



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 209 OF 2015**

**IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA**

**- AND -**

**IN THE MATTER OF: ARTICLE 10, 19, 20, 23 162 (3) AND 258 OF THE CONSTITUTION OF KENYA**

**- AND -**

**IN THE MATTER OF: SECTIONS 13 OF THE ENVIRONMENT AND LAND COURT ACT 2011.**

**- AND -**

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

**RIGHTS UNDER ARTICLE 40, 47 AND 64 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**GEYSER INTERNATIONAL ASSETS LIMITED.....PETITIONER**

**- VERSUS -**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**CHINA ROAD & BRIDGE CORPORATION (KENYA).....4<sup>TH</sup> RESPONDENT**

**RULING**

**I. PRELIMINARIES.**

1. What is before this Honorable Court for determination is the Notice of Motion application dated 14<sup>th</sup> July, 2021 filed by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. It is brought pursuant to the Provisions of Sections 1A, (1), 3A and 63 (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 1 Rule 10 (2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

**THE 2<sup>ND</sup> AND 4<sup>TH</sup> RESPONDENTS CASE**

2. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents in this application sought for only a single order, *inter alia*:-

***a) That the claim against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents in the Further Amended Petition dated Petition dated 6<sup>th</sup> February, 2019 and filed on 6<sup>th</sup> February, 2019 be dismissed with costs”***

The application is premised on the grounds, testimonies and the averments on the 10 paragraphed Supporting Affidavit of STANLEY GITARI sworn and dated on 14<sup>th</sup> July, 2021 and three (3) annexures marked as “C- 1 to 3” annexed thereto.

3. He deposed that he was a male adult of sound mind understanding and a Senior Legal Officer of the 2<sup>nd</sup> Respondent herein duly authorized by the 2<sup>nd</sup> Respondent to swear this affidavit for and on its behalf thus competent to swear it.

4. He stated that the claim and the relief sought by the Petitioner in the filed Constitution Petition herein dated 10<sup>th</sup> September, 2015 was for an order to restrain the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from interfering with all that property known as Land Reference No. Mainland North/ Section VI/3892 before payment of just compensation annexed and marked as “C-1”. (hereinafter referred to as “The Suit Property”). He held that on 14<sup>th</sup> January, 2019, the Petitioner filed the Further Amended Petition (Hereafter referred to “The further Amended Petition”).

5. The deponent stated that under the averments made out under Paragraph 14C of the Further Amended Petition, the Petitioner pleaded that it was paid the entire compensation award for both the compulsorily acquired property and the demolished boundary wall. Accordingly, he was only claiming interest on the delayed payment as pleaded in prayer (Ca) of the Further Amended Petition.

6. The Senior Legal Officer averred and based on the legal advise from his Advocates that the Provisions of Sections 125 (1) of the Land Act, of 2012 imposes the obligations to pay compensation for compulsorily acquisition of land on the National Land Commission. Further, he held that the Provision of Section 117(1) of the Land Act of 2012 imposes the obligation to pay interest for unpaid compensation onto the National Land Commission and not any other persons or agencies as the Petitioner had attempted to do in its pleadings hereof.

7. The Senior Legal Officer deposed that in the given circumstances as stated above the 2<sup>nd</sup> Respondent had no legal liability to compensate the Petitioner or pay interest arising from the Compulsory acquisition of the suit land. He emphasized that the plea for compensation and other reliefs sought on compulsory acquisition did not lie against the 2<sup>nd</sup> Respondent.

8. He argued that by this time, the Standard Gauge Railway (SGR) Project was complete. He held ultimately and in the Long run that the claim against the 2<sup>nd</sup> Respondent ought to be dismissed with costs as the 2<sup>nd</sup> Respondent was a State Corporation established under the Kenya Railways Corporation Act, and which had no legal duty to pay compensation or interest for compulsory acquisition as such as from the claim emanating from the Petitioners’ suit land and/or case.

### **III. THE PETITIONER’S RESPONSE**

10. On 5<sup>th</sup> August, 2021, while opposing the said application by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents, the Petitioners filed their 15 Paragraphed Replying Affidavit sworn by one PETER KIMANGA though undated. He deposed that he was a Director of the Petitioner, thus fully conversant with the facts of the matter and duly authorized and competent to swear the affidavit on its behalf.

11. The Director deposed in opposition and based on his Advocates advice that the application by the 2<sup>nd</sup> Respondent was misconceived, unmerited and an abuse of the Court process and the same ought to be dismissed with costs for the following reasons:-

(a) The compulsory acquisition of a portion of the suit land was done on behalf of the 2<sup>nd</sup> Respondent as the acquiring body for the purpose of the construction of the Standard Gauge Railway. Accordingly, the 2<sup>nd</sup> Respondent was a beneficiary of the Compulsory acquisition.

(b) The provisions of Sections 107 (1) and 111 (1A) of The Land Act 2010, as read with the Provisions of Article 40 (3) of the Constitution of Kenya required that the 2<sup>nd</sup> Respondent as the acquiring body to deposit compensation funds with the 3<sup>rd</sup> Respondent, prior to acquisition of the suit land.

(c) The 2<sup>nd</sup> and 4<sup>th</sup> Respondents have been called upon to liability to certain prayers from the Further Amended Petition for instance declaratory orders for breach of provisions of the Constitution of Kenya including Article 40 (3) by the 2<sup>nd</sup> Respondent, plea on costs and general damages for the unlawful conduct by the Respondents.

(d) The 2<sup>nd</sup> and 4<sup>th</sup> Respondents were crucial parties here.

(e) Any claim for Compensation following the compulsory acquisition should include the acquiring body since it’s the one providing the compensation funds from which interest would also accrue.

12. The Director argued that from the evidence tendered in court and the admission by the 2<sup>nd</sup> Respondents, it showed the matter being raised by the 2<sup>nd</sup> Respondent was “*Res Judicata*” having been raised before in their Grounds of opposition dated 24<sup>th</sup> August, 2018 and where this court in its ruling dated 14<sup>th</sup> January, 2019 allowed the Petition to file the Further Amended Petition against the entire against Respondent.

14. The Director contended that court in its ruling had held that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents would be adequately compensated by being paid its costs in the event the Further Amended Petition was dismissed in their favour. He held that the 2<sup>nd</sup> and 4<sup>th</sup> Respondents had not todate not sought to set aside, review or lodged any appeal against this ruling. He urged the court to dismiss the application with costs.

### **III. THE SUBMISSIONS**

16. On 21<sup>st</sup> July 2021 upon all the parties appearing before this Honorable Court, it directed that the said Notice of Motion application dated 14.7.2021 be disposed off by way of written submission and provided proper timelines to that effect. Pursuant to that, by 3<sup>rd</sup> November, 201 all parties had fully complied and a ruling date was reserved for 15<sup>th</sup> December, 2021.

#### **A. SUBMISSIONS BY THE 2<sup>ND</sup> AND 4<sup>TH</sup> RESPONDENTS**

17. On 10<sup>th</sup> September, 2021 the Advocate for the 2<sup>nd</sup> and 4<sup>th</sup> Respondents the Law Firm of Messrs. Ndegwa Katisya & Sitonik Advocates filed their written submissions. They submitted that there was no liability that would arise on the 2<sup>nd</sup> and 4<sup>th</sup> Respondents as the Further Amended Petition dated 6<sup>th</sup> December, 2019 did not have any cause of action seeking any reliefs against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. They stressed that the Further Amended Petition neither pleaded any wrongful acts of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents nor any provisions breached by them. On the contrary, they argued that the reliefs sought from the said Further Amended Petition instead were against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents respectively and not the 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein.

18. The Learned Counsel submitted that they did not impose any liability on the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to pay compensation or interest arising from compulsory acquisition land. Therefore, the 2<sup>nd</sup> and 4<sup>th</sup> Respondents submitted that the prayer under number (Ca) of the Further Amended Petition which sought for payment of interest on the delayed payments could not be deemed to be one against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. They relied on the Provisions of Section 125 (1) of the Land Act 2012 and the decision of **Republic – Versus - NLC & 2 Others Ex-Parte Samuel M.N. Mweru & 5 Others [2018] eKLR** where the court held the law imposes the obligation to pay compensation for the compulsory acquisition of land exclusively and squarely on the National Land Commission, the 3<sup>rd</sup> Respondent herein and not any other person or agency including the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. They argued that it was immaterial whether or not the acquiring authority had availed funds for the project as alleged by the Plaintiff/Applicant. They held that in the instant case the situation was better as under Paragraph 14(c) of the Further Amended Petition dated 6<sup>th</sup> February, 2019, the Petitioner admitted that National Land Commission had already paid it the principal amount of Kenya Shillings Three Eighty One Million One Hundred and Twenty Five Thousand and Seventy One (Kshs. 381,125,071.00/=).

19. Indeed, the Learned Counsel argued that under prayer (Ca) of the Further Amended Petition, the Petitioner was only seeking payment of interest, which under the Provisions of Section 117(1) of the Land Act, 2012 expressly imposed that obligation on National Land Commission and not any other authority. On this point, they buttressed by relying on the decision of ELC **Kipkai Enterprises Ltd. –versus- Kenya Urban Roads Authority & 2 others [2019] eKLR**.

20. The Learned Counsel vehemently refuted the assertion made by the Petitioner to the effect that the issues raised in the application was “*Res judicata*”. They denied that their application was res judicate having raised the said issues as those already in their grounds of opposition dated 24.8.2018 while opposing the Amended of the Petition. They held that in its ruling of 14.1.2019 this court allowed the Petitioner to file its Further Amended Petition including all the Respondents. In saying so, they relied on the following grounds:-

- (a) The grounds of opposition was exclusively on objection to be Petitioner’s Application dated 28.5.2018 which then sought to amend the Petition dated 10.9.2015.
- (b) The issues for determination then were different from the current ones.
- (c) The Instant application was only on the dismissal of the Petition against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents from the entire while the previous issue was on the amendment of the Petition – which was heard and finally determined on the ruling of 14.9.2019.
- (d) The ruling only dwelt on the amendment of the Petition.

In conclusion, the Learned Counsel urged this court to allow their

Application and with costs..

#### **B. THE SUBMISSION BY THE PETITIONERS.**

21. On 28<sup>th</sup> June, 2021, the Advocates for the Petitioners the Law Firm of Messrs. Anjarwalla & Khanna Advocates filed their written submissions. They submitted that the requirement to pay interest on compensations award is a Provision of the Law under Section 117 (1) of the Land Act – where payment of compensation was made following taking possession. Similarly, they argued that such interest applied to both compensation award for the acquired property as well as any additional sections payable to persons interested in the acquired land. They further averred that the rate of interest was prescribed based on the lending rate set out by the Central bank of Kenya and prevailing at that time from the time when possession was taken or compensation was paid, whichever was earlier.

22. The Learned Counsel held that the Respondent physically took possession of the land on 20<sup>th</sup> October, 2015 and the compensation of Kenya Shillings Three Eighty One Million One Hundred and Twenty Five Thousand and Seventy One (Kshs. 381,125,071/=) for compulsory acquisition and damaged boundary was paid on 9<sup>th</sup> November, 2017 two years thereafter. The Petitioner right to be paid interest at 12% per annum from the date of taking possession until payment was made in full. They held the law to rely on was The Land Adjudication Act Cap. 287 and not The Land Act of 2012. On this point, they relied on the decisions of “**Arnacherry Limited – Versus - Attorney General [2014] eKLR and Christabel Akinyo Onyango – Versus - Kenya Airports Authority [2014] eKLR**

Therefore they submitted that the plea for interest the Petitioner sought from the Petition was merited and prayed the same be awarded as

prayed.

23. On general damages and costs for the Petition the Learned Counsels argued that Section 13 (1) of Environment and Land Act No. 19 of 2011 gave this court discretion to grant any orders for damages. Relying on several authorities, they contended that the Petitioner had demonstrated breach of Article 40 of the Constitution of Kenya by the Respondents and they invoked Article 23 of the Constitution of Kenya in seeking general damages and costs for breach of its right to property. They held costs follow the events and in this case it was for the adequate, full and prompt compensation for the compulsory acquisition of the suit land.

In light of the foregoing the Petitioner prayed that the Further Amended Petition be awarded as drawn with further orders on rate of interest to be applied and general damages payable to the Petitioner.

#### **IV. ANALYSIS AND DETERMINATION**

24. I have carefully read and taken into account all the pleadings, the well-articulated written submissions by all the parties herein, the cited authorities and the relevant provisions of the law in reference to the Notice of Motion application dated 14<sup>th</sup> July, 2019 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

I have particularly observed that, apparently the Written submissions by the Petitioner, for unclear reasons seem to spend more energy addressing the issues intended for the main Petition as opposed to directly attacking the contents of the Notice of Motion Application of 14<sup>th</sup> July, 2015 and the submissions tendered by the 2<sup>nd</sup> and the 4<sup>th</sup> Respondents.

Be that as it may, I have framed a few issues to be considered and be as a guide in arriving at a just and informed decision herein. These are:-

***(a) Whether the Honourable Court should dismiss the case by the Petitioner against 2<sup>nd</sup> and 4<sup>th</sup> Respondents and hence should have them exonerated from the proceedings instituted by the Petitioner vide the further Amended Petition dated 6<sup>th</sup> February 2019.***

***(b) Whether the parties here in are entitled to the relief sought.***

***(c) Who will bear the costs.***

**Issue No. (a) Whether the Honourable Court should dismiss the case by the Petitioner against 2<sup>nd</sup> and 4<sup>th</sup> Respondents and hence should have them exonerated from the proceedings instituted by the Petitioner**

**vide the further Amended petition dated 6<sup>th</sup> February 2019.**

25. Prior to embarking on the details analysis leading to the final determination over this matter before me, I feel it imperative to expound on the brief facts. From the pleadings herein, the Petitioner being the legal and registered owner to the suit land had entered into an agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent for the compulsory acquisition of a portion of it in accordance with the provisions of Article 40(3) of the Constitution of Kenya and Part VIII of the Land Act of 2012. The Purpose was for the public use being the development of the Standard Gauge railway from Miritini Mombasa to Nairobi. The acquiring entity was the 2<sup>nd</sup> Respondent in the year 2015. The Petitioner was granted the compensation award and had it duly executed as required by law. The 2<sup>nd</sup> and 4<sup>th</sup> Respondents took possession and the construction of the Standard Gauge Railway commenced and was completed. Eventually, on 9<sup>th</sup> November, 2017, the Petitioner was paid the compensation award a sum of Kenya Shillings Three Eighty One Million One Hundred and Twenty Five Thousand and Seventy One (Kshs. 381,125,071/=) for both the acquired property and the boundary wall. But being aggrieved, on 10<sup>th</sup> September 2015, the Petitioner filed the Constitutional Petition dated 10<sup>th</sup> September, 2015 seeking to restrain the Respondent from interfering with the suit property before he had been paid just compensation in full.

On 14<sup>th</sup> December, 2019 he sought leave and was granted to amend the Petition. On 6<sup>th</sup> February, 2019 the Petitioner filed a further Amended Petition dated 6<sup>th</sup> February, 2019. In the process the 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed the instant applications and sought the said orders accordingly.

#### ***26. On the Concept of Compulsory acquisition of land.***

Under this sub heading, first and foremost, 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.**

27. Under the provisions of the Land Act, 2012, Section 107 of the Act holds that, the NLC - the 3<sup>rd</sup> Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of the Constitution of Kenya. In this case the threshold must be met.

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

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

28. 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 of Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of Sections 107 (5) & 110 (1) of the Act, the 3<sup>rd</sup> Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and national governments – Section 107 (8) of the Land Act for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under Section 108 of the Land Act. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC. The land owners plays no role at all hereof.

29. 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.

30. 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.

31. 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.

32. 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”***

Suffice to it say, the main quest in the matter is compensation and interest. 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 .....”***

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

#### ***34. On the issue of full payment & Liability from reliefs***

As indicated above the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are seeking to dismiss the claim against them in the Further Amended Petition primarily as it does not plead any law. In the Compulsory acquisition of land the law imposes an obligation on the full payment upon National Land Commission. Section 117 (1) of the Land Act 2015 provides:-

***If the amount of any Compensation awarded is not paid, the commission shall on or before the taking of possession of the land open a special account into which the commission shall pay interest on amount awarded”***

This Honourable court strongly holds that that The National Land Commission has to take the full charge and responsibility for all the full, prompt adequate and/or fair payments. The mischief envisaged and/or by the letter and spirit of the law was core value of accountability, transparency and order as envisaged under Article 10(2) (b) of Constitution of Kenya. This court has taken full cognizance that indeed the Petitioners were on 9.11.2017 paid the entire compensation award of Kshs. 381,125,071 for both the acquired property and the boundary wall. Based on the foregoing I find it difficult to impose this obligation on the 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein cause of action against them. Further they hold there is no liability that will accrue against them as the Petition has not sought any relief against. On this point I fully concur with the 2<sup>nd</sup> and 4<sup>th</sup> Respondents as by critically assessing the prayers sought under the filed Further Amended Petition – reads as follows:-

***(a) Prayer (a) – that the Petitioners rights to own and acquire property under Article 40 was breached. However by amendment the Petitioner struck off the names of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents.*** As their names were struck out by the Petitioner, it follows that the clam under prayer (a) does not lie against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

***(b) Prayer (b) A declaration that the Petitioner’s rights for fair administrative action were breached. However by amendment the Petitioner struck off the names of the 2<sup>nd</sup> and 4<sup>th</sup> Respondents.*** As their names were struck out by the Petitioner, it follows that the claim under Prayer (a) does not lie against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

***(c) Prayer (b) A declaration that the Petitioner’s rights to fair administrative action were breached by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.*** It is clear that the relief sought in this prayer are squarely and expressly against the 1<sup>st</sup> and 3<sup>rd</sup> Respondents only and not against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein.

***(d) Prayer (d) the Petitioner seeks for damages for violation of the Petitioner’s right to Property and right to fair administrative action.***

In my view, therefore, the liability by way of compensation cannot accrue against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents as the Petitioner does not seek any declaration of fault against them.

#### ***35. On the Imposition of liability by law***

As indicated above compulsory acquisition of land arising from the Provisions of Article 40 (2) of Constitution of Kenya and Part III of the Land Act, the process and the procedure are well spelt out upon compulsory acquisition the provision of Section 117(1) of the Land Act, 2012 holds that its National Land Commission 3<sup>rd</sup> Respondent which pays the compensation, the provision of Section 125 (1) of the Land Act of 2012 holds:- ***“The Commission shall as soon as in practicable, pay and just compensation to all persons interested in the land.”***

From the above legal citations, the law does impose the full responsibility on payment to the National Land Commission and nobody else. Where the National Land Commission fails to do so and the land is possessed by the acquiring authority before payment is made the obligations to ensure payments is made falls squarely on the commissions. They are the only statutory body that is vested with the legal authority to make all the payment including interest from the compulsory acquisition of land. In this case the 2<sup>nd</sup> and 4<sup>th</sup> Respondents notwithstanding being the acquiring body is immaterial they cannot be liable and hence the law does impose any responsibility on them.

### **36. On the issue of Res Judicata**

Additionally, the Principles of ***“Res judicata”*** is founded under the provisions of Section 7 of the Civil Procedure Act Cap 21 of Laws of Kenya as raised by the Petitioner.

***7. “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.***

37. From the above provisions of the law, for the doctrine of Res Judicata to be achievable, the following the ingredients must to be fulfilled:-

- a) The suit or issue was directly and substantially in issue in the former case
- b) The former suit was between the same parties or parties under whom they or any of them claim;
- c) Those parties were litigating under the same title;
- d) The issue was heard and finally determined in the former suit.
- e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

Expounding on the essence of the doctrine of Res Judicata, the court in ***“John Florence Maritime Services Limited & Another – Vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR*** pronounced itself as follows:

***“The rationale behind Res Judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, Res Judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”***

38. The Petition holds that:- ***The issues raised in the application is res - Judicata, having been raised by the same parties vide the Grounds of Opposition dated 24.8.2018 and that in its Ruling dated 14.1.20219 this Honorable Court conclusively determined the issue by allowing the Petitioner to file Further Amended Petition.***

In as much as indeed it’s the same matter that have been involved in all these proceedings but the issues are extremely distinct and different. By then the matter was on whether to amend the Petition or not. The matter was heard and determined allowing the amendment to take place. However, in the instant place the subject matter is to dismiss the Petition against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents. Besides the matter has neither been heard nor concluded. Clearly, in the instant case there are no ingredients of Res - Judicata at all as alleged by the Petitioner.

### **ISSUE No. c. Whether the parties are entitled to the relief sought.**

39. From the foregoing its clear that the person or statutory body responsible for all the compensation payment emanating from Compulsory acquisition in National Land Commission. It’s not the 2<sup>nd</sup> and 4<sup>th</sup> Respondents or any other person.

On that fact the 2<sup>nd</sup> and 4<sup>th</sup> Respondents are entitled to the relief sought. Nonetheless, the Petitioner is concerned by letting the 2<sup>nd</sup> Respondent off the hook at this stage being the acquiring body they may be frustrated in attaining their full payment and also access to information and other resources. On this ground alone, I fully concur with the Petitioner. Even this court would at some stage during the pendency of its suit require adequate information as pertaining this project and its only the 2<sup>nd</sup> and 4<sup>th</sup> Respondents who are best placed to impart such. For this reason alone, I hold its important the 2<sup>nd</sup> and 4<sup>th</sup> Respondents remain in the Constitution Petition proceedings as ***“amicus Curie”*** and merely Interested Parties for the sake of assurance and resource of information and nothing more. They will assume the role of 1<sup>st</sup> and 2<sup>nd</sup> interested parties and not Respondents any more. This way the Petitioners are entitled to the relief sought.

**ISSUE No. d) Who will bear the costs of the application.**

38. The provision of Section 27(1) of the Civil Procedure Act holds that costs follow the events. In this case the 2<sup>nd</sup> and 4<sup>th</sup> Respondents have succeeded and therefore deserves the orders of costs to be borne by the Petitioner.

**DETERMINATION**

39. Ultimately in view of the foregoing and for avoidance of doubt I do order as follows:-

- a) **THAT** the Notice of Motion application dated 14<sup>th</sup> July, 2015 by the 2<sup>nd</sup> and 4<sup>th</sup> Respondents be and is hereby allowed with costs.
- b) **THAT** for the sake of information, resource and quality assurance the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to remain in this Constitution Petition proceedings merely as 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties (or “*The Amicus Curiae*” of Court).
- c) **THAT** unless otherwise stated, the Honourable Court shall henceforth unconditionally discharge, dispense and/or dispel the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties from the matter upon the final conclusion and/or determination of the case.
- d) **THAT** for the expediency purpose the Petition through the Further Amended Petition dated 6<sup>th</sup> February, 2021 to be set down for hearing within the next 90 days by both the submissions and *Viva voce* evidence. The matter to be mentioned on 9.2.2022 for purposes of taking directions and pre-trial conference sessions.
- e) **THAT** costs of the application to be borne by the Petitioner.

**IT IS SO ORDERED.**

**RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 15TH DAY OF DECEMBER 2021.**

.....

**HON. JUSTICE L.L NAIKUNI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MOMBASA**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*M/s. Kombo holding brief for Mr. Karima for the 2<sup>nd</sup> and 4<sup>th</sup> Respondents/Applicants*

*Mr. Makuto for the 1<sup>st</sup> Defendant*

*Mr. Muthuri holding brief for Mrs. Onesmus for the Petitioner*