REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. E29 OF 2020

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 10, 19, 20, 23, 40, 47, 162,

165 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: SECTIONS 107, 111, 112, 113, 115 AND 117 OF THE LAND ACT 2012

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS

UNDER ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

FORT PROPERTIES LTD.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner filed this Constitution Petition on 1st October 2020 through a Petition dated the same date. The Petitioner sought for the following orders:-

> ***(a) A declaration that the Petitioner's rights to acquire and own property guaranteed under Article 40 of the Constitution of Kenya and Section 111(1) and 115 (1) of the Land Act, 2012 have been contravened by the Government of Kenya, the 2nd Respondent and/or the 3rd Respondent;***
>
> ***(b) A declaration that the Petitioner's rights to fair administrative action guaranteed under Article 47 of the Constitution of Kenya has been contravened by the 3rd Respondent;***

(c) A mandatory injunction compelling the 3rd Respondent to pay to the Petitioner immediately the full compensation awarded to the Petitioner for the acquired portion, in MN/VI/4931 being Kshs. 242,950,000/=;

(d) A declaration that the Petitioner is entitled to interest on the compensation award for the suit property MN/VI/4931 at the prevailing court interest rate or as such a rate as this Honorable Court shall deem just with effect from 21st March, 2014 and/or from the date when the 2nd Respondent, its agents, servant, employers and/or its contractors entered upon the Suit Property or such other relevant date this Honorable Court shall deem fit immediately;

(e) Mesne profits calculated at Kshs. 2 Million per month for the unlawful continued occupation of the Petitioners property being MN/VI/4929 from 2nd June, 2015 to the month vacant possession is given;

(f) The 3rd Respondent be compelled to issue within 14 days of this court's judgment;

i. The publishing in Kenya Gazete the degazettment of the cancelled portion of the property in MN/VI/4929.

ii. Vacant possession of the cancelled portion being MN/VI/4929 by the Respondent, their agents, servants, security personnel and/or employees.

iii. Pay the awarded amount being Kshs. 242,950,000.00 plus interest and mesne profits.

(g) The Costs of this Petition; and

(h) Such other or further orders or directions as the Court may deem fit to grant so as to meet the interest of justice;

2. The Petition is supported by the 20 Paragraphed supporting affidavit of **MR. KETAN PATEL** (hereinafter referred to "The Supporting Affidavit"). He deposed that he was the Director of the Petitioner herein and thus competent to make and swear this supporting affidavit. He attached an authority to plead to that effect under the seal of the Petitioner.

3. He deposed that the Petitioner was the registered proprietor of the two parcels of land known as Land reference numbers MN/VI/4931 and MN/VI/4929 measuring approximately 2.217 and 7.333 Hectares respectively and situated in the County of Mombasa within the Jurisdiction of this Honorable Court (Hereinafter referred as "The suit land")

4. He held that vide a publication of a notice carried out in the Kenya Gazzette being Gazette Notice No. 405 and 406 of 24th January 2014 the 3rd Respondent published the said Notice of the Government's intention to acquire land measuring 1.6853 and 0.7312 HA or thereabout of the suit properties for and on behalf of the 2nd Respondent for purposes of the Construction of the Mombasa Southern Dongo Kundu By - pass and Kipevu terminal link road.

5. The Petitioner stated that on or about 21st March 2014 the 3rd Respondent once again published another notice in the Kenya Gazette being Vol. CXVI No. 37 of the Kenya Gazzette Notice No. 1796 of 21st March 2014, a Notice of inquiry under the provision of Section 162 (2) of the Land Act of 2012 as read together with Section 9 (1) of the Land Acquisition Act (Repealed) which was to be held at the District officers Office, Miritini on 19th May, 2014.

6. On 19th May, 2014, having attended the public Inquiry held by the 3rd Respondent at the District Officers Office Miritini and made representation in regard to its claim for compensation. He provided the 3rd Respondent with copies of the relevant documents including the title and all the material documents. Thereafter, the 3rd Respondent promised to deliver a decision on the compensation payable in due course.

7. It's the deposition by the Petitioner that after aforestated representation the 3rd Respondent proceeded to issue the Petitioner with a certificate of award whereby the Petitioner's compensation was rated at a sum of Kenya Shillings Two Forty Two Million Nine Hundred and Fifty Thousand (Kshs. 242,950,000/=) and a sum of Kenya Shillings One Fourteen Million Two Hundred and Ninety two Thousand Seven Hundred and Fifty (Kshs. 114,292,750.00) respectively for the two suit properties. Unfortunately, he held that despite of all this, the said payments were never paid as stated and the compensation process became a nightmare for the Petitioner involving him making numerous visits to and from the offices of the 2nd and 3rd Respondents without any assistance. It held that, the process had also involved several visits to the Advocates offices where demand letters had to be issued to the 1st, 2nd and 3rd Respondents who instead had resorted to passing the bulk between themselves without directly and fully addressing the issue of their compensation as provided for in law. The Petitioner annexed copies of some of these correspondences exchanged between himself and the Respondents herein.

8. The Petitioner stated that todate, which was over six (6) years the 3rd Respondent had not paid up the Petitioner's monies yet the land acquisition had been completed, the road constructed and project commissioned and handed over to the public for use. He stated that as per the advise by his Advocates on record that taking that he had not been paid promptly, just and full compensation by the Government of Kenya (hereinafter referred to as "The GOK") as promised by the 3rd Respondent as required by the provisions of the Constitution of Kenya and the Land Act, of 2012 the GOK and the 2nd Respondent having entered into the Petitioner's property it was a breach of the Petitioner's rights to property under the provisions of Article 40 (1) & (2) of the Constitution of Kenya, 2010.

9. The Petitioner deposed that from the contents of the letter dated 3rd October, 2019, authored by the 2nd Respondent to him its when he learnt a lot on the MPAP which included that:-

(a) The parcel of land 4929/VI/MN had been located at the intersection of Kipevu Terminal Link road which was part of the Mombasa Port Area Development Project (hereinafter referred as "MPADP") road with the SGR marshaling yard at Mombasa and access road to the New Kipevu terminal.

(b) The Plot had been earmarked for the land acquisition where the critical designs of the Terminal link were done and gazetted in Gazette Notice No. 405 of 2014.

(c) The Construction of the new Kipevu Terminal Link terminated before the location of the plot to join the Kipevu Terminal link access road had been ostensibly developed by the Kenya Ports Authority (Hereinafter referred as "The KPA") and hence the Plot had not been affected by the MPARD project. Hence the Petitioner had requested the 3rd Respondent herein to cancel the land acquisition of Plot No. MN/VI/4929.

10. Some 1.6853 Ha. Of Plot No. MN/VI/4931 had been gazetted for the land acquisition through Gazette Notice No. 405 of 2014 for the development of New Kipevu Terminal Link road. The Petitioner further deposed that the 2nd Respondent forwarded a compensation Schedule to the 3rd Respondent with a sum of Kenya Shillings Two Hundred and Forty Two Million, Nine Hundred and Fifty Thousand (Kshs. 242,950,000/=) payable in respect of Plot No. MN/VI/4931 with the payee as the 3rd Respondent. He annexed the said letter to the pleadings for ease of reference.

11. The Petitioner averred that vide a letter dated 10.1.2020 he wrote to the 3rd Respondent and demanded for compensation for the breach of contract. He also requested for the degazetement Notice so as to be allowed to repossess the purportedly cancelled portion of the land known as Land Reference no. MN/VI/4929. According to him, the letter had todate not been responded to leaving it in darkness for lack of direction nor disclosure of material facts and non compliance. The Petitioner held that the failure by the 3rd Respondent to pay the award after confirming its claim for compensation and taking that the 2nd Respondent had taken possession of the suit property and had implemented the project – the Mombasa Southern Dongo Kundu by pass and the terminal link road on behalf of the Government of Kenya constituted a breach of his right to fair administrative action to be expeditious efficient and reasonable.

12. In summary, the Petitioner held that the whole process had been marred with unreasonable and inefficient administrative actions by the GOK, in publishing its intention to compulsorily acquire the property, inviting it to make submissions on its claim for compensation proceeding to make an award, entering into the suit property, commencing and completing the construction, completing it and handing over the completed project to the GOK but without making any payment to the Petitioner as their compensation as required by law. He held that it was trite law that compensation ought to have taken place before acquisition and not after as had been in this case. Therefore he urged court to make an award of interest and mesne profits for the illegal and continued trespass and unlawful possession by the 1st and 2nd Respondents respectively. Subsequently vide a Chamber Summon application dated 12th July, 2021 and filed in court on 13th July, 2021, the Petitioners applied and sought leave under the provisions of Order 1 Rule 14 Order 25 Rule 1 of the Civil Procedure rules, 2010 to withdraw its case against the 1st Respondent herein and which was granted accordingly. The 1st Respondent deposed that it had no knowledge of the subject matter of the suit and its inclusion had been for the purpose of representing the 2nd and 3rd Respondents. Later on, a consent dated 12th July, 2021 was duly executed by the Petitioner and the 1st Respondent. On 19th July, 2021 it was filed and adopted as an order of the Honorable Court.

II. THE RESPONDENTS CASE

13. The Petition was opposed vehemently by the 2nd and 3rd Respondents herein. On 29.10.2020 the 2nd Respondent filed a 10 Paragraphed Replying Affidavit dated 26th October, 2020 sworn by one DANEIL MBUTETI – the Senior Surveyor within the Directorate of Highway Planning and Design of the 2nd Respondent. He averred that the Petitioner had not demonstrated to court any violation of their constitutional rights as regards to the properties known as Land Reference numbers MN/VI/4931 and MN/VI/4929 measuring approximately 2.217 and 7.333 Ha. Respectively and situated in the County of Mombasa.

13. He asserted and confirmed that the suit property was located at the intersection of the New Kipevu Terminal Link road which was:-

(a) Part of the MPARDP road with the Standard Gauge Railway Marshalling Yard to New Kipevu Terminal.

(b) Part of the property had been earmarked for acquisition when the initial designs of the Terminal Link Road were done and Notices of intention to acquire the property were issued and published in the Gazette Notices No. 405 of 2014.

(c) Through the New Kipevu Terminal Link road was terminated before the location of the suit to join the Kipevu access road. It was his disposition that the access road was eventually constructed by the Kenya Ports Authority (KPA) at the same time when the 2nd Respondent was constructing the Terminal Link road and for this reason, the said the plot was not affected by the MPARD Project.

(d) Part of MN/VI/4931 was utilized for the construction of the New Kipevu Terminal Link Road – some of part of 1.6853 Ha. The 3rd Respondent forwarded compensation schedule to the 2nd Respondent for payment which the 2nd Respondent forwarded back the funds to the GOK, the National Treasury for payment to the affected parties as was the lawful procedure.

(e) Some part of 2.4749 Ha. Of the parcel of land LR. No. MN/VI/4929 were set to be acquired through Gazette Notice No. 405 of 2014 although it was not affected by the Terminal Link road development by the 2nd Respondent in that regard. He stated that the parcel was only affected by the Link Road developed by the Kenya Ports Authority. The KPA was therefore the acquiring entity for this parcel (No. MN/VI/4929) in conjunction with the 3rd Respondent. The 2nd Respondent never acquired this parcel and advised the Petitioner of the same via a letter dated 3rd October, 2019.

(f) He asserted that the 2nd Respondent requested the 3rd Respondent to cancel land acquisition of the plot No. MN/VI/4929 through a letter Ref. No. KeNHA/05.D/ MPARD/VOL.31/8632 dated 20th September, 2019 – attached.

14. He held that he was aware of the fact that the 2nd Respondent had requested the 3rd Respondent to degazette the property No. MN/VI/4929 and also admitted that the only compensation payable to the Petitioner had been for property No. MN/VI/4931 which the funds were in custody of the 3rd Respondent for payment to the Petitioner being the lawful procedure. Therefore, following the above information, the Senior Surveyor deposed that:-

(a) the process of compulsory acquisition of Land took a considerable amount of time due to the many parcels that were being processed not just that for the Petitioner's land and the other affected persons.

(b) The Petitioner's issue was recognized as being the stakeholders in the acquisition process for parcel No. MN/VI/4931 and hence urged the Petitioner to be patient to allow the process to be concluded for all affected persons and enable payments be forwarded by the 3rd Respondent and it were his views that filing of this case had been an impediment onto the compensation process.

(c) The Process of Compulsory land acquisition, by its very nature, were a multi-agency process which involved the acquiring entity, the 2nd Respondent, the 3rd Respondent and various other stakeholders.

(d) He stressed and reiterated that depending on the source of funding of the projects, the process integrated various other stakeholders and player including development partners or if it had a component of the Government of Kenya funding, the National Treasury.

15. He further reiterated that the 2nd Respondent forwarded the respective funds for all parcels affected to the 3rd Respondent for payment. It is for these reasons that he held that the orders being sought by the Petitioner were premature as the acquisition process was still subsisting and neither the 2nd Respondent nor the 3rd Respondent had indicated that they had reneged on its compensation for Plot No. MN/VI/4931. He asserted that the orders sought by the Petitioners were not the most efficacious as their claim were not disputed and furthermore they already held a valid consent recorded before the court on the sums due to them. He held that should the orders sought by the Petitioners be granted them all the land owners would rely on that precedent and in a panic rush to try and enforce their award payments which would put the entire Government at risk as to unfavorable judgments and additional litigation costs to the project fund rather than facilitate the ability of the Government through the 3rd Respondent to conclude the acquisition process and deliver the project to the people of Kenya. Hence, he stressed and reiterated that the Petition was premature. He urged court to dismiss the Petition in its entirety as the same was vexatious, omnibus, incompetent unfounded and an abuse of the court process.

2. THE 3RD RESPONDENT'S CASE

16. On 26th May, 2021, the 3rd Respondent filed their 22nd Paragraphed Replying Affidavit sworn and dated 25th May, 2021 by MR. MBURU F. K. – the acting Director Valuation and Taxation of the 3rd Respondent herein.

He deposed that during the construction of the Mombasa Port Area Development Project (MPARD) Mombasa Southern Dongo Kundu Bypass and Kipevu New Terminal Link Road (Package one) the 3rd Respondent herein compulsorily acquired the suit property as per the provisions of Article 40 (1) & (2) of the Constitution of Kenya and Part VIII of the Land Act.

He admitted it being factual and correct that in strict compliance with the said provisions of Part VIII of the Land Act, the 3rd Respondent published a Notice of intention to acquire the listed parcels in the Kenya Gazette No. 405 and 406 of 24th January 2014. Thereafter, he held that in compliance with the provisions of Section 112 of the Land Act, a notice of inquiry was published in the Kenya Gazette No. 17960 of 21st March 2014 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 3rd Respondent and present their claims of compensation.

17. He deposed that in the intervening period, the 3rd Respondent undertook ground inspection of the suit property to determine the amount of compensation payable as per the 3rd Respondent mandate and which as confirmed by the Petitioners they received the notice of the inquiry and also attended the inquiry and submitted their claim of compensation. He asserted that the Petitioner who attended the inquiry were accorded due process by making both oral and written representations before the 2nd and 3rd Respondents and upon conclusion of the inquiry, awards were prepared and served on the affected land owners. He held that in making the award, the Respondents took into consideration the submissions by the Petitioners and more critically the provisions of Part VIII of the Land Act and the provisions of the schedule to the Land Acquisition Act. Cap 295.

18. Accordingly, he deposed that the 2nd and 3rd Respondents acquired 1.6853 Ha of the Petitioner's land No. LR. No. MN/VI/4931 and an award of a sum of Kenya Shillings Two Fourty Two Million Nine Hundred and Fifty Thousand (Kshs. 242,950,000/=) was made broken down as follows:-

(a) Area of Land acquired = 1.6853 Ha.

(b) Value of Land Acquired = Kshs. 211,260,870

(c) Add 15% disturbance Allowance = Kshs. 31,689,190

Total Kshs. 242,950,000

Thereafter, the 3rd Respondent proceeded to request for the compensation funds for the subject parcel from the acquiring body – the 2nd Respondent. He held that the 3rd Respondent was willing to disburse the compensation funds to the project affect persons (PAPs) once the ownership of the land had been confirmed and any other encumbrance that would be registered against the property were discharged. Nonetheless, he strongly objected on payments of interest being made on grounds that the formal taking possession of the land by the 3rd Respondent had yet to take place as envisaged under Section 120 (3) in The Land Act 2012.

19. He deposed with regard to parcel No. MN/VI/4929, pursuant to a request made by the 2nd Respondent, the 3rd Respondent had already degazetted the suit land by publishing a Notice of detention in the Kenya Gazette. He held that the Petitioner under paragraph 10 of his affidavit had acknowledged having been informed by the 2nd Respondent that the construction of the New Kipevu Terminal Link terminated before the location of the plot to join the Kipevu terminal link access road was developed by the Kenya Ports Authority.

He deposed that vide a letter ref. no. NLC/VAL.1499/III/1 dated 12th April, 2021, the 3rd Respondent served upon the Petitioners Advocates – M/s. Wandai Matheka & Co. Adv. With a Notice No. 1701 of 19th February, 2021. He admitted that the 3rd Respondent was yet to serve the Petitioner the -land owner with a Notice of taking possession of the said parcel of land and therefore the Petitioner had not been privy to any occupation by any party other than the Petitioner. He further emphasized that it would not be prudent to use public resources to pay for land that had been determined as not required for public purposes or in public interest in this case being parcel number MN/VI/4929 as such funds would even better be available and utilized for compensation purposes.

In conclusion he held that the 3rd Respondent was opposing the Petition. He opined that the Petition had failed the test set out in the case of ***Anarita Karinu Njeru –VS- Republic (1979) eKLR***

IV. THE SUBMISSIONS

20. On 1st September, 2021 direction were taken for expediency sake before court in the presence of all parties in the matter to the effect that the Petition be canvassed by way of written submissions and hence judgment be delivered thereafter.

A. THE SUBMISSIONS BY THE PETITIONER

21. On 21st May 2021 the Advocates for the Petitioners – the law firm of Messers Wandai Matheka & Co. Advocates filed their written submission dated 20th May, 2021. They indicated the same were served upon the 1st, 2nd and 3rd Respondents. The Learned Counsels for the Petitioner submitted that the Directors of the Petitioner – "Fort Propertied Ltd" were citizens of Kenya with inalienable constitutional rights. It was an incorporated limited liability Company duly registered under the provisions of the Companies Act Cap 486 of the Laws of Kenya – they attached an authority under seal authorizing on of the Directors for the Petitioner – Mr. Ketan Patel under Order 4 rule 1(4) of the Civil Procedure Rules 2021 to sign and swear the affidavits and statements to be filed herein pertaining to this suit.

22. The Learned Advocates for the Petitioners referred court to the provisions of Articles 2 (1), (3), (4), 10, 40 (1) (2) & (3) of the Constitution of Kenya where this court is mandated to respect, uphold and ensure that the due complainant of the Constitution and any other law that was inconsistent with the provisions of the Constitution to be invalid, the national core values and the right of owning private property. They informed court that they had brought the said Petition in order to force and/or compel the 2nd and 3rd Respondents to pay it compensation for the compulsory acquired property. It noted that out of the three (3) Respondents, it was only the 2nd Respondent – KeNHA which had filed the pleadings and by the said pleadings it never denied the Petitioner's prayers or at all save that it alleged to have released the funds to the 3rd Respondents – NLC for payment to the Petitioners and that this Petition had been filed prematurely. In that regard, they submitted that the 2nd Respondent could be said to be in support of the Petition. They further opined that their argument was that as it's the 3rd Respondent who compulsory acquired the Petitioner's property for use by the 2nd Respondent as required by law thereof, their averments that its property was compulsory acquired and developed for public use was conceded.

23. Also conceded by the Respondent's, the Advocates held was that the road in question which has been in operation from the year 2017 or thereabout to date. Yet, despite all these concession, since the award was issued on the 2nd June, 2015 the Petitioner had todate which was over six (6) years down the line not received payments yet the 2nd Respondent had fully acquired, developed and allowed the road for public use all to the loss of the Petitioners.

In order to clearly highlight and advanced their arguments the Petitioner framed four (4) main issues which they wished the court to consider as it arrived at its decision. These were:-

(a) The Payment of Compensation award in reference to Land

Ref. No. MN/VI/4931

24. The Petitioner's Advocate held that the thrust of the Petition were that they were seeking for the payments of the award being a sum of Kenya Shillings Two Forty Two Million Nine Hundred & Fifty Thousand (Kshs. 242,950,000/=) towards the full and complete land acquisition of the Petitioner's property as contained in the award dated 2nd June, 2015. Under this sub-heading, to buttress their case, they relied on several provisions of the Constitution of Kenya being Article 2(1), (3) (4), 3(1), 10, 40(1) & (3) and the provisions of Section 115 of the Land Act, 2020 and the decisions of:-

"Priest –VS- security of State (1882) 81 LGR 193, 198 and Patrick Musimbi –VS- National Land Commission & 4 Others" Petition No. 613 of 2014". ELC No. 15 of 2017 Isaiah Otiato & 6 Others –VS- County Government of Vihiga 2018 eKLR and Arnacherry Ltd. –VS- Attorney General 2014 eKLR .

25. The Advocates submitted that the award dated 2nd June. 2015 was to have been paid before the Respondents acquired the suit property and not today which six (6) years later. Besides, still none of the Respondents had written to the Petitioner explaining to it the reason for the delay in making the payments and/or of dispute if any. They underscored the fact that within that period of over six (6) years the Petitioner had been patiently pursing and claiming for this payment by making numerous trips to and from Nairobi all in pursuit of the compensation and all that effort had been in vain which necessitated the institution of the Petition herein.

(b) Interest accrued in the delayed payments

The Petitioner's Advocates submitted that it for the Court to make a finding that the Petitioner was entitled to the payment of interest over the delayed payments. On this point they relied on the provisions of the Constitution of Kenya where a person deprived of their property would be entitled to interest penalties and in this case they held, it had not been denied that the interest had accrued on the awarded amount and to this they prayed the same be assessed at 12% which were court rates. On this part they relied on the provisions of Section 117(1) of the Land Act.

(c) On the Mesne Profits in regard to Land Reference No. MN/VI/4929.

The Advocates for the Petitioner under this sub-heading and with reference to prayers E & F of the Petition on to Mesne Profits submitted that the Respondents after acquiring the suit property without compensation ought to pay them Mesne Profits for the loss of its use, and particularly taking that the property had been acquired vide external debt financing with stringent measures that the property acquired ought to be compensated. Since this was never done, they argued that the Mesne profits would be good indicator as to the compensation scheduled for the Petitioner. On this, the Petitioner prayed that the assessment of the Mesne profits to be done at a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) per month from June 2015 to date. They held that this was an estimate amount based on the area of the suit property and it's proximity to the harbor and the Standard Gauge Railway (SGR) making it the best location for warehousing logistics and storage businesses.

(e) Costs and Interest

The Advocates for the Petitioners submitted that the Petitioner had fully succeeded in the Petition hence they were entitled to costs and interest from the date of judgment till payments in full.

B. THE SUBMISSIONS BY THE 2ND RESPONDENT

26. On 22nd July, 2021 the Advocates for the 2nd Respondents the law firm of Messers Nathaniel Munga Advocates filed their written submissions dated 24th May, 2021. They held that the Petitioner filed the Petition to enforce the award of the 3rd Respondent and to obtain orders directed at the Respondents to ensure the payments of the compensation for a sum of a sum of Kenya Shillings Two Fourty Two Million Nine Hundred and Fifty Thousand (Kshs. 242,950,000/=) for the compulsory acquisition of its property – the suit land for the construction of the Dongo Kundu by pass in the County of Mombasa.

They noted that the Petitioner had been pursuing payments for two parcels the other being Land. Reg. No. MN/VI/4929 measuring approximately 7.333 Ha and MN/VI/4931 which were both situated in the County of Mombasa. Nonetheless, the Advocates observed that it was since established during the pendency of the suit that the parcel known as Land Reg. No. MN/VI/4929 had been degazetted and therefore according to them was not a subject of this Petition.

By and large, they held that part of the parcel No. MN/VI/4931 had been utilized for the construction of the New Kipevu Terminal Link Road (Some part of 1.6853) Ha. And the 3rd Respondent had forwarded the compensation schedule to the 2nd Respondent for payment which the 2nd Respondent forwarded to the National Treasury for release of the funds. According to the Advocates and hence in admission submitted that the funds had never been released to date.

27. The Advocates submitted that it had now emerged from the documents availed, the 2nd Respondent wrote to the National Treasury to be furnished with the funds for the compensation for the Parcel no. MN/VI/4931 among other parcels acquired over the same project. Unfortunately, todate the National Treasury was yet to furnish the 2nd Respondent with the necessary funds to enable the 2nd Respondent channel the same to the 3rd Respondent for payment to the Petitioner and other land owners who had not yet been compensated as that was the procedure provided for by law.

They reiterated that depending with the source of the funding of the project, the process of compulsory land acquisition by its very nature was a multi agency one as it integrated various other stakeholders including development partners, the Budget provider that is the national Treasury, if it had a funding component in it, the acquiring entity – the 2nd Respondent together with the 3rd Respondent – who was the acquiring agent.

28. The Advocates stated that the 2nd Respondent forwarded the respective payments schedule for all the parcels affected to the national Treasury and requested for funds to be able to channel the same to the 3rd Respondent for payment, but they admitted that the National Treasury had not done so to date. From their submissions they wondered why the Petitioner had failed to enjoin the National Treasury in the suit in order to have assisted the court to issue orders compellable of the enforcement and to the right party being the National Treasury. The

Advocates reiterated that during the pendency of this matter the process of compulsory acquisition took a considerable amount of time due to the many parcels of land that were being processed for the project in question and not necessarily just that of the Petitioner's parcel alone. Nevertheless, the Advocate underscored the fact that the process had been ongoing with a view to compensating the affected persons. They stressed that the current position was that the funds had been requested from the National Treasury and would be disbursed to the 3rd Respondent for immediate channeling to the land owners as soon as the 2nd Respondent was in receipt of the said funds.

29. The Advocates opined that the Petitioners herein were already recognized as stakeholders in the acquisition process for the parcel – LR. No. MN/VI/4931. According to them, the Petitioner then ought to have exercised patience to allow the process to be concluded and for all the parties to enable the payments to be forwarded by the 3rd Respondent. It was their contention that by the Petitioner filing this Petition, it had been an impediment to the compensation process. The 2nd Respondent's Advocate contention was that the Petition was premature as the land acquisition process still stood and valid. Besides, the 3rd Respondent had never indicated that it had reneged on the its compensation for the plot No. MN/VI/4931. On the umpteenth time, they admitted that the said parcel had already been utilized for road construction and the parties had been issued with an award which the 2nd Respondent was still willing and ready to honor provided that the funds were availed by the National Treasury for the said purpose of the compulsory acquisition process. They cited the provisions of Section 111 of the Land Act which held:-

> ***"If land is acquired compulsorily under this Act, just compensation shall be paid PROMPTLY in full to all persons whose interest in the land have been determined".***

Nonetheless, according to them they criticized the above provision of law to the effect that, according to them, it failed to provide any specific timelines upon which compensation was to be done if anything they asserted it was tailored to cater for the elongated process that acquiring agencies had to go through to obtain the funds, to them most of the processes and the speed of making the payment were beyond the control of the parties such as the 2nd Respondent.

30. According to the Learned Advocate the orders sought by the Petitioners were not the most efficacious since their claim were not disputed and in any case they still held a valid award issued under the Land Act provisions and which stated when the sums due to them. The Learned Counsels reiterated the fact that the 2nd Respondent undertook multiple projects all over the county and under different funding requires and it always ensured all the parties were compensated fully under its compulsory acquisition exercise. In relation to this case, the Advocates assured the Petitioner that the 2nd Respondent would still pay them promptly.

Their main concern however, was that should the order sought by the Petitioner be granted herein then it would be setting up a bad precedent as all the land owners would follow suit in a panic to enforce their awards of payments a situation which would put the entire Government at risk to unfavorable judgments and additional litigation costs to the project funds rather than facilitating the ability of the Government through the 3rd Respondent to conclude the acquisition process and deliver the project to the people of Kenya.

31. The Learned Counsel contended that the 2nd Respondent had always remained transparent in its operations and processes and had always constantly kept the land owners including the Petitioners herein updated of the ongoing on the payments and thus they opined that the Petition was premature. On the claim of interest and Mesne Profits from the loss of the use of the suit property claimed by the Petitioner, the Advocates argued that these payments were not payable as the Compulsory acquisition process was still underway and the funds would be availed at the opportune moment. Besides, the governing law on the aspects of compulsory acquisition of land for public purposes or public interest being the Land Act 2012, it never envisaged such payments which would only serve to derail the whole process. Further, they held the same reasoning with regard to the claim for special damages. They argued that the Petitioner had neither specifically pleaded, substantiated nor proved with reference to these damages.

32. The Advocates held that court ought not issue orders incapable of enforcement and particularly in the situation where the National Treasury which were not the recipient of the orders compelling them to furnish the requested amounts for the compensation. To them the only orders that would be beneficial to the Petitioners would have been if the National Treasury were to be compelled to furnish the payments since the 2nd and 3rd Respondents were not the custodians of any public funds for the purpose of compensation in this project. On this point they relied on the court decision of "***Republic versus National Land Commission & 2 others Ex-parte, Samuel M.N. Mweru & 5 Others [2018] eKLR.***

In conclusion, the Learned Counsels stressed that the orders sought by the Petitioners could only be directed onto the 3rd Respondent and the provider of the funds being National Treasury. The upshot of it all they urged court to dismiss the Petition in its entirety as against the 2nd Respondent with costs and that the 2nd and 3rd Respondents be allowed to conclude the process of the compulsory acquisition and compensation of the other Persons affected by the project which included the Petitioner in accordance with the due process under the law.

C. THE SUBMISSIONS OF THE 3RD RESPONDENT

33. Despite of this court assuming that the 3rd Respondent, submissions were on record on 28.9.2021, it later come to its notice upon further scrutiny of the records and despite of it on 19.7.2021 and 1.9.2021 directing the submissions be file and served within a specific timeframe, the 3rd Respondent never obliged.

Being an unusually practice by court, despite all efforts by court on several occasions reminding the 3rd Respondent's Advocates, Mr. Mbuthia to ensure the copy of it was placed on file were all in vain. In the given circumstances and being beyond its control, has decided to deliver its judgment on the scheduled date on 28.10.2021 without the benefit of the said submissions.

IV. ANALYSIS AND DETERMINATION

34. The honorable Court has perused all the pleadings annextures the written submissions by the Petitioner and the 2nd Respondent together with the cited and other authorities, the relevant provisions of the law. In order to arrive at an informed decision, it has framed the following salient issues for determination:-

a) Whether the Petition filed by the Petitioner meets the fundamental threshold as founded out under a Constitutional set up.

b) Whether or not the Land Compulsory acquisition process of the parcels of Land belonging to the Petitioner 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.

c) Whether there has been any breach of the condition inherent for the Land Compulsory acquisition of the Petitioners Land by the 2nd and 3rd Respondents.

d) Who will bear the cost of the Petition?

<u>On Issue No. 1 -</u> ***Whether the Petition filed by the Petitioner meets the fundamental threshold as founded out under a Constitutional set up.***

35. Before this court arrives at its informed decision it is guided by the recognition of the fact that the constitutional provisions which are at the core of the Petition must be thoroughly reviewed and fully appreciated within the constitutional jurisprudence and Constitutionalism and its value as a whole. The said provisions cited by the Petitioner are mainly under Articles 2 (1), (4) 40 (1), (2) & (3), 47, 60 & 69 of the Constitution of Kenya. For clarity sake, I wish to expound on them thus:-

· Article 2 (1) provides that the Constitution is the supreme law of the Republic and binds all persons and all State organs at all levels of government.

· Article 2 (4) provides that any law that is inconstant with it is void to the extent of the inconsistency and is invalid.

· Article 3 (1) provides that every person has an obligation to respect, uphold and defend the Constitution.

· Article 10 (2) sets out all the national values and principles of Government that binds all the State offices, State organs, public offices and all persons whereas they apply or interpret the Constitution;

· Article 60 (1) enshrines the principles of security of land rights while;

· Article 64 recognises the private ownership of land in Kenya.

· Article 40 (1) provides the right for every person to acquire and own property at any prat of the Republic;

· Article 40 (3) provides that the state shall not arbitrarily deprive a person of property of any description or interest unless it is for public purposes or in public interest and its carried out in accordance with this Constitution and any act of Parliament that requires prompt payment in full, just, adequate and fair compensation.

36. Under Section 75 of the repealed Constitution of Kenya, it guaranteed the rights to property and provided conditions for compulsory acquisition. The right to or interest in property however is not created by the Constitution itself. In order to protect the right to property, a party must establish a proprietary right or interest in the land – ***Joseph Ihungo Mwaura & Other -Vs – The AG & Others (2012) eKLR (Nbi). -***

37. The Honorable court has also taken deep cognizance to the importance and sensitivities apportioned to land in this country. Indeed, land is a source of livelihood and very emotive. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often. Therefore, no citizen is to be deprived off his land by the State Or any public authority against his wish unless expressly authorized by law and public interest.

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.

38. Based on the principles set out in the edit of The Court of appeal case of ***the Mumo Matemu – Vs – 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 –VS- Republic [1980]KLR 154*** where the court is satisfied that the Petitioner's 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 – Vs – 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"***

39. In application of these set out principles for filing a Constitutional Petition to this case, the honorable court is fully satisfied that the Petitioner has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

> **Issue No. 2** ***Whether or not the Land Compulsory acquisition process of the parcels of land belonging to the Petitioner 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.***

40. 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 – Vs – 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***.

41. Under the provisions of the Land Act, 2012, Section 107 of the Act holds that, the NLC - the 3rd 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 – Vs – Land Acquisition & Compensation Tribunal & 2 Others (2015) eKLR).***

42. 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 3rd 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.

43. 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.

44. 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. 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.

45. 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 see 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, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person's private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's a extremely delicate balance to be weighed with utmost case.

In the case of ***Patrick Musimbi –VS- 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 parcels of land known as LR. No. MN/VI/4929 and MN/VI/4931 were acquired for purposes of the construction of the Mombasa Port Area Development Project (MPARD) Mombasa Southern Dongo Kundu By pass and Kipevu New Terminal Link Road (Package one) the Petitioner has held that the 2nd and 3rd Respondents herein has failed to pay it to date though they have since the Petitioner taken possession of the land and caused development on it. It has held that it has been caused to make numerous trips to Nairobi seeking for compensation as envisaged by Law without any success. At the same point, the Petitioner held that it was during the pendency of the hearing of this case that they learned merely from correspondences from the 2nd Respondent that all that parcel no. MN/VI/4929 had been surrendered and utilized by the Kenya Ports Authority (KPA). On the issue of degazettement of this

parcel is rather confusing. Certainly, there is a grey area here which needs clarity. I say so as on the one hand the 2nd Respondent vide its letter dated 20th September, 2019 it advised the 3rd Respondent to cancel and degazette it, and hence no compensation would be levied on it by the Petitioner. On the other hand, the Respondents emphatically hold that the project on the said land had been terminated and the access road on the land being constructed by KPA at the same time when the 2nd Respondent was constructing the Terminal Link road. For this reason, therefore, they held the plot was not affected by the MPARD Project as KPA were the acquiring entity. In all this state of affairs, the Petitioner was never involved. Without any evidence placed before it, court is left with no choice but on preponderance of probability to assume that the land known as Land Reference Number. MN/VI/4929 was never compulsorily acquired and thus any of its utility in whatever form, if any, was illegal, irregular and null and void in contravention of the required provisions of the law as extensively stated here.

46. 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 –VS- Sunderland Corporation [1941] 2KB 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 compulsory 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.

47. 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 significantly intriguing that although the 2nd and 3rd Respondents all having unanimously admitted and even with a recorded consent that the Petitioner is entitled to a full, fair, prompt and just compensation for the compulsory acquisition of its parcel of land – MN/VI/4931 - and indeed the payment schedule was drawn and the Petitioner 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 for a period of six (6) years.

None of them has imparted any reasonable and cogent cause for the procrastination for a period of over six (6) years in the payment of the compensation to the Petitioner. Apparently, the only bone of contention I successfully managed to decipher as being the plausible defence advanced by the Respondents while attacking the Petition and which this court found as extremely unprecedented were that the Petitioner's Petition was premature driven by its impatience not allowing them time - I wonder how much more patience was expected after six years - , the project was multi – agencies where numerous stakeholders were involved including the GOK; the suit was an impediment to the releasing of the funds which were available but only awaiting the fulfilment of two – fold pre - conditions - on taking possession of the land and all the encumbrances that would be registered against the property were completely discharged Their argument has been that if the orders sought were granted it would be setting a bad precedent encouraging other PAPs as it would lead to opening up of the Pandora's box – a case of a wakeup call to all the already sleeping dogs with similar land interest and claims who would start demanding to be paid. To the 2nd and 3rd Respondents, I imagined they were more selfishly concerned on what would happen to the Government, a state of what the Philosopher Thomas Hobbes once described as a state of **"short, brutish and nasty"** than to the detriment of the poor Petitioner. They held that the state of affairs would be making the settlement of the said awards a haeculian task where the Government of Kenya would not manage yet it had been acting for public interest and public order. Honestly, I find this assertion extremely callous, outrageous and insensitive contrary to what the law provides – payment promptly and just under Article 40 (3) of the Constitution. Further, the 2nd and 3rd Respondents in their defence argued that they wished to be exonerated from any blame for the non payment of the compensation funds as the finances were in the custody of the National Treasury as the law and procedure required. For this, they squarely, accused the Petitioner for failing to enjoin the National Treasury as a party in the suit land not themselves. Indeed, they opined that this court should not be granting orders which would be difficult to enforce against the National Treasury with who were not a party to the suit. There was never a privity of contract between the Petitioner with other third parties in this case the GOK, the National Treasury nor the Kenya Ports Authority whatsoever. All along it had been dealing with the Respondents and at no time had the National Treasury featured as being a party of this process nor have I seen reference of them from the above detailed process of law on compulsory acquisition of land. How the Respondents now conveniently bring in the National Treasury is a clear indication of lack of Commitment in adhering with the Law in the given circumstances. On the contrary, it actually them, being privy to all the internal and official bureaucratic machinations on finances and procedures only privy to the Respondents herein and bereft of the Petitioner, who should have sought the joinder to these third parties and not the vice versa.

Once more, I find this preposition to be an evasive, dereliction and abdication of their statutory obligations depicted by the Respondents. It is a mere theatrics clothed in such casual and playful blame games of mechanically passing the buck from one quarter to the other even after six (6) years of the project at the chagrin of the Petitioner. Why should the Petitioner or any other innocent citizen of this country who are Person Affected by the Projects (PAPs) be subjected to such inhuman, ill and unreasonable treatment for the mistake of the State and its agencies? It is unacceptable. I find these actions to be utter violation, infringement and denial of their Constitutional rights and freedoms to say the least. Indeed, court has been wondering loudly the lack of a plausible reason or wise counsel by the parties herein to have had the matter expeditiously and amicably resolved in the spirit enshrined under Article 159 (2) (C) of the Constitution of Kenya by effectuating the already recorded consent by providing it with clear timeframe under favourable terms and conditions on making the payments as agreed rather than reverting to such unnecessary, costly and protracted litigation process as it has happened hereof.

48. Now, turning to the issue of Mesne Profits. I have noted the Petitioner also sought for mesne profits calculated at a rate of Kenya Shillings two Million (Kshs. 2, 000, 000.00) per month for unlawful continued occupation of the Petitoners land known as MN/VI/4929 from 2nd June, 2015 to the month vacant possession was given. In terms of the definition, the Black Law dictionary simply defines **"Mesne Profits"** as ***"a profit of an estate received by a tenant in wrongful possession and recoverable of another person's land by the Land Lord".***

Apart from the Petitioner, all the other parties in this matter admit and seem to know that this parcel of land was never utilized after the compulsory acquisition. It is only the 2nd Respondent who casually states that vide its letter dated 3rd October, 2019 informed the Petitioner that the said parcel – LR. No. MN/VI/4929 – had been utilized by the KPA. There lacks seriousness here for a project of this magnitude of

great national importance. It needs to be degazetted and returned to the Petitioner.

49. Furthermore, it is not in dispute that the Petitioner is entitled to full, just and prompt compensation as per the Law. He is also is entitled to mesne profits as claimed onto parcel number MN MN/VI/4929 from 2nd June, 2015.

Based on the reasons adduced herein, I ably find that the Petition dated 1st October, 2020 has merit, well founded in law and thus be and is hereby allowed. For avoidance of doubt, I proceed to grant the following orders:-

a) That a declaration that the Petitioner's rights to acquire and own property guaranteed under Article 40 of the Constitution of Kenya and Section 111(1) and 115 (1) of the Land Act, 2012 have been contravened by the Government of Kenya, the 2nd Respondent and/or the 3rd Respondent;

b) That a declaration that the Petitioner's rights to fair administrative action guaranteed under Article 47 of the Constitution of Kenya has been contravened by the 3rd Respondent.

c) That a mandatory injunction compelling the 2nd and 3rd Respondents to pay to the Petitioner within the next thirty (30) days from this date hereof the full compensation awarded to the Petitioner for the acquired portion, in MN/VI/4931 being Kenya Shillings Two Forty Two Million Nine Hundred & Fifty Thousand (Kshs. 242,950,000/=) from the funds being held by the Government of Kenya, the National Treasury.

d) That a declaration that the Petitioner is entitled to interest on the compensation award for the suit property MN/VI/4931 at the prevailing court interest rate or as such a rate as this Honorable Court shall deem just with effect from 21st March, 2014 and/or from the date when the 2nd Respondent, its agents, servant, employers and/or its contractors entered upon the Suit Property or such other relevant date this Honorable Court shall deem fit immediately;

e) That Mesne profits calculated at Kenya Shillings Two Hundred Thousand (Kshs. 200, 000.00) per month or 12% the courts rate per annum for the unlawful continued occupation of the Petitioners property being MN/VI/4929 from 2nd June, 2015 to the month vacant possession is given.

f) That the 3rd Respondent be compelled to issue within 30 days of this court's judgment;

iv. The publishing in Kenya Gazete the degazettment of the cancelled portion of the property in MN/VI/4929.

v. Vacant possession of the cancelled portion being MN/VI/4929 by the Respondent, their agents, servants, security personnel and/or employees.

vi. Pay the awarded amount being Kshs. 242,950,000.00 plus interest and mesne profits.

g) The Costs of this Petition and interest .

IT IS SO ORDERED.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 28TH DAY OF OCTOBER, 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Matheka Advocate for the Petitioner/Applicant.

Mr. Munga Advocate for the 2nd Respondent

Mr. Mbuthia Advocate for the 3rd Respondent