Kambanga Ranching (DA) Ltd v Kenya Rural Roads Authority (Environment & Land Case 206 of 2019) [2023] KEELC 17532 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17532 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 206 OF 2019

LL NAIKUNI, J

MAY 4, 2023

BETWEEN

KAMBANGA RANCHING (DA) LTD ..... PLAINTIFF

AND

KENYA RURAL ROADS AUTHORITY ..... DEFENDANT

JUDGMENT

1. This Judgment relates to the suit instituted by "The Kambanga Ranching (DA) Co. Limited" – the Plaintiff herein vide a Plaint dated 19th November, 2020 and filed in Court on 20th November, 2019, against the Defendant herein. Upon being served with summons to enter appearance dated 21st November, 2019, on 31st December, 2019 the Defendant filed a 20 Paragraphed Statement of Defence as will be stated out herein below.

2. On 22nd January, 2020 the Plaintiff filed a Reply to the Defendant's Defence dated 20th January, 2020. Following the full compliance with the provisions of Order 11 of the Civil Procedure Rules, 2010, on case management whereby each parties filed their Lists of documents to rely on, List of witnesses and their statements, the suit commenced full trial on 21st February, 2022 accordingly.

II. The Plaintiff's case

3. From the filed pleadings the Plaintiff was a limited liability company duly incorporated under the law while the Defendant was a state corporation within the State Department of infrastructure under the Ministry of Transport Infrastructure Housing and Urban Development. At all metrical times to this suit, the Plaintiff was the registered owner of all that parcel of land known as Land Reference Number 29094 situated within the County of Taita Taveta (herein after known as The Suit Property). The Plaintiff averred that sometimes in month of June, 2018 or thereabout the Defendant without obtaining the consent of the Plaintiff decided to construct a road described as Mackinon Guranze road through its land thereby taking possession of a big chunk of it measuring approximately 66.32 acres

as ascertained by the survey exercise carried out by a Mr. Batholomen C. Mwanyungu a licenced Land Surveyor (k). The Plaintiff averred that the manner in which the said road was constructed across the suit property not only caused some two portion of it to be locked up between the same and two other parcels – Mwambeje Ranch and Kwale Trust Land but also rendered those portions uneconomical and useless.

4. The Plaintiff contention was that the Defendant had no claim on the land instead, they caused encroachment onto their property violating on their right to private property and sanctity of title. As a result, the Plaintiff had been deprived off its use and enjoyment. It had suffered loss and damages a total of Kenya Shillings Six Hundred and Seventy Six Thousand Six Hundred (Kshs. 676,600/=). They held the Defendant liable for the destruction of its land and the vegetation of its land and the vegetation thereon and construction of the road without due process as stipulated under the Provisions of Section 23 of the *Kenya Roads Act*.

   The Plaintiff claims that the value of the area taken by the Defendant for the construction of the road as per valuer's report was Kenya Shillings Fifty Six Million Nine Hundred Thousand (Kshs. 56,900,000/=) which they now claimed.

   Therefore, the Plaintiff claimed against the Defendant for:-

   a. A declaration that the Defendant's action in the encroaching the Plaintiff's parcel of the suit land and constructing a road thereon without first acquiring the said portion in line with the Provisions of Section 23 of the *Kenya Roads Act* was illegal unlawful and an affront to sanctity of title.

   b. A sum of Kshs. 56, 900,000/= in compensation, being the value of the portion of the suit property encroached and utilized by the Defendant for the construction of the road complained of.

   c. Special damages in the sum of Kshs. 676,600/=

   d. Exemplary damages

   e. Interest on (b), (c), and (d) above at the court rates from the date of the institution of the suit till payment in full.

   f. Costs of the suit.

7. On diverse dates of 21st February, 2022 and 28th April, 2022 the Plaintiff summoned three (3) witnesses namely the PW-1, PW - 2 and PW - 3 respectively. They relied on the seven (7) documents contained in its list of documents dated 19th November, 2019 and which were produced as Plaintiff Exhibits numbers 1 to 7 and three (3) documents contained in its further list of documents dated 26th November, 2021 as Plaintiff Exhibit Numbers 8 to 10. These were:

   a). Copies of the national identity cards for the witnesses;

   b). Copy of the Grant Title Deed for the Suit land;

   c). A Copy of the official Search for the Grant Title deed dated 23rd November, 2021;

   d). A Copy of a Letter by the Chief of Kasigau Location dated 18th January, 2011.

   e). A Copy of the Deed Plan.

   f). A copy of the Demand Letter by the Plaintiff's Advocate dated 14th July, 2021.

g). A copy of the resolutions for the Board of Directors for the Plaintiff dated 26th January, 2019.

h). A Copy of the Land Valuation Report dated 25th January, 2019 and receipts.

i). A Copy of the Land Surveyors Report dated December, 2018 and receipts.

j). A Copy of Letter dated 18th January, 2022.

The witnesses testified as follows: -

Examination in Chief by PW - 1 by Mr. Odongo Advocate

8. PW – 1 was sworn and testified in English language. He identified himself as Charles Mwemba Mwaiseghe. He was a holder of the National Identity Card bearing numbers 16001137. It was issued on 12th September, 2022. He was born on 1st April, 1953. He lived at Mwatate. He was a retired teacher. He further informed Court that he was the Secretary to the Kambanga Ranching (DA) Co. Limited, the Plaintiff herein which owned all the suit land, parcel Land Reference numbers 29094 in the County of Taita Tavetta. They were the ones who filed this suit. He recorded a witness statement dated 19th November, 2019 and filed it on 20th November, 2019. He wished to have it adopted as his evidence in this case.

9. He testified that the Defendant was constructing a road across their land – Land Reference No. 29094 CR. No. 59218 without their consent. The road was known as Mackinon - Guranze Road. The road crossed their land and it was a large acreage taken. They approached the workers who were constructing the said road but they were rude to them. They called Kenya Rural Roads Authority (herein after referred to as "KeRRA"). They showed them the bill Board. They sought for legal advise and taking that the land be surveyed. Mr. Mwanyungu a Land Surveyor assisted them. They were also assisted by Valuation expert whom they engaged. They were known as Messrs. Rashid Njihia Land Valuer. That road had never been there. They could prove that fact from the Deed Plan. PW – 1 stated that there was no road until they did this road. The road came from the County of Kwale and back to Kwale. The title Certificate of Title and the Deed Plan was issued to them. It was produced and marked as Plaintiff – Exhibits – 1 and 2". It was attached to the Deed Plan.

10. PW – 1 informed Court that Mr. Mwanyungu, the Land Surveyor, prepared a Land Survey report and receipt which were Marked for Identification and marked as "MFI – 3 (a) and (b)". They conducted the Land Valuer – Njihia Rashid Valuers whom they were paid a sum of Kenya Shillings One Hundred and Seventy Thousand (Kshs. 170,000/=) as their professional fees. The Valuation report and the receipts were marked for identification as "MFI - 4(a) and (b)" .

11. He stated that their Advocate did a demand letter dated 16th August, 2018 to KeRRA. It was produced and marked as "Plaintiff Exhibit – 5". There was no response. The Plaintiff sat down as the Directors – with the shareholders and agreed to institute this case by a resolution dated 26th January, 2019. The resolution was marked as "The Plaintiff - Exhibit – *6*"

They conducted an official search and found that there were encumbrances on the land. The official search was produced and marked as "Plaintiff Exhibit No. 7".

There were other Defendant Witnesses who had prepared witnesses for the Defendants. They were squatters on the land belonging to the Plaintiff. They came from Kwale. They were with notice to vacate/leave the land. They are charcoal burners and poachers. They claimed to have been indigenous and were purporting to be showing the Defendants the area. They complained to the chief. He gave an account of the letter dated 18th January, 2011. It was produced and marked as "Plaintiff Exhibit No. 8"

11. PW – 1 stated that they wrote a letter dated 14th July, 2021 addressed to some of the squatters to vacate the place. The letter was produced and marked as – "Plaintiff Exhibit No. 9". The land was given to the Plaintiff for ranching but they had now moved out leaving it for Conservancy of wildlife and Carbon harvesting use. The Plaintiff had not been compensated todate by the Defendant. The case had merit.

    Court:- When and how did you get involved in the matter of the Defendant being the suit land?

    PW – 1 responded by stating that they only came to the scene after the road had already been constructed as they lived very far from the place.

Cross Examination of PW – 1 by Mr. Rapando Advocate

12. The directors sat down and resolved to take legal action against the Defendant. The resolution was on the issue of the encroachment of the land but suit filed in court was on the market value of the land occupied by the road. The road was undertaken in June 2018, when the road had gone very far. Referred to the Bill Board – the photograph was taken in the year 2018 and there had been no road there before. It shows a boundary between their land seen. There were four (4) photographs which he was referred to. By then, there were vegetation grown on the place allegedly where the road took place.

13. The Plaintiff filed the case on 20th November, 2019. Referred to the Land Valuation Report by Messrs. Njihia Muoka Rashid Co. Limited dated 25th January, 2019. The value of the parcel of land taken and utilised by the Defendant for the road construction has been estimated to be of value of a sum of Kenya Shillings Fifty Six Million Nine Hundred Thousand (Kshs. 56,900,000/=). The report does not show the entire value of the whole land before it was constructed. Neither does it show the valuation of the whole after the road was constructed.

    Referred to the letter dated 18th January, 2021. The plaintiff were not consulted neither was their consent sought before and during the construction of the road onto their land. It was not clear whether it was a compulsory acquisition or not as they were never notified nor was the process ever followed.

    PW – 1 testified that apart from a few squatters, there were no members of the Plaintiff in occupation of the suit land. The people who constructed the road upon completion left. The Plaintiff could neither block the construction from taking place. The road was used for public use. That is all.

_Re - Examination of PW – 1 by Mr. Odongo Advocate: -

14. As a trained teacher, he could not advocate for the blocking of the construction and the use of the road. The road was not acquired through compulsory acquisition procedure for public use. The land measure 13, 665 HA. The Plaintiff used it for carbon harvesting. They were placing murram on it. The land was occupied by squatters but not the members of the Kambanga Ranching. That is all.

Examination in Chief of PW - 2 by Mr. Odongo Advocate

15. PW – 2 testified and was sworn in the English language. He identified himself as Mr. Bartholomew C. Mwanyungu. He was a practicing Licensed Surveyor. He started practicing in in the year 2006. He worked with the firm of Land Surveyors trading in the name and style of Messrs. Bartholomew C. Mwanyungu Surveyors. He was in Court due to the survey exercise he conducted on the suit land and the Survey he prepared dated 3rd December, 2018 on the all that parcel of land known as 29094/ Kambanga Ranch. The purpose was to determine the boundaries and the position of a road that was constructed on it. He was to carry out a topographical survey of a road developed through the parcel of the land by KeRRA. Additionally, he was to note the encroachment implication of the newly developed road through the suit land. He made a few observations in the report. He stated

that the boundaries were determined by normal survey practice. Measurement were from the Survey Plans, duly approved and authenticated by the Director of Surveys and Datum – Survey Plan FR No. 524/138 and 195/6. PW – 2 informed Court that the ground Survey was done to conform to the datum plan. He stated that the existing newly developed road was surveyed using the GPS and the width determined by the linen tape measurements and plotted from a Plan by AutoCAD Computer Software. He stated that photographs of the newly developed road and the bill board were taken and printed.

16. PW – 2 testified that from the Surveying exercise, the following observations were made. These were:

The total acreage of the land was 13,665HA (Approximately 33, 766.22 acres.)

a. There was a newly constructed road by KeRRA as per the Bill Board they had mounted at some point of the construction of the road. It encroached on the land for the Plaintiff.

b. The encroached road measured 11.0 metres wide and consuming a total of 9.92 hectres (approximately 24.52 acres). Given the assigned road reserve of 30 meters for such a road and services the area that would affect the parcel of land would be 26.84 hectres (66.32 acres).

c. The two parcels of land were separated by the constructed road from the main parcel of land. One of was 218.24 HA and the other was 362.20 HA of the land which parties were shown and it is indicated from the Diagram. The boundary of the road was clearly demarcated and was shown from the photographs he took. It would not be possible to fence and it would be an expensive affair.

17. In conclusion, due to the encroachment by the construction of the road the owners could not enjoy the full possession of the suit property. They could not undertake any development on the suit land due to the realignment. Thereafter he prepared the survey report and which he produced and marked as "Plaintiff Exhibit No. 4 (a) and (b). PW – 2 stated that he was paid a sum of Kenya Shillings Five Hundred and Four Thousand (Kshs. 504,000/-) as fees for the professional services rendered. He produced the official receipts dated 8th June, 2019, he issued to this effect and marked as Plaintiff Exhibit No. 4 (b).

He refuted there had been a road there before. He also annexed a Survey Plan and If there was road or road reserve there would be an entry on the title. The entry would be stating that there was an easement or road. In this case, he stated that it was not shown.

Cross Examination of PW - 2 by Mr. Rapando Advocate:-

18. PW – 2 was referred to the Project title and the mounted Bill Board by the Defendant. He confirmed that it read "Spot Improvement on the road". He stated he did not know the meaning of the term "Spot improvement". He was further referred to the photographs which were taken in the year 2018. He stated that the next photographs showed that there had been overgrown vegetation on the part of the road. The next photographed showed that the vegetation had started growing on the road. He stated that perhaps the road was an improvement and not a new construction from the observation. The last observation had been a separation of the two parcels of land by the road. It was such that if one tried to fence off the land, it would mean fencing them separately. This altered the topography of the suit land.

That is all.

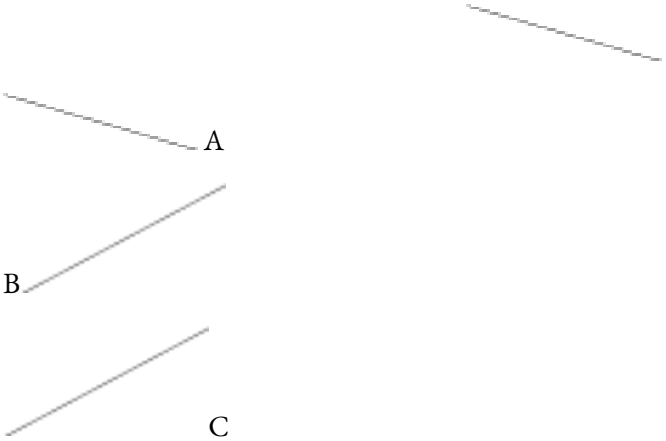
Examination in Chief of PW – 3 by Mr. Odongo Advocate

18. PW – 3 testified and sworn in the English language. He identified himself as Mr. Rashid H. Shake. He was a trained and qualified Land Valuer. He worked with the firm of Land Valuers trading in the name

and style of Messrs. Njihia Muoka Rashid Company Limited. They were engaged by the Kambanga Ranch to value the land having been hived off by KeRRA for the construction of the road.

19. They visited the site on 22nd January, 2019. It was the date of the inspection of the site. They relied on the report prepared by the Land Surveyor. PW – 3 stated that after the valuation exercise they prepared a Land Valuation report dated 25th January, 2019 and submitted it to the client. The terms of reference for the valuation exercise was to assess the market value of the land upon which the road passed.

He stated that the affected portion of the land by the road was 33, 000 acres and 11.0 metres. The actual part affected by the road 230 metres. The total affected part was 66.2 Acres. The road developed was on two portions. There are 3 portions as follows:- as per the surveyor's report.



Upon conducting the valuation they estimated the total value of the land from where the road utilized to be a sum of Kenya Shilling Fifty Six Million Nine Hundred Thousand (Kshs. 56, 900, 000.00/=) as the current market value. To arrive at this conclusion, they used the comparative parcel of land. They were paid a sum of Kenya Shillings One Hundred and Seventy Thousand (Kshs. 170, 000.00/=) as their fees for the professional services rendered to the Plaintiff. He produced the report which was marked as Plaintiff Exhibit 10(a) and (b) as the official Receipts dated 8th February, 2019. There was a 15 % as disturbance allowance which was catered for in the Land Valuation report.

Cross Examination of PW – 3 by Mr. Rapando Advocate

20. PW – 3 stated that the valuation exercise was conducted only on the affected area by the constructed road. He stressed the computation was on the portion taken by the road. He testified that his clients never opposed the road being taken nor constructed but they were requesting for compensation of the road. It was a marram road. The construction on the land road fundamentally altered the morphology of the land into portions. On Page 4 of his Land Valuation report made reference to carbon harvesting but without any evidence, they had not analyzed the aspects of carbon harvesting from other parcels of land.

21. PW – 3 informed Court that they had one of their clients who had leased the suit land and dealt with carbon harvesting. He confirmed that the photographs were taken in the year 2019. By then, the vegetation had begun growing. When they visited the site, the road was not being manned. That is all.

Re - Examination of PW – 3 by Mr. Odongo Advocate

22. PW – 3 stated that from the photographs, the road was being used. They saw several motor vehicles using it. That was all.

III. The Defendant's Case

23. As indicted above, on 31st December, 2019 the Defendant filed their Defence dated 20th December, 2019 to the allegation and assertion raised by the Plaintiff. They denied the claim that the Plaintiff was the owner of the suit land and that in the month of June 2018 without consent, negotiations or agreement, constructed a road described as Mackinon-Guranze road on the suit land. Further, they refuted that they took possession of a big chunk of it measuring 66.32 acres.

    In the alternative and without prejudice, the Defendant averred that Mackinon – Guranze road had always existed on the suit land since the year 1974 for use by members of the public. Accordingly, the Defendant held that from the relevant documents, from an already existing road, they only did pure spot improving of it. To them, therefore, this could not amount to encroachment and the Plaintiff's right to own property and hence the Provisions of Section 23 of *Kenya Roads Act* was not applicable.

24. The Defendant further denied having constructed a road across the subject suit property in the manner described under Paragraph 4 of the Plaint and having done so rendering Mwambeje Ranch and Kwale Trust land uneconomical and useless as alleged by the Plaintiff. They denied liability for destruction of land and vegetation. It denied the Plaintiff had been deprived of the usage and enjoyment of the suit property and hence as a result suffered loss and damages. The Defendant denied having taken possession of the suit land in a manner that deprived the Plaintiff the full use of it and that its action forced the Plaintiff to hire services of a surveyor and valuer at a total sum of Kenya Shillings Six Hundred and Seventy Six Thousand Six Hundred (Kshs. 676,600/=).

25. They denied the value of the land utilized was worth a sum of Kenya Shillings Fifty Six Million Nine Hundred Thousand (Kshs. 56,900,000/=) as per the valuation report. The Defendant denied threatening to retain the land without compensation.

    Finally, the Defendant averred that the suit disclosed no reasonable cause of action against them as the same was frivolous, incompetent and vexatious and hence it should be struck out and/or dismissed with costs to the Defendant.

26. On diverse dates of 21st September, 2022 and 4th November, 2022, the Defendant summoned four (4) Defence witnesses – DW - 1, DW - 2, DW - 3 being locals who resided on the land and DW - 4 being an employee of the Defendant – a Road Officer for Kinango Constituency, the County of Kwale. They relied on six (6) documents as contained in the list of documents dated 15th November, 2021. These were:-

    a. A Copy of Contract for the road works for Mackinon Guranze road;

    b. A set of topographical maps (1, 50000) published by Survey of Kenya on the following:

        i. Makamini 1974 (I);

        ii. Pikapika 1968 (II);

        iii. Likakani (III);

        iv. Kuraze 1968 (IV);

    c. Works completion Certificate for Makinon – Guranze road;

    d. Valuation report.

    e. Cadastral Map.

However, for no apparent reason adduced in Court, despite of the list being filed, the Defendant failed to neither produce nor mark these documents for identification. These was despite of all efforts and request made by the Plaintiff vide a letter to bring them to Court. They testified as follows: -

Examination in Chief of DW – 1 by Mr. Rapando Advocate.

27. DW – 1 testified and sworn in Kiswahili Language. He identified himself by the names of Mr. Bashora Muhindi Guyo. He was a holder of the Kenyan national identity card bearing numbers 13417210. His date of birth the 1.1. 1969. He was from a village called Zungulikali. He recorded his witness statement on 11th November, 2021 filed in Court on 11th November, 2021. He knew the road of Makinon - Guranze road. They got sponsors who agreed to assist them in its constructing. They did it.

28. In the year 2018 it got dilapidated and they approached KeRRA and who agreed to work on it. They started the construction of the road. KeRRA agreed to work on it in terms of renovating it without any shortcuts. But for now it had gone back to where it was before.

Cross Examination of DW - 1 by Mr. Odongo Advocate.

29. DW – 1 testified being a Primary School leaver. He lived at Zungulikali from when he was born. He was not aware that the land was adjudicated to the suit land. He did know of the Plot's numbers of the land he lived on nor did he have a title to it. He knew the person who filed the case. They were Kambanga Ranching (DA) Co. Limited.

30. He was issued with a demand letter to leave the suit land on allegations that he lived on it illegally. He gave evidence in Court in this case on behalf of KeRRA. He was born at Kilibasi. It was a mountain. It was partially in the two Counties of Kwale and Taita Taveta. He was not a Taita. He was a Mwata. The chief of their location was for Kazingao. He was referred to Plaintiff Exhibit – 8 a letter by the chief requesting for them to leave the place as they were squatters. He stated that he born in the year1968.

Re-Examination of DW-1 by Mr. Rapando Advocate.

31. DW - 1 was not in Court on matters of ethnic differences among the communities members. He was present in Court to testify on what was happening on the construction of the road.

Examination in Chief of DW - 2 by Mr. Rapando Advocate

32. DW – 1 testified and was sworn in Kiswahili language. He identified himself by the names of Mr. Chikoko Dukune. He was from Zinkulikani and that is where he was born. He was born in the year 1958 and a holder of the Kenya national identity card bearing numbers No. 8401257. There was a road passing Mackinon – Gunze, Kilibasi area. They approached KERA to assist them to renovate the road. They agreed. The community was engaged in removal and uprooting of the tree stamps and weeds to enable the construction of the road take place. The road for Zungulike went all the way to Kilibasi.

Cross Examination of DW - 2 by Mr. Odongo Advocate

33. DW -2 stated that he had no problem with Kambanga Ranch but had an issue. According to him, there was no land dispute there. DW – 2 had a problem with Kambanga Ranch for stopping the construction of the road. When they were uprooting the weeds and tree stamps, he did not know whose land it was.

    Re – Examination of DW – 2 by Mr. Rapando Advocate

    He had no enmity with the members of Kambanga Ranch.

Examination in Chief of DW – 3 by Mr. Rapando Advocate.

34. DW – 3 testified and was sworn in the Kiswahili language. He identified himself by the names of Khamisi Boru Bashora. He was a holder of the Kenyan national identity card bearing numbers 16046286. His date of birth was year 1958. He was from Zungulikani. On 11th November, 2019, he recorded a witness statement and which was adopted by Court as his evidence.

35. He found an already existing Mackinon to Guranze road. It had been there even during the colonial times. They were engaged to remove the weeds and tree stamps using their hands. They depended on the road for their livelihood. They approached KeRRA to assist them. They agreed though later on, they saw the construction had stopped.

Cross Examination of DW - 3 by Mr. Odongo Advocate

36. DW – 3 testified that they used to work on the road from the Kilibani junction to Zungulukani area. The route was used as a Major trade route to transport food stuff and other agricultural products. The road was from Mackinon road to Kilibani.

    He stated that it them and the elders who gave guidance and the direction on the road alignment along the road projects.

Re - Examination of DW – 3 by Mr. Rapando Advocate

37. There was no misinterpretation of the contents of the 3rd paragraph of his witness statement.

Examination in Chief of DW – 4 by Mr. Adede Advocate

38. DW – 4 testified and was sworn in the Kiswahili language. He stated that his name was Mr. Raphael Mwasaru Mwakamba. He was a holder of the Kenya national Identity Card bearing numbers 8522940. His date of birth was 1.1.1965. He lived at the County of Kwale at Kinango. He worked at Kinango as a Road Supervisor. He knew the reasons he was in in court. He recorded his witness statement on 12th November, 2021 and filed on 17th November, 2021 and which was adopted as evidence in support of his case.

39. DW – 4 testified that the road was already in existence there before having been constructed by the colonialists. Before the Defendant started the construction work, the road was unclassified. But today it was classified. This meant, it was in the Map of Survey of Kenya. It had always been there. The Defendant were doing this work on 28th June, 2018. This was when they commenced the construction work and finalized it after two (2) months. The Defendant were doing "Spot Improvement". The meaning of this was that it was like routine maintenance – i.e. to improve a road which was already in existence. The allegations that the road was new was not true. He emphasized that the road was already in existence.

Cross Examination of DW – 4 by Mr. Odongo Advocate

40. DW – 4 testified that he had nothing to show that the road was unclassified but was now classified. That is he had no map to that effect. He knew the Plaintiff witnesses. Had they not shown the Defendant, it would not have been known. It was an old road but the details does not disappear. The date remained. DW – 4 testified that normally they would use the Land Surveyor to point out where the construction needed to be undertaken but most of the time they just used the locals to show them. In this case, it was the Defendant witnesses here who showed them the land and where to construct the Mackinon

to Guranze road. His duty was to check on the existing road and the finished quality. He guided the Contractor based on the information supplied to them by the land Surveyor.

Re – Examination of the DW – 4 by Mr. Adede Advocate

Nil.

IV. Submissions

41. Upon closure of both the Plaintiff and the Defendant's case on 4th November, 2022, parties were directed to file their written submissions. Pursuant to that, upon compliance, the Honourable Court reserved 14th February, 2023 or on notice as the date to deliver its Judgment accordingly.

A) The written Submissions by the Plaintiff

42. On 25th November, 2022, the Learned Counsel for the Plaintiff the Law Firm of Messrs. Odongo B.O. and Company Advocates filed their written submissions dated 23rd November, 2022. Mr. Odongo Advocate provided a detailed background of the suit instituted by the Plaintiff in accordance with the pleadings filed. He submitted that from the evidence adduced the Plaintiff had proved its case within the required standards of proof.

43. He averred that by its letter dated 26th November, 2021, the Plaintiff's Advocate requested the Defendant's Counsel to provide them with the actual documents they intended to rely on during the hearing of the case. In response, the Counsel for the Defendant confirmed that they would not rely on the said documents already filed in Court. Thus, the Learned Counsel for the Plaintiff averred that that would explain why the Defendant never produced any documents during its hearing.

44. In a nutshell, the Learned Counsel submitted under the following three (3) issues. These were – Firstly, the Learned Counsel vehemently denied the assertion made by the Defendant that the Mackinon – Guranze road crossing the suit land had ever existed there before and constructed during the colonialists period for public use and its members from the year 1974 or at all. He emphatically stressed that there was no road on the suit land at all. He held that the Defendant's witnesses DW -1, 2 and 3 respectively confirmed to the Honourable Court in their testimony that they were the ones who knew where the road used to follow, it was them who showed the Defendant where the road used to be. Further, the Counsel stated that it them and other unnamed locals who cleared the bushes and shrubs on the way to make it easy for the construction of the road. Indeed, it was them who approached the Defendant to construct for them a road to enable them be using for their livelihood. They referred to it as Zunguluka Village in the County of Taita Taveta.

    The Learned Counsel contention was that DW – 4, the Defendant's Constituency Roads Officer of the County of Kwale was kept on referring to different roads and not the one on the suit land. To him the existence of a Government road in a particular region could not be a matter of guesswork. He picked up an issue stated by the Defendant that what they were doing was "a Spot improvement" on an existing road and not construction of a new road. Should that have been the case, the Learned Counsel then wondered loudly why in that case would they be involving the local in clearing up the bushes – which could not be part of Government improvement.

45. The Learned Counsel argued that DW - 4 from the contents of Paragraph 3 of his witness statement made on 12th November, 2021, he stated having knowledge from the available records that the subject road was an unclassified road (UD - 3002) which had since been upgraded to class C road (C - 203) but failed to table any documents to show that indeed the road had been in existence from the year 1974. Thus, the Counsel's assertion was that DW - 4 had no proper and professional capacity to comment on the road construction, survey and acquisition of land being a designated Road Supervisor. Further, the

Learned Counsel opined that the other Defendant witnesses, DW - 1, DW - 2 and DW - 3 respectively seem to be having serious issues with the Plaintiff due to their illegal occupation of the land and were required to be evicted as seen from "Plaintiff Exhibit Number 3", being letter dated 26th November, 2021. Hence their evidence was suspect and required corroboration by a non – partisan witness.

46. The Learned Counsel submitted that the Plaintiff produced an official search issued on 23rd November, 2021 which confirmed not only that they were the Legal owners of the suit land but also that it had no encumbrance or any kind of easement. Also that it was not affected by any road or way leave under the Way Leave Act. The Learned Counsel's contention was that the Mackinon and Guranze of Kinango Constituency were in the County of Kwale and hence wondered why would the Defendant direct the resources from the County of Kwale to that County of Taita Taveta. Besides, the evidence of DW - 4 was a Constituency Road Officer of County of Kwale and not of Voi Constituency.

47. The Learned Counsel averred that if the evidence of the three Defendant's evidence – DW - 1 to 3 was anything to go by, that as residents of Zungulukani Village requested the Defendant to make for them a road to their village then it explained the reason the road had to enter the suit land and exiting to Mwambeje ranch moved back to the suit land and left through to Kwale Trust Land. The Defendant wanted to take the road first to Zungulukani. They deliberately directed the road to Zungulukani at the instance of these village. The Defendant was trying to avoid the Kilibasi hills.

48. Secondly, the Learned Counsel submitted that the Defendants never followed the due process in acquiring the subject portion taken by the road even after the Plaintiff had lodged their complaint. PW - 1 testified that upon receiving the information from their workers on the ground that the construction of the road had been directed onto the land they conducted the Defendant but who ignored them. They proceeded on with clearing of the bushes. Even after filing this suit the Defendant never bothered to send its Land Surveyors to the suit property under the provisions of Section 24 of the Kenya Road Act 2007 to ascertain whether indeed the existing road crossed the Plaintiff's land or not. The Learned Counsel held that there was a breach of the Provisions of Section 23 (1) (a) of the Act which gave the Defendant as an authority the freedom to enter into an agreement with the land owner for purposes of acquisition of land for road construction. In this case, this was private land and there was no existing road whatsoever. Hence the due process of acquiring the toad was not followed.

49. Thirdly, the Learned Counsel submitted that the Plaintiffs were entitled to the reliefs sought from the filed pleadings – being the compensation for a sum of Kenya Shillings Fifty Six Million Nine Hundred Thousand (Kshs. 56,900,000/=) for the value of the portion used as was assessed by the land Valuers the Valuation firm of Messrs Rashid Njihia & Co. Ltd. As per the Valuation Report produced and Marked as "Plaintiff Exhibit No. 3". To the Counsel, this amounted to constructive compulsory acquisition of land but violated the provision of Article 40 (3) of *the Constitution* of Kenya, 2010. In other words, what the Defendant did was unlawful compulsory acquisition of land. To buttress its argument, the Counsel relied on the decision of the Supreme Court in "Attorney General –Versus - Zurij Limited Petition No. 1 of 2020 (2021) KESC 23 (KLR) Civil).

Further, the Learned Counsel argued that the Plaintiff contracted a Land Surveyor who conducted a land surveying exercise on the portion affected by the road and prepared and produced a report for that matter. There was also the valuation report. There was no rivalling valuation report by the Defendant to challenge this report.

Hence, in such circumstances, the value would not be in dispute, and any case the only reason the Defendant failure to pay it was because the road was in existence from the year 1974. The Counsel cited the case of "Amaka Development Limited td. –Versus- Taita Taveta County Government to support its argument.

It was his submissions that the Plaintiff should be compensated.

50. On the exemplary damages, he held that the manner in which the Defendant carried out this road construction and its attitude after it had been known they had encroached was wanting. He relied on the case of "Obongo & Another –Versus- Municipal Council of Kisumu 1991 IEA 91 (CAW) held that:-

> " ...exemplary damages for tort of trespass may only be awarded in two classes of case (apart) from any case where is authorised by statute) these are first where there is oppressive arbitrary or unconstitutional action by the servant of the government and secondly where the Defendants conduct was calculated to procure him dome benefit not necessary financial, at the expense of the Plaintiffs".

The Counsel was concerned that the Defendants being a public state corporation it would easily direct public funds from project to another place without observing the prerequisite guidelines. It proceeded to acquire private land belonging to the Plaintiff unlawfully, which was both oppressive arbitrary and unconstitutional causing the Plaintiff to be entitled to exemplary damages. He urged the Honourable Court to award a sum of Kenya Shillings Two Million Two Sixty One Thousand (Kshs. 2,261,000/=) and Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) as general damages to cover its vegetation which had reduced its carbon credit earning considerably. He urged Court to award special damages for the official receipts of the payment made by both the Land Surveyors and Land Valuers.

In conclusion he prayed that the Hon Court allows the prayers sought from the suit and enter Judgment to the Plaintiff's favour.

B. The Written Submissions by the Defendant

51. On 6th February, 2023, the Learned Counsel for the Defendants herein the Law Firm of J.M. Rapondo Advocates filed their written submission. Mr. Rapondo Advocate commenced his submission by stating that the Defendant would be relying on the filed statement of Defence dated 20th December, 2019, the written statement and the evidence adduced in court by the witness accordingly. He provided a summary of the case and defence by both the Plaintiff of the case and by the Defendant whereby the Plaintiff sued the Defendant for alleged encroachment and possession of the suit property doing spot improvement of the Mackinon - Guranze road. The Plaintiff also claimed that the Defendant' action of encroachment as provided for under section 23 of the Kenya Road Act was illegal and unlawful.

52. On its part the Defendant denied all the allegations and held that the Defendant had neither constructed a new road nor expanded it in any way but undertook spot improvement of an already existing road. Further, the Defendant had not deprived the Plaintiff of their rights to property as enshrined under Article 40 of Constitution of Kenya 2010 and finally the Plaintiff had failed to prove they were entitled to the damages sought.

53. Fundamentally, the Learned Counsel submitted on three (3) main issues: -

Firstly, whether the ingredients of trespass had been demonstrated by the Plaintiff. The Counsel argued the suit land with intention to commit an offence or to intimidate, insult or annoy any person lawfully in possession or occupation of the suit property; as there was already an existing road and had always been in use by public. The Defendant only undertook spot improvement of is and never undertook construction of a new road nor expanding of it. It was already marked as unclassified road (UD 3002) which was upgraded to Class C road (C203). Further the spot improvement was undertaken upon consultation with the local leaders and members of the public who had already used the road since colonial times.

54. Therefore, he argued the entry of the road was justifiable and done for the benefit of the members of the public who used the road since its existence. Thus the Plaintiff had failed to demonstrate that it was in actual, exclusive and constructive possession of it. To buttress on this, he relied on the decision of ELC No. 21 of 2021 (Formerly ELC at Kisii Case No. 254 of 2014) Hosea Nyandika Masagwe and 2 others – Versus- County Government of Nyamira 2021 eKLR and M'Kiriora M'Mukunya & Another – Versus- Gilbert Kabeere M/Mbijiwe (1984) eKLR .

55. Secondly, the Learned Counsel submitted by refuting that the Defendant was in contravention of Section 7 and 23 of the *Kenya Roads Act* which provided the mandate of the Defendant and where the Defendant required private land for performance of the mandate, the Defendant acquired the land through negotiations and agreement with the registered owners or through compulsory acquisition where negotiations failed.

The Learned Counsel argued that the Defendant performed its statutory mandate in the spot improvement of the road and held that the provision of section 23 did not apply as there already existed road and they were not acquiring it afresh and hence constructive compulsory acquisition of the land for purposes of the sop improvement of the road was not available to the Plaintiff. Further the Defendant had not acquired nor claimed ownership of the land.

56. Finally, the Learned Counsel contention was that the Plaintiff was not entitled to the relief sought – compensation for Kenya Shillings Fifty-Six Million Nine Hundred Thousand (Kshs. 56,900,000/=) for value of the portion of the suit land allegedly encroached by the Defendant, Kenya Shillings Six Hundred and Seventy-Six Thousand Six Hundred (676,600/=) as special damages and exemplary damages as the valuation report was unnecessary as this was not compulsory acquisition of the land. He reiterated that the action on compulsory acquisition of the land was not available to the Plaintiff as land had not been acquired by the Defendant nor was there any alteration of the Plaintiff's land and hence there was no need to provide a valuation report.

57. He argued that that from the photographs by the Plaintiff it showed the project was for spot improvement of the road. To buttress his point, the Counsel relied on the case of:-

> " Philip Ayanga Aluchio – Versus - Crispinus Ngayo 2014 eKLR where it laid down the criteria for an award of damages when it held as follows:-
>
> "It has been held that the measure of damages for trespass in the difference in value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less".

58. In conclusion, the Learned Counsel urged the Honourable Court to dismiss the suit by the Plaintiff for failure to disclose reasonable cause of action against the Defendants.

V. Issues for Determination

59. I have keenly assessed all the filed pleadings, both the oral and documentary evidence adduced by the summoned witnesses, the written submissions by both the Plaintiff and the Defendant the relevant provisions of *the Constitution* of Kenya, and the statures.

For the Honourable Court to reach an informed , reasonable, just and fair determination in this matter, it has condensed the subject matter in the following three (3) salient issues:-

a. Whether the suit instituted by the Plaintiff herein against the Defendant has any merit to wit:-

   i. Whose is the suit land?

ii. Was there an existing road?

iii. Was there any compulsory acquisition of the land and if yes was the procedure followed as enshrined by law?

b. Whether the parties are entitled to the reliefs sought from the suit.

c. Who will bear the costs of the suit?

Issue No. (a) Whether the suit instituted by the Plaintiff herein against the Defendant has any merit.

Brief Facts: -

60. Before embarking onto the issues under this sub heading, it is imperative that the Honourable Court provides brief facts of this case. From the filed pleadings and the evidence adduced herein by both the Plaintiff and the Defendant herein, there existed a dispute of a parcel land taken over by the Defendant for purposes of the construction of the road known as Mackinon – Guranze. The Plaintiff claim to be the legal owners of the suit land and the Defendant entered into it and commenced the construction of the road without their consent nor following the due process of acquisition of the land for public use. The Plaintiff insisted that the road which was taken over by the Defendant was theirs and which they had been using for Conservancy of wildlife and carbon credit harvesting. As a result, the taking over of the land had changed its size and also economic value rendering Mwambeje ranch and Kwale Trust Land uneconomical and useless for the Plaintiff. For all these, the Plaintiff claimed they ought to be compensated for taking their private land by the Defendant for public use without their consent and hence violating their proprietary rights under the provisions of Article 40 (1), (2) and (3) of *the Constitution* and other statutory provisions. They also claimed exemplary and special damages for engaging the services of Land Surveyors and land Valuation professionals as a result.

61. On the other hand, while the Plaintiff insisted that this was a new construction and the more reason the locals were being used to show the route and for the uprooting tree stamps and shrubs, the Defendant held that this was an old existing road having been unclassified and constructed by the colonialists. They held that their role was merely that of undertaking "Spot improvement" as shown from their mounted bill boards at some point of the road. The Defendant strongly contended that this was not compulsory acquisition of land and for that reason they never saw it necessary to engage any land valuation expert. They insisted no parcel of land belonging to the Plaintiff was taken away at all for them to be claiming to be compensated as it were. That is adequate for facts.

62. Now turning to the issues under this sub – heading. The main point to ponder upon is whether the suit instituted by the Plaintiff herein against the Defendant has any merit. To begin with, it is indicative to note the Defendants under Paragraph 3 of their Defence have pointed out thus:-

> " The Defendant is a stranger to the contents of Paragraph 2 of the Plaint and more particularly that the Plaintiff is the owner of Land Parcel number Land Reference No. 29094 situated within Taita Taveta County and the Plaintiff are put to strict proof.

63. Clearly, the ownership of the suit land has been disputed by the Defendant. Therefore, its imperative that Honourable Court puts the issue to rest first and foremost. Its established law that one may acquire land in Kenya in either of the following means as provided for under Section 7(1) of the *Land Act* No. 2012 these are:-

(a) Allocation;

(b) Land adjudication process;

(c) Compulsory acquisition;

(d) Prescription;

(e) Settlement programs;

(f) Transmissions;

(g) Transfers;

(h) Long term leases exceeding twenty one years created out of private land; or

(i) Any other manner prescribed in an Act of Parliament.

64. I wish to further state that the suit land is registered under the Registration of Titles Act Cap. 281 (now repealed). In its preamble it stated "An Act of Parliament to provide for the transfer of land by registration of titles. Subject: Land & soil. Before I can address the above issues, I have to deal with the applicable law considering that the Registration of Title Act, Cap. 281 have since been repealed and replaced with the Lands Registration Act, No. 3 of 2012 and the *Land Act*, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

> " Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed"

This position was upheld in the cases of "Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR" .

65. The provisions of Section 23 (i) and 24 (i), (ii) and (iii) of the Act holds that.

> " The Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named herein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, resolutions and conditions contained therein or endorsed thereon and the title or that proprietor shall not be subject to challenge except on the ground of fraud, or misrepresentation to which he is proved to be a party'
>
> i. except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;

ii. in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;

iii. no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya.

66. From the Certificate of Grant Title and the official search conducted on 23th November, 2021 and marked as "Plaintiff Exhibit Number 2" being conclusive "prima facie" evidence, clearly shows that the suit land was registered in the names of the Plaintiff. This information was corroborated by the evidence of PW – 2, the Land Surveyor, Mr. Batholomew C. Mwanyungu who was engaged by the Plaintiff to ascertain the extent and the size of the land the Defendant utilized for purposes of the construction of the Mackinon - Guranze road leading to Zungulikani village.

In all fairness and taking that the Defendant never brought any evidence to the contrary, it is my view and rightfully so that the suit land is registered and absolutely owned by the Plaintiff who have all the indefeasible right, title and Interest vested on them by law and protected under the provision of Article 40 of *the Constitution* of Kenya, 2010 as will be seen hereinbelow.

67. Additionally, the other extremely contentious issue was whether the road existed as a reserve road or at all. While the Defendant vehemently held that this road had always existed for public use from either colonial times or the year 1974. That it was pointed out to them by the locals who seem to know that there existed a road. To the Defendant they never caused any construction of a new road. Instead, the only activity they undertook was "the spot improvement" as shown from the Bill Boards mounted at some points of the road and as was requested by the locals. But this point was profusely refuted by the Plaintiff. According to the Learned Counsel for the Plaintiff, there was no evidence tabled by the Defendant such as a Map or any other empirical documentary that proved that this was an already unclassified road and now upgraded to a classified road as orally testified by DW – 4. The Learned Counsel argued that the DW - 4 who was an employee of the Defendant and designated as a Constituency Road Supervisor of Kinango Constituency of the County of Kwale, and other witness held that they were shown where the road was – having been unclassified roads (D - 3002) but upgraded to class C - 032 and that they had to clear the bushes to remove the overgrown vegetations on it in order to pave way for the road construction. To him this was not satisfactory. In any case, the said locals whom the Defendant seem to have over lyied on for information, pointing out the route and even uprooting of the shrubs and tree stamps were not the owners of the suit land. Instead, they were squatters who came over from the County of Kwale and were occupied in charcoal burning activities, They had no moral authority to be dealing on the land. The Learned Counsel argued by this act alone the Defendant breached the provisions of Section 23 of the Kenya Road Act. Upto this point, tend to fully concur with the Learned Counsel for the Plaintiff. None of these and I am yet to see any documents tabled by the Defendant to this effect. Should there have been a road as alleged, why would the DW – 4 engage in what appears to be some guess work by using the locals to point out and uproot the tree stamps and shrubs rather than just use the Defendant's qualified land Surveyor to so.

68. Still at this point, the Honourable Court perceives it being such was a major lethargic, misnomer and negligence attitude on the part of the Defendant to have failed not only to produce any empirical documentary evidence to support their case but also not summoning competent and qualified expert witnesses such as Land Surveyor and land Valuation Experts in such a serious matter. Instead, they chose to rely on a few locals and one Road Constituency Supervisor. This was not fair at all being a Public and State Corporation to say the least. In the given circumstances, I am compelled to fully

concur with the submissions by the Learned Counsel for the Plaintiff to the effect that all Government roads are a known fact and records and information are well documented without this prove and guided by the law – Section 107 of *Evidence Act* Cap 80, who alleges must prove, I am left with no alternative but to conclude that indeed this issue of the road having existed for public use from the year 1974 is a pure myth by the Defendant. Its my view that this road never existed at all and if at all it existed there would be nothing better than to produce the Honourable Court with documents which is within the domain of the Defendant. Unfortunately, the Defendant which was established and vested with this specific legal mandate could not provide such basic information or record whatsoever. The court finds this aspect rather disturbing to say the very least.

69. Suffice it to say, the Honourable court has noted the testimony by the DW - 4 the officer of Constituency Road Supervisor that they had been unclassified road but later on upgraded to a class C. To me this is a very serious and significant statement. I would have expected it to be backed up with the pre-requisite information but in vain. Furthermore, apart from the matter being stated on the Bill Board, the term "Spot Improvement" was neither elaborated, explained nor presented by any road experts such as Civil Engineers or any other to this Honourable Court as one would have expected to such a serious matter.

70. It is for these reasons that the Learned Counsel for the Plaintiff argued that the manner in which the Defendant acquired the land as alleged based on the request by the community to construct the road leading to Zungulikeni village was without the consultation, consent and without negotiations with the owner of the land that is the Plaintiff – contrary to the provisions of Section 23(1) of the Kenya Road Act. The section provides: -

> Section (1) where an Authority requires any land for its purposes under this Act, such Authority may either: -
>
> a. If such land is not public land acquire such land through negotiation and agreement with the registered owner thereof

71. Accordingly, although the Defendant had denied it, this being private land, there ought to be some procedure on acquiring it compulsorily as provided for under Article 40 (3) of *the Constitution* of Kenya and Sections 107 to 119 of the *land Act*, No. 6 of 2012 of the Laws of Kenya it tantamount to being an unlawful, illegal and un-procedural compulsory acquisition of land which was oppressive, unconstitutional and wrongful contrary to the Provisions of Article 40 (8) of *the Constitution* of Kenya 2010. The Court cannot agree with this assertion more. Ideally, the Defendant should have invoked the provision of Sections 107 to 119 of the *Land Act* 2012 or Sections 7, 8 and 9 of the Land Acquisition Act (Repealed) by issuing notices to be published in the Kenya Gazzette showing the intention for the acquisition of the land for public use and inviting the Plaintiff for an inquiry for purpose of giving them prompt, fair and adequate compensation for having taken their land.

72. Therefore, from the above detailed statutory analogy, its 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 a extremely delicate balance to be weighed with utmost case.

In the case of "Patrick Musimbi – Versus - National Land Commission & 4 Others" Petition No. 613 of 2014" 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 of the proprietor, 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"

Certainly, this process never took place, therefore, for lack of this evidence the court is persuaded that the acquisition of the land by the Defendant was unlawful and an afront. I fully concur with the case cited by the Learned Counsel of Supreme Court "Attorney General –Versus - Zurij Limited Petition No. 1 of 2020 (2021) KESC 23 (KLR) Civil) (Supra) on this point which held:-

> "that the issuance of duplicate titles over the appellant's land, in favour of third parties, amounted to unlawful compulsory acquisition and a violation of its right to property under Article 40 (3) of *the Constitution*. The Learned Judge determined that the acreage unlawfully acquired was 51.129 HA and awarded the Respondent a sum total of Kshs. 413, 844, 248.70/= as compensation for the land encroached and Kshs. 51, 129, 000/= as general damages for breach of the Respondent's right to property under Article 40 of *the Constitution*....."

And hence amounting to encroachment of the private land belonging to the Plaintiff as shall be deliberated on hereinbelow.

Issue No. (b) Whether the parties are entitled to the reliefs sought from the suit.

73. Having been able to demonstrate that the suit land belonged and legally registered in the names of the Plaintiff, and that there never existed any road as alleged during the colonial times or from the year 1974, the Defendant breached in acquiring the land allegedly for spirit improvement was in contravention of the provision of Section 23 of Kenya Road Act. At this juncture, the Court feels it critical to deliberate in depth on the procedure for compulsory acquisition of land for public use in a little bit depth. Having confirmed that the Petitioner is the registered owner of the suit land, the 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

74. 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.

75. Under the provision of 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.

76. 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.

77. 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;

78. The provision of the Section 115 of the Act states 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.

79. 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.

Further, the acquisition of the land allegedly as compulsory acquisition for purpose of improvement of the road was unlawful. Based on this elaborate background provided herein, the Honourable Court holds that the Plaintiff are entitled to the relief sought from there filed pleadings. These include being compensated for the illegal acquisition of the land, exemplary special damages for the expenses incurred in engaging a surveyor, and land valuers and general damages.

80. Finally, on general damages arising from the action of trespass by the Defendant herein as prayed for by the Plaintiff herein, I have decided to cite a few cases to back up my legal reasoning. In Nakuru Industries Limited – Versus – S. Mehta & Sons (2016) eKLR". The Court held:-

> " In tort, damages are awarded as a way to compensate a Plaintiff for loss he had incurred due to a wrongful action on the part of the Defendant. The damages so awarded are intended to return the Plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. He value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the Costs of the restoration of the land to the position it was in before the wrongful act was committed."
>
> In Halsbury 4th edition Vol. 45 at Paragraph 26, 1503 provides as follows on computation of damages in an action of trespass.
>
> (a). If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.

b). If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.

c). Where the Defendant has made use of the Plaintiffs land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.

d). Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.

e). If the trespass is accomplished by aggravating circumstances which do not allow an award of exemplary damages, the general damages my be increased.

In the case of "Phillip Aluchio – Versus – Crispinus Ngayo (2014) eKLR Court held:-

> " .....The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration whichever is less.....The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....."

81. In the instant case and from the evidence adduced herein, it is admitted that the invasion of the land by the Defendant led and/or caused the destruction of the vegetation belonging to the Plaintiff. According to them, that invasion rendered the suit land – the larger Mwambeje ranch and Kwale Trust Land uneconomical and useless to the Plaintiff. Unfortunately, although the Defendants summoned four (4) witnesses – DW - 1, DW - 2, DW - 3 and DW - 4 who testified in court but failed to produce any empirical documents to support their case. Furthermore, they never saw it fit and suitable to summon a Land surveyor, Land Valuer or Civil Engineers as experts to come and challenge all the evidence adduced by the Plaintiff on the value of the land and its improvement before and after the construction of the road. On the contrary, the Plaintiff engaged the professional services of the Land Surveyors and the Land Valuation expert who not only prepared reports and testified. It is my view that the Defendant was liable for trespass action and hence only subject to both exemplary and nominal damages. Thus, it is for these reasons that the Honourable Court proceeds to award a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) on account of nominal general damages for the trespass together with interest at the Court rates from the date of this Judgement until payment in full.

82. In the long run, the Honourable Court is left with no alternative but to hold that while the Plaintiff are entitled to the reliefs sought the Defendant have failed to satisfy court they ought to be granted the reliefs sought and to have the Plaintiff's case dismissed or struck out.

Issue No. (c) Who will bear the costs of the suit?

83. It's well established that matter of costs is at the discretion of Court. Costs means any award that a party is granted at the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya Sugar Board –

Versus – Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR" where Courts held that:-

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

84. In the instant case, the Plaintiff has been able to establish its case against the Defendant and therefore they are entitled to be awarded the costs of the suit.

VI. Conclusion and Disposition

85. Consequently, having caused an indepth analysis to the framed issues herein, the court has been persuaded that the Plaintiff has been able to prove its case on preponderance of probability. Therefore, specifically the Honourable Court proceed to order as follows:-

a. That Judgment be and is hereby entered in favour of the Plaintiff against the Defendant with costs.

b. That there be a declaration that the action by the Defendant in encroaching the parcel of land for the Plaintiff being Land Reference Numbers 29094 within the County of Taita Tavetta and the construction of the Mackinon - Guranze road was unlawful, illegal and un-procedural contrary to the Provisions of Section 23(1) of the Kenya Road Act, Article 40 (5) of *Constitution of Kenya, 2010* and Sections 7, 8, and 9 of the Land Acquisition Act 1968 (Repealed).

c. That there be a declaration that the suit land is registered in the names of Plaintiffs.

d. That an order be made hereby that the Plaintiff be paid a sum of Kenya Shillings Fifty Six Million Nine Hundred Thousand (Kshs. 56,900,000/=) as adequate, prompt, just and fair compensation for the acquisition of the land for purposes of construction of the road complained of.

e. That the Plaintiff be granted exemplary damages a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=).

f. That there be an order to pay the Plaintiff a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) as special damages.

g. That the costs and interests at the 14% Court rate of the (c), (d) (e) and (f) above

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS 4TH 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. Gillian, the Court Assistant.

b. Mr. Odongo Advocate for the Plaintiffs.

c. Mr. Adede Advocate holding brief for Mr. Rapando Advocate for the Defendant.