



REPUBLIC OF KENYA

IN THE ELC COURT AT MOMBASA

ELC. CIVIL CASE NO. 66 OF 2021

GODFREY SIMIYU MUJUMA.....1ST PLAINTIFF/APPLICANT

MURIITHI JEL NTEERE.....2ND PLAINTIFF/APPLICANT

AMINA ABDU ALLI.....3RD PLAINTIFF/APPLICANT

JOHN MBUI GITONGA.....4TH PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS

AUTHORITY.....1ST DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

THE COUNTY COMMISSIONER,

MOMBASA COUNTY.....3RD DEFENDANT/RESPONDENT

RULING

1. Before the Honorable Court is the notice of motion application filed and dated 8th April 2021 by the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants. The said application was brought under the provisions of Articles 10 (2) (d), 20, 23, 40 (3) and 159 of the Constitution of Kenya, Sections 1A, 1B, 3A & 63 (e) of Civil Procedure Act, Cap. 21 of the Laws of Kenya, Order 40 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules.

2. At the same time, the 1st, 2nd, 3rd & 4th Plaintiffs/Applicants filed a suit in form of a Plaint dated 8th April, 2021 with a verifying affidavit. They complied with the provisions of Order 11 of the Civil Procedure Rules on case management by filing a list of documents, list of witnesses and witness statements. From the filed Plaint they sought against the 1st, 2nd and 3rd Defendants jointly and severally for the following orders:

- a) General damages;**
- b) Compensation for the land compulsorily acquired;**
- c) Costs of the suit;**
- d) Interest on the above.**

3. Through the afore said application, the 1st, 2nd, 3rd and 4th Plaintiffs/Applicants sought for the following orders:-

(a) Spend

(b) That the eviction of the Plaintiffs/Applicants from their business premises as well as their house for road expansion project be stopped pending the payment of their due compensation pending the inter parte hearing;

(c) That the eviction of the Plaintiffs/Applicants from their business premises as well as their house for road expansion project be stopped pending the payment of their due compensation pending the hearing and determination of the suit.

4. The said application is based on the grounds annexures and the 9 Paragraphed supporting affidavit signed jointly by all the Plaintiffs/Applicants - of GODFREY SIMIYU MUJUMA, MURIITHI JEL NTEERE, AMINA ABDU ALI and JOHN MBUI GITONGA sworn and dated the 6th April 2021 (Hereinafter referred to as the Supporting Affidavit).

By the averments of the said supporting affidavit, the Plaintiffs/ Applicants have deposed that they were the duly appointed Legal Administrators of the estate of the late Mariamu Mohamed Mwanjira (Hereinafter referred to as "The Deceased"). They held that they were the legal and proprietors of small businesses and residential houses in the area situated around the Bahati Area within the County of Mombasa where there were road constructions works was taking place particularly the Dual of the Mombasa – Mariakani road project. Through the publication of the notices in the Kenya Gazette being Gazette Notices No. 1388 and 1389 respectively the parcel of land known as Land reference numbers MN/VI/2398 legally and belonging to them herein was all earmarked for at compulsory acquisition for purposes of the construction of the above stated public road.

5. They stated that although they had no objection on the land being compulsorily acquired by the State for public use but their only concern was their compensation. They pleaded by holding being under economic hardship particularly exacerbated by the severe and harsh effects of the global Covid – 19 Pandemic. They reiterated that they were ready to vacate the land to be utilized for the intended purposes but on condition that they were promptly, just and fairly compensated and to be re – located elsewhere onto an alternative land. They annexed the awards which they were issued by the National Land Commission herein. They stated that they had received letters dated 31st March, 2021 from the 1st Respondent demanding that they re-locate from their parcels of land on or before 8th April, 2021

6. The Plaintiffs/Applicants claimed that some of their neighbours had already been paid the compensation for the use of their land for this purpose and therefore wondered the reason they were being discriminated. It is for these reasons that they felt their Constitutional fundamental rights were violated, denied and threatened.

The said application was served upon all the Defendants as evidenced from the affidavit of service dated 14th April, 2021 by one Mr. Benson Sila Mulumba duly appointed and qualified High Court Processor Server.

II THE 1ST DEFENDANT/RESPONDENT'S CASE

7. Despite of service upon all the Defendants, it is only the 1st Defendant/Respondent who filed replies opposing the said application. On 13th May, 2021 the 1st Defendant/Respondent's Advocate the law firm of Messrs. Merlene Alogo Advocates filed a Preliminary Objection dated 10th May, 2021 on grounds that the whole of the Plaintiffs/Applicants application and suit were fatally defective as it failed to comply with the mandatory provisions of Section 67 (a) of the Kenya Roads, 2007 requiring party to issue a thirty (30) days' notice to the Director General prior to filing of a suit.

III THE SUBMISSIONS

8. On 24th June, 2021 when this matter came up for "*inter - parte hearing*", court was informed that the Plaintiffs/Applicants had been fully compensated by the 1st Defendant/ Respondents and that the said Plaintiffs/Applicants would be wishing to withdraw the suit altogether. However, instead they insisted the withdrawal of the suit would be only with orders to costs. Therefore court had to make a determination of this sole issue. The 1st Defendant/ Respondent vehemently opposed on them being paid any costs taking that they were fully paid even before the case was set down for hearing. Besides, the Plaintiffs/Applicants had indicated intention on withdrawing their case under Order 25 (1) of the Civil Procedure Rules. On this issue, the 1st Defendant/ Respondents indicated they would be filing a notice of preliminary objection to have the whole suit struck out. As a result, court directed that once the said preliminary objection got filed and served they be canvassed by way of written submissions.

A. THE 1ST DEFENDANT/RESPONDENT SUBMISSIONS

9. On 14th September, 2021, the 1st Defendant/Respondent Advocates, the law firm of Messrs. Merlene Alogo Advocates filed their written submission accompanied by several authorities thereof dated 9th September, 2021. They submitted that the 1st Defendant/Respondent's Preliminary objection was in opposition to the hearing of the Notice of Motion application and the suit by the Plaintiff/Applicants, notwithstanding the provision of Article 159 (2) (d) of the Constitution of Kenya, as both of them were fatally defective for failure to comply with the mandatory procedure of law envisaged under the provision of Section 67 (a) of the Kenya Roads Act, 2007 This provision of law required the issuance of a thirty (30) days' notice to the Director General of the Kenya National Highways Authority, the 1st Defendant/Respondent herein prior to any party instituting a suit against the 1st Defendant/Respondent. According to the 1st Defendant/Respondent is Advocates they held that, the intention for the issuance of the said notice was to avert or avoid filing of any suits altogether. The said Notice provided the Director General's office with an opportunity to easily explore an out of court negotiation as envisaged under the provision of Article 159 (2) (c) of the Constitution of Kenya.

10. The Learned Counsel submitted that on the 24th June, 2021 when the matter came up for hearing, the Plaintiffs/Applicants indicated to court and it was on record that they had received full compensation payments by the 1st Defendant/Respondent and they sought the withdrawal of the suit and have the matter marked as settled with no orders to costs. The Advocates held that while they never had intention to oppose the application for the withdrawal of the suit but were constrained to oppose it on the award of costs of the suit. To this end court directed that the single pending issue on awarding of costs to the Plaintiffs/Applicants be canvassed by way of written submission.

11. While relying on the provision of Section 27 (1) of the Civil Procedure Act, Cap. 21, the Advocates submitted that there were two (2)

principles in relation to the costs. These were:- a). Costs followed the event b). Costs are the discretion of court.

To buttress their argument, they further relied on several decisions being of “*Supreme Court Pet. No. 4 of 2012 - Jabir Singh Rai & Others –VS – Tarlochan Rai & Others eKLR (2014) - ; Republic –VS – Rosemary Wairimu Munene, Ex Parte Applicant – Vs – Ihururu Dairy Farmers C – Operative Society Limited; HCCC (Meru) CA No. 84 of 2011 - Stanley Kaunga –Vs- Nkarichia – Vs – Meru Teachers College & another (2016) eKLR; Supreme Court Misc Appl. No. 24 of 2014 - John O. Ochanda – Vs – Telkom Kenya Limited, eKLR 2014; HCCC (Nyeri) No. 17 of 2014 - Cecilia Karuru Ngaya – Vs – Barclays Bank of Kenya & another eKLR (2016); and Goodharg – Vs – Hynett (1883) 25 Ch.D 182.*

12. In summary, and while they never disputed the fact that on awarding costs, the principles adhered with were “costs followed the event” which simply means the results of the entire litigation – they argued that the party who called forth the event by instituting a suit, would bear the costs if the suit fell. But if the said party showed that legitimate occasion, by having the successful suit, then the Defendant or Respondent would bear the costs. Nonetheless, the Advocates held that in making this decision on whether or not to award costs was a discretionary issue by court to be exercised judicially and not whimsically by considering the special circumstances of the case and one guided by the ends of justice. For instance, when deciding to award costs or not court would take into consideration several aspects of public interest, motivation and the conduct of the parties prior to the institution of the case they submitted. Further, they held that, the “Costs follow the events’ principles should not be used to penalize the losing party in this case the 1st Defendant/Respondent herein but rather to compensate the successful party for the trouble taken in prosecuting or defending a case.

13. The Learned Counsels further, they argued that this court would even make an order for payment of costs “Suo Moto” in the interest of justice in favour of the 1st Defendant/Respondent. In this case, the Advocates observed that the Plaintiffs/Applicants withdrew their case ideally under the provisions of Order 25 (1) of the Civil Procedure Rules before it had been set down for hearing as opposed to where a matter had been set down for hearing under Order 25(2) of the Civil Procedure Rules the implication of awarding of costs would have been different. The withdrawal of the suit by the Plaintiff/Applicants was not opposed by the 1st Defendant/Respondent. In reality, it is actually the 1st Defendant/Respondents who should have been awarded costs for having taken the trouble of getting up and penning down a replying affidavit the Preliminary Objection and the written submissions.

The Plaintiffs/Applicants Replies to the Preliminary Objection.

14. On 23rd June, 2021, the Plaintiffs/Applicants filed a 5 Paragraphed Replying Affidavit dated 23rd June, 2021 responding to all the issues raised in the Preliminary Objection by the 1st Defendant/Respondent. They admitted having been fully compensated. They deposed by comparing the provision of Section 67 (a) of the Kenya Roads Act, 2007 to the provision of Section 13A of “The Government Proceedings Act” in that they argued these provisions of law had the same implication as both required the litigants issuing a stipulated notices to the Director General of the 1st Defendant/ Respondent and the Government respectively before instituting a suit against each of them.

15. According to them, the provision of Section 13A of the Government Proceedings Act, a replica of section 67 (a) of the Kenya roads Act had been declared illegal null and void by court in the decision of “*Haron Muma Nyameche – Versus – County Government of Kisii & County Public Service Board*” as like the provision of Section 67 (a) of the Kenya Roads Act, they argued contravened the provision of Article 48 of the Constitution of Kenya which guaranteed any citizen of Kenya, including the Plaintiffs /Applicants their rights on access to justice. For this reason, they held that the notice of the Preliminary Objection was misconceived and defective and ought to be dismissed with costs.

III. ANALYSIS AND DETERMINATION

16. I have read and put into account all the pleadings – the written submission by the 1st Defendant/Respondent, the authorities, the Plaintiffs/Applicants replies to the filed Preliminary Objection by the 1st Defendant all emanating from and pertaining to the application dated 8th April, 2021 filed by the Plaintiffs/Applicants and considered the appropriate provisions of the law. In order to arrive at a fair, just and informed decision as urged by both parties herein the court has framed and relied on the following issues. These are:-

(a) Whether the filed preliminary objection by the 1st Defendant/Respondent meets the known and established threshold of a preliminary objection as set out by law and precedents.

(b) Whether the Plaintiffs/Applicants are entitled to be granted the orders of Costs against the 1st Defendant/Respondent after withdrawing their application and the entire suit against the Defendants.

(c) Who will bear the costs of the notice of the Preliminary Objection filed by the 1st Defendant/Respondent.

Issue No. 1 - Whether the filed preliminary objection by the 1st Defendant/Respondent meets the known and established threshold of a preliminary objection as set out by law and precedents.

17. According to the Black Law Dictionary Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made more elaborate in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held that *a proper preliminary objection constitutes a pure points*

of law. He held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

18. Additionally I wish to make reference to the decision of *Attorney General & Another –VS- Andrew Mwaura Githinji & another [2016] eKLR:-* which does in a very explicit way spell out the preposition as pertains Preliminary objections *inter alia:-*

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

19. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case, though it is always convenient if the objection is raised at the earliest opportunity of the case in order to pave way for the smooth management and determination of the main dispute in a matter. The 1st Defendant/Respondent raised the objection immediately the Plaintiffs/Applicants though intended to withdraw their case, but on condition to press on with the issue of being awarded costs to the suit. Therefore, to me, the case would not be deemed as fully settled with this single issue still pending to be decided by court. Notwithstanding the provision of Article 159 (2) (d) of the Constitution of Kenya, the 1st Defendant/Respondent argued that there had been need for the Plaintiffs/Applicants to have fully complied with the mandatory procedure of law stated out under the provision of Section 67 (a) of the Kenya Roads Act, 2007 which required them to have issued a thirty (30) days’ notice to the Director General of the Kenya National Highways Authority, the 1st Defendant/Respondent herein prior to them instituting the suit against the 1st Defendant/Respondent as they did. They held filing of this suit would have been averted or avoided altogether. The Advocates argued that by this alone the Plaintiff/Applicants suit was fatally defective and ought to be dismissed. I assume this provision was enacted to provide the Director General’s office an opportunity to explore an out of court negotiation as envisaged under the provision of Article 159 (2) (c) of the Constitution of Kenya.

20. On the other hand, the Plaintiffs/Applicants have contrasted this legal preposition by stating that the provision of Section of 67 (a) of the Kenya Roads, Act and that of Section 13A of the Government Proceedings Act, had the same negative connotation in law. Indeed, according to them, the provision of Section 13A of the Government Proceedings Act, Cap. 40 had been declared illegal, null and void by court in the decision of ***“Haron Muma Nyameche – Versus – County Government of Kisii & County Public Service Board”*** supposedly as it contravened the provision of Article 48 of the Constitution of Kenya which guaranteed any citizen of Kenya, including the Plaintiffs /Applicants their rights on access to justice. I have considered these to be serious issues on pure law and thus they need to be dealt with before embarking to the hearing and determination the main suit on its merit. Therefore, to that front, I find that the Preliminary objection raised by the 1st Defendant/ Respondent has great merit and having met the fundamental threshold of raising a Preliminary Objection.

ISSUE No. 2. Whether the Plaintiffs/Applicants are entitled to be granted the orders of Costs against the 1st Defendant/Respondent after withdrawing their application and the entire suit against the Defendants.

21. In order to handle this sub - heading with the required finesse, I felt it imperative to extrapolate on the facts of the case though briefly. As indicated above, the Plaintiffs/Applicants were the legal and proprietors of small businesses and residential houses in the area around the Bahati Area within the County of Mombasa where there were road construction works under way particularly the Dual of the Mombasa – Mariakani road project. From the Complaint, the Plaintiffs/Applicants sought against the 1st, 2nd and 3rd Defendants jointly and severally for the following orders:-

a) General damages;

b) Compensation for the land compulsorily acquired;

c) Costs of the suit;

d) Interest on the above.

22. Likewise, from the afore said application, the Plaintiffs/ Applicants sought for the above stated orders. They held that the 1st Defendant/Respondent caused a publication of the notices in the Kenya Gazette being Gazette Notices No. 1388 and 1389 respectively in relation with the parcel of land known as Land reference numbers MN/VI/2398 which were legally registered and belonged to the Plaintiffs/Applicants herein all earmarked for compulsorily acquisition for public use and purposes of the road construction. They stated that they had no objection on the land being compulsorily acquired by the State for the intended public use but their only concern was on the failure to pay them their compensation. They pleaded that they were under economic hardship and particularly exacerbated by the effects of the global Covid – 19 Pandemic.

23. They reiterated their readiness and willingness to vacate the land to be utilized for the intended but on condition that they be compensated through payment and on relocation onto an alternative land elsewhere by the 1st Defendant/Respondent. They annexed the awards issued to them by the National Land Commission herein. They stated that they had received letters dated 31st March, 2021 from the 1st Respondent demanding that they should have re - located on or before 8th April, 2021. On the contrary, the Plaintiffs/Applicants complained that some of their neighbours had already been paid the compensation sum for the use of their land for this purpose and wondered the reason they were being discriminated. It was as result of these circumstances that they felt their Constitutional fundamental rights were being violated, denied and threatened. Despite service of the said application by the Plaintiffs/Applicants upon all the Defendants, it was only the 1st Defendant/Respondent who responded to it. They opposed it.

24. On 13th May, 2021 the 1st Defendant/Respondent's Advocate filed a Preliminary Objection dated 10th May, 2021 on grounds that the whole of the Plaintiffs/Applicants application was fatally defective as it never complied with the mandatory provisions of Section 67 (a) of the Kenya Roads, 2007 requiring the issuance of a thirty (30) days' notice to the Director General prior to filing of a suit. On 24th June, 2021 when this matter came up for "*inter - parte*" hearing, the honorable court was informed that the parties had been fully compensated and the only pending issue for determination was the Payment of costs for the suit. At that juncture, the 1st Defendant/Respondent were vehemently opposed to the Plaintiffs/Applicants being paid any costs which was contrary to law. They indicated that they would be filing a notice of preliminary objection on this issue and to have the whole suit struck out. As a result, court directed that the application and the preliminary objection be canvassed by way of written submissions.

25. The legal substratum on costs is well founded under the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that:-

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction shall be no bar to the exercise of those powers; Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order".

I fully concur with the 1st Defendant/Respondent's Advocates that there are two principles in relation to the costs namely:- a). Costs followed the event b). Costs are the discretion.

26. In a nutshell, on awarding costs, I further agree with the argument advanced by the 1st Defendant/Respondent to the effect that the principles adhered with were "**costs followed the event**" which simply means the results of the entire litigation, to the point that the party who called forth the event by instituting a suit, would bear the costs if the suit falls. But if the said party showed that legitimate occasion, by the successful suit, then the Defendant or Respondent would bear the costs. That awarding of costs by court is discretionary one which is exercised judicially and not whimsically by considering the special circumstances of the case and being guided by the ends of justice. Further, the "Costs follow the events' principles should not be used to penalize the losing party but rather to compensating the successful party for the trouble taken in prosecuting or defending the case.

27. The argument by the Plaintiffs/Applicants mainly in comparing the provisions of Section 67 (a) of the Kenya Roads Act, 2007 to that of the provision of Section 13A of the Government Proceedings Act" They averred that the two provisions of law had the same implications as both required the litigants to notify the 1st Defendant/Respondent and the Government respectively before instituting the suit against each party. I will need to consider this argument as well.

To them, they argued that the provision of Section 13A of the Government Proceedings Act, which they saw as being "*Ejusdem generis*" to that of Section 67 (a) of the Kenya Roads Act had been declared illegal, null and void by court in the decision of "**Haron Muma Nyameche – Versus – County Government of Kisii & County Public Service Board**" as it contravened the provision of Article 48 of the Constitution of Kenya which guaranteed any citizen of Kenya, including the Plaintiffs /Applicants their rights to access to justice.

28. A quick reference to these provisions is paramount. Section 67 (a) of the Kenya Roads Act provides *inter alia*:- **Limitation of actions – "Where any action of other legal proceedings lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or any such duty, the following provision shall effect:-**

a). the action or legal proceeding shall not commence against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director – General by the Plaintiff or his agent;

This provision of the law is couched in mandatory terms and is very clear as daylight. It requires no further interpretation whatsoever. Certainly, the Plaintiffs/Applicants herein never complied with the dictums of the said law as they never issued any such notice to the Director General prior to them instituting this suit. Nonetheless, they defended themselves by contrasting and citing the provisions of Section 13A (1) of the Government Proceedings Act, Cap. 40 and holding it to have been declared unconstitutional – null and void. The section provides thus:- **Notice of intention to institute proceedings – No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty (30) days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings"**

The Plaintiffs/Applicants strongly argued that these twin provisions of law had the same legal and negative connotation as a result according to them were declared unconstitutional in the case of "**Haron Muma Nyameche – Versus – County Government of Kisii & County Public Service Board**" for being in contravention to the provisions of Article 48 of the Constitution of Kenya on right to access to justice. Unfortunately, despite all efforts made, this court has not succeeded in tracking down this particular case law/precedent which the

Plaintiffs/Applicants failed to furnish court with any and/or proper citation. Perhaps they could be right or wrong on that point as I give them the benefit of doubt. But all said and done, the court is not satisfied that this the current legal jurisprudence on the matter. Hence, it will leave the matter at that position.

29. Moving forward, I now wish to proceed to squarely make the determination on costs. Firstly, while making this consideration, I have been persuaded and heavily relied on the decision of **“HCCC (Nyeri) No. 17 of 2014 - Cecilia Karuru Ngaya – Vs – Barclays Bank of Kenya & another eKLR (2016); cited by the 1st Defendant/Respondent with the following holdings:**

“In determining the issue of Costs, the Courts is entitled to look at inter alia i) The Conduct of the parties ii). The subject of litigation iii). The circumstances which led to their institution of the proceeding iv). The events which eventually led to their termination v). the stage at which the proceedings were terminated vi). The manner in which they ever terminated vii). The relationship between the parties and viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) © of the Constitution.”

30. Based on the above case law, the conduct by the Plaintiffs/Applicants before they instituted this case was understandable. They held that they were not objecting to the compulsory acquisition of their land and the same being utilized for public use by the 1st and 2nd Defendants whatsoever. Their only borne of contention was on full and fair compensation payments, Clearly from the facts there were some unexplained delays in making the payments, Indeed, they became apprehensive from learning that their neighbors were paid and them left out. They imputed discrimination on them. Therefore, they decided to institute the suit as the only alternative remedy. Essentially, this decision was driven by an extreme fair, reasonable and plausible motivation. This is just but a human being attribute. Here, I totally apportion the blame to the 1st Defendant/Respondent for failing to freely walk with the Project affected persons and failing to impart adequate information, under Article 35 (1) of the Constitution of Kenya on the actual implementation of the project and the adequate, just, prompt and fair compensation for the compulsory acquisition of the land for public use as provided for under Article 40 (3) of the Constitution of Kenya. From experience, this became a very common phenomenon on such projects depicted by the Procuring and project implementing for reasons only known to them. It is unnecessary negative attitude which only attracts costly litigation processes. This state of affairs, tends to germinate such apprehension, anxiety, anguish and emotions as happened with the Plaintiffs/Applicants are likely to raise to a point of making wrong decisions which includes institution of civil suits or resorting to long and expensive litigations. These are situations caused by the grotesque opaqueness, concealment of material facts, information and secrecy which ought to be avoided by the project implementing agencies.

31. Secondly, this court has noted that the substratum and /or the cause of action in this suit emanate from the compulsory acquisition of land for public use by the Respondent. The legal concept on compulsory acquisition of land is founded under the provision of Articles 40 (1), (2) and (3) of the Constitution of Kenya and Part VIII of The Land Act, of 2012 Sections 107 to 115 of the said Act. It holds that all individuals have a right to acquire and own property of any description and in any part of Kenya unless it is for public purpose or in public interest. To this end, no one will be arbitrarily deprived of their property. When that happens, the individual shall be adequately compensated and/or paid in full, just and promptly. Articles 22 and 23 of the Constitution of Kenya provide legal mechanisms and remedies upon which to institute Petitions where there is any violations, infringement, denial or threat. The said Constitution Petition has to be in full compliance with the set out principles edicts in the now famous **Anarita Karimi Njeru – Versus – Republic (1980) eKLR 154 to wit:**

“Constitutional violations must be pleaded with reasonable degree of precision in framing of issues in Constitutional Petition is an extension of this principle.”

32. I have taken cognizance that instead of the Plaintiffs/ Applicants ventilating their plight by instituting a Constitutional Petition, proceeded to institute a common suit under an ordinary suit through a Plaint. This is not undue technicality. It is not one of those issues described as “Constitutional Avoidance” a concept discussed in details in the cases of **“Communication Commission of Kenya & 5 Others – Vs – Royal Media Services & Others (2014) eKLR; and Uhuru Muigai Kenyatta – Vs – Nairobi Star (2013) eKLR.** Perhaps this happened as I noticed the Plaintiffs/Applicants who are acting in person are lay persons. They may have lacked the professional dictum of competent law trained persons to have known this but the legal maxim that ignorance is bliss and hence no defence in law does not come to their aid. Surprisingly, the 1st Defendant/ Respondent never seem to have spotted this rather obvious and peculiar legal lacuna in form and substance of the Plaintiffs/Applicants filed pleadings. For this reason alone, I wonder whether this suit would have survived its salt for nothing else, if it was allowed to proceed to its logical term. I doubt it. Therefore, their justification for costs is utterly wanting, unfounded and baseless. I need say no more.

33. Thirdly, all said and done, based on the provisions of the Sections 1, 1A 3 and 3A of the Civil Procedure Rules 2010, Section 3 of the Environment & Land Act, No. 19 of 2012 and Article 159 of the Constitution of Kenya, what are termed as overriding objectives. These provisions of law do donate to court a greater latitude when dealing with land matters to overcome any undue technicalities which would hinder the attainment and application of the said overriding objectives and its principles to ensure and facilitate fast expeditious, proportionate and accessible resolution of dispute before it. It is noted that land is sensitive and a main source of livelihood in this Country and the same has to be handled with ginger care on its merit. The construction of the Mombasa – Mariakani road was a project of immense public interest and which has socially, economically and psychologically been beneficial to the public. It was of public interest and order. Had it not been for the single issue of costs to be awarded to the Plaintiffs/Applicants, the suit would have been settled before it proceeded to deep litigation of full trial where oral and documentary evidence was to be adduced. It took a very short time to be fully concluded and in their own admission immediately they got compensated. In all fairness, and using my discretion and arising from the fact that there were intention to withdraw the case by the Plaintiffs/Applicants under Order 25 (1) of the Civil Procedure Rules, it should have brought the matter to a logical conclusion. Therefore, I reiterate, the prayer for costs in the given circumstances is unmerited and thus disallowed.

34. In view of the forgoing, and for avoidance of any doubts, I proceed to order as follows:-

a) THAT pursuant to the provisions of Order 2 Rule 6 and 25 (1) of the Civil Procedure Rules, the notice of motion application and the suit vide a Plaint all dated 8th April, 2021 instituted by the Plaintiffs/Applicants be and is hereby marked as settled and withdrawn in accordance to their submissions presented during “the inter partes’ hearing in court on 24th

June, 2021 with no orders to costs.

b) THAT the Preliminary Objection by the 1st Defendant/Respondent dated 10th May, 2021 is allowed as prayed.

c) THAT each party to their own costs.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

IN THE PRESENCE OF:-

M/S. YUMNA – THE COURT ASSISTANT

NON - APPEARANCE FOR THE PLAINTIFFS/APPLICANTS.

NON – APPEARANCE FOR THE DEFENDANT/RESPONDENT