



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 182 OF 2017

TIMOTHY MACHARIA (Suing as an Administrator

of the Estate of John Macharia Mwangi).....PLAINTIFF

VERSUS

SILIBWET PRIMARY SCHOOL BOARD OF MANAGEMENT...1st DEFENDANT

COUNTY DIRECTOR OF EDUCATION

(NYANDARUA COUNTY).....2nd DEFENDANT

PRINCIPAL SECRETARY MINISTRY OF EDUCATION.....3rd DEFENDANT

HON.ATTORNEY GENERAL.....4th DEFENDANT

JUDGEMENT

1. Before me for determination is a matter that was filed by the deceased Plaintiff on the 27th November 2014 at the High Court of Kenya at Nakuru, as Civil Suit No. 328 of 2014. The deceased Plaintiff further filed their pre-trial questionnaire on the 23rd February 2015 and wrote a letter, dated the 17th July 2015, to the Deputy Registry to have the matter placed before the Judge for pre-trial directions.
2. Service of the mention notice was effected upon the 4th Defendant on the 27th November 2015.
3. Subsequently the matter was placed before the Hon Judge on the 3rd March 2016. There was no appearance by the 4th Defendant who had also not filed their defence. The court ordered that the matter be fixed for hearing on the 11th July 2016.
4. In the meantime the 1st Defendant filed a witness statement on the 19th April 2016. On the 30th May 2016, the Plaintiff filed their supplementary list of documents. On the 29th May 2016 he filed his supplementary list of witnesses together with a reply to the defence and counter claim, which are not in the court file. On the 6th July 2016, he filed yet another supplementary list of witnesses.
5. On the 11th July 2016 when the matter came up for hearing, the Hon Judge was not sitting and parties were directed to fix a hearing date in the registry.
6. On the 25th January 2017, upon the establishment of the Land and Environment Court-Nyahururu, the matter was transferred thereto where it was registered with the present number and placed before me on the 9th May 2017, on which day, Counsel for the Plaintiff appeared in court and informed the court that the Plaintiff in this matter had since passed away. He thus sought for time to file the necessary documents to substitute him.
7. On the 25th July 2017, the Plaintiff's Counsel filed an application dated the 20th July 2017 wherein he sought for orders to substitute the deceased Plaintiff John Macharia Mwangi with Timothy Mwangi Macharia his son.
8. The application was allowed on the 25th July 2017 and leave granted to the Plaintiff to amend their plaint in view of the substitution.
9. The Plaintiff subsequently filed their amended Plaint on the 1st November 2017 on which day they also sought for the matter to be set down for formal proof since the Defendants had not filed their papers. The court having noted that the Defendants had neither filed their

memorandum of appearance nor defence, scheduled the matter for formal proof for the 22nd January 2018.

10. On the 22nd January 2018 the matter did not proceed as Counsel for the Plaintiff was engaged in a personal matter. The matter was adjourned to the 19th March 2018 wherein notice was served upon the 4th Defendant who acknowledged receipt of the same on the 29th January 2018.

11. Come the 19th March 2018, neither the Defendants nor their representatives were present in court and nether had they filed their Defence. The court having satisfied itself that the hearing notice had been served and received, proceeded to hear the matter ex-parte.

The Plaintiff's case

12. In his amended plaint dated the 10th October 2017 and filed on the 1st November 2017, the Plaintiff prays for orders of:

- i. Compensation for value of 4.5 (11.13 acres) hectares of land in cash at the current market value of Ksh. 4,000,000/-
- ii. Mens profit at the rate of Ksh. 5000/- per acre from 1965 to date of full payment
- iii. Cost of the suit
- iv. Interest on i, ii, and iii above a court rate.

13. It was the Plaintiff's case, through the evidence adduced by Timothy Mwangi Macharia that he was a son to John Macharia Mwangi who passed away on the 17th April 2010, as per the death certificate produced as exhibit 1, and Marion Njeri Macharia who also passed away in the pendency of this matter.

14. That when his father passed away, he had left behind his mother and four (4) siblings, as per the letter from the chief which was produced as exhibit 2. After the death of his father, his mother had filed Succession Cause No. 169 of 2014 at the Nakuru High Court wherein she had been issued with a grant ad litem, herein produced as Plaintiff exhibit 3.

15. That his mother had subsequently filed the present suit but she too had passed away on the 16th October 2016, as evidenced by the death certificate herein produced as exhibit 4, and the chief's letter dated the 20th April 2017 produced as exhibit 5.

16. That armed with the said documents, he had filed Succession Cause No. 141 of 2017 at the Nakuru High Court wherein he had obtained a grant ad litem, which he produced as exhibit 6, so that he could continue with the present case.

17. The witness further testified that his late father had been the proprietor of the land No. Nyandarua /Silibwet/72 (which we shall refer to as the land for ease of reference) measuring 30 hectares, approximately 75 acres, having been allotted the same by the Settlement Fund trustee in the year 1965 as per the allotment letter dated the 6th December 1965 which he produced as exhibit 7.

18. That on the 5th July 1991 his father had been issued with the title to the land, a copy which he produced as exhibit 8 and informed the court that the original title deed had been surrendered to the land's office for sub-division of the land.

19. The witness testified that on the 12th January 2001, he had conducted a search on the land wherein he had confirmed that the land was still registered in to his father. The search certificate was produced as exhibit 9.

20. The witness went on to testify that subsequently, there had been an agreement between his late father and the committee of the 1st Defendant wherein they had sought permission from him to build a school on part of his land measuring 11 acres, in exchange for another piece of land. A mutation, herein produced as exhibit 10, had been drawn on the 16th July 1965, wherein the school was given land parcel No. 1648 which was as a resultant of the subdivision of No. Nyandarua /Silibwet/72 and which forms the subject suit herein.

21. That the said agreement, a copy which was produced as exhibit 11 stipulated that while his late father was to surrender 11 acres of his land to the school they in turn would compensate him with another land.

22. That after the mutation, there was an agreement dated the 26th April 2001 between his father and the school committee which was signed by his late father as the proprietor of the land, David Gachoka Mwangi, his uncle Jesse Kamau Macharia and his brother all these who signed the same on behalf of his father. On behalf of the 1st Defendant, the agreement was signed by Peter Wainaina, the Chairman, John Giothi the treasure, Nixon Njuguna and the headmaster of the school.

23. In the year 1969, Silibwet Primary school, a public school, was built on 11 acres of his father's land.

24. That on the 31st May 2001, his father and the 1st Defendant's committee member had gone to the land Control Board wherein a consent, produced as exhibit 12, had been issued and the 1st Defendant got the 11 acres of land.

25. That after the 1st Defendant got the 11 acres of land, it did not give his father the substitute land as had been agreed upon, instead on the 23rd April 2004, his father received a letter from the District Commissioner, herein produced as exhibit 13, informing him that there was no

land available for compensation as at the time, but that he should keep reminding them of this issue.

26. The witness testified that as at the time his father passed away in the year 2001, they had not been compensated wherein he and his mother decided to file the present suit in the year 2014, seeking for compensation.

27. That they had then sought help from a land valuer called Mbugu and Associates Valuers who had valued the suit land No. Nyandarua/Silibwet/1648, land on which the 1st Defendant's school had been built on, at Ksh. 4,000,000/-. He produced the report dated the 12th August 2014 as exhibit 14.

28. The witness also produced as exhibit 15 and 16 respectively an area map dated the 10th March 1994 being sheet No. 3/119/2/1 showing the suit land before the subdivision of the land, and sheet No. 5(119/2/6) showing the area map after the sub-division.

29. To conclude his evidence, the witness testified that at the time the 1st Defendant's school got the suit land in the year 1965, the going price for leasing the same was Ksh 5,000/- per acre per year. That presently, the cost of leasing out an acre of that same land would be Ksh 11,000/-per year. He also testified that they did not wish to have the school evicted from their land but that all they had wanted was compensation and mesne profit.

30. After the close of his case, the Plaintiff filed their written submissions on the 26th April 2018 which gave a history of the matter in issue as submitted by the Plaintiff in his evidence. They submitted that on the 23rd April 2004, the Government had compulsorily acquired 11 acres of land which had been excised form land parcel No. Nyandarua/Silibwet/72 land upon which the 1st Defendant built the school. The acquisition had been based on a conciliation that the deceased would be compensated.

31. That by a letter dated the 23rd April 2004, the District Commissioner-Nyandarua on behalf of the Government had confirmed the Plaintiff's claim to the suit land and his right to compensation.

32. Counsel relied on Section 23(1) of the Limitation of Actions Act that stipulates;

Fresh accrual of right of action on acknowledgement or part payment

(1) Where—

(a) a right of action (including a foreclosure action) to recover land; or

(b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property,

has accrued, and—

(i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or

(ii) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right accrues on and not before the date of the acknowledgement or payment.

33. He submitted that from the government's acknowledgement of the deceased's right to the said land vide a letter dated the 23rd April 2004, the deceased and his estate had 12 years from 23rd April 2004 to bring suit and could therefore bring the action by the 23rd April 2016.

34. That further their claim was guided by Section 16 of the of the Limitation of Actions Act which provided that;

For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

35. That from the said provision, the time began running for the Plaintiff from the time he was granted the letters of administration on the 7th July 2017 as evidenced by the Plaintiff exhibit 6.

36. Counsel further relied on the documentary evidence produced by his witness to submit that indeed the parcel of land known as Nyandarua/Silibwet/1648 upon which the 1st Defendant's school had been built was part of Nyandarua/Silibwet/72 which was owned by the deceased John Macharia Mwangi, land which the Government had acquired with a promise to compensate the deceased but which they had reneged on their promise vide a letter dated the 23rd April 2004 stating that there was no land available then for compensation.

37. Submissions were to the effect that the Plaintiff had produced evidence in the form of a valuation report (exhibit 14) dated the 12th August 2014 placing the market value of the suit land, as at that year, at Ksh 4,000,000/- .That there was no dispute that the suit land was still registered in the name of the deceased.

38. It was the Plaintiff's further submission that the Plaintiff had not used 11 acres of their land since the year 1965 to date. The Plaintiff claimed mesne profit at Ksh. 5,000/- per year for 53 years which translated to Ksh. 55,000/- per year totaling to Ksh. 2,915,000/-

39. Submissions was also to the effect that the Defendant opted not to defend the suit despite service and hearing notices having been duly received and acknowledged.

40. The Plaintiff thus prayed for judgment as prayed in the plaint for;

- i. Compensation for value the land at of Ksh. 4,000,000/-
- ii. Mesne profits at Ksh 2,915,000/-
- iii. Cost of the suit
- iv. Interest on the above a court rate.

41. I have considered the evidence adduced in court, the documents produced as exhibits, the recorded statements thereto, I find that although on the 29th March 2016 the Plaintiff herein filed a reply to the defence and defence to the counterclaim, yet the record of the court as well as the proceedings do not support the fact that the Defendants ever filed their defence and counterclaim. Indeed on the 3rd March 2016 the court was informed that the Defendants had not filed their defence a fact which was reiterated in the Plaintiff's submission filed on the 26th April 2018. To this effect the court will proceed on the assumption that no defence was filed.

42. I find that there is no dispute that the deceased was allotted the suit land by the Settlement Fund trustee on 6th December 1965. There is also no doubt that the deceased was registered as the proprietor of the suit land No. Nyandarua /Silibwet/72 measuring 30 hectares, approximately 75 acres, wherein he was issued with the title to the land, on the 5th July 1991.

43. There is also no dispute that there had been an agreement between the deceased and the committee of the 1st Defendant to the effect that they would build a Public school on 11 acres of the deceased's land and compensate him with another piece of land.

44. It is also not in doubt that a mutation done on the 16th July 1965, wherein the school was given the resultant land parcel No. 1648. That after the 1st Defendant got the 11 acres of land, it did not give the deceased the agreed substitute land. Indeed vide a letter dated the 23rd April 2004, the District Commissioner- Nyandarua confirmed proprietorship of that the suit land but informed the deceased that there was no land available for compensation. By the time the deceased died in the year 2001, he had not been compensated. The Defendants have not contested the Plaintiff's claim as they never filed their defence, save for the 1st Defendant's witness statement filed on the 19th April 2016.

45. The issues for determination can be framed as follows:

- i. Whether *the Plaintiff holds a good title to the suit property.*
- ii. Whether *the Plaintiff is entitled to any compensation*
- iii. Whether *the Plaintiff is entitled Mesne profits*
- iv. *What should be the order as to costs.*

46. As earlier observed, the deceased was allotted Plot No. 72 by the Settlement Fund trustee on 6th December 1965.

47. That upon allotment of the suit land, Silibwet Primary School, which is a public school, was built on about 11 acres of land which comprised part of the deceased's land.

48. It is also in evidence that the deceased was subsequently registered as the proprietor of land No. Nyandarua /Silibwet/72 measuring 30 hectares, approximately 75 acres, wherein he was issued with the title to the same on the 5th July 1991.

49. Upon the issuance of the said title, the deceased became the *absolute* and *indefeasible* owner of the property. However from the testimony of the Plaintiff herein, the deceased had entered into an agreement with the 1st Defendant's committee on the 26th April 2001 wherein they were to put up a school on part of his land and thereafter they would compensate him with another piece of land.

50. This in turn led to the parties going before the Land Control Board wherein they obtained consent, a mutation was drawn on Nyandarua /Silibwet/72 with a resultant of parcel No. Nyandarua /Silibwet/1648, land which was compulsorily acquired by the school.

51. The fact that on the 23rd April 2004 the District Commissioner-Nyandarua, on behalf of the government wrote to the deceased confirming that indeed the land the school was built on belonged to the deceased and further informing him that they had no land to compensate him with was proof enough that the suit land belonged to the deceased.

52. On whether the Plaintiff's hold a good title to the suit property, the Court finds that the root of the Plaintiff's title is traceable. In the case

of *Joseph N. K. Arap Ngok vs Justice Moiwo Ole Keiwa & 4 Others*, Civil Appl. NO.60 of 1996, the Court of Appeal held that:-

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.”

53. The provision of section 24(a) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

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

54. Section 25(1) of the Land Registration Act also stipulates that ;

‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...’

55. Section 23(1) of the Registration of Titles Act (now repealed) and replaced with Section 26(1)(a)&(b) of the Land Registration Act 2012, provides that:-

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

a. On the ground of fraud or misrepresentation to which the person is proved to be a party

b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

56. The certificate of title herein was issued by the lands officials. There was no evidence availed by the Defendants, that the deceased was involved in fraud or irregular registration of the suit property. Given that the history and root of this title can be traced, the Court finds and holds that the Plaintiff’s deceased father herein held a good title to the suit property which title has not been cancelled and/or revoked. It has been demonstrated that despite service, the Defendants failed to file their papers and/or defend the suit.

57. *As to whether the Plaintiff is entitled to any compensation*, it was the Plaintiff’s evidence that after the deceased had entered into the agreement with the 1st Defendant’s committee members to give them part of his land in exchange for another, that the deceased’s land parcel No. Nyandarua /Silibwet/72 had been sub divided wherein parcel No. Nyandarua /Silibwet/1648 was given to Silibwet School. Thereafter the deceased had never been compensated as earlier agreed which in effect meant that the Government had compulsorily acquired the deceased’s land.

58. Acquisition by the government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act**. The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012.

59. In the present case, I find that the deceased was not served with any copy of a Gazette Notice on the impending acquisition. The 1st Defendant therefore forcefully took the deceased’s property. That such acquisition constituted an illegal acquisition of private property without prompt and full compensation, in violation of the deceased’s right to property *which is protected under Section 75 of the Repealed Constitution and Article 40 of the Constitution 2010*.

60. The Government school buildings (Silibwet School) put up after the acquisition still stand on the land. Therefore, by these acts, the Government had purported to acquire the deceased’s land without due or proper administrative process, full, fair and prompt compensation as was required of it under **Sections 75 of the Repealed Constitution, Article 40** of the Constitution 2010, the provisions of the **Land Acquisition Act Cap 295** Laws of Kenya (now repealed), and the **Land Act**.

61. **Section 75 of the Repealed Constitution and Article 40 of the Constitution 2010** are both aimed at securing and protecting property rights, allowing persons whose property rights have been violated a right of access to Court and furthermore, they all provide for prompt payment as just compensation for compulsory acquisition of land.

62. The acquisition and unlawful occupation of the suit land is therefore continuing whereby the witness, while relying on a valuation report dated the 12th August 2014, herein produced as exhibit 14, has prayed for compensation of Ksh. 4,000,000/- for the value of the land as well as mesne profit of Ksh. 2,915,000/- .

63. The documentary evidence produced by the Plaintiff has also not been controverted by the Defendant. Under Section 13(7) of the Environment and Land Court Act No.19 of 2011, the Court has jurisdiction as follows:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any order or grant, any relief as the Court deems fit and just including:-

a) Interim or permanent preservation orders including injunction.

b) Prerogative orders

c) Award of damages

d) Compensation

e) Specific performance

f) Restitution

g) Declarations or

h) Costs.

64. It is therefore clear that the Court has power to award damages as well as compensation under Section 13(7) (c) and (d) plus costs. Further, having found that the Plaintiff's right to property under Article 40 of the Constitution had been violated, one of the remedies in that regard as found in Article 23(3) (c) of the Constitution is an order for compensation including by an award of damages.

65. This being the case, the Plaintiff's demand for compensation is as a result of the compulsory acquisition of the subject parcel which is grounded on the basis that there has never been compensation.

66. I have considered the land transfer agreement dated the 26th April 2001 as well as the letter from the District Commissioner dated the 23rd April 2004 and do find that the Defendants herein admit that the Plaintiff is entitled to compensation. According to the valuation report of Mbugua and Associates, Valuers, the property is identified as Nyandarua Silibwet/1648, situated approximately six (6) Kilometers from Boiman Town ship towards Charagita Trading center in Nyandarua West District and measures 4.5 hectares (11.12 acres). As per the official search, the property is registered in the name of John Macharia Mwangi. On the ground stands a permanent school known as Silibwet Primary school (Which did not feature in their valuation) According to the valuation report, the value of the agricultural land is in the sum of Ksh 4,000,000/- as per the date of the report which was on 12th August 2014.

67. The Plaintiff has put loss of use incurred by themselves over the property at the rate of Ksh. 5000/- per acre from 1965 for 11 acres to date at Ksh 55,000/ per year for 53 years giving a total of Ksh 2,915,000/-

68. In that regard in the case of **Radcliffe v. Evans [1892] QB 524** with regard to damages, the court stated that;

"...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pedantry..."

69. In the Ugandan case of **Jephtar & Sons Construction & Engineering Works Ltd vs The Attorney General HCT-00-CV-CS-0699-2006**, the court held that;

*"...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably **Sietco vs Noble Builders U Ltd SCCA No. 31 of 1995** is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit..."*

70. Further, in the Lesotho case of **Mosisili vs Editor, Mirror Newspaper and Others Case No. CIV/T/275/2001** the Court pointed out that;

"...it has been said that generally, it serves little purpose to refer to other cases where damages have been awarded since seldom is one case similar to another. What the cases offer are general guiding principles which by no means are exhaustive either. In the final analysis, a judge makes an award that he thinks meets the justice of the case."

71. In addition, and specifically with regard to special damages, the Court in the case of **Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR** .. stated that;

*"...The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716**, at P. 717 and 721, where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag. J.A. — held:*

"Special damages must not only be specifically claimed (pleaded) but also strictly proved. ...for they are not the direct natural or

probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. "...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortious act(s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims, the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test... I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid-2001, I find no sufficient reason to interfere with the Learned Magistrate's award of KShs.180,000/- (One Hundred Eighty Thousand Only) under the head of general damages. Accordingly, I uphold the lower court's award..."

72. In the Ugandan case of **Mawenzi Investments Ltd vs Top Finance Co. Ltd & Another HCCS NO 02 OF 2013**, the Court stated thus;

.. Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury's Laws of England, 4th ED Vol. 12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of **Kyambadde v. Mpigi District Administration [1983] HCB 44**, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly... Assessment for general damages is based on the principle of restitutio in integrum according to East African Court of Appeal in the case of **Dharamshi vs. Karsan [1974] 1 EA 41**. The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury's laws of England fourth edition (reissue) volume 12(1) and paragraph 802 thereof damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered...

73. Going back therefore to the matter before me, I have already found that the deceased's right to property under Article 40 of the Constitution had been violated as he was not compensated at all. I have considered the valuation report by Mbugua and Associates, Valuers, and do find that the same is reasonable in terms of the value of the property for purposes of compensation under the Land Act.

74. On loss of user, I do find that the Plaintiff has established that he had the right to the property and that his right of user was deprived. I do find that compensation of Ksh.2, 915,000, (**Two Million, nine hundred and fifteen thousand only**) is sufficient for loss of user of the property for 53 years.

75. Ultimately, I do award the Plaintiff Kshs.4,000,000 (**Four Million Shillings Only**) as the amount payable as compensation for compulsory acquisition of his parcel of land in 1965 as well as Ksh 2, 915,000, (**Two Million, nine hundred and fifteen thousand Only**) as mens Profit. The amount to be paid by the national government promptly as required by the Constitution.

76. The Defendants did not defend the suit and as such placed no material before the court to contradict the Plaintiff's evidence. It is therefore my finding that the Plaintiff has proved his case on a balance of probability. I enter judgment for the Plaintiff against the Defendants as follows;

- i. Compensation for value the land at of Ksh. 4,000,000/-
- ii. Mesne profits at Ksh 2,915,000/-
- iii. Interest on the above a court rate.
- iv. To avoid unjust enrichment, the Plaintiff to surrender his certificate of title for Nyandarua Silibwet/1648 to the State.
- v. The plaintiff shall have the cost of this suit at a lower scale since the same was undefended.

77. It is so ordered.

Dated and delivered at Nyahururu this 4th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE