support of the Petition, it was not denied that while in urgent need to acquire land for public purpose and having obtained the permission of the Petitioner, the 1<sup>st</sup> Respondent took possession of the vacant portion of the suit property under the belief at the time that compulsory acquisition process over the parcels of land earmarked for acquisition for the MPDP project was underway and that all claims of compensation emerging thereof were addressed and settled by the 2<sup>nd</sup> Respondent on behalf of the acquiring entity being KENHA. However, due to proposed changes to the initial design of the MPDP project, some of the claims for compensation arising therefrom were inadvertently not paid.
- u. Further, it was not true that any of the Respondents and/or the other State agencies involved in the MPDP project harboured any intentions of depriving the Petitioner of his land in an arbitral manner without payment of just compensation as alleged by the Petitioner or at all. The Petitioner had presented a measured account of the efforts undertaken by the Respondents and other State agencies in identifying and settling the emergent claims of compensation arising from the MPDP project. Compulsory acquisition of the plots affected by the MPDP project was a lawful process undertaken by the Respondents and other State agencies in good faith and for the benefit of the general public. Any claims to the contrary were denied and the Petitioner was put to strict proof thereof.
- v. The 1<sup>st</sup> Respondent denies the contents of Paragraphs 7,8, 9, 10 and 11 of the Affidavit in Support of the Petition and puts the Petitioner to strict proof thereof. In particular, the 1<sup>st</sup> Respondent states that before the filing of the suit herein by the Petitioner, the 1<sup>st</sup> Respondent through its parent Ministry had already requested the 2<sup>nd</sup> Respondent to commence and progress the compulsory acquisition process over the suit property. The 2<sup>nd</sup> Respondent was an independent commission with its own procedures for administering the compulsory acquisition process. Once such compulsory acquisition process was complete the Petitioner shall be entitled to payment of just compensation.
- w. In response to Paragraphs 12, 13, 14, 15, 16 and 17 of the Affidavit in Support of the Petition, the 1<sup>st</sup> Respondent sought and obtained permission from the Petitioner herein prior to entering upon and taking possession of the portion of the suit property. With such permission



having been freely obtained, it could not be said that any of the acts undertaken over the portion of the suit property by the 1<sup>st</sup> Respondent could amount to trespass as alleged by the Petitioner or at all.

- x. In any event, it is trite that the tort of trespass was a tort in violation of the right to possession and that the 1<sup>st</sup> Respondent has adequately demonstrated by evidence that it was entitled to the right to immediate and exclusive possession of the portion of the suit property being public land currently in use for public purpose.
- y. Further, once the Petitioner allowed the 1<sup>st</sup> Respondent to take possession of the portion of the suit property, the land immediately stood vested in the State as public land free from all encumbrances and that as such there cannot be any question of divesting the land and/or re-vesting the land and/or restitution of possession of the land to the Petitioner. The only right the Petitioner has is as to the determination of payment of just compensation in accordance with the [Land Act](#), No. 6 of 2012.
- z. The provisions of Section 120 [2] of the [Land Act](#), No. 6 of 2012 recognize that possession of acquired land may actually be taken before all the compulsory acquisition procedures were followed through and before the payment of compensation. Thus, it could not be said that where the 1<sup>st</sup> Respondent has compulsorily acquired land for public purpose, such land is subject to being restored to the previous owner on the ground that the payment of compensation has not been concluded. The amount of money determined to be payable as just compensation for the compulsory acquisition of the land, if unpaid, was a debt owed to the erstwhile owner of the land and should be paid in accordance with the provisions of the [Land Act](#), No. 6 of 2012.
  - aa. Notwithstanding, delay or failure to make the award and pay compensation within a certain period does not nullify the public interest in the portion of the suit property. In any event, having discovered that it was through inadvertence and/or mistake that payment of compensation to the Petitioner was omitted, it then follows that whether the period allowed for the acquisition of the portion of the suit property had expired or not, the 1<sup>st</sup> Respondent was entitled to remain in undisturbed possession of the portion of the suit property provided that payment of just compensation should be made to the Petitioner under the compulsory acquisition process commenced by the 2<sup>nd</sup> Respondent.
  - ab. The 1<sup>st</sup> Respondent denied the contents of Paragraphs 18 and 19 of the Affidavit in Support of the Petition and puts the Petitioner to strict proof thereof. Without prejudice to the foregoing, the 1<sup>st</sup> Respondent acted upon the inquiries raised by the Petitioner which action resulted in the conduct of the joint survey over the MPDP project area with several plots being identified as having been affected by the project, including the suit property. The survey is what informed the 1<sup>st</sup> Respondent's letter dated 20<sup>th</sup> January, 2021 to the CS National Treasury and the subsequent commencement of the compulsory acquisition process by the 2<sup>nd</sup> Respondent over the portion of the suit property.
  - ac. The 1<sup>st</sup> Respondent denies the contents of paragraphs 20, 21 and 22 of the Affidavit in Support of the Petition and puts the Petitioner to strict proof thereof. In particular, it was denied that the acts of the 1<sup>st</sup> Respondent over the portion of the suit property have occasioned losses to the Petitioner as alleged by the Petitioner or in any manner whatsoever.



- ad. In any event, any acts undertaken by the 1<sup>st</sup> Respondent over the portion of the suit property were acts subject to statutory authority in the exercise of the powers conferred to the 1<sup>st</sup> Respondent under the provisions of Sections 12, 15 and 16 of the Kenya Ports Authority and thus where damage or loss was alleged to have been suffered as is the case of the Petitioner, no court action or suit lies thereto but for resolution in accordance with the alternative dispute resolution mechanisms available under the provision of Section 62 of the [Kenya Ports Authority Act](#).
- ae. In response to Paragraphs 23, 24, 25 and 26 of the Affidavit in Support of the Petition, it was not in doubt that the Petitioner herein is entitled to just compensation of the portion of the suit property, the 1<sup>st</sup> Respondent having acquired the same for public purpose. Even though the procedure for compulsorily acquiring the portion of the suit property had not been concluded, the same can be remedied by the payment of just compensation to the Petitioner after the Respondents follow the due process elaborated under the provisions of the [Land Act](#), No. 6 of 2012.
- af. To the extent of the foregoing, it was apparent that the 1<sup>st</sup> Respondent took possession of the portion of the suit property way back in the year 2012. The Petitioner had invested huge amounts of public funds in developing the portion of the suit property. All components of the MPDP project have already been completed and operationalized. Even though the Petitioner as a private entity has its rights, at this point, public rights and interests supersede the Petitioner's private rights and the Petitioner's remedy lies in compensation as determined under the [Land Act](#), No. 6 of 2012.
- ag. Consequently, the 1<sup>st</sup> Respondent prays for the Court to strike out and/or stay the Petition herein pending resolution envisaged under the provisions of Section 62 of the [Kenya Ports Authority Act](#) Cap. 391

## **B. The Replying Affidavit of the 1<sup>st</sup> Respondent**

- 27. The 1<sup>st</sup> Respondent also filed an 42 Paragraphed Replying Affidavit sworn on 28<sup>th</sup> April, 2023 by JOHN CHAU MWANGI, the Senior Estates and Rating Officer at the Contracts and Conveyancing issue in this suit. He averred that:-
  - a. The Petition dated 12<sup>th</sup> July, 2022 and filed in court on 14<sup>th</sup> July, 2022 was premature, bad in law and an abuse of the Court process as the Petitioner had failed to exhaust all statutory mechanisms and legal remedies envisaged under the provisions of Article 159 [2][c] of [the Constitution](#) of Kenya, 2010; Section 20[2] of the Environment and Law Court [Act, No. 19 of 2011](#); and Section 62 of the [Kenya Ports Authority Act](#) and Section 62 of the Kenya Port Authority Act Cap. 391 Laws of Kenya before approaching the Honourable Court for redress.
  - b. Consequently, the Petition dated 12<sup>th</sup> July, 2022 ought to be struck out and/ or stayed in order to pave the way for the parties herein to explore and exhaust the alternative dispute resolution mechanisms available under the law and which mechanisms are condition precedent to any proceedings before the Honourable Court.
  - c. Without prejudice to the foregoing, the Petitioner had filed the Petitioner herein in order to seek various orders in respect of a portion of the suit property and the issue of payment of compensation thereof.



- d. On various dated in the years 2008 and 2011, the 1<sup>st</sup> Respondent in conjunction with other state agencies and stakeholders undertook measures to commence the construction of the MPDP aimed at expanding and increasing the container handling capacity of the port of Mombasa.
- e. In planning for the MPDP project, the Kenya Railways Corporation [Kenya Railways] requested the Kenya National Highways Authority [KENHA] to revise the initial design for the MPDP project in order to put up further construction ancillary to the Standard Gauge Railways. The proposed revision of the MPDP project occasioned an increase in the project – affected persons entitled to compensation for acquisition of their properties for the project.
- f. By way of Gazette Notice Number 405 published on 17<sup>th</sup> December, 2013 pursuant to the provisions of Sections 162[2] of the Land Act, No. 6 of 2012 as read together with Section 6 [2] of the Land Acquisition Act Cap. 295 [Now repealed], the 2<sup>nd</sup> Respondent published a notice of intention to acquire a portion of the suit property measuring approximately 0.0735 hectares on behalf of KENHA for the construction of Mombasa Southern Bypass and Kipevu Oil Terminal Link Road components of the MPDP project. Annexed in affidavit and mark as “KPA-1” was a copy of the Gazette Notice No. 405 dated 17<sup>th</sup> December, 2013.
- g. Additionally, the 2<sup>nd</sup> Respondent vide Gazette Notice Number 2470 published on 21<sup>st</sup> April, 2015 pursuant to the provisions of Section 162 [2] of the Land Act 2012 and Section 9 [1] of the Land Acquisition Act Cap. 295 [Now repealed], issued notice that inquiries in respect to hearing of claims of compensation resulting from the acquisition of the properties affected by the MPDP project including the suit property were to be held on 8<sup>th</sup> May, 2015 at the Assistant County Commissioner’s Office, Changwamwe. Further in the said Gazette Notice, the 2<sup>nd</sup> Respondent invited the Petitioner and other affected land owners to deliver amongst other requirements a written claim of compensation, land ownership documents and bank details on or before the date slated for the inquiry. Annexed in the affidavit and marked as “KPA - 2” was a copy of the Gazette Notice No. 2470 dated 21<sup>st</sup> April, 2015.
- h. Nevertheless, the proposed revision of the initial design of the MPDP project was consequently vetoed by the project consultants who reverted to the initial design of the project with several adjustments to mitigate the number of projects affected persons entitled to compensation.
- i. Consequently, several owners of the Plots affected by the MPDP project including the Petitioner herein were not compensated under the then KENHA compensation programme.
- j. At the time of the foregoing, the 1<sup>st</sup> Respondent had already finalized payment of the claims for compensations of the Project Affected Persons for the main component of the MPDP project being the construction of a new container terminal. Thus, any emerging claims of compensation were unforeseen and not budgeted for by the 1<sup>st</sup> Respondent.
- k. The final design of the project included inter alia development of the Port Access Road to Kipevu West Container Terminal, resulting in several plots adjacent to the MPDP project area and the Port of Mombasa boundary being affected. The various persons whose plots were affected brought claims for compensation to the 1<sup>st</sup> Respondent who subsequently undertook a joint survey of the MPDP project area involving the said Project Affected Persons, KENHA and the Government Surveyor.
- l. As a result of the joint survey, a portion of the suit property measuring approximately 0.7254 acres was identified amongst other plots as having been partially affected by the MPDP project.



Therefore, the Petitioner became identified and recognized as part of the emergent claims of compensation arising from the implementation of the MPDP project.

- m. By way of a letter dated 20<sup>th</sup> January, 2021, the 1<sup>st</sup> Respondent requested the Cabinet Secretary National Treasury to formally submitted request to the 2<sup>nd</sup> Respondent to commence the compulsory acquisition process of the portion of the suit property provisions of Section 107 of the Land Act, No. 6 of 2012. Annexed in the affidavit and marked as “KPA - 3” was a copy of the 1<sup>st</sup> Respondent’s letter dated 20<sup>th</sup> January, 2021.
- n. While making reference to a letter dated 14<sup>th</sup> June, 2022 from the CS National Treasury requesting the acquisition of the plots affected by the MPDP project, the 2<sup>nd</sup> Respondent vide their letter dated 29<sup>th</sup> June, 2022 called for the 1<sup>st</sup> Respondent to submit additional information to facilitate and fast-track the land acquisition process over the portion of the suit property pursuant to the provisions of Section 107 [2] of the Land Act, 2012. The information sought by the 2<sup>nd</sup> Respondent included inter alia list of the plots affected and the required acreage; land ownership details of the affected plots and current official searches of the plots; a georeferenced and signed land acquisition plan derived from approved cadastral maps; and confirmation of the availability of funds for compensation in accordance with the provisions of Section 111 [1] [a] of the Land Act, No. 6 of 2012.
- o. From the above, it was evident that despite the inadvertent administrative delays occasioned in the implementation of the MPDP project, the 1<sup>st</sup> Respondent through its parent Ministry has managed to request the 2<sup>nd</sup> Respondent to commence and progress the compulsory acquisition process over the portion of the suit property and payment of compensation thereof to the Petitioner.
- p. So much water has passed under the bridge since the development and completion of the Port Access Road to Kipevu West Container Terminal component of the MPDP Project.
- q. Having not received compensation under the primary KENHA compensation programme, the Petitioner has since then been following up on his claim for compensation with all the tree state agencies involved in the implementation of the MPDP project that was Kenya Railways, KENHA and the 1<sup>st</sup> Respondent.
- r. It was not in dispute that due to some inadvertence and/or mistake, claims of compensation were not fully addressed and settled when payment for compensation of the plots affected by the MPDP project was initially undertaken.
- s. Further, it was not in dispute that the remedy available under law for the acquisition of the Petitioner’s land inter alia lies in the payment of just compensation in accordance with the determination of the Land Act, No. 6 of 2012.
- t. The process of compulsory acquisition was ordinarily undertaken by the 2<sup>nd</sup> Respondent, who was obliged to ensure that all the procedures related to compulsory acquisition of the portion of the suit property were complied with.
- u. By the time the 2<sup>nd</sup> Respondent arrived at and/or reached a conclusion in respect to the compensation payable to the Petitioner herein for the acquisition of the portion of the suit property, all the aforesaid State agencies ought to be involved and integrated with the said compulsory acquisition process to avoid a similar situation in which further emergent claims of compensation arising from the project keep recurring in future.



- v. The adequate platform for holding such multi-agency consultations exists in other alternative dispute resolution mechanisms, not in the suit commenced herein by the Petitioner. The 1<sup>st</sup> Respondent that such alternative dispute resolution mechanisms are available under the provisions of Section 62 of the *Kenya Ports Authority Act*, and failure by the Petitioner to consider, explore and exhaust such mechanisms renders the Petition dated 12<sup>th</sup> July, 2022 premature, bad in law and an abuse of the Court process.
- w. In particular response to the Petition dated 12<sup>th</sup> July, 2022 and the Affidavit in Support of the Petition dated 28<sup>th</sup> June, 2022, the contents of Paragraphs 4 to 25 hereinabove and further state as follows:
- x. The contents of Paragraphs 1 and 2 of the Affidavit in Support of the Petition are not contested in so far as the same lay basis for the Petitioner's case before the Court.
  - a. In response to Paragraphs numbers 3, 4, 5 and 6 of the Affidavit in Support of the Petition, it was not denied that while in urgent need to acquire land for public purpose and having obtained the permission of the Petitioner, the 1<sup>st</sup> Respondent took possession of the vacant portion of the suit property under the belief at the time that compulsory acquisition process over the parcels of land earmarked for acquisition for the MPDP project was underway and that all claims of compensation emerging thereof were addressed and settled by the 2<sup>nd</sup> Respondent on behalf of the acquiring entity being KENHA. However, due to proposed changes to the initial design of the MPDP project, some of the claims for compensation arising therefrom were inadvertently not paid.
  - b. Further, it was not true that any of the Respondents and/or the other governmental bodies involved in the MPDP project harbored any intentions of depriving the Petitioner of his land in an arbitrary manner without payment of just compensation as alleged by the Petitioner or at all. The Petitioner has presented a measured account of the efforts undertaken by the Respondents and other State agencies in identifying and settling the emergent claims of compensation arising from the MPDP project which efforts foresaw amongst other things the issuance of Gazette Notices Number 405 and 2470 for the acquisition of the portion of the suit property. Compulsory acquisition of the plots affected by the MPDP project was a lawful process undertaken by the Respondents and other State agencies in good faith and for the benefit of the general public. Any claims to the contrary are denied and the Petitioner was put to strict proof thereof.
  - c. The 1<sup>st</sup> Respondent denied the contents of Paragraphs 7, 8, 9, 10 and 11 of the Affidavit in Support of the Petition and puts the Petitioner to strict proof thereof. In particular, the 1<sup>st</sup> Respondent reiterated the contents of Paragraph 16 hereinabove and states that before the filing of the suit herein by the Petitioner, the 1<sup>st</sup> Respondent through its parent Ministry had already requested the 2<sup>nd</sup> Respondent to commence and progress the compulsory acquisition process over the suit property. The 2<sup>nd</sup> Respondent was an independent commission with its own procedures for administering the compulsory acquisition process. Once such compulsory acquisition process is complete the Petitioner should be entitled to payment of just compensation.
  - d. In response to Paragraphs 12, 13, 14, 15, 16 and 17 of the Affidavit in Support of the Petition, the 1<sup>st</sup> Respondent sought and obtained permission from the Petitioner



herein prior to entering upon and taking possession of the portion of the suit property. With such permission having been freely obtained, it cannot be said that any of the acts undertaken over the portion of the suit property by the 1<sup>st</sup> Respondent could amount to trespass as alleged by the Petitioner or at all.

- e. In any event, the Advocates on record for the 1<sup>st</sup> Respondent had explained to him that the tort of trespass is a tort in violation of the right to possession and that the 1<sup>st</sup> Respondent has adequately demonstrated by evidence that it was entitled to the right to immediate and exclusive possession of the portion of the suit property being public land currently in use for public purpose.
- f. Once the Petitioner allowed the 1<sup>st</sup> Respondent to take possession of the portion of the suit property, the land immediately stood vested in the State as public land free from all encumbrances and that as such there could not be any question of divesting the land and/or re-vesting the land and/or restitution of possession of the land to the Petitioner. The only right the Petitioner had was as to the determination of payment of just compensation in accordance with the Land Act, No. 6 of 2012.
- g. Indeed, the Advocates on record for the 1<sup>st</sup> Respondent informed him that the provision of Section 120 [2] of the Land Act, No. 6 of 2012 recognize that possession of acquired land may actually be taken before all the compulsory acquisition procedures were followed through and before the payment of compensation. Thus, it could not be said that where the 1<sup>st</sup> Respondent has compulsorily acquired land for public purpose, such land is subject to being restored to the previous owner on the ground that the payment of compensation has not been concluded. The amount of money determined to be payable as just compensation for the compulsory acquisition of the land, if unpaid, is a debt owed to the erstwhile owner of the land and shall be paid in accordance with the provisions of the Land Act, No. 6 of 2012.
- h. The delay or failure to make the award and pay compensation within a certain period never nullified the public interest in the portion of the suit property. In any event, having discovered that it was through inadvertence and/or mistake that payment of compensation to the Petitioner was omitted, it then follows that whether the period allowed for the acquisition of the portion of the suit property had expired or not, the 1<sup>st</sup> Respondent was entitled to remain in undisturbed possession of the portion of the suit property provided that payment of just compensation shall be made to the Petitioner under the compulsory acquisition process commenced by the 2<sup>nd</sup> Respondent.
- i. The 1<sup>st</sup> Respondent denied the contents of Paragraphs 18 and 19 of the Affidavit in support of the Petition and put the Petitioner to strict proof thereof. Without prejudice the 1<sup>st</sup> Respondent acted upon the inquired raised by the Petitioner which action resulted in the conduct of the joint survey over the MPDP project area with several plots being identified as having been affected by the project, including the suit property. The survey was what informed the 1<sup>st</sup> Respondent's letter dated 20<sup>th</sup> January, 2021 to the CS National Treasury and the subsequent commencement of the compulsory acquisition process by the 2<sup>nd</sup> Respondent over the portion of the suit property.
- j. The 1<sup>st</sup> Respondent denied the contents of Paragraphs 20, 21 and 22 of the Affidavit in support of the Petition and puts the Petitioner to strict proof thereof. In particular, it was denied that the acts of the 1<sup>st</sup> Respondent over the portion of the suit property



have occasioned losses to the Petitioner as alleged by the Petitioner or in any manner whatsoever.

- k. In any event, any acts undertaken by the 1<sup>st</sup> Respondent over the portion of the suit property were acts subject to statutory authority in the exercise of the powers conferred to the 1<sup>st</sup> Respondent under the provisions of Sections 12, 15 and 16 of the Kenya Ports Authority and thus where damage or loss is alleged to have been suffered as is the case of the Petitioner, no court action or suit lies thereto but for resolution in accordance with the alternative dispute resolution mechanisms available under the provision of Section 62 of the *Kenya Ports Authority Act*.
- l. In response to the contents of Paragraphs 23, 24, 25 and 26 of the Affidavit in support of the Petition, it was not in doubt that the Petitioner herein was entitled to just compensation of the portion of the suit property, the 1<sup>st</sup> Respondent having acquired the same for public purpose. Even though the procedure for compulsorily acquiring the portion of the suit property has not been concluded, the same could be remedied by the payment of just compensation to the Petitioner after the Respondents follow the due process elaborated under the provisions of the *Land Act*, No. 6 of 2012.
- m. To the extent of the foregoing, it was apparent that the 1<sup>st</sup> Respondent took possession of the portion of the suit property way back in the year 2012. The 1<sup>st</sup> Respondent had in vested huge amounts of public funds in developing the portion of the suit property. All components of the MPDP project have already been completed and operationalised. Even though the Petitioner as a private person has his rights, at this point, public rights and interests supersede the Petitioner's private rights and the Petitioner's remedy lied in compensation as determined under the *Land Act*, No. of 2012.
- y. The Affidavit in opposition to the Petition dated 12<sup>th</sup> July, 2022 and prayed for the Court to strike out and/or stay the same pending resolution envisaged under the provisions of Section 62 of the *Kenya Ports Authority Act*.

## **VI. The Further Affidavit of the Petitioners**

28. The Petitioner responded to the Replying Affidavit dated 17<sup>th</sup> February, 2023 through a 44 Paragraphed Further Affidavit sworn on 22<sup>nd</sup> February, 2023 where the Affiant deposed as follows: -
- a. In response to Paragraph 4, the Petition herein was merited and properly before this Honourable court, and that any attempt to approach the 1<sup>st</sup> Respondent has been met with ignorance and delay.
  - b. Paragraphs 6, 7 and 8 of the 1<sup>st</sup> Respondent's Replying Affidavit was not contested as the same related to the cause of action before his Honourable Court.
  - c. In response to Paragraph 9 of the 1<sup>st</sup> Respondent's Replying Affidavit, the 2<sup>nd</sup> Respondent's actions with regard to issuing Gazette Notice Number 405 published on 17<sup>th</sup> December, 2013 were contrary to the provisions of Section 107 [5] and 120 [2] of the *Land Act*, No. 6 of 2012. Additionally, the said gazette notice was published on behalf of KENHA and nowhere had the 1<sup>st</sup> Respondent shown this Honourable Court that any gazette notice was issued on behalf.
  - d. In further response to Paragraph of the 1<sup>st</sup> Respondent's Replying Affidavit on 13<sup>th</sup> January, 2017, the 2<sup>nd</sup> Respondent published gazette notice no. 340 being an intention to acquire land



[addendum] and further deleting several parcels of land including his property herein MN/VI/2444. Therefore, the 1<sup>st</sup> Respondent could not purport to have followed procedure by relying on gazette notice no. 405 published on 17<sup>th</sup> December 2013 without disclosing to this Honourable court the deletion of his property in that regard, while continuing to encroach his land. Annexed in the affidavit and marked as “BS - 1” was a copy of gazette notice number 340 published on 13<sup>th</sup> January 2017].

- e. In response to Paragraph 10 of the 1<sup>st</sup> Respondent’s Replying Affidavit, the 2<sup>nd</sup> Respondent published Gazette Notice no.12828 on 14<sup>th</sup> December 2018, deleting several parcels of land including the Deponent property herein MN/VI/2444. As such, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents should have issued the Deponent with written explanations for their actions as the same was never disclosed. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents therefore infringed on his right under Article 45 of *the constitution* of Kenya 2010. Annexed in the affidavit and marked as “BS - 2” was a copy of Gazette notice number 12828 published on 14<sup>th</sup> December 2018].
- f. In response to Paragraphs 11, 12, 13, 14, and 15 of the 1<sup>st</sup> Respondent’s Replying affidavit, it was not denied that he was never compensated under the KENHA compensation program. The 1<sup>st</sup> Respondent had however failed to show timelines on when he became identified and recognized as part of the emergent claims of compensation arising from the implementation of MPDP project, since the 1<sup>st</sup> Respondent encroached his land as early as 2012.
- g. In further response to the above, what the Respondents were doing despite being the legal proprietor of the suit property and as such, he believed his right to access information was infringed upon.
- h. In further response to the Paragraph 15 of the 1<sup>st</sup> Respondent’s replying affidavit, if at all the alleged joint survey on his land measuring approximately 0.7254 acres was ever done, the alleged surveyor never shared a report with his in that regard.
- i. In response to Paragraph 16 of the 1<sup>st</sup> Respondent’s Replying Affidavit, the letter adduced by the 1<sup>st</sup> Respondent dated 20<sup>th</sup> January 2021 requesting the Cabinet Secretary National Treasury to formally submit a request to the 2<sup>nd</sup> Respondent to commence the compulsory acquisition process of his land was way out of time.
- j. In further response to Paragraph 16 of the 1<sup>st</sup> Respondent’s Replying Affidavit, if at all it was an urgent necessity for the acquisition to be delayed by following the normal procedures of compulsory acquisition under the *Land Act*, No. 6 of 2012 the procedure to be followed under the provision of Section 120 [2] of the *Land Act* 2012 was never adhered to and the acquisition was therefore illegal.
- k. In response to Paragraph 17 of the 1<sup>st</sup> Respondent’s Replying Affidavit, the alleged letters dated 14<sup>th</sup> June 2022 from the CS National Treasury and 29<sup>th</sup> June 2022 by the 2<sup>nd</sup> Respondent were an afterthought upon receipt of Demand letter dated 7<sup>th</sup> April 2022 from his Advocates on record and received by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on 21<sup>st</sup> April 2022. Further, the 1<sup>st</sup> & 2<sup>nd</sup> Respondent’s actions were a clear indication that they had silently ignored his letters and emails in pursuit of information and compensation.
- l. In response to Paragraph 17 he deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents waited ten [10] years after illegally acquiring his property, to make enquiries about compensation for the affected proprietors. It was a clear indication that if he had not pursued his compensation award vide the Petition herein, the Respondents would have never performed their duties as mandated



by law in compensating me for the illegal compulsory acquisition and would have eventually barred his claim by relying on the statute of limitation of time.

- m. In response to Paragraph 18 of the 1<sup>st</sup> Respondent's Replying Affidavit, it was unreasonable for the 1<sup>st</sup> Respondent to claim that the reason for not compensating him was inadvertent delays occasioned in the implementation of the MPDP project, yet none of those alleged factors affected the construction of the MPARD project and container terminal in the year 2012 and completed sometime in the year 2015. If that was the case, then the Respondents had a duty in the interest of justice and Article 45 to inform the Deponent of the alleged inadvertent delays, and therefore disclosing the same ten [10] years later was a ruse to cover their unlawful conduct.
- n. In response to Paragraph 19 of the 1<sup>st</sup> Respondent's Replying Affidavit, it was insensitive to allege that so much water had passed under the bridge since the development and completion of the port access road at Kipevu west container terminal component of the MPDP project, without acknowledging the difficulty occasioned upon him in pursuing compensation for a period of ten [10] years, without any feedback from the 1<sup>st</sup> & 2<sup>nd</sup> Respondents, while having already compulsorily acquired his property and utilized the same.
- o. The deponent was not averse to Paragraphs 21 and 22 of the 1<sup>st</sup> Respondent's Replying Affidavit so far as the same was an admission that his claim was not fully addressed and settled when payment for compensation of the plots affected by the MPDP project was initially undertaken.
- p. In further response to Paragraph 22 of the 1<sup>st</sup> Respondent's Replying Affidavit, it was unreasonable for the 1<sup>st</sup> Respondent to state at Paragraphs 16 and 17 of their Replying affidavit that on 20<sup>th</sup> January 2021, it submitted a request to the 2<sup>nd</sup> Respondent to commence the procedure for compulsory acquisition, and later state at Paragraph 22 that his remedy lay in payment of just compensation once the requirements of just compensation were met.
- q. Indeed the statements by the 1<sup>st</sup> Respondent contradicted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions and he was left wondering how much longer he had to wait for the just compensation, in addition to the ten [10] years already exhausted. Additionally having encroached and utilized the land to his detriment, he believed he was entitled to an expedited process in receiving his compensation.
- r. In response to Paragraph 23 of the 1<sup>st</sup> Respondent's Replying Affidavit, despite the fact that the process for compulsory acquisition was ordinarily undertaken by the 2<sup>nd</sup> Respondent, who was obliged to ensure that all the procedures related to compulsory acquisition of the portion of the suit property are complied with, the 2<sup>nd</sup> Respondent carried out the said procedure on behalf of the 1<sup>st</sup> Respondent.
- s. Further, if the 2<sup>nd</sup> Respondent had not commenced the procedure for compulsory acquisition, seeing as the 1<sup>st</sup> Respondent made a request for the same to commence the procedure on 20<sup>th</sup> January 2021, then indeed the 1<sup>st</sup> Respondent did trespass and encroach on my property illegally.
- t. In response to Paragraph 24 of the 1<sup>st</sup> Respondent's Replying Affidavit, the allegation that all the aforesaid state agencies ought to be involved and integrated with the said compulsory acquisition process by the time the 2<sup>nd</sup> Respondent arrived at and/or reaches a conclusion was in bad faith because currently, the 1<sup>st</sup> Respondent and Kenya Railways Corporation are now



under the National Treasury which the 1<sup>st</sup> Respondent had already admitted is in the process of commencing the process.

- u. Further to the foregoing, it was not clear whether the process for compulsory acquisition had commenced or whether the aforesaid state agencies was being integrated with the process of compulsory acquisition before the 2<sup>nd</sup> Respondent arrived at a conclusion. He believed that he was entitled to any and all information in regards to compensation for his acquired property.
- v. In response to Paragraph 25 of the 1<sup>st</sup> Respondent's Replying Affidavit, the deponent reiterated Paragraph 4 herein above and further state that his Petition was properly before this Honourable Court, and the remedy under provision Section 62 of the Kenya Ports Authority Act only applied to Sections 12, 14 and 15 while his claim was premised on Section 13 of the Act.
- w. In response to Paragraph 28 of the 1<sup>st</sup> Respondent's Replying Affidavit, the alleged urgency in acquiring his property had not been buttressed clearly and it was denied that the 1<sup>st</sup> Respondent obtained his permission in taking possession of his property.
- x. In further response to Paragraph 28 of the 1<sup>st</sup> Respondent's Replying Affidavit, the allegation that the 1<sup>st</sup> Respondent took possession under the belief at the time that compulsory acquisition process for the MPDP project was underway, and that all claims of compensation had been settled is in bad faith because, the 1<sup>st</sup> Respondent at Paragraph 16 of their Replying Affidavit had admitted to requesting the Cabinet Secretary National Treasury to formally submit a request to the 2<sup>nd</sup> Respondent to commence compulsory acquisition on 20<sup>th</sup> January 2021. This was nine [9] years post encroachment, construction and utilization of his property.
- y. In response to Paragraph 29 of the 1<sup>st</sup> Respondent's Replying Affidavit, he maintained that the Respondents and/or the other governmental bodies involved in the MPDP project harbored ill intentions of depriving him of his land in an arbitrary manner without payment of just compensation for a period of eleven [11] years.
- z. Further to the foregoing, the 1<sup>st</sup> Respondent seemed to be misleading this Honourable Court by relying on Gazette Notices number 405 and 2740 whilst ignoring gazette notices no. 340 of 12828 deleting his property from those previously listed. Therefore, compulsory acquisition of his property by the 1<sup>st</sup> Respondent was unlawful and in bad faith.
  - aa. In response to Paragraph 30 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated Paragraphs 7, 8, 9, 10 and 11 of his affidavit in support of the Petition and further state that, it took the 1<sup>st</sup> Respondent nine [9] years after encroaching his property and utilizing the same, to request for the process of compulsory acquisition to begin and therefore it cannot purport to have followed the procedure under Part VIII of the Land Act, 2012 on 20<sup>th</sup> January 2021.
  - ab. Further to the foregoing, the 2<sup>nd</sup> Respondent could not act without a request under the provision of Section 107 of the Land Act, 2012. The 1<sup>st</sup> Respondent had chosen to rely on their belief that the process had commenced back in the year 2012 when it trespassed and encroached his property while contravening Section 120 [2] of the Land Act, 2012, without adducing evidence of a request ever made at that time, and the only evidence of such request is letter dated 20<sup>th</sup> January 2021; nine [9] years later.
  - ac. In response to Paragraph 31 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterate Paragraphs 12, 13, 14, 15, 16 and 17 of his Affidavit in support of the Petition and maintain that the 1<sup>st</sup> Respondent never at any point in time sought permission prior



to entering upon and taking possession of his property. Consequently, all the acts undertaken by the 1<sup>st</sup> Respondent over his property amount to trespass.

- ad. In response to Paragraph 32 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated that the alleged entitlement to the right to immediate and exclusive possession of my land for public use by the 1<sup>st</sup> Respondent contravenes Section 120 [2] of the [Land Act](#), 2012. The 1<sup>st</sup> Respondent's actions were/are therefore in bad faith.
- ae. In response to Paragraph 33 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated the contents of Paragraphs 33 and 34 herein above. Seeing all he never allowed the 1<sup>st</sup> Respondent to take possession of his land, the same could not have vested in the state as public land free from all encumbrances unless the same was done through compulsory acquisition. His Petition challenges the procedure followed in acquiring his land if at all, and further reiterated that indeed his only recourse was payment of just compensation in accordance with the [Land Act](#) 2012.
- af. In response to Paragraph 34 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated Paragraphs 6, 13 and 32 herein above, a period of fifteen [15] days from the date of publication of the notice under the provision Section 107 [5] must have expired for the 1<sup>st</sup> Respondent to exercise the right under the provision of Section 120 [2] of the [Land Act](#), 2012. There being no notice to that effect, the 1<sup>st</sup> Respondent trespassed and encroached on his property with no intention of making a request to compulsorily acquire his land as is required.
- ag. In response to Paragraph 35 of the 1<sup>st</sup> Respondent's Replying Affidavit, Paragraphs 18 & 19 of the Deponent's Affidavit in support of the Petition and further reiterated Paragraph 11 herein above. Such report ought to have been shared with him.
- ah. In response to Paragraph 37 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated Paragraphs 20, 21 and 22 of his Affidavit in support of the Petition and further state that upon encroachment and acquisition of his land, he lost use of the same and could not utilize it in any way because of the 1<sup>st</sup> Respondent's actions.
- ai. In response to Paragraph 38 of the 1<sup>st</sup> Respondent's replying affidavit, he reiterated Paragraphs 3 and 26 herein above under section 13 of the [Kenya Ports Authority Act](#), where any compensation was payable to any person in respect of any land, specified in the notice given therein, acquired by the President or the Minister responsible for lands, and such land after being so acquired was placed at the disposal of the Authority, the amount of compensation payable to that person, in accordance with the provisions of the law under which the land was acquired, should be paid by the Authority.
- aj. In response to Paragraph 39 of the 1<sup>st</sup> Respondent's Replying Affidavit, he reiterated Paragraphs 24, 24, 25 and 26 of his Affidavit in support of the Petition and further state that as at the time the 1<sup>st</sup> Respondent encroached his property, the process for compulsory acquisition was never followed and from the onset, neither permission, or consent was sought and further, no notice was issued by the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> Respondent because the 1<sup>st</sup> Respondent never made that request. The alleged request was made nine [9] years later, an injustice to him.
- ak. The response to Paragraph 40 of the 1<sup>st</sup> Respondent's Replying Affidavit, the 1<sup>st</sup> Respondent never denied his claim for compensation; however, he was opposed to



the statement that public rights and interests supersede his private rights yet the right to property was constitutionally protected and a person could only be deprived of that right as provided under *the Constitution*. Having not followed procedure and the rules of natural justice, the 1<sup>st</sup> Respondent's actions had always been in bad faith and contrary to the provisions under the *Land Act*, 2012.

- al. The further affidavit was sworn in support of his Petition dated 12<sup>th</sup> July, 2022 and humbly asked this Honourable Court to grant the prayer sought therein.

## VII. The 2<sup>nd</sup> Respondent's Replying Affidavit

29. The 2<sup>nd</sup> Respondent opposed the Petition through a 24 Paragraphed Replying Affidavit sworn by ISABEL NJERU, the Chief Valuation and Taxation officer of the National Land Commission on 30<sup>th</sup> July, 2024. The Deponent averred as follows: -

- a. Vide letter Ref TNT/CONF 16/01 dated 14<sup>th</sup> June 2022 the Cabinet Secretary, the National Treasury and Planning wrote to the 2<sup>nd</sup> Respondent herein requesting for land acquisition for parcels MN/VI/2445, 2446, 2480, 2424/500 and 818 on behalf of and for the use of the 1<sup>st</sup> Respondent herein.
- b. Upon receipt of the said request to compulsorily acquire land, the 2<sup>nd</sup> Respondent vide letter Ref: NLC/VAL.1663/1 dated 29<sup>th</sup> June 2022 wrote to the 1<sup>st</sup> Respondent herein and the National Treasury, requesting for the prerequisite documents and funds to facilitate gazette as provided under the provision Section 107 [2] of the *Land Act*.
- c. The 1<sup>st</sup> Respondent vide letter Ref: MCS/4/8/1206 and 1205 dated 1<sup>st</sup> March 2023 wrote to the Chairman of the National Land Commission providing the requisite documents for the gazette.
- d. Before the 2<sup>nd</sup> Respondent could gazette the suit land, there was an executive Presidential order to transfer the 2<sup>nd</sup> Respondent function of compulsory acquisition to the Ministry of Lands and Physical Planning hence this could not be executed. During intervening period to allow the 2<sup>nd</sup> Respondent to continue with its mandate, the 1<sup>st</sup> Respondent's functions were transferred from the National Treasury and Planning to the Ministry of Transport and Infrastructure as the line Ministry. In the circumstances, the request to compulsorily acquire the land on behalf of the 1<sup>st</sup> Respondent could only be made by the Cabinet Secretary, Ministry of Transport and Public works where the 2<sup>nd</sup> Respondent was domiciled.
- e. The law provided under the provision Section 111 [f] of the *Land Act* [Revised in 2019] that upon the lapse of two years from the date of receipt of the request to compulsorily acquire the land, the project should be gazetted afresh. The same was yet to be done noting that the initial request was affected by the lapse of the two years period above stated.
- f. The above issues were brought to the attention of the 1<sup>st</sup> Respondent vide a letter Ref: NLC/Val.1663/2 dated 4<sup>th</sup> June 2024 from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent but the letter was yet to elicit a response.
- g. The 2<sup>nd</sup> Respondent could only proceed to gazette land for acquisition and apply the provision of Part VIII of the *Land Act* to the property upon receipt of a valid request for acquisition from the line Cabinet Secretary which had not happened in this case.



- h. Similarly, the 2<sup>nd</sup> Respondent has not received any funds from the 1<sup>st</sup> Respondent to enable it proceed to acquire the land on its behalf and compensate the project affected persons.
- i. The provisions of Part VIII of the Land Act on compulsory acquisition have thus not been applied to the suit land and thus the issue of compensation is prematurely before the Court.
- j. The 1<sup>st</sup> Respondent had not gazetted or identified the suit property for compulsory acquisition and the issue of compensation cannot arise under the law.
- k. An inquiry to determine the compensable interests in the land has similarly not been done under the provision Section 112 of the Land Act and as such the figures being sought by the Petitioner as compensation amounts had no basis and are arbitrary.
- l. An award of compensation which was final and conclusive in terms of the size and value of the property compulsorily acquired had not been issued by the 2<sup>nd</sup> Respondent to any party in relation to the suit land and neither has vesting and taking possession of the suit land been done to entitle the Petitioners to compensation if any.
- m. The suit land remained private land registered in the name of the Petitioners and compensation can only be done once the said land was converted to public land by way of compulsory acquisition which has not yet happened.
- n. The 1<sup>st</sup> Respondent had equally not communicated whether it still requires the land compulsorily acquired on its behalf.
- o. The Petition as framed was a simple claim for money baptized a Petition and the issues raised therein are best addressed in a civil suit where evidence will be led and tested.
- p. Section 133 of the Land Act had established the Land Compensation Tribunal whose jurisdiction had not been exhausted and this Honourable Court is bereft of jurisdiction to entertain and determine the matter.
- q. The Petition raised no constitutional issues and the court ought to enforce the doctrine of avoidance.
- r. The Petition failed the test of “Anarita Karimi Njeru v Republic”.
- s. The affiant had annexed and marked “NLC 1” a bundle of documents in support of the averments made above.
- t. The affidavit was sworn in response and opposition to the instant Petition and prayed that the same be dismissed with costs.

### **VIII. Submissions**

- 30. While all the parties were in court, they were directed to canvass the Petition dated 12<sup>th</sup> July, 2022 by way of written submissions. At the time of penning down the Judgement, the Honourable Court had only managed to access the written Submissions from the Petitioner. It could not avail the ones from the Respondents from neither the Judiciary CTS Portal nor the ELC Registry thereof. Pursuant to that, all parties obliged and the Honourable Court reserved a Judgment date. It was eventually delivered on 9<sup>th</sup> July, 2025 accordingly.



## A. The Written Submissions by the Petitioner

31. The Petitioners through the Law firm of Messrs. Wandai Matheka & Co. Advocates filed written submissions on 15<sup>th</sup> March, 2023. Mr. Wandai and Mr. Mathare Advocates commenced their submissions by stating that the Petitioner herein was a citizen of Kenya with alienable constitutional rights. Indeed, under the provision of Article 2 of the Constitution of Kenya, 2010, this Honourable Court was mandated to respect, uphold, and ensure the due compliance of the constitution come rain and sunshine. The Learned Counsels reminded the court of the famous words by the former Chief Justice Hon. David E. Maraga when answering to the constitution call, his response was emphatic as it was direct: “let justice be done even though the heaven must fall”.
32. According to the Learned Counsels, the Honourable Court granted this did not hold the same vigor or attraction as an election Petition pitting the two largest ideologies and narratives jostling for power but nonetheless, in a fundamental part that had often been left unchecked and was now the bane of many a property owner once the government intended to compulsory acquire their property.
33. The Counsels held that the Petitioner herein had brought this Petition to force the Respondents to pay it for the compulsorily acquired property. Of the two Respondents sued, only KPA had filed its pleadings in the matter and that was the Response dated 17<sup>th</sup> February 2023 and a Replying Affidavit dated similar date. From the Response, the 1<sup>st</sup> Respondent never deny the Petitioner’s prayers or at all save it alleged to have followed procedure in the manner with regard to compensation and blame the lack of compensation on inadvertent administrative delays occasioned by the implementation of the MPDP project. In that regard, the 1<sup>st</sup> Respondent could be said to support the Petitioner.
34. The Learned Counsels averred that the 1<sup>st</sup> Respondent’s allegation at Paragraph 4 of the Response to the Petition that the Petition herein was pre – mature and an abuse of court process as the Petitioner had failed to exhaust all statutory mechanisms including Section 62 of the Kenya Ports Authority Act Cap 391 Laws of Kenya was a blanket statement meant to mislead the Honourable court. The Petitioner submits that his claim falls within the ambits of section 13 of the Kenya Ports Authority Act Cap. 391 titled “Acquisition of land for the purposes of the Authority” which compensation was provided for under the provision of Section 13 [3] and not Section 62 as adduced by the 1<sup>st</sup> Respondent. Thus, the Petition was merited.
35. The Learned Counsels averred that the Petitioner’s property was acquired by the 2<sup>nd</sup> Respondent for use by the 1<sup>st</sup> Respondent as was the law. In that regard, the Petitioner’s averments that its property was compulsorily acquired and developed for public use was thus conceded. It was also conceded that the road in question had been in operation from the year 2015 or thereabout to date yet ever since, the award certificate showing the compensation awards to be paid for the encroached area was never issued and the Petitioner had to date not received payments, yet the 1<sup>st</sup> Respondent had fully acquired, developed and allowed the road for public use all to the loss of the Petitioner.
36. In addition to the prayers prayed by the Petitioner, without prejudice to those prayers, the Learned Counsels wished to highlight and buttress the following seven [7] triable or main issues for the court consumption. These were:-
37. Firstly, on whether the Petitioner’s rights to property and fair administrative action have been contravened by the Respondents. The Learned Counsel submitted that this was the thrust of their Petition. They sought the payment of the award towards the full and complete acquisition of the petitioner’s property as described above. Article 2 [1] of the Constitution of Kenya provides that the constitutional law of the Republic and bind all persons and all state organizations at both limbs. Article



2 [4] provides any law that is inconsistent with this constitution to be invalid. Article 3 [1] states that every person has an obligation to respect, uphold and defend *the constitution*. Article 10 sets out the national values and principles of Government that binds all state offices, state organs, public offices, and all persons whereas they apply or interpret *the constitution*.

38. The provision of Article 40 [1], [2], [3], and [4] of *the Constitution* 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.
- [4] Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause [3] who may not hold title to the land.”

39. Further Article 47 of *the Constitution* states as follows:’

- [1] Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
- [2] If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- [3] Parliament shall enact legislation to give effect to the rights in clause [1]and that legislation shall-
  - [a] provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - [b] promote efficient administration.’

40. The Respondent categorically stated at Paragraph 8 of its Replying Affidavit that the initial design for the MPDP was revised upon request by the Kenya Railways Corporation in order to put further construction ancillary to the Standard Gauge Railways [SGR]. As early as the year 2012, the Respondents had already encroached and commenced construction on the Petitioner’s land without due notice of intention to acquire as is required by law. The 1<sup>st</sup> Respondent further averred at Paragraphs 11 to 15 of the Replying Affidavit that upon voting of the proposed revision of the initial



design of the MPDP project, several owners of the plots affected by the said project including the Petitioner were not compensated, but those originally affected by the main component of the MPDP had already been compensated. Their conclusion was that the Petitioner's claim for compensation was among the unforeseen and not budgeted for by the 1<sup>st</sup> Respondent. As per the statement adduced at Paragraph 14 of the 1<sup>st</sup> Respondent's Replying affidavit and through the 1<sup>st</sup> Respondent's annexure to the Replying Affidavit marked as "KPA - 3" being a letter dated 20<sup>th</sup> January, 2021 at page 8 of Paragraph 4. It had emerged that indeed, the KPA access road was constructed between years 2012 and 2016, being the period which the Petitioner raised issues of encroachment without reply from either of the Respondents.

41. From the evidence presented, it was not in doubt that at the time the Petitioner's land was compulsorily acquired, procedure with regard to Notice as outlined in Part VIII of the Land Act 2012 was not adhered to and neither consent nor agreement was sought by the 1<sup>st</sup> Respondent, despite the Petitioner demanding for the same. It was important to bring to the Court attention that as per the 1<sup>st</sup> Respondent's averments in its Replying Affidavit at Paragraph 9 and 10, notice of intention to acquire which was published on 17<sup>th</sup> December 2013 vide Gazette Notice No. 405 and notice on enquiry which was published on 21<sup>st</sup> April 2015 vide Gazette Notice No.2740, were all in respect to KeNHA project and not KPA's project. The 1<sup>st</sup> Respondent was trying to cover its illegal acquisition under KeNHA's project.
42. The Learned Counsel asserted that the 1<sup>st</sup> Respondent averred at Paragraph 16 of its Replying Affidavit that by way of letter dated 20<sup>th</sup> October, 2021, it requested the Cabinet Secretary National Treasury to formally submitted a request to the 2<sup>nd</sup> Respondent to commence the compulsory acquisition process of the portion of the suit property. This however contravened the whole procedure on compulsory acquisition because as of 20<sup>th</sup> January 2021, encroachment, construction and public use had all commenced and thus, it would mean that the Respondent's intention was to apply the law retrospectively. Going further, no citizen was to be deprived of his land by the state or any public authority against his wish unless expressly authorized by law, and public interest decisively demands so as per LORD DENNING MR in the case of: "Priest v Security of State [1882] 81 LGR 193,198".
43. It was the Learned Counsel's submission that the Petitioner's right to administrative action as well as his rights to utilize his property in any way whatsoever had been infringed upon by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Contrary to the provision of Article 47 [2] of the Constitution of Kenya 2010, the Petitioner never received written reasons for the Respondent's joint actions, despite severally writing to the 1<sup>st</sup> Respondent and providing all the requisite documents proving ownership of suit land.
44. Secondly, on the issue of whether the Petitioner was entitled to compensation for general damages for infringement of rights. The Learned Counsel submitted that it was trite principle of law that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress included an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts.
45. Under the provision of Article 22 [1] of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, was an order for compensation as per Article 23 [3] [e] of the Constitution. The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.



46. The Learned Counsels opined that his rights to property was violated by the Government when it compulsorily acquired its land and he was therefore entitled to an award of damages at a sum of Kenya Shillings Two Hundred Thousand [Kshs. 200,000.00/=]. They urged this Honourable Court to place reliance upon the valuation Report by Mugi Property Consultants marked as annexure “BS – 9” and item No. 9 of the Petitioner’s list of documents. The compulsory acquisition of part of the Petitioner’s land, not only deprived him of the same but rendered the unacquired portion un- utilizable. The Learned Counsel submitted that the Government ought to be deemed to have compulsorily acquired the whole, and not just part of the land.
47. Thirdly, on whether the Respondents had compulsorily acquired the Petitioner’s property. The Learned Counsel submitted that human endeavour whether through mutual or unilateral physical development often leads to conflict. Therefore, there was always a need for provision to ensure that disputes and conflicts do not evolve out of any individual or national endeavours. National endeavours geared towards development will naturally touch on public as well as private property and with it an obligation to protect any proprietary rights.
48. In the famous case of “Patrick Musimbi v NLC & 4 Other” a Five Judge bench interpreted with clarity the question of compulsory acquisition of land and its process. In Paragraph 82 of the court held: -
- “As the taking of a person’s property against his will is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights requires to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intention is always the protection rather than interference with proprietary rights.”
49. At Paragraphs 83 to 94 the Honourable Court outlined the process of compulsory acquisition founded under Part VIII of the Land Act, No. 6 of 2012 and from the foregoing, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein had not followed the process of the compulsory acquisition in full and to its end as envisaged under the Constitution of Kenya 2010 and the Land Act 2012. The 1<sup>st</sup> Respondent encroached the suit property way back in the year 2012 without publishing and/or causing to be published by the 2<sup>nd</sup> Respondent a notice of the Government of Kenya’s intention to acquire 0.102 Ha of the property MN/VI/2444, the 1<sup>st</sup> Respondent commenced construction of Mombasa Port access road to completion and public use. To date, despite the Petitioner’s plea for full and just compensation by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents as required by the constitution of Kenya 2010 and the Land Act 2012, the same has been blatantly ignored.
50. Further at Paragraph 114 the court stated:-
- “The power to expropriate private property as donated to the State by both the Constitution and statute law [the Land Act] leaves the private landowner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private landowner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized: see Commissioner of Lands V Coastal Aquaculture Limited [1997]1 KLR [L&E] 264. See also the Australian case of R & R Fazzolari Pty Limited -v - Parramatta City



Council [2009] HCA 12 where the court held the view that such scrutiny must invite and also involve common law as well as statutory protections. Just compensation is consequently mandatory.”

51. In the case of:- “ELC NO.15 OF 2017 Isaiah Otiato & 6 Others v County Government of Vihiga [2018] eKLR” this court sitting in Kakamega ordered the Respondent to compensate the Petitioners before compulsorily acquiring their parcels.

52. The Learned Counsel relied on the case of:- “Arnacherry Limited v Attorney General [2014] eKLR”, that stated:-

“The allegation of violation of constitutional rights, the core right at the center 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.”

53. In the matter herein, upon encroachment by the government, civilians followed suit in setting up open air canteens to serve truck drivers in and out of the 1<sup>st</sup> Respondent's Gate No. 24. Article 40[3] was a constitutional requirement that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

54. Thirdly, on whether the Petitioner was entitled to payment of the compensation award in reference to the suit property. The Learned Counsels submitted that the issue herein was clearly outlined under the provision of Section 115 of the *Land Act* 2012 which provided the following: -

[1] After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where-

[a] there is no person competent to receive payment; or

[b] the person entitled does not consent to receive the amount awarded; or

[c] there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which 85 No.6 Land 2012 the compensation is to be paid.

[2] In any of the cases referred to in paragraphs [a], [b] and [c] of subsection [1], the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly.

55. It was undisputed from the above provision that the award was to be paid promptly and not today, ten [10] years later. There really was no arrangement in that regard. It was important to note that over this period of is no arrangement in that regard. It was important to note that over this period of ten [10] years, none of the Respondents have ever written to the Petitioner for any reason in the delay of



- payment and/or dispute if any. Therefore, this is emphasized infringement of the right under Article 47[3].
56. The current procedure for acquisition of land by the state is partially outlined above and as could be seen, parliament took seriously its constitutional duty to legislate on the state's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative. Consequently, the Petitioner challenges the procedure adopted by the 1<sup>st</sup> Respondent. The Petitioner had been patiently chasing this payment for ten [10] years and all that effort bore no fruit hence resulting in the filing of this Petition. Suffice it to say, the main quest in this matter is compensation. As was stated by Scott L.J. in relation to compulsory acquisition in the case of "Horn v Sunderland Corporation [1941] 2KB 2640" "The word "Compensation" is almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that unless he received a price that fully equated his pecuniary detriment, the compensation would not be equivalent to the compulsory.
57. Based on the above exposed, the law demands that where land had been acquired compulsorily from an owner that just compensation is to be paid in full to the said affected person[s]. This is in line with the Constitutional requirement under Article 40 [3] of *the Constitution* of Kenya and that person should not be deprived of their property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.
58. Fourthly, on whether the Petitioner was entitled to interest accrued on delayed payments of the compensation award. The Learned Counsels submitted that the Petitioner prayed this Court made a finding that the Petitioner was entitled to payment of interest over the delayed payment. Under *the constitution*, a person deprived of property was entitled to interest penalties. In this case, it was not denied that interest had accrued on the awarded amount and to which we pray that the same be assessed at the current prevailing market value being a sum of Kenya Shillings Two Thirty Million [Kshs. 230,000,000.00/-].
59. Under the provision of Section 117 [1] of the *Land Act* provides the following: -
117. [1] If the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest on the amount awarded at the rate prevailing bank rates from the time of taking possession until the time of payment.
60. Whereas the law makes a minor amount of 6% as interest payable, there was no reason why the court ought to assess this rate given the imparity, arrogance and self-entitlement displayed by the Respondents and further noting inflation. The Learned Counsels contended and asked the Court to assess interest on the award amount from the date of compulsory acquisition to payment in full.
61. Fifthly, on whether the Petitioner was entitled to Mesne profits regarding the suit land. The Learned Counsel asserted that they sought guidance from the Honourable Court to prayer H of the Petition in reference to mesne profits. They referred Court to section 2 of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya which defines mesne profits. They also cited Halsbury's Laws of England, which defines mesne profits as an action by a land owner against another who was trespassing on the owner's lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he had suffered through being out of possession of the land. Mesne profits being damages for trespass could only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord had recovered possession, or the tenant's interest in the land had come to an end.



62. With reference to Halsburys, op. cit, 4<sup>th</sup> Edition above the Learned Counsels opined that the same suggested that where mesne profits were awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent. The Learned Counsels submitted that the Respondents after illegally acquiring and constructing the road on the property without compensation ought to pay mesne profits for the loss of use of the same. The Petitioner had lost profits that he normally would be earning, should he have rented or leased the suit property but the same was not possible because of the Respondent's actions. The Petitioner prayed that the assessment be done at a sum of Kenya Shillings Three Million Six Hundred Thousand [Kshs. 3,600,000.00/=] per month from the year 2012 to the date of payment in full.
63. The Learned Counsel averred that this was an estimate amount based on the area of the property and its proximity to the harbour and Standard Gauge Railway [SGR] making it the best location for warehousing, logistics and storage businesses. The Respondent was and continued to benefit from the Petitioner's property without having compensated the same.
64. Lastly, on whether the Petitioner was entitled to costs and interests. The Learned Counsels submitted that the Petitioner prior to filing this Petition issued demand letters to the Respondents herein but they failed to act and/ or responded on the same thus forcing the Petitioner to file this instant Petition. Thus the Learned Counsels argued that the Petition should be allowed costs together with interest at court rates.

#### **IX. Analysis and Determination**

65. I have carefully considered all the filed pleadings pertaining to the Petition dated 12<sup>th</sup> July, 2022, the Affidavits by the Petitioner and the 1<sup>st</sup> Respondent, the comprehensive and articulate written submissions and the cited authorities by the Petitioners, the appropriate provisions of the Constitution of Kenya, 2010 and the statutes.
66. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three [3] salient issues for its determination. These are:-
  - a. Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.
  - b. Whether the Constitution Petition has any merit and, if affirmative, if the Petitioner are entitled to the reliefs sought?
  - c. Who will bear the Cost of the Petition?

#### **IssueNo. a]. Whether the Petition by the Petitioners meets the threshold for Constitution Petitions.**

67. Under this Sub - heading, for the Honourable Court to respond to this query, it will be inevitable to critically assess certain aspects of the concept of Constitutional provision. In so doing, the Court will not be re – inventing the wheel as it is an issue well articulated by various Courts. To begin with, under the provision of Article 2 [1] & [4] of Constitution of Kenya defines the Constitution as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.
68. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, the Constitution of Kenya under Article 259 [1] provides a guide on how it should be interpreted as such:-



- a. Promotes its purposes, values and principles;
  - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. Permits the development of the law; and
  - d. Contributes to good governance.....”
69. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
70. Based on the principles set out in the edit of the Court of appeal case of: “Mumo Matemu v Trusted Society of Human Rights Alliance & Another [2013] eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
- Further, in the “Thorp v Holdsworth [1886] 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
- “The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”
71. Article 23 [3] of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.
72. In this Petition, the Petitioner seeks declarations cushioned around the provision of Articles 40, 47 &, 50 of *the Constitution* of Kenya, 2010 and various statutes on compulsory land acquisition. Thus in application of these set out principles for filing a Constitutional Petition, the Honourable Court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

**IssueNo. b]. Whether the Constitutional Petition has any merit and, if affirmative, if the Petitioner is entitled to the reliefs sought?**

73. Under this sub - heading, it’s imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. 6 of 2012 and Article 40 [1], [2] and [3] of *the Constitution* of Kenya [See “Viranda Ramji Gudka & 3 Others v The AG [2014]eKLR” as read together with Part V of The Land Regulations of 2017.



74. The Petitioner has alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu v Trusted Society of Human Rights Alliance & Another [Supra]” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim was well pleaded and articulated with absolute particularity. It held: -

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

75. The Petitioner has contended that sometimes in the year 2012, the 1<sup>st</sup> Respondent, without publishing and/or causing to be published by the 2<sup>nd</sup> Respondent a notice of the Government of Kenya’s intention to acquire 0.102 Ha of the suit property, for and on behalf of the 1<sup>st</sup> Respondent, and/ or its contractor through their respective servants/employees/agents, unlawfully and unprocedurally encroached onto the suit land so as to implement the MPARD and in the process a road [Mombasa Port Access Road] and Container Terminal construction activities took off. Later on in the year 2013, while the 1<sup>st</sup> Respondent was still continuing with the illegal encroachment, a fence and a temporary weighbridge were placed on part of the suit property without due regard to the petitioner’s right to property and in particular on beacons “S3” and “S2” bringing the total area encroached by the 1<sup>st</sup> Respondent to be 0.102 Hectares. Sometimes in the year 2015, the Mombasa Port Access Road was tarmacked over beacon “S2” and the road was in immediate use with an upgraded fence erected across the suit property, where a common boundary is shared by the Petitioner and the 1<sup>st</sup> Respondent’s gate no. 24. The road that was completed sometime in 2015, which cuts across the Petitioner’s suit property, was only beneficial to the 1<sup>st</sup> Respondent as heavy commercial vehicles entering the 1<sup>st</sup> Respondent through gate number 24, pass through the suit property. The Petitioner stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to follow the requisite procedure with regard to compulsory acquisition of land. Pursuant to Section 113 of the Land Act, No. 6 of 2012, he was entitled to an award certificate showing the compensation awards to the paid for the encroached area of the property and further pursuant to Article 111[1] of the Land Act, 2012, he was entitled to just payment and to be paid promptly.

76. Since the Petitioner had not been paid prompt, just and full compensation by the Government of Kenya as required by the Constitution of Kenya and the Land Act, 2012 the 1<sup>st</sup> Respondent and/or its contractor through their respective servants/employees/agent’s entry onto the Petitioner’s property was a breach of the Petitioner’s rights to property under Article 40 of the Constitution of Kenya, 2010.

77. The Petitioner had therefore been deprived of his right to property without inter alia the payment in full of just compensation, therefore. Further the failure by the 2<sup>nd</sup> Respondent to compensate and pay in full the Petitioner while the 1<sup>st</sup> Respondent, its contractors, agents, servants and/or employees entered onto the Suit Property and implemented the Government of Kenya’s project, constitutes a blatant breach of the Petitioner’s right to fair administrative action under Article 47 of the Constitution of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. The 1<sup>st</sup> Respondent had fenced the portion of the Petitioner’s property that shares a boundary thus causing trespass by trucks and open-air canteens that emerged because of the encroachment. In addition to the above, the continued unlawful occupation of the Petitioner’s property by the 1<sup>st</sup> Respondent without relinquishing it’s right or returning it to the Petitioner should be interpreted as trespass and forced acquisition on the Petitioner’s property and was without a doubt a breach of the Petitioner’s rights. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s aforementioned actions and/or inaction have defrauded and/or disenfranchised the Petitioner’s right to property and to wit the petitioner demands immediate eviction. The Petitioner stated that pursuant to Section 117[1] of the Land Act, 2012, it was entitled to interest on any compensation award not paid.



78. According to the Petitioner, it was an unreasonable and clearly inefficient administrative action for the Government not to publish its intention to acquire the property, not invite the Petitioner to make submissions on its claim for compensation nor proceed to make an award, enter the suit property, commence construction, complete construction of a Government project and without paying the Petitioner his compensation or at all. Before filing this Petition, the Petitioner wrote several letters to the 1<sup>st</sup> Respondent herein demanding procedure to be followed in acquisition of the property but have not received any useful response from either of the Respondents. The Petitioner therefore prayed to this Honourable Court to intervene and remedy the blatant breach of the Petitioner's constitutional rights.

79. The Article 40[1], [2], [3], and [4] of *the Constitution* 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.

[4] Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause [3] who may not hold title to the land.”

a. Further Article 47 of *the Constitution* states as follows:

“[1] Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

[2] If a right or fundamental freedom of a person has been or is likely to



be adversely affected by administrative action, the person has the right to be given written reasons for the action.

[3] Parliament shall enact legislation to give effect to the rights in clause [1] and that legislation shall-

[a] Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

[b] Promote efficient administration.’

80. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.

81. In the case of “Alba Petroleum Limited v National Land *Commission & 4 others [Constitutional Petition 36 of 2022]* [2024] KEELC 1267 [KLR] [26 February 2024] [Judgment]”, this Honourable Court opined that:-

“155. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.”

82. Further, in the case of “Republic v Kombo and 3 Others ex-parte Waweru [2008] 3 KLR [EP] 478” which was cited by the Petitioner it was held, inter alia, that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong [such as taking a man’s land], or which infringes a man’s liberty [as by refusing him planning permission], must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

83. The meaning and intent of the Article 40 [3] of *the Constitution*. Article 40, reads in part as follows:

40. [1] Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--



- [a] of any description; and
  - [b] in any part of Kenya.
- [2] Parliament shall not enact a law that permits the State or any person—
- [a] to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - [b] to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 [4].
- [3] The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- [a] results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - [b] is for a public purpose or in 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.

84. The Land Acquisition Act [now repealed] provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows: -

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

85. Under the provision of Sections 24, 25 and 26 of the *Land Registration Act* 2012 upheld the indefeasibility of title:

Section 24 stipulates as follows;

Subject to this Act—

- [a] the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- [b] the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides;

- [1] The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated



except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- [a] to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - [b] to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- [2] Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that;

Certificate of title to be held as conclusive evidence of proprietorship

- [1] The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - [a] on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - [b] where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- [2] A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

86. The 1<sup>st</sup> Respondent on the other hand contended that it was a stranger to the allegations at Paragraph 4 of the Petitioner's Supporting Affidavit and was put to strict proof of the said allegations. In particular, the 1<sup>st</sup> Respondent had not at any given time acted in any matter as intimated in paragraph 4 as stated. The process being referred to was carried out by the 2<sup>nd</sup> Respondent in the performance of its statutory mandate and the Petitioner was fully engaged and aware of the process.

87. The Petitioner was aware that the properties were acquired vide a gazette notice and they participated in the process up to the point of deletion. Thereafter they approached the 1<sup>st</sup> Respondent vide the Notice under Section 66[a] of the *Kenya Ports Authority Act*. All processes of acquisition have a mandatory procedure to be subscribed to. The 1<sup>st</sup> Respondent could not directly acquire property by compulsorily acquiring one in light of the new land regime established under *the Constitution*. The 1<sup>st</sup> Respondent had to liaise with various national government institutions and departments which include the Treasury and especially the 2<sup>nd</sup> Respondent.

88. Under the provisions of the *Land Act*, No. 6 of 2012, the provisions of Section 107 of the Act holds that, the NLC - the 2<sup>nd</sup> Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC



providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 [3] of *the Constitution* of Kenya. In this case the threshold must be met. Significant variation in the law includes the provision of Section 107 [3] of the *Land Act*, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in Section 107 [3] of the *Land Act* and Article 40 [3] of *the Constitution* of Kenya.

89. Under the provision of Section 108, as part of the NLC's due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. [See "Nas Auto Spares v Land Acquisition & Compensation Tribunal & 2 Others [2015] eKLR]. This process is thereafter followed by a verification meeting [See Section 107 [2] with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, Cadastral Maps of the affected areas, a Resettlement Action Plan [RAP] accompanied by a list or Persons Affected by the Project [PAPs] so that their applications can be put into consideration. Under the provisions of Sections 107 [5] & 110 [1] of the Act, the 3<sup>rd</sup> Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and National Governments – Section 107 [8] of the *Land Act* for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under Section 108 of the *Land Act*. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC.
90. The land owners play no role at all hereof. Under the provision of Section 112 of the *Land Act* is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen [15] days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry [See Section 112 [2] of the Act. At this stage, the NLC exercises a quasi - judicial powers.
91. For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents [See Section 112 [5] of the Act makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of Sections 113-119 of the Act. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act.
92. Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of



compensation. [See. Sections 113 & 114]. Adequate and conclusive compensation can also be in form of land if available, whose value does not exceed that amount of money the NLC considers should have been awarded [See. See Section 142 [2]. Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such award is not subject to taxation. A compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision of Sections 120-122 of the *Land Act*.

93. In what has now become “the Classicus Locus” case on compulsory acquisition of land, the case of: “Patrick Musimbi –v - National Land Commission & 4 Others” Petition No. 613 of 2014” the word “compensation” was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence. Therefore, from the above detailed statutory analogy, it’s clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person’s private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It’s an extremely delicate balance to be weighed with utmost case.

94. The case of: “Patrick Musimbi [Supra]” held inter alia: -

“As the taking of a person’s property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights..... the power to expropriate private property as donated in the State by both *the Constitution* and statute law [the *Land Act*] leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”



95. The most disheartening part is that from the proceedings herein, it will be noted that the willful lethargy, unwillingness and reluctance depicted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents depicted in initiating the process of compulsory acquisition as provided for by law. When inquired by the Court on the reason for this failure, they would engage the Court in a game of blame game and perfected art of moving musical chairs. It was until the Court having reached the edge of the cliff and decided to issue summons to show cause against the top management and decision makers of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that at least the process of gazettelement commenced in earnest. The Honourable Court is pleased that at least it is now work in progress.
96. Be that as it may, this Honourable Court is of the opinion that the Petitioners have demonstrated a violation of their legal and constitutional rights being the registered proprietor of the suit property, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioners herein had not dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought.
97. In view of the foregoing, I find the claim by the Petitioner on the breach of his constitutional rights by the Respondents meritorious and well founded in law. Hence, I hereby then proceed to examine the material before court as to whether it supports the Petitioner's prayers on the Petitioners. The Petitioner on prayer one has attached their Certificate of Title. The title deed, which is a conclusive prima facie evidence was never challenged by the Respondents. It confers indefeasible rights, title and interest of land vested by law to the Petitioner. I have held this legal position before in this court times without number. For instance, I elaborately stated in the case of: "Said & 3 others v Kenya Rural Roads Authority [Environment & Land Case 198 of 2020] [2024] KEELC 4662 [KLR] [4<sup>th</sup> June 2024] [Judgment]" that:-

“.....It is trite law that for a person to prove legal ownership of land they must bear a prima facie conclusive evidence in form of documentation for instance a Certificate of Title. The proprietor and/or absolute owner ought to have it registered in his/her name. have a title for one to have acquired indefeasible title, interest and title on the land as vested in law. Ideally, the legal effect and efficacy of registration of the documentation is provided for under the provision of Section 24 of the Land Registration Act, No. 3 of 2012 which provides as follows: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

58. Section 25 [1] of the said Act further provides that: -

“ the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”



59. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26[1] of the [Land Registration Act](#) which provides; -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a. on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

60. It will be seen from the provision of Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the [Land Registration Act](#) gives the registered proprietor absolute rights over the registered land, Section 26 gives sanctity to title and makes provisions of when such title can be cancelled or revoked.

61. To cap it up, it is evident that the right to own and acquire property in Kenya is premised under Article 40 of [the Constitution](#) of Kenya, 2010. The said Article provides as follows: -

“[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...”.

98. The Petitioner has averred that he is the registered proprietor of all that parcel of land known as L.R. No. MN/VI/2444 measuring approximately 0.7446 Hectares and situated in Mombasa County within the jurisdiction of this Honourable Court. In his supporting affidavit he annexed and marked as “BS - 1” were copies of the Certificate of Title and the respective Certificate of Postal Search which I had the pleasure of perusing. Undoubtedly, the Petitioner is the absolute and registered legal owner to the suit property. What does that then mean? The effect and efficacy of registration of land is founded under the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Section 24 gives the registered proprietor absolute rights over the registered land and the benefits that come with the said land. In finding that the Petitioner is the registered owner of the suit property, he is therefore entitled to prayer 1 on the foot of his Petition.

99. Regarding prayer number two of the Petition. The Honourable Court examines the right to fair administrative action. The provision of Article 47[1] of the Constitution of Kenya, 2010 is couched in mandatory terms, to wit:-

“Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

100. The Constitution binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19[1] of the Constitution which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies. [See “Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR”].

101. In the case of:- “Dry Associates Limited v Capital Markets Authority and Another, [2012] eKLR” the Court observed: -

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act [Cap 26 of the Laws of Kenya] but is to be measured against the standards established by the Constitution.”

[1] Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

[2] Every person has the right to be given written reasons for any administrative action that is taken against him.

[3] Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-



- [a] prior and adequate notice of the nature and reasons for the proposed administrative action;
  - [b] an opportunity to be heard and to make representations in that regard;
  - [c] notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - [d] a statement of reasons pursuant to section 6;
  - [e] notice of the right to legal representation, where applicable;
  - [f] notice of the right to cross-examine or where applicable; or
  - [g] information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- [4] The administrator shall accord the person against whom administrative action is taken an opportunity to-
- [a] attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.
  - [b] be heard;
  - [c] cross-examine persons who give adverse evidence against him; and
  - [d] request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- [5] Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- [6] Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”

102. The importance of this right to fair administrative action as a constitutional right in our Constitution under the provision of Article 47 cannot be over emphasized. The Court of Appeal stated in the case of: “Judicial Service Commission v Mbalu Mutava & another [2014] eKLR” that:-

“Article 47[1] marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47[1] to the principle of



constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

103. Juxtapose this position, the Respondents have not explained their failure to pay the just and full compensation promptly to the Petitioners. Paradoxically, this was while the 1<sup>st</sup> Respondent had entered upon the Suit Properties, until recently with the intervention of this Court, had not even commenced the process of compulsory acquisition. To worsen the situation, the 1<sup>st</sup> Respondent had even implemented project by constructing and completing the road and erecting a security fence constitutes a blatant breach of the Petitioners’ right to fair administrative action under Article 47 of *the Constitution* of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. Pursuant to Section 117[1] of the *Land Act*, 2012, the Petitioners are entitled to interest on any compensation award not paid from the year 2013 when the 1<sup>st</sup> Respondent took possession of the Suit Properties and from 1<sup>st</sup> September, 2014 when the compensation awards were made until payment in full. Subsequently going by the facts above the Court finds that the Petitioners’ right to administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the Respondents.
104. On the declaration that the 1<sup>st</sup> Respondent has compulsorily acquired the suit property, the Honourable Court at paragraphs 74 to 97 of this judgment already determined that the Respondents transmitted the Petitioners’ land by compulsory acquisition and by *the constitution* Article 40[3] were to adequately compensate the Petitioner which they never did. For this reason prayers number [d], € and [f] are found to be merited and with legal basis thus allowed.
105. The Court further finds that it will not harm the Respondents to paying compensation in respect of the further utilization by the 1<sup>st</sup> Respondent of 0.102 Hectares of the suit property within 30 days or such period as the Honourable Court may order being that the Petitioners are the registered owners of the property they have been utilizing totaling to a sum of Kenya Shillings Two Thirty Million [Kshs. 230,000,000/-] as per the valuation report dated 8<sup>th</sup> April, 2022 plus interest of the compensation from the date the property was acquired till payment in full but this is subject to an valuation report to be conducted again as per the current market prices and inflation rates; thereby granting prayer [g]. I also take note that in their response the 1<sup>st</sup> Respondent absolved themselves from any liability in the transmission of the suit properties but it must be noted that they were the ones that utilized the property and the properties were also acquired therefore the liability also lied on them as well.
106. On the prayer for Mesne profit; Mesne profits are sums of money paid for the occupation of land to a person with right of immediate occupation, where no permission has been given for that occupation. In the case of “Maina Kabuchwa v Gachuma Gacheru [2018]eKLR”, the court held that:-
- “Where a party claims for both mesne profits and damages for trespass, the court can only grant one.”
107. The provision of Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-
- “Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”



108. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-

- “ 13. Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—
- [1] for the possession of the property;
- [b] for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- [c] directing an inquiry as to rent or mesne profits from the institution of such suit until—
- [i] the delivery of possession to the decree-holder;
- [ii] the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court; or
- [iii] the expiration of three years from the date of the decree, whichever event first occurs.
- [2] Where an inquiry is directed under sub rule [1] [b] or [1] [c], a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

109. The Court of Appeal in the case of “Attorney General v Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The Court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

110. According to the valuation of the suit property was recorded and the same was not challenged. Mesne profits as alluded above is a genre of special damages which must be proved. I am persuaded that the Petitioner has proved the same and the Court finds no reason to decline the same; awarded at a sum of Kenya Shillings Three Million Six Hundred Thousand [Kshs. 3,600,000.00/=] per month for the unlawful continued occupation of the Petitioner’s suit property from the year 2012 till payment in full. Having granted the prayer, I see no reason to determine prayer No [h] as the same is repetitive.

#### **IssueNo. c]. Who bears the costs of the Petition.**

111. It is now well established that the issue of Costs is the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings in litigation. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 [1] of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 [1] and [2] of *the Constitution* of Kenya [Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013] provides: -

“ [1] The award of costs is at the discretion of the Court.



[2] In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

112. In the case of “Reids Hewett & Company v Joseph AIR 1918 cal. 717” and “Myres v Defries [1880] 5 Ex. D. 180”, the House of the Lords noted: -

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

113. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh v Tarchalans Singh, [2014] eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu v Barclays Bank of Kenya & Ano. [2016] eKLR” the Courts held: -

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

114. Therefore, the events in the instant case is that the Petitioner herein has succeeded in establishing his case on preponderance of probabilities. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner to be borne by the by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

## **X. Conclusion and Disolution**

115. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner herein has succeeded in all the prayers sought from its filed Petition dated 12<sup>th</sup> July, 2022 against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. Clearly, from these proceedings, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not liable and thus fully exonerated from this matter. For avoidance of doubt, I allow the said Petition specifically under the following terms:-

- a. That Judgement be and is hereby entered in favour of the Petitioner as per the Petition dated 12<sup>th</sup> July, 2022 in its entirety.
- b. That a declaration do and is hereby made that the Petitioner’s rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Section 111[1] and 115[1] of the *Land Act*, 2012 have been contravened by the 1<sup>st</sup> Respondent and/or the 2<sup>nd</sup> Respondent.
- c. That a declaration do and is hereby made that the Petitioner’s rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.
- d. That a declaration do and is hereby made that the Petitioner is entitled to compensation for infringement of his rights.
- e. That a declaration do and is hereby made that the 1<sup>st</sup> Respondent has compulsorily acquired the Petitioner’s property known as L.R. No. MN/VI/2444 without compensation.



- f. That an order do and is hereby issued that the 2<sup>nd</sup> Respondent the already initiated process of compulsory acquisition of the Petitioner's entire property known as L.R. No. MN/VI/2444 to be concluded within the next 180 days from this date hereof.
- g. That a declaration do and is hereby issued that the Petitioner be and is hereby entitled to interest on the compensation award for the property known as LR NO. MN/VI/2444 at the prevailing market interest rate or as such a rate as this Honourable Court shall deem just with effect from the year 2012 and/or from the date when the 1<sup>st</sup> Respondent, its agents/servants/employers and/or its contractors entered upon the Suit Property or such other relevant date as this Honourable Court shall deem fit immediately.
- h. That the Petitioner to be awarded Mesne profits calculated at a sum of Kenya Shillings Three Million Six Hundred Thousand [Kshs. 3,600,000/=] per month for the unlawful continued occupation of the Petitioners property being MN/V1/2444 from the year 2012 till payment in full.
- i. That the costs and interest of the Petition dated 12<sup>th</sup> July, 2022 to be awarded to the Petitioner and be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents be and are hereby exonerated from this matter.

It Is So Ordered Accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH MISCROFT TEAMS VIRTUALLY THIS 9<sup>TH</sup> DAY OF JULY 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI  
ENVIRONMENT AND LAND COURT  
AT MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Matheka & Mr. Mathare Advocates for the Petitioner.
- c. Mr. Amakobe Advocate for the 1<sup>st</sup> Respondents.
- d. No appearance for the 2<sup>nd</sup> Respondent.

