



**Geyser International Assets Limited v National Land Commission (Constitutional  
Petition 24 of 2019) [2023] KEELC 17813 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17813 (KLR)

**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION 24 OF 2019**

**LL NAIKUNI, J**

**MAY 10, 2023**

**IN THE MATTER OF: ARTICLES 10, 22, 23, 25, 27, 28, 40,  
47, 7 AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 13 OF THE  
ENVIRONMENT AND LAND COURT ACT 2011**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTIONB  
OF THE BILL OF RIGHTS UNDER ARTICLES**

**23(1) (3), 40(3) AND 47 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

**IN THE MATTER OF: LAND ACT NO 6 OF 2012**

**BETWEEN**

**GEYSER INTERNATIONAL ASSETS LIMITED ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**



## JUDGMENT

### I. The Preliminaries.

1. The Judgment of this Honourable Court relates to the filed Constitution Petition dated 27<sup>th</sup> June, 2019 by the Petitioner on 28<sup>th</sup> June, 2019. The Constitution Petition is brought under the dint of the provisions of Articles 23 (1), 40 (3) and 47 (1) of the Constitution of Kenya, 2010, Sections 13 of the Environment & Land Court Act, No. 19 of 2011 and the provisions of the national land Act, No 5 of 2012 and the Land Act, No. 6 of 2012. As a matter of background information, despite of being served with the pleadings and clearly demonstrated from the filed Affidavit of Service of Peter Mburu Waithaka, a Licensed Court Process Server dated 30<sup>th</sup> July, 2019. Despite of this, the Respondent failed to enter appearance and defend the Petition. Further, on record there is an affidavit of service sworn on 10<sup>th</sup> May 2021 serving the Respondent with a mention notice dated 18<sup>th</sup> March 2021 and another affidavit of service sworn on 30<sup>th</sup> September 2022 serving the Respondent with a mention notice dated 26<sup>th</sup> September 2022 and the order dated 22<sup>nd</sup> September 2022.
2. Despite of service being effected, the Respondents failed to file any response nor participate in the matter. For that reason, the Honourable Court was bereft of the advantage of assessing the Viva Voce oral and documentary evidence by the Respondent at the time of penning this Judgement down. It is instructive to note that, in the pendency of the proceedings, the Honourable Court was informed that parties were engaging in some discussion and exploring an out of Court negotiation with a view of attaining a settlement. However, in the fullness of time, it appears the efforts became a cropper. Be that as it may, it still proceeded on to deliver the said Judgement their absence notwithstanding as guided and provided for under the provisions of Rules 14 (1) & (2); 15 (1), ( 2 ) (a) (i) & (ii); ( b ) & ( 3) and Rule 16 (1) & ( 2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Also referred to as “The Mutunga Rules”).
3. The Petitioner described itself as the registered limited liability company and the lawful proprietor of all that Parcel of land known as Plot No. MN/VI/3892 (hereinafter referred to as “The Suit Land”).
4. The Respondent is established as a Constitutional body under Article 67 (1) of Constitution and further Article 67 (2) read with the National Land Act, No. 5 of 2012 which makes the provision for the function and powers of the NLC. The transitional and saving provisions of the NLC Act provide that any function, transition, Civil proceedings or other processes in respect of any public land administration matter within the docket of the Ministry of Land before the commencement of the Act is deemed to be carried by the Act as per the provision of Section 30 of the NLC Act. The enactment of the NLC Act is in furtherance of the objects and the principles of devolved government in land management and land administration. The Respondent’s role in the Standard Gauge Railway Project was the compulsory acquisition of 1.089 ha from Plot No. MNVI/3892 owned by the Petitioner.

### II. The Petition.

5. The Petitioner states that on or about 15<sup>th</sup> July 2016 the Respondent published a Gazette notice under the authority of the government of Kenya informing the public that the government intended to acquire 1.089 ha from the suit property for purposes of construction of the Mombasa – Nairobi standard Gauge Railway (SGR).
6. The Respondent awarded the Petitioner a sum of Kenya Shillings Ninety-Six Million Five Fourty Six Thousand Two Ninety-Two Hundred (Kshs 96,546,292/=) as a fair and reasonable compensation



for the portion acquired. The Petitioner accepted the award and supplied details of bank account which money was to be deposited which the Respondent had not paid despite the Petitioner making follow ups through letters. The demand letter has not elicited any response from the Respondent. The Petitioner stated that failure by the Respondent to promptly compensate the Petitioner even after the award was made is a clear violation of its rights under Constitution. The Petitioner relied on the provision of Articles 2, 3, 10, 20, 22, 23, 25, 27, 28, 40, 47, 67, 162, 258. The Petitioner blamed the Respondent for failure to fairly and promptly compensate exposing the Petitioner to economic hardships, losses and damages.

### III. The facts and reliefs sought

7. The Petition dated 27<sup>th</sup> June 2019 was premised on the grounds, testimonial facts and 11 Paragraphed Supporting Affidavit sworn by PETER NDUNGU KIMANGA and dated 27<sup>th</sup> June, 2019 together with eight (8) annexures marked as “PNK – 1 to 8” annexed thereto. He averred that:
  - a. He was the Managing Director of the Company for the Petitioner and hence duly authorised under the seal of the Company dated 27<sup>th</sup> June, 2019 to swear this affidavit and represent the Petitioner in this suit.
  - b. He confirmed that the Petitioner’s was legal and absolute proprietors of the suit property and he attached a Copy of the title deed marked as “PNK – 2” thereof.
  - c. On or about the 15<sup>th</sup> July, 2016, the Respondent published a Gazette Notice under the authority of the Government of Kenya and Marked as “PNK – 3” was a true copy of the Gazette.
  - d. The Gazette Notice informed the Public that the Government of Kenya intended to acquire (1.089 HA) from the suit property and on behalf of the Respondent for purposes of the construction of the Mombasa – Nairobi Standard Gauge Railway (Hereinafter referred to as “The SGR”).
  - e. Subsequently, and pursuant to the intended acquisition of the suit property by the Government of Kenya, as per said Gazette Notice, the Respondent awarded “Geysler International Assets Limited” – the Petitioner herein a sum of a sum of Kenya Shillings Ninety-Six Million Five Forty-Six Thousand Two Ninety-Two Hundred (Kshs 96,546,292/=) as fair and reasonable compensation for land. Annexed hereto and marked as “PNK - 4 is a copy of the Award dated 23<sup>rd</sup> October, 2017.
  - f. The Petitioner accepted the award by the Respondent and supplied details of their bank account into which the money was to be deposited. Annexed hereto and marked as “PNK -5” was a copy of the Statement of Acknowledgement dated 4<sup>th</sup> December, 2017 and “PNK – 6” was a copy of the Electronic Fund Transfer details dated 4<sup>th</sup> December, 2018.
  - g. After the award was made by the Respondents in favour of the Petitioner had made follow ups and even written letters to the Respondent demanding payment, and which letters were yet to elicit any response from said Respondent.
  - h. It was clear from the foregoing that the failure by the Respondent to promptly compensate the Petitioner even after the award was made of their land to the Petitioner was a clear violation of the Petitioner’s rights as set out in Constitution of Kenya, 2010.
  - i. This Honourable Court had jurisdiction under the Constitution to order/compel the Respondents to compensate the Petitioners forthwith.



- j. Despite notice of intention to sue having been given by the Petitioners, the Respondent had failed to compensate the Petitioner for compulsorily acquiring Plot No. MN/VI/3892. Annexed hereto and marked as “PNK – 8” was a copy of the Notice under the Government Proceedings Act.
- k. The Respondent had already concluded its inquiry and should issue the award notice to the Petitioners and payment thereof.
- l. The Petitioner prayed for:-
  - i. A declaration that the Respondent contravened the Constitution and their actions are unlawful, void ab initio
  - ii. That the Respondent abused their statutory powers in refusing to compensate the Petitioner.
  - iii. An order directing the Respondent to compensate the Petitioner a sum of Kshs 96,546,262 as per the award dated 23<sup>rd</sup> October 2017.
  - iv. An order that the Petitioner is entitled to interests, and any other damages applicable in law on the compensation to be awarded by the Respondent from the date provided in law until payment in full at commercial rates
  - v. Costs of the Petition to be borne by the Respondent
  - vi. That the Honourable Court do make any orders that it may deem necessary in the interests of justice.

#### **IV. Documents by the Petitioner.**

- i. Authority to plead.
- ii. A copy of the title.
- iii. A copy of the gazette notice Vol CXVIII-NO 78 dated 15<sup>th</sup> July 2016
- iv. A copy of the award dated 23<sup>rd</sup> October 2017
- v. A copy of the statement of acknowledgement dated 4<sup>th</sup> December 2017.
- vi. A copy of demand letter dated 27<sup>th</sup> June 2017
- vii. A copy of the notice of intention to sue.

#### **V. Submissions**

- 8. As indicated above, despite service, the Respondent failed to enter appearance and defend the Petition. On 20<sup>th</sup> September 2022 the Honourable Court directed that considering that the negotiations to resolve the dispute have not borne any fruits the Petition be fixed for hearing. The Court granted 21 days to the Respondent to file replies with similar corresponding leave to the Petitioner to file supplementary affidavit and written submissions with the Respondent being granted 14 days to file written submissions.



## A. The Written Submission by the Petitioner

9. On 1<sup>st</sup> November, 2022, the Learned Counsel for the Petitioner the Law firm of Muturi Gakuo & Kibara Advocates filed their written submissions dated 31<sup>st</sup> October 2022 concomitantly with the bundle of authorities. Mr. Gakuo Advocate for the Petitioner commenced by providing a brief background of the matter leading the institution of this suit. The Learned Counsel submits that in contravention of article 40 (3) (b) (i) of the Constitution the Respondent has refused to compensate the Petitioner. To the Petitioner it is unfortunate that the standard gauge railway project being a great success in the country, the Petitioner was deprived its rightful use of its property and has never been compensated per the award dated 23<sup>rd</sup> October 2017. To buttress its case, the Learned Counsel for the Petitioner cited the cases of “Modern Coast Builders & Contractors Limited versus National Land Commission (2021) eKLR and Forth Properties Limited versus Attorney General & 2 Others (2021) eKLR

## VI. Issues for determination

10. I have considered the entire record, the Petition, the supporting affidavit, the documents and the submissions and in my view the three (3) issues which present for determination are:-
- a. Whether the Court has jurisdiction to hear and determine the Petition?
  - b. Whether the Petition meets the fundamental threshold of a constitutional Petition and if at all it has merit?
  - c. Who bears the costs of the Petition?

## VII. Analysis & Determination.

### Issue No. a). Whether the Court has jurisdiction to hear and determine the Petition?

11. It is prudent that I satisfy myself that the Court has jurisdiction to hear the dispute in question before I make any step. In the locus classicus case of “Owners of the Motor Vessel “Lillian S” - Versus - Caltex Oil (Kenya) Ltd. (1989), where Justice Nyarangi JA:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

12. It is truism that the court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of “Samuel Kamau Macharia – Versus - KCB & 2 Others, Civil Application No. 2 of 2011 stated thus:

“A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”



13. Article 162 (2) (b) establishes the Environment and land Court. To give effect to the aforementioned provision, Parliament Enacted the [Environment and Land Court Act](#), No 19 of 2011. Section 13 of the Act provides for jurisdiction of this court:-
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.
  - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the [Constitution](#).
  - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  - (5) Deleted .
  - (6) Deleted .
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
    - (a) interim or permanent preservation orders including injunctions;
    - (b) prerogative orders;
    - (c) award of damages;
    - (d) compensation;
    - (e) specific performance;
    - (f) restitution;
    - (g) declaration; or
    - (h) costs.
14. Section 128 of the [Land Act](#) provides that any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination. PART VIII of the [Land](#)



Act (2012) lays down elaborate procedure for compulsory acquisition of interests in land. Section 133 (A) establishes the Land Acquisition Tribunal whose jurisdiction is provided under 133: -

- (1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land
  - (2) A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
  - (3) Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
  - (4) Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
  - (5) If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
  - (6) Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
  - (7) Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
  - (8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of the Constitution, using the framework set out under the Fair Administrative Action Act or any other law.
15. In the instant Petition it is a fact that the Petitioner is the proprietor of land L.R NO MNVI/3892 with all rights and privileges belonging or appurtenant thereto. The Respondent on behalf of Kenya Railways Corporation compulsorily acquired 1.089 ha being a portion of the suit for the construction of the Standard Gauge Railway. The Respondent then awarded a sum of a sum Kenya Shillings Ninety-Six Million Five Forty Nine Thousand Five Two Sixty Two Hundred (Kshs. 96,549,262.00/=) to the Petitioner, the Petitioner accepted the award. There is no dispute as to amount to be paid to the Petitioner. The issue is that the Respondent has failed to promptly compensate the Petitioner by paying the amount contrary to the Constitution. Based on the reasoning brought out herein, it my view that the Honorable Court has requisite jurisdiction to determine the instant petition.

**Issue No. b). Whether the Petition meets the fundamental threshold of a constitutional Petition and if it has merit?**

16. In the case of “Anarita Karimi Njeru - Versus - the Republic (1976-1980) KLR 1272 the court set the standard of drafting constitutional pleadings as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”



17. The Court of Appeal in the case of “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5 others [2013] eKLR affirmed the tests set out in Anarita Karimi case. The Court of Appeal judges stated:-

“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“ The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...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.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1<sup>st</sup> respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1<sup>st</sup> respondent...”

18. On its part the Supreme Court confirmed the importance of complying with the stated principle by stating in the case of “Communications Commission of Kenya & 5 others - Versus - Royal Media Services Limited & 5 Others [2014] eKLR as follows:

“(349) ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”



19. The first question, therefore, is whether the Petitioner has disclosed a violation of the Constitution, the constitutional provisions violated and the manner in which the provisions were violated. In the pleadings, the petitioner alleges violation of its rights and principles enunciated and protected by inter alia Articles on articles 2, 3, 10, 20, 22, 23, 25, 27, 28, 40, 47, 67, 162 and 258 of the Constitution.
20. The main quest for the Petitioner is to receive the compensation awarded by the Respondent. Prompt payment of compensation in respect of compulsorily acquired land is without any doubt a constitutional question touching on the right to property as provided under article 40. It is my that finding that the Petition meets the threshold of a constitutional petition. The Petition presents clear violation of rights . I find that the dispute as filed in Court is properly presented.

#### **Whether the Petition has merit?**

21. It has been confirmed that the Petitioner is the registered owner of land Plot No. MNVI/3892 right to the said land is protected under the Bill of Rights Chapter four of the Constitution of Kenya 2010 Article 40 which protects the right to property states that:-
  - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) Parliament shall not enact a law that permits the State or any person—
    - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - (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.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired



22. Further, under the provision of Article 67 of the Constitution establishes the National Land Commission with mandate over public land including land that has been compulsorily acquired. Section 107 (1) provides that:-
- Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.
23. Section 111 (1) of the Land Act reiterates the provision of article 40 (3) (b) to the effect that:-
- “If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.
24. The Land Act governs the process of Compulsory Land Acquisition in Kenya and mandates at Section 111(1) that the National Land Commission shall regulate the assessment of such just compensation and to prepare the award for compensation of such land that has been acquired:-
- “If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.
- (2) The Commission shall make rules to regulate the assessment of just compensation.
25. In the instant Petition the process of compulsory acquisition of the suit property began in the year 2016 and the Petitioner issued with an award in the year 2017. It is in the public domain that construction of Mombasa – Nairobi Standard Gauge Railway is complete and now operational. Section 2 of the Land Act defines prompt to mean within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission;
26. Section 115 of the Act sates that
- (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 the compensation is to be paid.
27. In the case of: “Commissioner of Lands - Versus - Essaji Jiwaji & Public Trustee [1978]eKLR the Court of Appeal rendered itself:-
- “When property is compulsorily acquired by the Government, it vests in the Government. The previous owner merely loses his rights and title to his property; he does not in any sense transfer the property.
28. From the record, the Petitioner wrote a letter dated 27<sup>th</sup> June 2017 seeking information about the compensation which the Petitioner has not received. From the letter the Kenya Railways Corporation and the China Bridge Corporation by then had already took possession of the suit property.



29. A three judge bench consisting of Lenaola J ( as then he was) M.Ngugi J ( as then she was) L.Achode ( as then she was) G.V. Odunga ( as then he was) in a judgement delivered by J.L.Onguto J in the case of “Patrick Musimba - Versus - National Land Commission & 4 others [2016] eKLR the Court stated:-
- “ 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.
30. It is the Respondent who made the award and decided it will compensate the Petitioner in form of monetary payment. The law is very clear that the Respondent is required within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission. More than six years cannot be reasonable time, it is an injustice and affront to the Petitioner’s right to property for the Respondent to have taken such long and unreasonable time and still has not compensated the Petitioner. .
31. Section 111 (1A) states that the acquiring authority shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.
32. In the case of: “Modern Coast Builders & Contractors Limited - Versus - National Land Commission [2021] eKLR , Eboso J stated:-
9. I have considered the constitutional framework under which the above relief is sought. I have also considered the framework in Part VIII of the *Land Act*. Article 40(3) (b) (i) requires prompt payment in full, of just compensation to a person whose property has been compulsorily acquired by the state for a public purpose. Secondly, Section 111 of the *Land Act* re-emphasizes this requirement and requires the acquiring body to deposit compensation funds with the National Land Commission before the acquisition is undertaken. It was therefore the duty of the National Land Commission to ensure that it had the requisite funds before taking possession of the Petitioner’s land and before handing the petitioner’s land to the acquiring body. It does emerge from the evidence presented in this petition that the respondent undertook compulsory acquisition, took possession of the Petitioner’s land, and handed the petitioner’s land to the acquiring body without first ensuring that it had been put in funds. In the circumstances, the court is satisfied that the respondent breached Article 40 (3) (b) (i) of the *Constitution*. Consequently, the first relief in the petition will be granted to the petitioner in so far as it relates to the breach of the said Article.
33. I am in total agreement with the learned Judge, the law is succinct that the acquiring authority shall deposit with the Commission the Respondent herein the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken. It was therefore the duty of the Respondent herein satisfy itself by ensuring that it had the requisite funds before the Kenya Railways Corporation and the China Bridge Corporation could take possession of the petitioner’s land and before handing the petitioner’s land to the acquiring body. In the circumstances, I am satisfied that the Respondent breached Article 40 (3) (b) (i) of the *Constitution*.



### Issue No. c). Who bears the costs of the Petition?

34. It is now well established that the issue of Costs is at the discretion of Court. In accordance with the provision of Rule 26. (1) of the Constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013 the award of costs is at the discretion of the Court. In the Court of Appeal cases of “Rosemary Ihururu Munene – Versus – Ihururu Dairy Cooperatives Limited (2014) eKLR; Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited (2016) eKLR and the Supreme Court case of “Jasbir Singh Rai & 3 Others - Versus - Tarlochan Singh Rai & 4 Others the Court observed as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. (emphasis added).

... in the classic common law style, the Courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...

35. The Apex Court further discussed discretion and how it ought to be exercised. It observed as follows: -

“... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

36. Hence, in the instant case, taking that the petitioner herein has been successful, he will be entitled to Costs of the Petition accordingly.

### VIII. Conclusion and disposition.

37. The upshot of this is that based on the provision of Article 3(1) of the Constitution of Kenya, 2010 imposes solemn duty that every person has an obligation to respect, uphold and defend this Constitution. From the foregoing elaborate analysis of the issues arising out of the Petition, the Honorable Court finds that the Petitioner has proved its case. Thus, it specifically proceeds to make the following orders:-

- a. That Judgement be and is hereby entered in favour of the Petitioner as prayed with costs.
- b. That a declaration be and is hereby made that the Respondent contravened the Constitution and their actions are unlawful.
- c. That a declaration be and is hereby made that the Respondent abused their statutory powers in refusing to promptly compensate the Petitioner.



- d. That an order be and is hereby made directing the Respondent to compensate the Petitioner a sum of Kenya Shillings Ninety Six Million Five Forty Six Thousand Two Sixty Two Hundred (Kshs 96, 546, 262.00/=) as per the award dated 23<sup>rd</sup> October 2017 within the next Ninety (90) days from the date of the delivery of this Judgement.
- e. That an order be and is hereby made that the Petitioner is entitled to interests, and any other damages applicable in law on the compensation to be awarded by the Respondent from the date provided in law until payment in full at commercial rates.
- f. That the Costs of the Petition is awarded to the Petitioner to be borne by the Respondent

It is ordered accordingly.

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MAY 2023.**

.....

**HON. MR. JUSTICE L.L NAIKUNI, (JUDGE).**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Gakuo Advocate for the Petitioner.
- c. No appearance for the Respondent.

