REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 106 OF 2015

MISTRY PREMJI GANJI (INVESTMENTS) LIMITED.....PLAINTIFF

= VERSUS =

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

J U D G E M E N T

1. The plaintiff commenced these proceedings via a plaint dated 21st May 2015. She pleaded that she is the registered proprietor and entitled to possession of land parcel known as subdivision No. 735 (originally No 626(7) of section V M.N Mombasa and CR No. 18624 on deed plan No. 129949. It is pleaded that the said land is currently vacant and adjoins parcel numbers 730 and 734 also owned by the plaintiff which are developed with several warehouses let out on commercial leases inter alia Kenya Tea Development Authority (KTDA).

2. That on 16th February 2015 the defendant served KTDA with notice of intended demolition on what they termed removal of encroachment on a designated road reserve. KTDA passed on the notice to the plaintiff who then responded to the notice by sending to the defendant documents in respect of the suit property the following;

(i) Copies of title deed and surveyed deed plans.

(ii) Site survey.

(iii) Location survey plan.

(iv) Copies of Council Rates receipts.

3. The plaintiff pleaded that the defendant in reply stated that the suit land was created from several sub-divisions from the original plot No. MN/V/393/R from which the government had acquired 0.333ha for road expansion vide gazette No. 3581 of 21st November 1969. The plaintiff continued that while they were investigating the history of their title, the defendant on 18th May 2015 demolished 30 metres of the plaintiff's boundary wall, damaged two gates, damaged the electric fence and trespassed on to the suit land. The plaintiff added that the notices were issued in flagrant disregard of article 40, 47 and 64 of the Constitution of Kenya and section 22 of the Kenya Roads Act.

4. Consequently, the plaintiff pleads she has suffered loss and damage. She prayed for judgment for;

(a) A declaration that the certificate of title CR. 18624 that the plaintiff holds in respect of the said land constitutes conclusive evidence of ownership of the said land and that the plaintiff is the lawful, absolute and indefeasible owner and entitled to immediate possession of all the said land.

(b) A declaration that the notice dated 16th February 2015 wrongly addressed to KTDA and captioned "Notice of Intended demolition/removal of encroachment" is invalid, null, unlawful and/or ultra vires the powers of the defendant and therefore of no purpose or effect.

(c) A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from demolishing or further demolishing or destroying any part of the said land or any structure or structures thereon.

(d) A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from either entering, occupying or any party having a lawful interest in the said land from either entering

occupying or using any part of the said land.

(e) General damages, aggravated and/or exemplary damages in respect of the unlawful demolition carried out by the defendant on the said land.

(f) Damages for trespass;

(g) Interest thereon at court rates;

(h) Costs; and

(i) Any other or further relief which this Honourable Court deems fit to grant.

5. The defendant filed a defence on 10th July 2015 denying each and every allegation of the plaintiff's claim. It pleads that sub-division No. 735 under CR. No. 18624 previously formed part of all that parcel No. MN/V/393/R. That through gazette notices 3581 & 3637 dated 21st and 28th November 1969, 0.333ha were acquired from L.R No. 393/R. The defendant contends that there is encroachment of 0.05ha by part of the suit land. The defendant said that it was appalled by the contents of paragraph 13 of the plaint and stated that ***"the provisions of section 49(1)(a), (4) and (5) of the Kenya Roads Act No. 2 of 2007 and those of Section 91(2) Traffic Act Cap 403 Laws of Kenya are still legally in force and that the defendant in acting as per the said provisions is well within the ambits of the law."***

6. The defendant pleaded further that the provisions of section 22(4) of Kenya Roads Act does not come into play since the suit land had encroached on a road reserve. It urged the court to dismiss the plaintiff's suit with costs.

7. After pleadings closed, the matter was set down for hearing. The plaintiff relied on the evidence of two witnesses while the defendant called one witness. Suresh Kanji Patel testified on 31/10/2016 as **PW1**. He is one of the directors to the plaintiff. PW1 relied on the documents filed in support of the plaintiff's case which he identified as follows;

- *Page 1 – change of name of the plaintiff.*
- *2-Title deed for parcel sub-division 735 issued on September 1987.*
- *Page 4 – a bundle of deed plans for 735 showing the boundary layout.*
- *Page 40 – plot numbers including parcel No. 735 appearing below 513/7 which is the MSA-NBI highway.*
- *Page 5 – 21 details of the lease between the plaintiff and KTDA.*
- *Page 23 – Notice of intended demolition from the defendant addressed to their tenant (KTDA).*
- *Page 24 letter dated 19/2/2015 from plaintiff to the defendant enclosing copies of their title and deed plans.*
- *Page 27 – defendant's letter dated 13/4/2015 now specifying the affected plot.*
- *Page 28 – shaded area stated to be encroached area attached to the letter of 13/4/2015.*

8. **PW1** continued that he purchased the land in the 1980s. He instructed his advocate to take over this matter on their behalf. They also engaged a surveyor (PW2) to carry out the investigations **PW2** acted on the instructions and prepared the report dated 14th May 2015. That a few days after the report i.e. on 18/5/2015, a bulldozer came and destroyed 30 meters of their wall which included the gate wall KTDA was using to enter the plots. The electric fence on top of the wall was also demolished together with neighbouring shanties. KTDA vacated as a result of this demolition as shown in their letter of 22/5/2015. That the Land original number 393/V/MN was subdivided and the 6th part registered as 513/V/MN. L.R No. 513 was also sub-divided and the 6th part created plot No. 626/V/MN. It is plot No. 626/V/MN which is the mother title to the plaintiff's land with the 7th portion numbered as 735.

9. **PW1** stated that the plaintiff has been in occupation of the suit plot since 1985 when she acquired it. That at no given time did he receive any notice of encroachment or evidence of compulsory acquisition. He urged the court to grant the prayers sought in the plaint dated 21/5/2015. In cross-examination, **PW1** said there was already a road in 1987. That from the road to the demolished wall is approximately 10 meters. That the surveyor identified for him the existing beacons before he purchased the land. That he had come across the gazette notice of 21/11/1969 but the one of 28/11/1969 was never brought to his attention. That part of his wall and neighbouring shanties were demolished.

10. In further cross-examination, **PW1** stated that subdivision of 513 was done by a registered surveyor. According to him, the space between his wall and the existing road was sufficient for expansion of the road. In re-examination, **PW1** said that the location plan (page 40) is a miniature of the surveyor's own drawing. He did not know if plot No. 513 was allocated to the government. He had not seen any compensation paid pursuant to the gazette notice of 28/11/1969.

11. Denise Malembeka Katunga gave evidence as **PW2**. Mr. Malembeka stated that he holds a BSc in Survey and photogrammetry with 20 years' job experience. He continued in evidence that he visited the suit land and prepared his survey report dated 14/5/2015. He explained how the original mother plot number 393 was subdivided to give L.R No. 513. Parcel No. 513 was later subdivided to create plot No. 626 among many others.

12. **PW2** further states that in 1982, plot No. 626 was subdivided to create parcel Nos 730 – 735 with plot No. 735 being registered currently in the plaintiff's name. That the deed plan attached to the plaintiff's title provided the dimensions of the plot as should be on the ground. The witness added that he annexed several survey plans to his report including the subdivision of plot No. 626. **PW2** stated that he checked the acquisitions contained in the gazette notice No. 3581 and found the following information:

(a) 1951 – 1953; plan B deed plan 393/1 - 0.961ha.

(b) 1969 folio 72 showing plot 393 became 393/2 after the second acquisition of 0.5166ha.

(c) 1982 – 1982 subdivisions of 513 to plot Nos 623 – 626 & 513/7 being road surrender portion measuring 0.2694ha.

(d) He explained the documents at page 29 of his plaintiff's bundle that;

(i) 393/R – remainder land after acquisition.

(ii) 393/3 what is being acquired.

13. According to the witness, the defendants' notice of demolition should have annexed a plan. He dismissed the documents annexed as **TG1** in the defendants replying affidavit that it does not amount to a working diagram and **TG2** is not an aerial photograph as it is neither referenced to the director of survey nor registered. That annexture **TG6** is their plan A showing the alignment between the beacon and the road clearly marked hence the alleged encroachment is strange.

14. **PW2** was put to cross-examination by Mr. Dulo learned counsel appearing for the defendant. He stated that according to him 0.333ha was not acquired as per the survey plans that he was able to gather. That the gazette notice of 28/11/1969 gave notice of inquiry of the acreage the government intended to acquire. **PW2** stated that the disputed area is under a fixed boundary and page 7 of his report gave the acreage as 0.5166ha which information he picked from the survey records. That an encroachment arises when you go beyond the approved plans of the director of survey. Title number 513/7 size of 0.2694ha is given. He confirmed that plot 626 was further subdivided in 1987 while the road was already in place and the resultant sub-plots are not served directly by the government road.

15. That parcel No. 735 shares a boundary with the main road. The witness did not take the measurement between the wall *JP10 -JP11* and black tar. That the length of road as provided by the map is not clear. **PW2** denied that the subdivisions did not take into account the issue of road reserve. He concluded that there was no encroachment because the perimeter wall was within the fixed boundary. In re-examination, **PW2** stated that the notices served only gave what was proposed to be acquired but he did not see any evidence that they were compulsory acquired. That 1.233ha and 0.2694ha are official figures from survey records. That beacons *JP10 - JP11* forms the boundary between plot number 735 and the Mombasa – Nairobi Highway.

16. The defendant opened her case with the evidence of Thomas Gichira Gachoki. **DW1** said he is a qualified surveyor working for the defendant. He stated that when the government decides to construct a road, preliminary survey is done then the engineers prepare the designs. From the designs, the affected proprietors are marked out and an acquisition plain is prepared. The plain is sent to National Land Commission (NLC) who then publishes the affected notices in the Kenya gazette alongside a notice of intention to acquire and inquiries.

17. That NLC values the affected properties and owners issued with an award. That the documents annexed to his affidavit of 10th July 2015 were sourced from the Ministry of Lands. From the documents, annexed;

- TG1 is proposed road before acquisition.
- TG7 is gazette notice No. 3637 citing affected properties which including parcel No. 393/R/V measuring 0.822 acres.
- TG5 is gazette notice dated 28/11/1969 and FR 163/57 (plot No. 513/7/MN/V measuring 0.26ha).
- That the same FR plan at the corner showed 513/1 & 513/7 were for surrender to the road.

18. According to this witness the gazette notice showed what was acquired approximated at 0.333ha while what was used was 0.36ha. That the difference of what was acquired and used was not included in the surrender. That it is part of this unsurrendered portion which is included in plot No. MN/V/735 (suit plot) and which is forms the encroachment on to the road. That before demolitions, they served the plaintiff with notices (annex TG8 & TG9). He produced these documents as exhibits in support of their case. DW1 further stated that from the gazette notices, the road must have been done in the 1970s.

19. In cross-examination by Mr. Inamdar learned counsel for the plaintiff, DW1 stated that the original title No. 393/V/R was subdivided to create amongst them No. MN/513 (393/V/6). That MN/V/513 was later sub-divided and the 6th portion registered as MN/523/626. Plot No. 626 was again sub-divided to create parcel Nos 730 – 735. That the deed plan for parcel No. 735 did not take into account the acquisition of 1969. He confirmed that the demolitions were done in May 2015. That plot 735 was hived from original plot No. 393/R/W. DW1 admitted that annex TG2 is not an aerial plan but a document prepared by the Ministry of Public Works. That TG-4 is dated 1982 and that part of the

land to be acquired is in constant with the gazette notice of 1969. That the plan annexed to their letter of 13/4/2015 was done based on the acquisition of 1969 and the existing road. He had nothing to say about the survey report dated 27/4/2016 (by Msa County Surveyor) which stated that the road reserves had not been surveyed.

20. In re-examination, DW1 said that their letter of 13/4/2015 explained the extent of the developments. Since the plaintiff's title was issued in 1987, the person doing the survey ought to have seen the existing road. The defence closed their case at this stage and parties adjourned to file their written submissions on 18/6/2019. From the record, the submissions were filed one year later.

21. It was not until 19th December 2020 when we received the file from Mombasa for writing of the Judgement. The advocates on record filed quite lengthy submissions supported by statutes and case laws attached. The summary of the submissions rendered are as given herein below:

Plaintiffs Submissions

22. The Plaintiff's submissions filed on the 17th of January, 2020 reiterated the facts of the case, the history of its title to the land, evidential and legal analysis. In paragraph 9 of its submissions, the Plaintiff states that the bone of contention in this current suit is whether any part of the suit land was ever compulsorily acquired by the Government for the purpose of creating a road reserve. The plaintiff maintains that there is no encroachment onto any road reserve and that the specific Gazette Notice Number 3581 of 21st November, 1969 only highlights an intention by the Government to acquire the land comprised in the original mother title, Plot No. 393/V/MN. That no evidence points to the specific acquisition of any part of the said land or the alleged encroaching portion of the suit land.

23. The Plaintiff further submitted that the alteration made to the road alignment on the properties on the opposite side of the road to the land necessitated the concoction of a fictional acquisition of part of its land by the Defendant simply to facilitate a parallel alignment to that on the opposite side of the newly aligned road. That there was no known survey following the Gazette Notice Number 3581 showing exactly how the 0.333acres intended to be excised was taken out of Plot No. 393/V/MN/R save that what was acquired from the adjoining land well before the demolition of part of the Plaintiff's said land was a much larger area than the area specified in the notice. That the acquisition of the demolished part of the said land is yet a further addition to that, presumably unsanctioned, larger area.

24. The Plaintiff states that the Defendant's case on compulsory acquisition based on the evidence given by it is wholly lacking in particularity, rationale or justification. That nowhere can the implausibility of the Defendant's case, that the demolished portion of the land was compulsorily acquired previously, be seen more clearly in the District Surveyor's report, R. M. Ndambuki, dated 27th April, 2016. That the Defendant did not call the surveyor to testify and that his report is nothing short of a damning condemnation of the Defendant's repeated misrepresentation that the demolished portion of the said land was part of a defined compulsorily acquired road reserve.

25. With regards to the issue of the validity of the notice, the Plaintiff submitted that the notice was defective because:

(a) The notice is addressed not to the Plaintiff who owned the suit land but to KTDA;

(b) The notice was served on KTDA at its leased premises on plots 730-734 being land that was not even the subject of the land said to have been compulsorily acquired; and

(c) The Notice did not identify or specify the location or extent of the portion said to have unlawfully "encroached on the Digo Road-Changamwe 5.8km (A 109) road reserve."

26. The Plaintiff alludes to the fact the Defendant established by the Kenya Roads Act, 2007 taking over the functions of the Roads Department (under the Ministry of Roads) and the Urban Development Department (under the Ministry of Local Government) and that the two bodies never complained of any encroachment by the Plaintiff over any land compulsorily acquired as a road reserve. On whether the specific portion of the said land demolished by the Defendant had been compulsorily acquired by the Government, the Plaintiff submits that the Defendant's evidence infers an intention by the Defendant to acquire part of the land and the 2nd Gazette Notice Number 3637 dated 28th November 1969 inviting the owners to attend an inquiry hearing for compensation, do not constitute evidence of concluded acquisition. That the entire Defendant's case fails as the Gazette Notices were issued under the repealed Land Acquisition Act, Cap 295.

27. That the Plaintiff's title is indefeasible as enshrined under section 23(1) of the Registration of Titles Act (now repealed) and the saving provisions of section 107 of the Land Registration Act, 2012. Section 26 (1) of the Land Registration Act replicates the provisions of section 23 of the Registration of Titles Act and from the said provisions neither fraud nor misrepresentation were alleged or proved by the Defendant.

28. That the Defendant's allegation that the compulsory acquisition over the land took place in terms of the Gazette Notice No. 3581 which assertion is supported by an undated, unsigned and un-particularised plan allegedly constituting evidence of encroachment onto the road reserve. The Plaintiff states that none of the plans produced by the Defendant to support its case of compulsory acquisition are of any probative value as they are neither signed, sealed nor bear any reference number and these plans can therefore not be relied upon to justify the Defendant's case in demolishing the relevant portion of the said land.

29. The Plaintiff stated that the Defendant violated its rights under Articles 40 and 47 of the Constitution. Specifically, that any administrative action failing to meet any single limb of the threshold set in the Constitution amounts to a violation of the right to fair administrative action and to this extent is unconstitutional. That by virtue that the Plaintiff holds an indefeasible title to the said property, the propriety or legality of the said title can only be challenged through the application of due process. The plaintiff concluded by submitting that it is entitled to the reliefs set out in the plaint.

30. The Plaintiff relied on the following authorities among others:

(a) **West Dunbartonshire Council v. William Thompson and Son (Dumbarton) Ltd (2015) ScotCS C SIH-93**, where the court held that,

"*there is clear distinction between errors which go to the fundamental validity of a notice by failing to meet the requirements of the empowering document (whether that be a statutory provision as in Lay v. Ackerman or a lease or other contract) and errors in the content of the notice. It is only if a notice meets the strict requirements for formal validity that the court will go on to construe the meaning of the notice by use of the reasonable person in the position of the contractually specified recipient."*

(b) **Geothermal Development Company Ltd vs. AG & others (2013) eKLR**, *where the Court observed that, "As a component of due process it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only un cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well…."*

(c) **Virenda Ramji Gudka & 3others vs. Attorney General (2014) eKLR,** the Court opined: "*In my view, a Gazette Notice for the intended acquisition alone cannot effectuate a compulsory acquisition and in order to effectuate the acquisition the procedure for acquisition under the Act to be adhered to. The Gazette Notice for the acquisition and the Gazette Notice notifying the payment of the compensation can only affect parties directly such as the registered proprietors at the time of the notice of compulsory acquisition is given. Third parties dealing with acquired land can only be put on notice if the process of acquisition is completed and the provisions of sections 19 and 20 of the Act complied with."*

(d) **Elizabeth Wambui Githinji & others vs. Kenya Union of Road Authority & others (2019) eKLR**, where the Court stated thus: *"without an entry in the register recording the acquisition, the consequence was any party dealing with the land would be justified in assuming that the land still belonged to the original owners….. Through possession, the interest of the public body in whose favour the land is being acquired is safeguarded and the attention of the general public is drawn to the fact that the land is not available for alienation…"*

(e) **Shree VisaOshwal Community & Another vs. A.G & others (2019) eKLR** where the Court stated that, "*it must always be remembered that when Parliament confers power on a public authority with a clear framework of how those powers are to be exercised, there is an obligation on the public authority concerned to strictly comply with that procedure in order to render the decision valid."*

Defendant's Submissions

31. The Defendant submissions filed on the 30th day of October 2020, opened by defining its function under section 4 (1) of the Kenya Roads Act, 2007 that it shall be the Highway Authority responsible for the management, development, rehabilitation and maintenance of national roads. The Defendant seeks to persuade this Court to find and hold that the alleged infractions brought by the Plaintiff are unproven, that the remedies proposed against it are unwarranted and made without jurisdiction, and that this Defendant was within its mandate and functions when it demolished the Plaintiff's perimeter wall.

32. The issues for Determination according to the Defendant are:

(a) Whether the Government compulsorily acquired 0.333 hectares of MN/V/393/9 in 1969;

(b) Whether the Plaintiff's title is indefeasible in view of the apparent compulsory acquisition of 0.333 hectares of MN/V/393/R in 1969 and whether specific portion of the said land demolished by the Defendant is a road reserve that had been compulsorily and conclusively acquired by the Government for public use;

(c) Whether the road reserve (the specific portion demolished by the Defendant) is an overriding interest contemplated in and in accordance with the section 30 (a) and (c) of the Registered Land Act;

(d) Whether the Defendant has the legal mandate to demolish structures put up and/or encroaching on the road reserves;

(e) Whether the Defendant afforded the Plaintiff their legal and constitutional right to fair administrative action before effecting the demolition;

(f) Costs.

33. On the first issue, the Defendant submitted that compulsory acquisition by the State for public purposes is ordinarily a creature of statute and that the courts have been as astute in imposing strict construction on statutes allowing the appropriation of private property by the State. The Defendant states that although the Plaintiff derisively dismissed the two Gazette Notices as not evidence of the compulsory acquisition, the Notices were issued in accordance with the sections 6 (2) and 9(1) of the Land Acquisition Act, 1968 (now repealed).

34. The Defendant explains that compulsory acquisition begins with section 6(2) which provides a notice of intention to acquire land, a copy of which shall be served on every person who appears to be interested in the land. Section 7 of the Land Acquisition Act required that the land be marked out and measured and shall cause a plan to be prepared. That the said plan was prepared and hence the first Gazette Notice

No. 3581 dated 21st November, 1969. Section 9 of the Land Acquisition Act provides that the Commissioner shall appoint a date not earlier than twenty-one (21) days after the publication of the notice of intention to acquire, for holding an inquiry for hearings of the persons interested in the land. That this notice was done vide Gazette Notice No. 3637 dated 28th November, 1969.Thereafter the Commissioner is to prepare a written award in which he shall make a separate award for compensation to each person he has determined to be interested in the land. According to the Defendant, the original proprietor of the suit land was compensated and even went to court to challenge the compensation via **Civil Appeal No. 3 of 1970 at Mombasa Appellate side (appeal against award made by the valuer/collector under the Land Acquisition Act No. 47 of 1968, R.F Tanner Esq) Ludwig Lany vs. R.F Tanner (Collector/Valuer)** and suitably managed to have the compensation increased from Kshs.13,251 to Kshs.18,997. That this therefore proves that the award was given and the compensation paid. That the Court in the appeal also confirmed that the Commissioner had taken possession when it held that, **"the appellant is entitled to interest on Kshs.5,746/- at 6% from the date on which the Commissioner took possession to the date of payment of the excess and to his costs."**

35. The Defendant states that this is sufficient proof that compulsory acquisition was done to finality and that the Commissioner of Lands then took possession of the said land for the road expansion and as a result the road was expanded and that the road reserve moved from 150 feet to 80 feet after the expansion of the road.

36. With regards to the **issue of the indefeasibility of the Plaintiff's title**, the Defendant submits that it is impossible for the Plaintiff acquire by way of transfer any interest in a portion of land that was acquired by the Government through compulsory acquisition. The Defendant alleges that the previous owners of the land were compensated and lost their rights, interests and the title thereto as upon acquisition, the proprietary rights in the road reserve vested in the Government. That the Plaintiff therefore acquired no right, interest in law or equity over land within boundaries of the road reserved and the District Surveyor's report was inconclusive as he was unable to identify the extent of the road reserve.

37. The Defendant further submits that it is on record that the land was acquired for public good, the re-alignment of the Nairobi-Mombasa road which was built after a final survey plan was made subject to Section 17 of the Land Acquisition Act. It is therefore inconceivable that the Government can compulsorily acquire land and take possession without demarcating the extent of the acquired land and a have a road built on the same without boundaries.

38. The Defendant reiterated that a compulsorily acquired land for public good cannot subsequently be diverted to serve private need hence the indefeasibility of the Plaintiff's title fails. That the Defendant cannot therefore compensate the Plaintiff with damages for land it already owns and it cannot re-acquire or re-compensate the land twice over. The Defendant also contended that the legal burden to prove that the Government acquired the road reserve does not extend to their property lies with the Plaintiff. That the Defendant has the evidentiary burden to prove that the road reserve was compulsorily acquired by the Government in 1970 and that the Plaintiff's property encroached and extended in to the Defendant's road. The Defendant submits that the Plaintiff's title was as a result of a subdivision done in 1987, seventeen years after the Government compulsorily acquired the portion of suit property. That the Plaintiff is therefore deemed to have had notice of a road reserve because the disputed title came into existence in 1987 making the compulsory acquisition an overriding interest.

39. The defendant raised a question whether it **had the legal mandate to demolish the Plaintiff's perimeter wall and it** cited the provisions of section 49(1) (4) and (5) if the Kenya Roads Act No. 2 of 2007 and section 91 of the Traffic Act, Cap 403 which gives the Defendant the authority to remove any encroachments on and damages to roads. That the Defendant followed the protocol by issuing the notice on the 16th of Feb, 2015 allowing the Plaintiff to stated their case and consequently on the 18th of May, 2015, three (3) months later undertook demolitions. That section 3 and 4 of the Kenya Roads Act No. 2 of 2007 spell out the Defendant's mandate and it is within its mandate that the Defendant issues notices and demolishes property on road reserves.

40. That the Plaintiff erected a perimeter wall with the knowledge that this was being done on a road reserve and despite notice from the Defendant to have the encroachments removed it failed to do so forcing the Defendant to remove the structures thus fulfilling its mandate under the law. The Defendant urges this Court to consider its actions in line with public interest and that the said demolitions were carried out in consideration to public interest so that this Court finds that the Defendant adhered to the law since the commencement of the acquisition on the 21st November, 1969.

41. The Defendant submits that although the notice was addressed to KTDA as averred by the Plaintiff, the Plaintiff on receipt of the notice from KTDA responded to the said letter on 13th April, 2015. The Defendant further submits that it afforded the Plaintiff the right to be heard and even gave them reasons for their decisions in accordance with Article 47 of the Constitution. That the demolition was done before the enactment and commencement of the Fair Administration Action Act of 2015. That procedural fairness is now therefore a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of duty to afford one an opportunity to be heard. That the Defendant is alive to their constitutional mandate as outlined and afforded the Plaintiff the due process and also gave them adequate and valid notice and reasons for their decisions as envisaged in Article 47 of the Constitution before moving in to demolish the perimeter wall.

42. The Defendant concluded that:

(a) Public interest demands that land meant for use as a public roads reserve should be used for the intended purpose intended and should not be appropriated for private use;

(b) The Defendant has done its best to carry out compulsory acquisition in accordance with the law and it is denied to continue construction of the Mombasa-Nairobi road and the public stands to suffer immensely due to lack of infrastructure; and

(c) The Defendant acted in accordance with the law and that there are documents to back its claim is in the public domain, documentations that will contradict the findings by the Plaintiff's surveyor;

(d) The Plaintiff's suit be dismissed with costs to the Defendant.

43. The Defendant sought to rely on the following case law among others to support its case:

(a) **Ludwig Lany vs. R.F Tanner (Collector/Valuer), in the Mombasa Appellate Side, Civil Appeal No. 1 of 1970,** where the opening paragraph states, *"This is an appeal against an award of shs.13,251/- for the acquisition of 1.6308 acres of land plots 393/3 and 393/R Section V Mainland North Mombasa for the realignment of Mombasa-Nairobi Road."* The Court goes further to hold that, *"the appeal is allowed to the extent of increasing the award from shs.13,251/- to shs.18,997. The appellant is entitled to interest on shs.5,746/- at 6% from the date on which the Commissioner took possession to the date of payment of the excess and to his costs."*

(b) **Eunice Grace Njambi Kamau & Another vs. Attorney General & 5 others (2013) eKLR,** Mutungi J (as he then was) stated that, "*the language of section 19 and 20 is couched in mandatory terms attesting to the significance of the taking possession and vesting of the acquired land in the government…Quite clearly observance of section 19(3) and section 20 of the Act, would serve to notify third parties that the government has acquired an interest in the subject land particularly because the Registrar would have been notified and a relevant entry would be made on the land resister signifying the interest of the government.*

(c) **Shalien Masood & 5 others vs. Kenya National Highways Authority & others CA No. 327 of 2014** where Honourable Waki JA stated that, *"…that courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multi furious altars of private interests nor will they sit idly by and see land cartels, briefcase investors and speculators with high connections use public land as tickets to individual largesse in the wake of public pain or inconvenience. Government cannot compulsorily acquire land only for it to be gifted or otherwise conveyed to private individuals who have access to shakers and movers for purposes of selling them off to line their pockets."*

(d) **Catherine C Kittony vs. Jonathan Muindi Dome & 2 others (2019) eKLR**, where the court stated that, "since the mode of acquisition of title was unlawful, Article 40 does not kick hence the title to the suit land held by the appellant was defeasible.

(e) **John Peter Mureithi & 2 others vs. Attorney General & 4 others (2006) eKLR,** where Nyamu J (as he then was) quoting with approval his earlier decision in the case of Kenya Allied Workers Union vs. Security Guards Services & 38 others Misc. 1159 of 2003, where when defending the autonomy of the industrial court on the grounds of public interest, he observed that, "*Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous Jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it acknowledged by the public at large, the sons and the daughters of the land sing and dance, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves…."*

44. The Plaintiff filed **supplementary submissions on the 4th of December, 2020** in response to the Defendant's submissions. The Plaintiff submits that although the Defendant relied on Civil Appeal Case 3 of 1970 citing the acquisition in the said case does not bear any relevance to the instant suit either in fact or in law. That a party claiming to the acquisition must prove that such acquisition was undertaken by way of production documentary evidence and that the Defendant's reliance in the decision set out in the Ludwig case does not suffice to meet the threshold set out in section 107 (1) of the Evidence Act in discharging the burden of proof on its claim for compulsory acquisition.

45. The Plaintiff argues that Thomas Gacoki's replying affidavit made unsupported allegations of compulsory acquisition on the disputed portion of the suit land which are denied by the Plaintiff. The Plaintiff further states that the Defendant's argument that there exists an overriding interest on the disputed portion of the suit land cannot stand and its claim that there is an existing road reserve prior to the acquisition is dependent on establishment of evidentiary proof of compulsory acquisition which the Defendant has abjectly failed to adduce.

46. With regards to the **second issue**, the Plaintiff states that the although the Defendant alleged that the Plaintiff's title was acquired illegally and unprocedurally, and by inference through a fraudulent and/or corrupt scheme, the Defendant has neither pleaded fraud or misrepresentation and the same cannot therefore be raised in the written submissions.

47. Lastly, the Plaintiff concedes to the fact that the Defendant is statutorily empowered to remove structures erected on a road reserve and it is expected to carry out the exercise fairly and strictly in accordance with the law. That the Defendant however cannot be restricted to superficial compliance of the Kenya Roads Act by merely issuing notices despite genuine concerns raised prior to the impugned demolition.

48. That the Defendant did not supply the Plaintiff with an authenticated survey plan to justify its position, instead it doubled down, on its initial unauthenticated plan and went ahead to demolish the Plaintiff's perimeter wall. Therefore, the Defendant's actions cannot be said to constitute a lawful or reasonable exercise of its statutory powers and that the Defendant as public institution must act reasonably and in good faith at every turn in all its dealings.

49. The Plaintiff in its supplementary submissions cited the following decisions among others:

(a) **Moses Watayi Kiteresi vs. Daniel Wanyonyi & 2 others (2014) eKLR**, were Hon. Karanja J. quoted, '*section 34 of the Evidence Act which provides for admissibly of evidence given in previous proceedings only in circumstances where the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or where his presence cannot be without or amount of delay or expense which in circumstances of the case the court considers unreasonable.'*

(b) **Anastacia Ruguru vs. Anthony Mwai Waweru & another (2018) eKLR** where Majanja J. also quoted section 34 of the Evidence Act.

(c) **Mariam & Others vs. The State and Others (1980) AIR Ker** 176 in paragraph of 6 the Court stated that, *'the judgement in a case determining compensation for land acquired is a judgement in personam and not a judgement in rem. If so, the admissibility of such judgement must be considered in the background of section 43 of the Evidence Act. If the judgement does not fall under section 40, 41 and 42 of the Act, it would be irrelevant unless the existence of such judgement, order or decree is a fact in issue or is relevant under some other provisions of the Act. Even so, it would only be the existence of the judgement that would be relevant and not the contents thereof.*

(d) **Peter Ngari Kagume & 6 others vs. Attorney General (2016) eKLR,** the Court of Appeal while agreeing with the trial judge on whether the allegations raised by the appellants were supported by the by other evidence quoted the judge as stating, *"I have gone through the Petitioners' affidavits which have horrifying allegations….It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculations and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners."*

(e) **Monica Wangu Wamwere vs. The Attorney General (2019) eKLR,** where the Court stated that, *'we respectfully disagree; a party who files suit bears the burden and obligation to tender evidence to prove elements that would assure success of the claim. Mere claims without claims without solid evidence remain sentimental hopes which are no good.'*

(f) **Dennis Noel Mukhulo Ochwada & another vs. Elizabeth Murungari Njoroge & another (2018) eKLR,** where the Court stated that, *'as regards standards of proof of fraud, the law is quite clear. In **R.G Patel vs. Lalji Makhanji**, the former Court of Appeal of East Africa stated thus, " allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

(g) **Republic vs. National Police Service Commission exparte Daniel Chacha Chacha (2016) eKLR,** where *the Court while quoting Prof Sir William Wade in his work, Administrative Law, stated that, "the powers of public authorities are…. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.*"

Determination

50. Both parties framed issues in their submissions which they felt was determination by this court. I have merged those issues to the following;

(a) Whether or not the portion of land demolished had been compulsorily acquired by the government.

(b) Whether or not the notice served upon the plaintiff was sufficient.

(c) Whether or not the Plaintiff is entitled to any award of general damages

(d) What orders this court ought to grant.

51. It is not disputed that part of the wall fencing plot No. 735/V/MN was demolished on the 18th May 2015. It is also not in dispute that the suit title is registered in the name of the plaintiff. What is disputed by the defendant is whether that land was available for alienation to the plaintiff in 1987. The defendant relies on the gazette notice dated 21/11/1969 produced by both parties (page 29 of plaintiff's documents). On this notice was published an inquiry to compulsorily acquire several parcels of land including a portion of L.R No. 393/R/V measuring 0.333ha (or 0.8222 acres) and 393/3/V – 0.327ha. The plaintiff in his evidence said he did not see the gazette notice dated 28/11/1969 which purportedly concluded the acquisition. It is therefore his evidence that the acquisition was never concluded.

52. The plaintiff contended further that even if the acquisition was completed then the suit parcel did not constitute part of the land acquired. The court is called to launch into the evidence given to ascertain whether there was an acquisition of a portion of the land that was later registered as L.R No. 735/MN/V. PW2 gave a narration of how L.R No. 735 came to be in his report dated 14th May 2015 (page 31 of the plaintiff's documents). PW2 stated that *"a search to determine if any acquisitions as per the Gazette Notice number 3581 of 14th November 1969 were noted on the Title of the original plot number, which was then known as MN/V/393/R and then later MN/V/626, was unsuccessful and all records related MN/V/393 and later MN/V/626 both in Nairobi and Mombasa lands records offices/registries were also not possible to trace as our title copy shows no historical ties apart from the survey records only".*

53. This witness observed that there was no known survey that was carried since the gazette notice No. 3581 of 14th November 1969 taking out the acreage of 0.333ha. He noted further that since the notice, the total acreage that has been acquired on MN/V/393/R is officially 1.2313ha (3.042 acres) which is approximately 2.220 acres above the notice demand. That according to the defendant, a further acreage of 0.2438acres will be added from MN/V/735 which was part of the MN/V/393/R.

54. The defendant's witness gave a narration of the process involved in the compulsory acquisition of land. According to him the acquisition was completed around 1969 – 1970 pursuant to the inquiries published in the gazette notices of 21/11/1969 and 28/11/1969. The gazette notice No. 3581 was a publication of notice of intention to acquire a portion of 393/R/V measuring 0.333ha while the notice No. 3637 of 28/11/1969 published the date of inquiry as 18th December 1969. The defendant did not present any further evidence to confirm that the acquisition was complete instead relying on the findings in the Case of ***Ludwig Lany Vs R.F Tanner, Civ. Appeal No. 3 of 1970.*** The defendant submitted that since this was an appeal against an award of Kshs.13,251/= for acquisition of 1.6308 acres of land in plots 393/3

and 393/R section V for the re-alignment of Mombasa-Nairobi Road.

55. According to DW1, the deed plan for title No. 735 did not take into account the acquisition of 1969. He stated in his evidence in chief that the gazette notice of 28/11/1969 and F.R 163/57 shows that plot numbers 513/1 & 513/7 are for surrender for the road. That what was acquired was 0.333ha while what was used was 0.36ha. That this difference was not included in the surrender and it is part of the un-surrendered portion which in plot No. MN/V/735 comprises the encroachment on the road.

56. Indeed, there is evidence that the process of compulsorily acquiring a portion of plot No. 393/R/V commenced. The parties did not have a focal point on whether the process got to a conclusion. The defendant agrees that Land Acquisition Act provided the stages to be followed and in this case because they were locked out in producing documents to prove that the acquisition was completed. There was no evidence of survey done for the acquired portion nor valuation thus the defendant put reliance on the proceedings in Msa Civ. Appeal No. 3 of 1970. The defendant cited the case of **Eunice Grace Njambi Kamau & Another vs. Attorney General & 5 others supra** which stated that parties would be notified of the government's in the acquired land by the Land Registrar making such an entry in the register. In paragraph 23 of both his replying affidavit and witness statement DW1 stated thus "*The Respondent requested the said documents from the relevant authorities and the said documents were readily availed at a cost."* However, from their evidence adduced, no document was produced showing any such entry made nor even the outcome of the Case Civil Appeal No. 3 of 1970 (which according to it challenged the award) being noted in the register. It is not demonstrated how then the public was put on notice.

57. The Court is alive to the fact that the burden of proof lies on the plaintiff to prove that her plot has not encroached on the road reserve. Has the plaintiff demonstrated that there was no encroachment and that the demolished walls were in line with the existing beacons JP10 & JP11. It is not disputed that the gazetted portion for acquisition of L.R no 393/R was 0.333ha. The issue is whether or not the portion acquired was marked both on the ground and paper/records/lands registry. DW1 also introduced a new line of evidence during his oral testimony when he stated that what was acquired was 0.333ha while what was used was 0.36ha. This gives a difference of 0.03ha of more land used than what was not "acquired." His statement is that it is this difference which constitutes the encroachment.

58. Since it is the defendant's evidence that the encroached portion is approximately 0.05ha, the burden then shifted on the defendant to show by what authority the 0.03ha was bestowed on it. Unfortunately, no such evidence was forthcoming. Therefore, taking into consideration that there was nothing on record to affirm the acquisition of the 0.333ha and further taking into account that besides the 0.333, more land was used; it is my considered opinion that the defendant had no foundation to apply the provisions of section 49 of the Kenya Roads Act when it proceeded to demolish the plaintiff's wall and attendant developments.

59. The defendant in its submission justified its action also by relying on the provisions of section 30(a) & (c) of the Registered Land Act (repealed) submitting that the road reserve was an overriding interest. From the documents produced, the area in question comprises land that has fixed boundaries. The defendant further cited the Case of ***Commissioner of Lands & Ano Vs Coastal Aquaculture Ltd, Civil Appeal No. 252 of 1996 KLR at 264,*** thus ***"I agree with the learned Judge that for a successful compulsory acquisition, the requirements of the Constitution and of the Act must be strictly complied with and that if there is full compliance with the law, compulsory acquisition cannot be interfered with".***

60. At paragraph 71, the defendant submitted thus *"A person who puts the boundary and identity of land an issue must successfully contradict the defendant's survey plan of land in dispute otherwise he would fail. In this matter, the plaintiff has the legal burden to prove that the government acquired road reserve does not extend to their property. Conversely the defendant has the evidentiary burden to prove that a road reserve was compulsorily acquired by the government in 1970 and the plaintiff's property encroached and extend into the road. The defendant's evidential burden are issues of fact".*

61. I find the defendant contradicting itself. Its either the disputed portion was compulsorily acquired or not. The provisions of section 30 of Cap 300 (repealed) are specific to overriding interests which have not been noted in the register. In this case, the defendant wants an inference drawn that it has overriding interest over the suit plot but at the same time shifts the burden on the plaintiff to show that the acquired road reserve did not extend to her property. In any event, the fact of none entry of the acquisition into the register can only be treated as an overriding interest and which then laid a burden upon the defendant to demonstrate that they have been using the disputed part to be entitled to it. The evidence laid show otherwise since the plaintiff fenced of the portion sometimes in 1987.

62. The second contradiction is that provisions to section 30(a) refers to rights subsisting at the time of first registration. The evidence presented does not suggest that there existed a road reserve on a portion of parcel No. 393/V/R that was capable of implementation. The road was not in existence as it was designed in 1969 which was after the registration of the original title number 393/R so the overriding interest cannot apply ante. In regard to section 30(c), I have already stated that the defendant did not avail evidence to confirm that indeed part of the land acquired for the road reserve had been eaten by parcel No. 735/V/MN.

63. To buttress the plaintiff's claim is the Mombasa County Surveyor's report filed pursuant to an application made by the defendant on 14th September 2016. The report is dated 27th April and these were the findings recorded; *"Plot No. MN/V/735 was a sub-division of plot No. MN/V/626 which was done on 10/9/87 by licensed surveyor F.M. KASYI. Plot No. MN/V/626 was a subdivision of MN/V/513.MN/V/513 was a subdivision of MN/V/404 and plot No. MN/V/404 was a subdivision of plot No. MN/V/393/R. As per gazette notice No. 3581 within VOL.LXX1-No.53 dated 21st November 1969; an acquisition was done by the Commissioner of Lands on plot No. MN/V/393/R for a road reserve which has not been surveyed to date. There are no survey records defining the road reserve extents on the suit property".*

64. The defendant submitted that the mode of acquisition of the plaintiff's title was unlawful fraud hence the plaintiff cannot rely on the indefeasibility of his title to hold onto his claim. The plaintiff through the evidence of PW2 gave a history of how the suit title MN/V/735 came to be through various subdivisions. He supported his evidence with several plans for each of the subdivisions. The whole suit land is given as measuring 0.9162ha and according to DW1/s evidence the encroaching portion is 0.05ha. The evidence of PW2 was not contradicted by the defence so that if in the opinion of the defendant the title was unlawfully acquired it had the obligation to prove the acts constituting the illegal acts. Besides the two gazette notices dated 21st Nov & 28th Nov 1969, there was nothing presented by the defendant to support the allegations of illegality of the title or the encroachment levelled against the plaintiff. In essence, the demolition of the wall was

uncalled for, illegal and against the rights of the plaintiff as the proprietor of the suit plot.

65. Was the notice served valid? The first notice served on the plaintiff's tenant KTDA was invalid as they had no proprietory interest in the land. However, the irregularity was overtaken by the subsequent events when the notice was delivered to the plaintiff and by virtue of the correspondences exchanged between the defendant and the plaintiff. The Case of ***Balgay Ltd Vs William (2016) CSIH55*** in my view is distinguishable because serving notice under the provisions of section 49 of the Kenya Roads Act did not confer any rights upon the KTDA.

66. What reliefs if any is the plaintiff entitled to? The plaintiff submitted that it has laid out a proper case for and is entitled to the reliefs in the plaint. Having found that the defendant wrongly demolished the plaintiff's walls and gates, I make an order that the defendant shall restore the wall together with the gates within 90 days of this judgement. In default, the defendant to re-imburse the equivalent of the cost of construction undertaken by the plaintiff with the plaintiff being at liberty to execute. Secondly, there is sufficient evidence adduced by the plaintiff that her tenant (KTDA) moved out as a consequence to the demolitions making the plaintiff to lose income accruing from the rents. The monthly rents was provided in the lease document produced in evidence. The monthly rent payable in the year 2015 when the demolition took place is given at Kshs1,335,469 and in the year 2016, monthly rent was given at Kshs1,435, 529.

67. It is therefore my considered opinion that the plaintiff is entitled to compensation for lost rent. The same is now calculated for the year 2015 at Kshs1,335,469 x 7 months and for the year 2016; Kshs1,435,529 x 12 months (being rents for the remainder term of Lease). For the period running from 2017 till when the judgement was rendered, I do award Kshs Fifty Five million (55,000,000) only for general damages for trespass and loss of income.

68. In conclusion, I make the following final orders;

(a) A declaration that the certificate of title CR. 18624 that the plaintiff holds in respect of the suit land constitutes conclusive evidence of ownership of the said land and that the plaintiff is the lawful and indefeasible owner and entitled to immediate possession of all the said land.

(b) A permanent injunction be and is hereby issued restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from demolishing or further demolishing or destroying any part of the said land or any structure or structures thereon.

(c) A permanent injunction restraining the defendant whether by themselves and/or their servants or agents or otherwise howsoever from either entering, occupying or any party having a lawful interest in the said land from either entering occupying or using any part of the said land.

(d) Restoration of the walls unlawfully demolished by the defendant on the said land together with damages of Kshs 81,574,631 as enumerated in paragraph 67 hereinabove.

(e) A stay of execution for a period of 30 days is hereby given.

(f) Interest thereon at court rates;

(g) Costs

DATED, SIGNED & DELIVERED ONLINE AT BUSIA THIS 8TH OF APRIL, 2021.

A. OMOLLO

JUDGE

Sent to advocates on record via email at MOMBASA this 8th Day of APRIL 2021

DEPUTY REGISTRAR

MOMBASA