



**African Gas and Oil Co Limited & 4 others v National Land Commission  
& another (Environment & Land Petition 51, 52, 53, 54 & 55 of 2019  
(Consolidated)) [2022] KEELC 2746 (KLR) (4 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2746 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND PETITION 51, 52, 53, 54 & 55 OF 2019 (CONSOLIDATED)**

**LL NAIKUNI, J**

**JULY 4, 2022**

**IN THE MATTER OF: THE COMPULSORY ACQUISITION  
OF THE PETITIONER'S LAND PARCEL NO. MN/VI/4948**

**IN THE MATTER OF: ARTICLES 40(3) (B) AND 64 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: OF SECTION 128 OF THE LAND ACT NO. 6 OF 2012**

**IN THE MATTER OF: CONTRAVENTION OF THE RIGHT TO PROPERTY**

**BETWEEN**

**AFRICAN GAS AND OIL CO. LIMITED ..... 1<sup>ST</sup> PETITIONER**

**MIRITINI FREEPORT LIMITED ..... 2<sup>ND</sup> PETITIONER**

**CREEK PORT COMMISSION ..... 3<sup>RD</sup> PETITIONER**

**SEMIX ENTERPRISE LIMITED ..... 4<sup>TH</sup> PETITIONER**

**MJAD INVESTMENTS LIMITED ..... 5<sup>TH</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KAHIA TRANSPORTERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**I. Preliminaries**

1. This is a ruling solely for purposes of providing some specific directions onto the five (5) consolidated constitution petitions being numbers 51, 52, 53, 54 and 55 of 2019 successively filed on different occasions but with a common denominator and the counter claim filed by the 2<sup>nd</sup> respondent herein



that they all revolve around the constitutionality or legality of the 1<sup>st</sup> respondent – the National Land Commission’s (hereinafter referred to as “the NLC”) compulsory acquisition of the land supposedly belonging to the parties herein which includes the petitioners and the 2<sup>nd</sup> respondent who was joined to the suit later on.

2. The petitioners are limited liability companies registered under the [Companies Act](#). The 1<sup>st</sup> petitioner’s claim is on the plot of land known as No MN/VI/4838 measuring 3.4634ha (approximately 8.56 acres). The 2<sup>nd</sup> petitioner’s claim is on the plot of land known as No MN/VI/4805 measuring 12.8259ha (approximately 31.7 acres). The 3<sup>rd</sup> petitioner’s claim is on the plot of land known as No MN/VI/4948 measuring 0.2338ha (approximately 0.577 acres). The 4<sup>th</sup> petitioner’s claim is on the plot of land known as No MN/VI/3827 measuring 9.6397ha (approximately 23.82 acres). The 5<sup>th</sup> petitioner’s claim is on the plot of land known as No MN/VI/3916 measuring 8.7626ha (approximately 21.66 acres). All these plots are said to be situated in Miritini, the county of Mombasa.
3. The 1<sup>st</sup> respondent, the National Land Commission, is an independent commission established under article 67 (2) of the [Constitution](#) and operationalized by the [National Land Commission Act](#), Act No 5 of 2012 with the fundamental function of management of public land on behalf of the national and county governments. The NLC is also charged under the [Land Act](#) to take charge of and conduct any compulsory acquisition of private land by the county or national governments: see section 107 of the [Land Act](#).
4. The 2<sup>nd</sup> respondent herein (Kahia transporters Limited) is a limited liability company registered under the [Companies Act](#). The claim by Kahia transporters limited is on all that parcel of land known as land reference plot No 5169/VI/MN measuring 90.04ha (approximately 222.5 acres) situated in the county of Mombasa.
5. The main pith and substance of the matter is boundary dispute between the land belonging to the petitioner and the 2<sup>nd</sup> respondent.

## II. The Petitioners’ Case

6. It is the petitioners’ case that they are the registered proprietor of the aforementioned plots. They plead and profusely refute that their land does overlap Kahia alleged parcel of land, plot No MN/VI/5169 as evidenced by the NLC’s publication (gazette notice No 951 of February 19, 2016), intended to acquire the petitioners’ land.
7. According to the petitioners, the NLC issued a notice of compulsory acquisition *vide* gazette notice No 405 of January 24, 2014. This notice was for the compensation of various properties required for the public purpose of construction of the Mombasa port area road development project (hereinafter referred to as “MPARD”) Mombasa bypass and Kipevu new terminal link road (Mombasa southern bypass) (hereinafter, ‘the Mombasa southern bypass project’) by the Kenya National Highway Authority (KENHA).
8. The petitioners aver that among the properties to be affected by the Mombasa southern bypass project was their parcels of land but the same was not gazetted in the said gazette notice No 405. They state that they subsequently made an objection to the gazette notice No 405 and following their objections, the NLC published an addendum of gazette notice 405 *vide* gazette notice No 951 of February 19, 2016 giving notice of intention to acquire the petitioners’ land under section 9(1) of the [Land Act](#), No 6 of 2012.
9. The petitioners contended that at the time of publishing gazette notice No 951, KENHA and its contractors had taken possession of the land for purposes of conducting the Mombasa southern



bypass project. They averred that they attended the hearing of claims to compensate interested persons whereby they presented to the NLC a valuation report dated June 10, 2015. The petitioners asserted that they were not issued with an award and *vide* a letter dated October 30, 2018. Thus, through their advocates on record, the petitioners notified the NLC that any award to be made had to take into account the market value of the land returned by the NLC for the land whose part had been acquired for the standard gauge railway (SGR) and also the values returned for other lands neighboring or in close proximity to the subject land.

10. The petitioners stated that despite demands for payment, they were yet to be compensated even though their lands had been taken possession and used for the afore stated projects thereof and the project completed.
11. The contention by the petitioners was that the NLC's continued failure to promptly pay full and just compensation to them was contrary to the law and a continued denial, infringement and violation of the petitioners' right to property as provided for under the provision of article 40(3) of the Constitution of Kenya, 2010 and their right to fair administrative action under the provision of article 47 of the Constitution. The petitioners stated that they had been subjected to and continued to suffer irreparable damage as a consequence of the NLC's illegal and unconstitutional acts of commission and omission thereof.
12. The petitioners also held that their rights under the provision of articles 20 (1) (2) & (3)(b), 22 (1), 23(1)(3), 40(3)(b)(i), 47 and 64 of the Constitution of Kenya, 2010 and sections 111 and 115 of the Land Act should be protected and safeguarded altogether.
13. The petitioners prayed *inter alia* for a declaration that their land did not overlap that of the 2<sup>nd</sup> respondent - Kahia's land, payment of the compensation award as per their valuation report, and general damages for violation of their constitutional rights.

### III. The 2<sup>nd</sup> Respondent's Case.

14. In response to the filed five (5) constitution petitions, the NLC filed.....paragraphed replying affidavits sworn by Mr Mburu F.K, the acting director valuation and taxation for the 1<sup>st</sup> respondent. He deposed that during the construction of the Mombasa southern bypass project, the NLC compulsorily acquired the petitioners' land as per the provisions of article 40 (3) of the Constitution and part viii of the Land Act. He further deposed that the NLC in strict compliance with the said provisions of law published a notice of intention to acquire the certain listed properties in the Kenya gazette being legal notice number 405 of January 24, 2014. He added that the NLC subsequently caused to be published an addendum to legal notice number 405 to include the petitioners' land which had been inadvertently omitted while publishing the said notice of intention to acquire.
15. The deponent further deposed that, thereafter and in compliance with the provisions of section 112 of the Land Act, a notice of inquiry was published in the Kenya gazette as notice No 951 of February 19, 2016 notifying all the affected property owners or persons with interest in the parcels of land identified in the notice to attend an inquiry of the NLC and present their claims of compensation.
16. He deposed that in the intervening period the NLC undertook ground inspections of the petitioners' land to determine the amount of compensation payable as per the NLC's mandate. The deponent deposed that at the inquiry the petitioners were accorded due process by making both oral and written representation before the NLC. He added that the petitioners conceded to having presented a valuation report dated June 10, 2015 to the NLC. He deposed that upon conclusion of the inquiry awards were prepared but the petitioners have failed to collect their awards. He further deposed that in making the award, the NLC took into consideration the valuation report presented by the



petitioners and more critically, the provisions of part viii of the land Act and the provisions of the Land (Assessment of Just Compensation) Rules, 2017.

17. He deposed that at the inquiry, the petitioners prepared and presented to NLC a consolidated and grossly inflated claim comprising of two different and unrelated projects that is the standard gauge railway (SGR) project and the Mombasa southern bypass project. He deposed that this claim of compensation presented by the petitioners as contained in the valuation report erroneously and mischievously valued and took into consideration a bigger area of land compared to what the NLC had gazetted and acquired. He deposed that the discrepancy in the acreage compulsorily acquired was so huge and glaring and it effectively explained the difference in the values as alleged by the petitioners. The deponent deposed that the petitioners to date had failed to collect their awards from the NLC.
18. The deponent deposed that if a party was dissatisfied with the award of the NLC, the only recourse was to lodge an appeal to the Environment and Land Court, and not to resort to and negotiations. Hence, according to the deponent these petitions were not necessary and was a gross abuse of the court process. He deposed that the NLC was ready to pay the petitioners their compensation as per the award.

#### **IV. The 2<sup>nd</sup> Respondents Case**

19. On June 8, 2022 the 2<sup>nd</sup> respondent, the Kahia transporters limited filed its replies dated June 6, 2022 to the further amended petition and a counter claim dated even date. It averred that this petition was “sub judice” because another pending suit being ELC (Mombasa) No 405 of 2017 stopped the payment in respect of all that parcel of land known as plot No MN/VI/4805. The 2<sup>nd</sup> respondent further contended that it was the registered and legal owner of all that parcel of land known as land reference number plot 5169/VI/MN which was in the same location with the alleged plots belonging to the petitioners’. According to them, there was an issue of boundary, encroachment and/or overlapping dispute between them and the petitioners. According to Kahia, that dispute was yet to be resolved in ELC (Mombasa) 405 of 2017. Hence, in as far as Kahia was concerned, in order to resolve the issue of boundaries and proper compensation, the NLC was required to have firstly ascertained by way of causing exact land surveying as to which was the petitioners’ land and which is Kahia’s land because, all of the properties had been affected by the SGR and the Mombasa southern bypass project. Secondly, it is further averred that upon confirmation of each of the parties properties affected, the NLC should proceeds to tabulate, assess, and compensate the parties.

#### **V. The 2<sup>nd</sup> Respondent’s Counterclaim**

20. Additionally, the 2<sup>nd</sup> respondent, Kahia filed a counterclaim/cross petition against the NLC as the respondent and the petitioners as the interested parties. The 2<sup>nd</sup> respondent - Kahia pleaded that it was the registered owner of the plot known as plot No MN/VI/5169 and that the petitioners’ plots had encroached and/or overlapped onto their parcel of land.
21. It was also pleaded that the SGR line and Mombasa southern bypass had passed through its plot. However, the NLC had illegally and unlawfully made a decision to only pay compensation to the petitioners in total disregard of Kahia’s interest. Kahia further contended that it had not received compensation from the NLC in spite of the fact that 11.7948 ha (29.2 acres) and 0.9792 ha (approximately 2.42 acres) of its land was being used by the SGR and the Mombasa southern bypass respectively. According to Kahia, the portion of land affected was worth a sum of Kenya shillings one billion two seventy seven million four hundred thousand Kshs 1,277,400,000/=) computed at a rate of a sum of Kenya shillings one hundred million (Kshs 100,000,000/=) per acre.



22. It further pleaded that the petitioners were wrongfully paid for properties which did not belong to them as per the judgment delivered in constitutional petition (Mombasa) No 17 of 2018. Hence, as a very fundamental measure, the NLC should first and foremost ascertain the ownership of the lands before any compensation was effected. It was for these reasons that Kahia prayed for inter alia, an assessment of the compensation and an award to be paid in his favor.

## VI. Submissions

23. On May 9, 2022, through this court's ruling, I directed all parties to canvass the matter by way of written submissions. Pursuant to that, all parties managed to file their written submissions despite the stringent timelines granted by this court.

### A. The petitioner's written submissions

24. On September 3, 2021, the learned counsel for the petitioners, the law firm of Messrs A.A Said and Company Advocates filed their written submissions dated August 31, 2021. Mr Ogendo advocate submitted that the petitioners filed the petition seeking to secure its constitutional rights under article 40(3) of the Constitution of Kenya and the right to fair administrative action under article 47 of the Constitution of Kenya following the compulsory acquisition of the petitioners' parcel of land for the Mombasa southern by pass and SGR. The claim by the petitioners are set out in the further amended petition, verifying affidavit, supporting affidavit and further supporting affidavit.
25. The learned counsel held that in answer to the petition the 1<sup>st</sup> respondent filed the replying affidavit of Mburu F.K sworn on November 25, 2020 whereby it affirmed that all the parcels by the petitioners herein were acquired for the Mombasa southern by pass. The land was gazetted for compulsory acquisition in the Kenya gazette No 951 of February 19, 2016. It is notable that the gazette was after the 1<sup>st</sup> respondent through the contractor constructing the Mombasa southern bypass had entered the petitioner's land on January 25, 2016. That an award of Kenya shillings eight million six hundred and twenty five thousand (Kshs 8,625,000.00) dated August 5, 2019 was prepared.
26. The counsel submitted that the responses by the 1<sup>st</sup> respondent amounted to misrepresentation and non-disclosure of material facts to enable the court render justice to the parties in the matter. He held that the only issue for determination by the court was the full and just compensation payable by the 1<sup>st</sup> respondent to the petitioners in respect of the compulsory acquisition of all the parcels of land for the Mombasa southern by pass interest at 14% in the compensation value awarded by the court as in terms of section 117 of the Land Act No 6 of 2012, general damages and interest thereon for the constitutional violation by the 1<sup>st</sup> respondent plus costs of the petition.
27. He contended that the petitioners' right of property over the said parcels was not contested as it was admitted by the 1<sup>st</sup> respondent that the petitioners were the registered owners of the said parcels of land. Therefore, the counsel argued that following this and the compulsory acquisition of their parcels of land, provision of article 40(3) of the Constitution comes to play – among other things the full and just compensation of the petitioners' land compulsorily acquired for the Mombasa southern bypass and SGR. To buttress his point he relied on the decisions of “Patrick Musimba v National Land Commission & 4 others [2016] eKLR, Kanini Firm Limited v Commissioner of Lands [1996] KLR 1, Hellen Wachuka Njoroge v Attorney General & another [2016] eKLR.
28. The counsel opined that the petitioners had exhibited the valuation report prepared by Knight Frank Valuers Ltd dated June, 2015, this was as a result of the ongoing compulsory acquisition of the petitioners' land for both SGR and the Mombasa southern bypass *vide* gazette notice No 405 of January



24, 2014 to which gazette notice No 951 of February 19, 2016 the subject of the acquisition was published as an addendum.

29. The learned counsel contended that the Kenya National Highway Authority (KENHA) and its contractors had as at January 25, 2016 entered and taken possession of the petitioners land it followed that the assessment the full and just compensation of the petitioners had, interest as more particularly provided for in section 117 of the Land Act No 6 of 2012 ought to be factored from the time of taking possession. Notably this section provides for interest at the prevailing base lending rate set by the central Bank at the rime of taking possession. In this case the interest rate would be at 14% on the market value of the petitioner’s parcel of land as assessed by the land valuers. They cited the decision of Kenya Revenue Authority v Mohamed Saleh & Company Limited [2019] eKLR. On the interest rate at 14%.

30. With regard to the value returned by the 1<sup>st</sup> respondent, the petitioners submitted it was gross under valuation of the land and not full and just compensation as required by the Constitution and the Land Act 2012. On this point they relied on the decision of Five Star Agencies Limited v National Land Commission [2014] eKLR. And the Land (Assessment of Just Compensation) Rules – rule 3.

On the market value, the learned counsel held that for the respondent failure to exhibit a land valuation report to demonstrate to court how they determined the market value of the petitioners had and the award was fatal. Thus they leave the market value of the petitioner had as determined by the valuation report by Knight Frank Valuers Limited. As the only quick available to the court. They argued that the working and the market value estimated by the 1<sup>st</sup> respondent was subjective and not based on the principles of assessment of just compensation hence erroneous.

31. The learned counsel submitted that the value given by the 1<sup>st</sup> respondent had failed to factor the severance assessment as required by rule 3(b) of the Land Assessment of Just Compensation) Rules the portion acquired being just a small part of the main land would affect the other portions of the land its severance in terms of access and limit use. Hence, the court was urged to factor in the severance resulting from the compulsory acquisition of the petitioner land.

32. The learned counsel submitted on the claim for general damages and interest thereof arising from the violations committed by the 1<sup>st</sup> respondent in its failure to strictly comply with the constitutional and statutory safeguards in undertaking the compulsory acquisition herein, which have not been controverted by the 1<sup>st</sup> respondent on this issue he cited the case of Isabel Waitthera Njoroge v Ministry of State for Provincial Administration and Internal Security & 4 others [2014] eKLR. and Multiple Hauliers East Africa Limited v Attorney General & 10 others [2013] eKLR. The petitioners urged court to award them Kshs 5,000,000/= for the blatant violation of the petitioners right under articles 40 & 47 of the Constitution and general damages for a sum of Kshs 10,000,000.00 at the rate of 14% being the current court rates.

The petitioners’ also claim being entitled to costs of the proceedings.

## **B.The 2<sup>nd</sup> respondent’s written submissions**

33. On June 23, 2022 the learned counsel for the 2<sup>nd</sup> respondent the law firm of Messrs Omwenga & Mabeya Advocates filed their written submissions date on even date. Mr Omwenga advocate submitted that their submission was in respect to the Petitioner’s further amended petition dated May 17, 2022 and its counter claim by the 2<sup>nd</sup> respondent dated June 6, 2022. He noted that the 1<sup>st</sup> respondent who is also the respondent in the counter claim never opposed the 2<sup>nd</sup> respondent’s counter claim. There were no grounds of opposition, defence and/or replying affidavit filed by the 1<sup>st</sup> respondent to objection to the 2<sup>nd</sup> respondent’s counterclaim.



34. The learned counsel submitted that it was not in doubt that the 2<sup>nd</sup> respondent was the legal and absolute proprietor to all the parcel of land known as land reference No CR 70862 (plot No 5169/VI/MN) which is a leasehold interest of 99 years with effect from January 1, 1999. He observed that even by the time the gazette notices were being published in January, 2014 and February, 2016 the 2<sup>nd</sup> respondent title was already in existence save that its title deed had not been issued. For this reason, the 1<sup>st</sup> respondent failed to take into account the 2<sup>nd</sup> respondent's interest while it was compulsorily acquiring its portion for the SGR and the Mombasa port bypass road on the southern part
35. The learned counsel further argued that by the court order in ELC No 405/2017 the court stopped any compensation payment by the 1<sup>st</sup> respondent as it related to plot No MN/VI/4968 which is the petitioners plot.

He contended that the 2<sup>nd</sup> respondent engaged the services of a land surveyor – Mr Edward M. Kiguru who prepared a report dated March 23, 2020 which showed indeed that the SGR and the port bypass road had cut through the said respondent's plot No 5169/MN/VI and the size for SGR and port bypass road were 11.7948 acres and 2.4196 acres respectively which has affected the 2<sup>nd</sup> respondent's parcel of Land.

36. The learned counsel contended that it was not in dispute that the 1<sup>st</sup> respondent had never compensated the 2<sup>nd</sup> respondent for that area which had already been taken by SGR and port bypass road in spite of the fact that the area was already in use by SGR and port bypass road.

According to him the property was worth a sum of Kenya shillings one billion two seventy-seven million four hundred thousand (Kshs 1,277,400,000/=) a fact that was never disputed by the 1<sup>st</sup> respondent and hence the court should award the same amount to the 2<sup>nd</sup> respondent.

He submitted that the 3 main basis of the counter claim was that the 1<sup>st</sup> respondent was supposed to be compelled by this court to tabulate assess and compensate the petitioner in the counter claim in respect of its property already affected by this project.

37. The learned counsel argued that the petitioner had not filed any documents to contradict the following facts:-
- (a) The 2<sup>nd</sup> respondent was not the registered owner to land bearing numbers CR 70862, (5169 VI) MN.
  - (b) The plot was affected by the project.
  - (c) 1<sup>st</sup> respondent not tabulated assessed and compensated the petitioner in the counter claim for the portion affected by the project.
  - (d) The 1<sup>st</sup> respondent had no mandate to tabulate, assess and compensate the petitioner in the counter claim for its portion of land affected by the construction of the project.
  - (e) The 1<sup>st</sup> respondent should not proceed and ascertain the size of the petitioner and the 2<sup>nd</sup> respondent's areas affected by the project and thereafter proceed to tabulate, assess and compensate each of them.

38. Finally, the learned counsel held that the court should find that the procedure to compulsory acquire and use the 2<sup>nd</sup> respondent's land was not followed. The buttress their case they relied on the cases of "petition No 1 of 2020 Supreme Court of Kenya – *Attorney General v Zinj Limited*, petition No 33 of 2019 (Malindi) ELC – *Nightsshade Properties Limited v NLC & 3 others* [2021] eKLR.



And urged court to find that the 2<sup>nd</sup> respondent had demonstrated that its counter claim was merited and should be allowed as prayed.

## VII. Analysis And Determination

39. I have read through all the filed pleadings, the bundles of exhibits, the written submissions and authorities relied on by all the learned counsels, the relevant provision of the Constitution of Kenya and statutory provisions.
40. In order to arrive at a fair, just and informed decision in this matter, I have condensed all the salient issues into seven (7) sub heading for its determination. These are:-
- a) Whether the five (5) constitution petitions instituted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> petitioners against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the counter claim filed by the 2<sup>nd</sup> respondent herein against the petitioners and the 1<sup>st</sup> respondent meets the fundamental threshold of a constitution substratum.
  - b) Whether or not the land compulsory acquisition process of the parcels of land numbers MN/VI/4838, 4938, 4805 and 5169 allegedly belonging to the petitioner and the 2<sup>nd</sup> respondent was properly undertaken as required by law or was it inconsistent with and/or in contravention of article 40 (3) of the Constitution of Kenya and/or written law.
  - c) Whether this honorable court at this stage capable of making a determination of the legal ownership to the parcels of the land allegedly belonging to the petitioners and the 2<sup>nd</sup> respondents without calling for more evidence under the provision of section 173 (1) of the Evidence Act, cap 80 through conducting of proper land surveying exercise by dully appointed independent land surveyors.
  - d) Whether there is need to have a consolidation and final determination of all the pending suits in various courts over the same subject matter.
  - e) Whether in the intervening period, the National Land Commission should released the funds for compensation to the parties herein?
  - f) Whether the parties are entitled to the relief sought.
  - g) Who will bear the costs of the petitions and the counter claim /cross petition by the parties.

**Issue No. 1 Whether the five (5) constitution petitions instituted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> petitioners against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the counter claim filed by the 2<sup>nd</sup> respondent herein against the petitioners and the 1<sup>st</sup> respondent meets the fundamental threshold of a constitution substratum.**

41. The constitutional basis of the further amended petition for the five petitioners include:-
- (a) Article 25(c) of the Constitution which provides that the right to a fair trial shall not be limited despite any other provisions of the Constitution of Kenya.
  - (b) Article 40 (1) and (3) of the Constitution of Kenya declares the right to acquire and own property of any descriptions in any part of Kenya and protection from state deprivation unless procedurally done and due compensation was made.



- (c) Article 47 of Constitution of Kenya on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.
- (d) Article 22 of Constitution of Kenya declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.
- (e) Article 23 of the Constitution of Kenya giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.
- (f) Article 64.....
- (g) Article 165(3) (d) and 5 as read with article 162 (2) (b) of the Constitution of Kenya giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the bill of rights has been denied, violated, infringed or threatened inland matters

42. As a matter of course, the Constitution of Kenya under article 259(1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

- a) Promotes its purposes, values and principles;
- b) Advances the rule of law, and the human rights and fundamental freedoms in the bill of rights;
- c) Permits the development of the law; and
- d) Contributes to good governance.....”

This court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

43. Based on the principles set out in the edit of the Court of Appeal case of the Mumo Matemu v Trusted Society of Human Rights Alliance & another [2013] eKLR provided the standards of proof in the constitutional petitions as founded in the case of Anarita Karimi Njeru v Republic [1980] eKLR 154 where the court is satisfied that the petitioners’ claim were well pleaded and articulated with absolute particularity. It held:-

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

Further, in the “Thorp v Holdsworth [1886] 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and



thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

In application of these set out principles for filing a constitutional petition to this case, the honourable court is fully satisfied that the petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this further amended petition against the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the counter claim filed by the 2<sup>nd</sup> respondent herein and pleading for the prayers sought.

**Issue No. 2 Whether or not the land compulsory acquisition process of the parcels of land numbers mn/vi/4838, 4938, 4805 and 5169 allegedly belonging to the petitioner and the 2<sup>nd</sup> respondent was undertaken as required by law or was it inconsistent with and/or in contravention of article 40 (3) of the Constitution of Kenya and/or written law.**

44. Under this sub heading, it’s imperative to extrapolate indepth on the concept of land compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under part viii, sections 107 to 133 of the Land Act No. 6 of 2012 and article 40 (1), (2) and (3) of the Constitution of Kenya (see Viranda Ramji Gudka & 3 others v The AG (2014)eKLR as read together with part v of the Land Regulations of 2017. The process of the compulsory acquisition is in summary provided as follows:-

The article 40 (3) provides as follows:-

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.

45. Under the provisions of the Land Act, 2012, section 107 of the Act holds that, the NLC - the 1<sup>st</sup> respondent herein is ordinarily prompted by the request of the national or county government through the cabinet secretary or county executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the land must be acquired for public purpose or in public interest and not any other purpose as dictated by article 40 (3) of the Constitution of Kenya. In this case the threshold must be met.

Significant variation in the law includes section 107 (3) of the Land Act, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in section 107 (3) of the Land Act and article 40 (3) of the Constitution of Kenya.

Under section 108, as part of the NLC’s due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. (see “Nas Auto Spares v Land Acquisition & Compensation Tribunal & 2 others (2015) eKLR).



46. This process is thereafter followed by a verification meeting (see section 107 (2) with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, cadastral maps of the affected areas, a Resettlement Action Plan (RAP) accompanied by a list or Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of sections 107 (5) & 110 (1) of the Act, the 3<sup>rd</sup> respondent upon approval of a request for the compulsory acquisition a notice of the intention to acquire the land is published in the gazette and county gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the land registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both county and national governments – section 107 (8) of the Land Act for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under section 108 of the Land Act. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC. The land owners plays no role at all hereof.

47. Under the provision of section 112 of the Land Act is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen (15) days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry (see section 112 (2) of the Act. At this stage, the NLC exercises a quasi - judicial powers.

For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents (see section 112 (5) of the Act makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of sections 113-119 of the Act.

48. If the land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of section 111 of the Act.

Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded ( see section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the land in question being taken by the NLC. The property is deemed to have vested in the national or county government as the case may be with both the proprietor and the land registrar being duly notified.

49. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such award is not subject to taxation. A



compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision of sections 120-122 of the *Land Act*. In the case *Patrick Musimba* (supra) the word compensation was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not be equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence.

Therefore, from the above detailed statutory analogy, it is 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 these fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's an extremely delicate balance to be weighed with utmost care.

50. In the case of *Patrick Musimbi v 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.....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”

In application of these principles to this case, it is seen that, the petitioner's and the 2<sup>nd</sup> respondent parcels of land known as LR No MN/VI/4838, 4939, 4805 and 5169 were acquired for purposes of the construction of the Mombasa bypass (Kipevu new terminal link road (southern bypass project), Mombasa port area road new development and the standard gauge railways (SGR) whereby the petitioners and the 2<sup>nd</sup> respondent have held that the 1<sup>st</sup> respondent herein has failed to pay them to date though they had since taken possession of the land and caused development on it.

51. Suffice to it say, the main quest in the matter is compensation. As was stated by Scott L.J in relation to compulsory acquisition in the case of “*Horn v Sunderland Corporation* [1941] 2 KB 2640 “The word “compensation” is almost of itself carried the corollary that the loss to the seller must be completely



made up to him, on the ground that unless he receives a price that fully equated his pecuniary detriment, the compensation would not be equivalent to the compulsory .....

Based on the above legal expose, the law demands that where land has been acquired compulsorily from an owner that just compensation is to be paid in full to the said affected person(s). This is in line with the constitutional requirement under article 40 (3) of the *Constitution* of Kenya and that person should not be deprived of their property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

52. From the above observation, the facts derived from the pleadings and the law herein and the cited relevant provisions of the law, this court finds it that the petitioners and the 2<sup>nd</sup> respondent are entitled to a full, fair, prompt and just compensation for the compulsory acquisition of their parcels of land aforementioned and indeed the payment schedule was drawn and the petitioners granted an award, the money was still being held by the government of Kenya – the national treasury and even recorded a consent in court is unclear the reason and their conduct for the non payment to date. Once this has been done, it will then leave court and the parties to deal with the sticky issue of boundaries between the petitioners and the 2<sup>nd</sup> respondent which is the next issue for analysis herein below.

**Issue No. 3 Whether this honorable court is capable at this stage to make a determination of the legal ownership to the parcels of the land allegedly belonging to the petitioners and the 2<sup>nd</sup> respondents by invoking the provision of section 173 (1) of the Evidence Act, cap 80 through conducting of proper land surveying exercise by duly appointed independent land surveyors.**

53. I have considered all the pleadings, exhibits, submissions, and authorities relied on by learned counsel. From the pleadings, it is not contested that the NLC compulsorily acquired land for purposes of constructing the Mombasa southern bypass. According to NLC, they conducted due diligence and they found that the land belonged to the petitioners. The petitioners have further provided copies of the title for their respective parcels of land. Kahia on the other hand has claimed that the land that was acquired is its land. It provided a title to the land and a copy of a Topo cadastral survey and report that stated that the bypass road passed through its land.

In order to proceed on smoothly, this honorable court is compelled to invoke the provision of section 173 of the *Evidence Act*, cap 80. The provision states:- “The extended powers of court of obtaining proper evidence – a judge or magistrate may, in order to discover or obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible ; any may order the production of any document or thing and neither the parties nor their agents shall be entitled to object to any such question or order nor without leave of court to cross – examine the witness upon any answer given in reply to any such question.

Provided that judgement shall be based only upon facts which are otherwise admissible and which have been duly proved’

54. In so doing, the court will be conducting a site visit and a land surveying exercise will be conducted led by the government coast land surveyor and whereby the parties will be at liberty to engage their own independent private surveyors for this noble task. Further to the parties will each engage their own land valuation and a report prepared to be presented to court. It is based on this information that this court will now make the final judgement to these issues hereof.



**Issue No. 4 Whether there is need to have a consolidation and final determination of all the pending suits in various courts over the same subject matter.**

55. The 2<sup>nd</sup> respondent herein has also alleged that there are other cases filed that touch on the subject land. On the issue of land ownership, Kahia has also stated these parcels of land are subject matters in other three (3) cases pending hearing and final determination. He listed them as follows:-
- i. ELC (Mombasa) Case No 405 of 2017 - “Kahia Transporters Limited & Trade Lead Limited v National Land Commission. In this case the plaintiffs have pleaded that they are the registered owners of parcels of land including 5169/VI/MN and that there is a boundary dispute with several plots including the petitioners' plots (MN/VI/4838, MN/VI/4948, MN/VI/4805). In this suit, the plaintiffs prayed for inter alia orders of prohibition and inhibition to restrain the defendant from transferring any money in respect of the acquisition of the parcels of land, including the three plots of land said to belong to the petitioners herein.
  - ii. Constitutional petition (Mombasa) No 17 of 2018; Theresia Runji and 3 others v National Land Commission and Miritini Free Port limited as the interested party. In this case, the subject matter for the petition was land known as plot No 3912 and 3913/VI/MN. The petitioners therein claimed that they had been allotted the said land however the commissioner of lands cancelled their survey plan issued the suit land to one Miqdad Enterprise who later sold it to Miritini Free port who consolidated the land to be known as MN/V/4688, and a further consolidated the land to make plot MN/VI/4805. In the judgment, the High Court rendered the acts of the commissioner of lands a nullity and further held that NLC should compensate the petitioners for the 3.997ha that came from plot no 3912 and 3913/VI/MN, and the undisputed portion of MN/VI/4805 that belongs to Miritini to remain undisturbed by the judgment.
  - iii. The Court of Appeal civil application No 10 of 2020 National Land Commission v Theresia Runji & 4 others. This is an Appeal from constitution petition No 17 of 2018. The court issued stay to the High Court’s judgment. It also took note that the High Court dealt with matters that are in the jurisdiction on the Environment and Land Court.
56. The ownership of the land acquired by the NLC has been called to question. Kahia in its reply to the petition claimed that its land overlapped that of the petitioners' land. In a way, Kahia claims that the petitioners' land and its land are one and the same parcel of land. Fundamentally, this honorable court cannot casually wish away the allegations by Kahia. This are serious matters of law and falls into the fours of the jurisdiction of this court. Its a claim which is not by any means frivolous or vexatious. Indeed to this effect, Kahia also filed a counterclaim/cross petition. This being a constitutional petition, I could have struck out the counterclaim for not conforming to the legal substratum of the famous case of “*Anarita Karimi Njeru v Republic* [1979] eKLR however, I have been hesitant being guided by the provision article 50(1) and article 159(d) of the *Constitution* of Kenya, 2010 I will give the interested party leave to amend its claim accordingly and the other parties can file their responses appropriately.
57. As part of the petitioners' claim is that their rights under article 40 have been violated, denied and infringed. Taking into consideration the ownership of the land has been challenged, would it be an injustice if NLC compensates them and later it is found that the land actually did not belong to them? This honorable court has been compelled to rely on the case of the case of:- “*William Musembi 13 others v Moi Educational Centre Co Limited & 3 others* [2021] eKLR, the Supreme Court dealt with the issue of whether the constitutional guarantees of the right to property extend to property that had been unlawfully acquired. It held that the constitutional guarantees of the right to property ownership



and entitlement under articles 40 of Constitution were only in relation to property that had been legally acquired and did not extend to property that had been unlawfully acquired. In that regard, the Supreme Court stated that article 40(6) of the Constitution was instructive and provided that the rights under article 40 did not extend to any property that had been found to have been unlawfully acquired.

58. For justice to be met, the ownership conundrum must be determined first. This issue can only be determined if a proper hearing is conducted. Parties should be given an opportunity to adduce further evidence to prove ownership of the land that has been acquired by NLC. article 25 of the Constitution stipulates that the right to a fair trial may not be limited. To avoid multiplicity of suits and/or contradictory judgments all the cases touching on the suit property should be availed to the presiding judge for further direction.

**Issue No. 5 Whether in the intervening period, the national land commission should released the funds for compensation to the parties herein?**

59. The next issue is on the amount to be compensated. The NLC stated that out of the five parcels of land, it acquired 3.914 ha, 13.373 Ha, 0.233 ha, 9.6397 ha, and 8.692 Ha. Under the provisions of the article 40(3)(b)(i) of the Constitution requires that after the compulsory acquisition, the landowner should be promptly paid in full, of just. article 40(3), reads in part as follows:

“40(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.”

60. The Constitution under article 40(3) stipulates that upon compulsory acquisition of private land, the landowner should be paid promptly in full, of just compensation. In the case of “Patrick Musimba v National Land Commission & 4 others [2016] eKLR a five-judge bench elaborated the meaning of prompt payment in full, of just compensation to the person as stated in article 40(3) of the Constitution. The bench stated as follows:-

“As was stated by Scott L.J, in relation to compulsory acquisition, in the case of *Horn v Sunderland Corporation* [1941] 2 KB 26,40:

“The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice”.

Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that



he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority": see *Director of Buildings and Lands v Shun Fung Wouworks Ltd* [1995] AC 111,125.

We see no reason why the same approach should not be adopted locally. The Constitution decrees "just compensation" which must be paid promptly and in full. The Constitution dictates that the compensation be equitable and lawful when the word "just" is applied as according to *Black's Law Dictionary* 9th Ed page 881 the word "just" means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates to restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by reference to the market value of the land."

61. In so far as the application of the principles governing the assessment of just compensation is concerned, the NLC is expected under section 111(2) of the Land Act to regulate such assessment using "the Land (Assessment of Just Compensation) Rules, 2017. Rule 4 and rule 6 provide as follows:-

"Rule 4 assessment of market value

- (1) The commission shall determine an award based on the market value of the land to be acquired.
- (2) When assessing the market value—
  - (a) the commission shall take into consideration the effect of any express or implied condition of title or law which restricts the use to which the land concerned maybe put;
  - (b) if the market value of the land has been increased, or is currently increased, in either of the following ways, the increase shall be disregarded—
    - (i) an increase by reason of an improvement by the owner or his or her predecessor after the date of publication in the gazette of the notice of intention to acquire the land; or
    - (ii) an increase by reason of the use of the land or premises in a manner which could be restrained by a court or is contrary to the law, or is detrimental to the health of the occupiers of the premises or to public health.

Rule 6 additional compensation

The commission shall add a sum equal to fifteen per cent of the market value to the amount of compensation as compensation for disturbance.

62. From the above provisions, just compensation is based on the market value of the land. The valuation report as provided by the petitioners and the compensation amount as pleaded and prayed is for two projects. The SGR and the Dongo Kundu bypass. The Constitution must be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits not only the development of the law but also contributes to good governance. Therefore, article 40(3) of the Constitution did not only intend to have the landowner who is being stripped of his property compensated but also sought to ensure that the public treasury from



which compensation money is drawn, is protected against improvidence. Just as the owner must be compensated, so too must the public coffers not be looted. The petitioners were well aware that the project which the NLC published in the Kenya gazette was only for the Mombasa southern bypass project. The fact that they quoted a sum that included the SGR project is an act of mischief and greed intended to loot the national government.

63. The NLC has annexed a copy of the award for each petitioner. They have however not provided any valuation report or explained to the satisfaction of this court how they arrived at the figure they proposed to be the compensation award. The award which is said to have been drawn by NLC's director of valuation and taxation uses the term, "The total value of land, in my opinion, is Kshs..." In assessing compensation, NLC should have taken into consideration the market value.
64. On the other hand, the petitioners' valuation report has shown an estimate of the market value. Clause 2.7 of the petitioners' report states as follows: "the principal method of valuation in our assessment is through the analysis of comparable where recent sales of land in Mombasa West have been analyses and adjustment made to reflect the comparative advantages and/or disadvantages to the subject against the comparable." In responding to the petitioners' averments in the petition, the NLC through the replying affidavit of Mburu FK only criticized the size of the plot. Mburu noted that the petitioners had tabulated the compensation amount using more acreage than the one that was compulsorily acquired. He did not contest the market value of the property as quoted.
65. What then is 'market value'. In the decision of "*Kanini Farm Limited v Commissioner of Lands* [1986] KLR 310" the court stated as follows:

"The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character"
66. In the case of "*John Kariuki Macharia v Commissioner of Lands* [2014] eKLR the court defined the market value for purposes of compulsory acquisition as follows:-

"My view therefore on what the market value of the suit property entails in this appeal, is that it is the unimproved site value of the suit property and the value of the developments thereon in the open market at the time of gazettment of the notice of intention to acquire the suit property on May 28, 2010. I have arrived at this definition because both the appellant and respondent gave no comparable property that was sold at that time that had developments similar to those on the suit property, and the majority of the comparable were of properties with vacant possession.
67. From the law and the jurisprudence above, the market value of a property is how much a property is worth in the open market according to different market participants. The arrived value should be seen to be based on different factors including comparable, but it should not only be based on a personal opinion. That being said, parties should in 60 days of this order file their valuation report assesses the market value of each of the properties at the time the notice of intention to acquire was published in the Kenya gazette. These reports will enable the court to assess the compensation award to be paid to the land owners.



**ISSUE No. 6. Whether the parties herein are entitled to the relief sought.**

68. Upon elaborate and keen assessment of the pleadings filed by the petitioners and the 2<sup>nd</sup> respondents herein being the consolidated further amended petition and the counter claim and the responses made by the 1<sup>st</sup> respondent herein, this honorable court is fully satisfied based on the laid - down provisions of the Constitution and statutory law, that the parties are fully entitled to the claims made thereof. For that reason, the honorable court has proceeded to award them as prayed accordingly. The calculations are as tabulated and assessed herein below.

A. Total sum claimed by the petitioners

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners herein made a claim against the 1<sup>st</sup> respondent for a total sum of Kenya shillings two billion and sixty seven five twenty four million two twenty three and fifty eight (Kshs 2, 067, 524, 223.58) a total sum broken down as:-

- a) petition No. ....(African Gas & Oil ltd) - Kshs 376, 314, 849.04;
- b) petition No. ....Semix Enterprises( - Kshs 363, 226, 585.48
- c) petition No. ....(CreekPort ltd) – Kshs 9, 960, 528.94;
- d) petition No. ....– Mjid Enterprises ltd Kshs 461, 501, 528.73;
- e) petition No. ....Miritini Freeport ltd – Kshs 856, 520, 721.40.

B. Paid by consent.

On December 10, 2020, the parties herein entered into a consent entered in court and the following sums were paid up by the 1<sup>st</sup> respondent. These were:-

- a) petition No. ....CreekPort Limited - Kshs 8, 625, 000.00
- b) petition No. .... African Gas – Kshs 77, 970, 000.00;
- c) petition No. .... Semix Enterprises ltd - Kshs 77, 786, 000.00;
- d) petition No. .... – Mjad Investments Limited - Kshs 72, 800, 750.00;
- e) petition No. ....Miritini Freeport Limited – Kshs 268, 467, 500.00;

Hence making a total principal sum of Kshs 505, 649, 250.00) agreed upon by consent but out of which only a sum of Kenya shillings seventy three million three and eight thousand seven fifty (Kshs 73, 308, 750.00) was paid up.

69. From the above, the total sum still to be settled and the gist of these petitions is a sum of Kenya shillings three billion three seventy five thirty five two fifty six, eight seventy four thousand nine seventy three and fifty eight (Kshs 3, 876, 184, 506.58) arrived at as follows:

- a). Total claims per the amended petition - (Kshs 2, 067, 524, 223.58);
- b). Interest on the initial claim per the addenda to gazette notice No 405 of 2014(Kshs 1, 513, 557, 923.00) - Kshs 1, 808, 660, 283.00
- c). Total claim plus interest - Kshs. 3,876, 184, 506.58
- d). Less, claim already awarded via court order.

Balance claim prayed for - Kshs. 3, 876, 186, 506.58



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inclusive of interest at 14% compound interest rate for the over six (6) years.

70. The 2<sup>nd</sup> respondent who claims its parcel of land measuring 11.7948 ha (29.2 acres) and 0.9792 ha (approximately 2.42 acres) is being used by the SGR and the Mombasa southern bypass respectively. According to the 2<sup>nd</sup> respondent - Kahia, the portion of land affected was worth a sum of Kenya shillings one billion four seventy seven million four hundred thousand (Kshs 1,421,440,000/=) computed at a rate of a sum of Kenya shillings one hundred million (Kshs 100,000,000/=) per acre.

Further from this petition, it is alleged that there exists boundary dispute of the parcel of land for the petitioners known as land reference numbers MN/VI/4838, MN/VI/4938 and MN/VI/4805 and that of the 2<sup>nd</sup> respondent land reference numbers MN/VI/5169. Definitely, in all fairness, this sticky issue needs to be resolved once and for all. Above.

#### **Issue No. 6 Who will bear the costs to these petitions and the counter claim.**

71. The *Black Law Dictionary* defines “cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow events. It is trite law that the issue of costs is the discretion of courts. In the case of “*Reids Hewett & Company v Joseph* AIR 1918 cal. 717 & *Myres v Defries* [1880] 5 Ex D 180, the House of the Lords noted:-

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

72. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the petitioners from the filed five (5) consolidated petitions and the 2<sup>nd</sup> respondent in the counter claim have partially succeeded in their cases. For that very fundamental reason, therefore, the costs of this suit will be borne by each party.

#### **VI. Conclusion & Disposition.**

73. As a way of conclusion to these cases, the honorable court wishes to sincerely thank the learned counsels Mr Ogendo, Mr S. Mbutia and Mr Omwenga for the petitioners, the 1<sup>st</sup> and 2<sup>nd</sup> respondents for their resilience, dedication and devotion in the manner in which they handled the matter and themselves.

The long shot of all this very elaborate, robust and indepth analysis of the framed issues herein, the honorable court finds that both the petitioners from the filed consolidated further amended petitions and the counter claim by the 2<sup>nd</sup> respondent herein have partially succeeded. Be that as it may and for avoidance of doubt, the honorable court makes the following orders. These are:-

- a. That the National land Commission be and is hereby within the next thirty (30) days directed to pay the law firm of Messrs AA Said & Company Advocates a sum of Kenya shillings two billion four fifty four million seven forty six thousand five and six fifty eight thousand (Kshs 2, 454, 746, 506.58) out of the total sum of Kenya shillings three billion eight seventy six million one eighty four thousand five and six hundred and fifty eight (Kshs 3, 876, 184, 506.58) out of the balance from the amount already paid up all tabulated and assessed in connection



to, in relation with and/or pertaining to the filed pleadings by both the petitioners and the 2<sup>nd</sup> respondent herein, context of the Kenya gazette notice No 951 of February 19, 2016 and as stated in the land valuation report prepared in the year 2015 by the petitioners pertaining to and in connection to the five (5) parcels of land all measuring approximately 88.61 acres, the 1<sup>st</sup> respondent, (the NLC) compulsorily acquired as follows:-

- i. Parcels measuring 3.914ha, (approximately 9.67 acres)
  - ii. Parcel measuring 13.373ha, (approximately 33.04 acres);
  - iii. Parcel measuring 0.233ha, (approximately 0.58 acres);
  - iv. Parcel measuring 9.6397ha, (approximately 23.82 acres); and
  - v. Parcel measuring 8.692ha, (approximately 21.5 acres)
- b. That immediately for purposes of the payments of the compensation from this project, the two law firms of Messrs. A.A Said & Company Advocates for the petitioners, Messrs. Mogaka, Omwenga & Mabeya Advocates Company for the 2<sup>nd</sup> respondent and the National Land Commission, the 1<sup>st</sup> respondent to open a joint escrow bank account whereby the National Land Commission, the 1<sup>st</sup> respondent is directed to deposit a sum of Kenya shillings one billion four twenty-one four fourty thousand (Kshs 1, 421, 440, 000.00) within the next thirty (30) days from this date awaiting the outcome of the land surveying exercise, the site visit by this court and further orders of this court.
- c. That considering that the issue of compensation touches squarely onto the land ownership of land acquired by way of compulsory acquisition on, all the pending nine (9) cases including but not limited to the following: -
- i. Mombasa ELC case No 405 of 2017
  - ii. Mombasa ELC No 273 of 2017; Kahia Transporters Limited & another v Chunky Limited and another.
  - iii. Constitutional and judicial review petition No 20 of 2017 between Kahia Transporters v Director of Survey, Chief Land Registrar and National Land Commission.
  - iv. Mombasa ELC No 87 of 2015 (formerly constitutional petition No 21 of 2015); Stephen M.K Mbinu and others v Chunky Limited & others.
  - v. ELC No 247 of 2015; Curly Wurly Limited v Chifu Gala Bemngumi & others.
  - vi. ELC Constitutional Petition No 171 of 2016; Miritini Free Port Limited v Attorney General & others.
  - vii. Constitutional Petition No 34 of 2016; Ali Nyamani v Miritini Free Port & others.
  - viii. Mombasa High Court ELC No. 161 of 2013; Monica Wambui Kamau & another (suing as legal representative of the estate of James Kamau Thiong'o) v Golden Sparrows Trading Company Limited & another.
  - ix. Mombasa Civil Appeal No 111 of 2016

The matter of “ELC No 405 of 2017 ‘Kahia Transporters Limited & another v the NLC” which touches on the land allegedly belonging to either the petitioners and/ or the 2<sup>nd</sup> respondent herein be and is hereby brought under and placed before this



Environment & Land Court at Mombasa. For expediency sake, these matters to be heard and determined within the next ninety (90) days from the date of this judgement. The said matters to be mentioned on September 26, 2022 in open court for pre - trial session conference, a site visit and further direction and guidance in on their disposal.

- d) That in the meantime, pursuant to the provisions of section 173 (1) of the *Evidence Act*, cap 80 of the Laws of Kenya and order 18 rule 11 of the *Civil Procedure Rules, 2010*, within the next thirty (30) days hereof, this court to conduct a site visit (*locus in quo*) onto the disputed suit properties whereby the petitioners and the 2<sup>nd</sup> respondent herein be at liberty to:-
- i. allow the coast regional surveyor and the land registrar and also engage their own independent surveyors to proceed and ascertain the size of the parcels of land known as land reference numbers plots MN/VI/4948 and MN/VI/5169 respectively as the parcels that have been affected by the standard railway gauge and the by pass.
  - ii. Each of these experts to prepare their comprehensive and detailed reports to be served upon parties and filed in court.
- e) That further to the same statutory provision above, the petitioner and the 2<sup>nd</sup> respondent be at liberty to engage qualified land valuers to prepare and file fresh land valuation reports within the next thirty (30) days of this order.
- f) That all these reports under clauses (d) and ( e ) of this order to be formally presented in court for adoption and usage for future purposes as far as the tabulation and assessment on the final compensation is concerned.
- g) That each party to bear its own costs.

It is ordered accordingly

**RULING SIGNED AND DELIVERED ON THIS 4<sup>TH</sup> DAY OF JULY, 2022.**

**HON. JUSTICE MR. LL. NAIKUNI (JUDGE)**

**ENVIRONMENT & LAND COURT, MOMBASA**

**In the presence of:-**

- a) M/s. Yumnah Hassan, the Court Assistant.
- b) Mr. Ogendo Advocate for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Petitioners.
- c) Mr. Omwenga Advocates for the 1<sup>st</sup> Respondent.
- d) Non Appearance for the 2<sup>nd</sup> Respondent.

