REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

PETITION NO 5 OF 2016

(FORMERLY MILIMANI NAIROBI PETITION 211 OF 2016

IN THE MATTER OF CHAPTER FOUR, THE BILL OF RIGHTS, ARTICLES 2(5), 2(6), 3(1), 11(1), 11(2)(a), 32, 35, 44, 48, 50(1), 56(d), 159 AND ARTICLES 165 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 32 AND 44(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF APPLICATION BY:

ISAIAH WAWERU NGUMI….....1ST PETITIONER

EVASON J.M.JOMO.....2ND PETITIONER

DANIEL NG'ANG'A JOEL.....3RD PETITIONER

VERSUS

THE CHAIRMAN NATIONAL

LAND COMMISSION.....1ST RESPONDENT

THE DIRECTOR GENERAL

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND RESPONDENT

[The 3rd Respondent was expunged by an order of the Court dated 31/08/2016]

THE DIRECTOR GENERAL

NATIONAL MUSEUMS OF KENYA.....3RD RESPONDENT

ORIGINALSIGONA ENTERPRISES LIMITED.....4TH RESPONDENT

THE KIAMBU COUNTY EXECUTIVE

DEPARTMENT OF CULTURE.....5TH RESPONDENT

THE DIRECTOR GENERALNATIONAL

TRANSPORT AND SAFETY AUTHORITY.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The Petitioners are all residents of Kiambu County and they either live or work in the Sigona area around Kikuyu Sub-county. They are, also, all shareholders of the private company known as Original Sigona Enterprises Limited, a limited liability company registered in Kenya. They are aggrieved by the cumulative decisions of the Respondents respecting the designed and planned construction and expansion of the Nairobi-Naivasha Road (A104) from the James Gichuru Junction in Nairobi County to Rironi Junction in Kiambu County under the National Urban Transport Rehabilitation and Improvement Project (NUTRIP) (Hereinafter "NUTRIP Road A104 Road Expansion Project"). Believing these decisions amount to violations of their constitutional rights, the Petitioners have brought thepresent Petition seeking certain orders against, principally, the 1st, 2nd and 4th Respondents.

2. The 1st Respondent is an independent Constitutional Commission established under Article 67 of the Constitution. It is charged with compulsory acquisition and compensation of private land in Kenya as provided under Article 40(2) and (3) of the Constitution.

3. The 2nd Respondent is established under Part II (A) of the Kenya Roads Act, 2007 with the mandate to manage, develop, rehabilitate and maintain national roads. The 2nd Respondent is the entity responsible for designing and constructing the NUTRIP A104 Road Expansion Project.

4. The 3rd Respondent is an international organization which is, ostensibly, funding the NUTRIP A104 Road Expansion Project and was expunged from the suit by an order of Justice Onguto on 31/08/2016 in view of the provisions of the Bretton Woods Agreement Act (Chapter 464 of the Laws of Kenya).

5. The 4th Respondent is established as a body corporate under section 3 of the National Museums and Heritage Act (Chapter 216 of the Laws of Kenya). Among other functions, it is charged with the task of identifying, protecting, conserving and transmitting the cultural and natural heritage of Kenya.

6. The 5th Respondent is a private limited liability company and the registered owner of the parcel known as LR Sigona/1937 on which Sigona House is situate. The 5th Respondent did not enter appearance or participate in the proceedings in any way despite being served with all the court processes and being aware of the suit.

7. The 6th Respondent is part of the County Government of Kiambu.

8. The 7th Respondent is a body corporate established under section 3 of the National Transport and Safety Authority Act, 2012 to, among other things, plan, manage and regulate the road transport system in Kenya and to ensure the provision of safe, reliable and efficient road transport services. It did not participate in the suit in any way despite being served and being aware of the suit.

B. THE PETITIONERS' CASE

9. Foremost, the Petitioners believe that the NUTRIP Road A104 Road Expansion Project if executed will

lead to the needless demolition of Sigona House, a building located on Parcel No. LR/Sigona/1937 which the Petitioners allege is a historical building and a cultural heritage that should be preserved as such by the 4th Respondent (The National Museums of Kenya) rather than being compulsorily acquired and demolished to pave way for the construction of the Expanded NUTRIP A104 Road as currently designed. They also believe that the current design will lead to the needless demolition of other historical buildings and cultural sites which should be preserved – including a historical church building, and two nearby petrol stations. Additionally, the Petitioners are concerned that the NUTRIP Road A104 Road Design will lead to the demolition of a local borehole which serves 5,000 people in the locality.

10. Further, the Petitioners are persuaded that the route taken by the NUTRIP Road A104 Road Design which will lead to all these cultural and other costs is unnecessary. They believe that the 2nd Respondent (the National Highway Authority) had already acquired, way back in 1988, alternative land west of Kamuguga/Zambezi Junction which is more appropriate for the expansion of the road. They find the decision not to utilise the already acquired land and instead change course and acquire more land on an alternative route to be suspect and irrational.

11. Lastly, the Petitioners protest that the NUTRIP Road A104 Road Expansion Design will maintain the Zambezi Underpass along the general route which, they argue, is a safety hazard and causes a lot of injuries, deaths and destruction of property since it is mis-located.

12. As discussed in detail below, the Petitioners' claims are complicated by four intersecting factors:

a. First, they are made in the context of a planned compulsory acquisition of the property where Sigona House – which the Petitioners want preserved – by the 1st and 2nd Respondents.

b. Second, the success of part of their claims depends on statutory action by the 4th Respondent (the National Museum) to declare Sigona House a monument or cultural heritage (the technical word is "Protected Building") worth preserving hence, hopefully, having that act as a bulwark against compulsory acquisition by the 1st and 2nd Respondents. Needless to say, the 4th Respondent has failed or refused to act as they desire.

c. Third, the Petitioners are not Directors of the 5th Respondent (OSEL) which is the legal owner of the property they wish to save from compulsory acquisition. Instead, they are only shareholders in OSEL. It would appear from the context that OSEL, through its directors, is formally not opposed to the compulsory acquisition.

d. Fourth, part of the Petitioners' claims are made in a representative capacity of the people of that locality – but in a procedural posture of the case where many of the issues raised cannot be appropriately determined due to the multiplicity of issues presented and inchoate development of the facts. For example, in the current proceedings, the Court will be unable to adjudicate on questions of propriety of the road design for safety purposes – both because that determination will involve the usurpation of the proper authority of a statutory agency but also because the Court does not have the technocratic competence or adequate materials placed before it to make an informed decision on whether the decisions by the Respondents are outside the realms of reasonable conduct necessitating judicial review. This fourth factor looms large in this case and previews the determination of the issues.

13. In order to properly and most clearly understand the Petitioners' specific claims so that the appropriate issues for adjudication can be framed, it is important to restate the Petitioners' claims. In essence the Petitioners' claim can be stated thus: the design of the NUTRIP A109 Road Expansion will lead to the violation of their various constitutional rights. The specific rights they mention are the following – which, then, can be treated as the points for determination in the case:

a. First, they allege that their right to freedom of expression guaranteed by Article 33 of the Constitution is violated by the NUTRIP Road A104 Road Expansion Project.

b. Second, they allege that their right to enjoy their culture guaranteed under Article 44(2) of the Constitution will be contravened if the Road Design is maintained as it is. They believe that their culture and heritage will only be preserved through the preservation of Sigona House and other historical sites around it.

c. Third, they believe that their right to access to information guaranteed by Article 35(1) of theConstitution has been violated but it is not entirely clear how. It would appear that the Petitioners believe that 2nd Respondent has failed to give them a copy of the Road Design so that they can determine what further action to take.

d. Fourth, they allege that article 46(1)(a) and (b) of the Constitution regarding their consumer rights have been violated.

e. Fifth, as I understand their petition, they also believe that the design of the Highway Expansion Road Project is irrational because it is designed to pass in a route that will necessitate the demolition and destruction of many historical and cultural sites while the road could conceivably pass to the south of the designed road (which has already been acquired) which will obviate these destructions of cultural sites. Additionally, in their view, redesigning the road as they suggest would create a safer road leading to less accidents since the envisaged Zambezi Underpass, which will be maintained by the planned NUTRIP Road A104 Road Expansion Project, is a safety hazard.

C. THE RESPONDENTS' CASE

14. The Respondents have opposed the Petition. I have reframed and re-organized their objections under the five heads stated below. In my view, as re-framed, the five heads comprehensively cover the issues that need to be decided in the case. As such, rather than rehash the arguments of the Respondents under a separate heading, I will discuss the arguments on each side of the issue under the five separate headings.

a. First, the Respondents argue that the Petitioners do not have *locus standi* to bring the present suit as they are not the property owners of the suit in question.

b. Second, factually, the 1st Respondent claims in its Grounds of Opposition that Sigona House is situated on Property known as LR Sigona/1937 which is not one of the properties that is planned to be compulsorily acquired according to Gazette Notice No. CXVII-No. 12 dated 12/02/2016. As such there is no cause of action and the suit is frivolous and vexatious.

c. Third, the 2nd, 4th and 6th Respondents argue that the suit is fatally defective and cannot yield any positive orders as framed. For this proposition, they rely on the doctrine enunciated in ***Anarita Karimi Njeru Versus Republic (1976 – 80) 1 KLR 1272***. The argument is that the Petition is not framed with sufficient specificity to warrant any remedies from the Court.

d. Fourth, the 2nd Respondent argues that one cannot stop the government from compulsorily acquiring property once the constitutional threshold of due process is met and the compulsory acquisition is in line with Article 40 of the Constitution. Further, the Respondents argue that the Court cannot compel the 4th Respondent to declare the Sigona House a monument as that will be to usurp the work and authority of an independent statutory body that is clothed with that authority and power.

e. Fifth, the Respondents, argue that the Petitioners have not established that any of their constitutional rights has been violated or is threatened with violation sufficiently to compel the 2nd Respondent to re-design NUTRIP A104 Road Expansion Project.

C.1 DO THE PETITIONERS HAVE *LOCUS STANDI* TO BRING THE PRESENT CASE?

15. The first salvo unleashed by the Respondents is a technical one: that the Petitioners are the wrong parties in Court; they have no standing to bring the present claim. The argument can be easily stated: The

anchor property which is the subject of the suit is LR Sigona/1937 which is registered in the name of OSEL, a limited liability company. As trite law teaches us, a company has its own corporate identity different from that of its shareholders. It can sue and be sued in its own name and it can maintain any legal claims in its own name. Such claims are usually authorized by the Board of Directors and brought in the company's name.

16. Here, though, the Respondents argue, the Petitioners are shareholders seeking to maintain a suit supposedly for the benefit of the company. Yet it is not a derivative law suit but a suit filed in their own name but maintained on behalf of the company. The Respondents would argue that the suit is incompetent because the Petitioners simply do not have the standing to bring it: they are mere shareholders not the company and they cannot object to the compulsory acquisition on behalf of the company.

17. The 2nd Respondent argued that the Petitioners' remedy would have been to present their complaints to the Board of OSEL and have the Board take up the issues in the name of the company. The Petitioners respond that this would have been futile because the Board of OSEL chose not to act even after due notice.

18. In any event, the Petitioners argue that they can maintain the present suit in their own name as their individual constitutional rights are under threat. Hence, they argue, they bring the action in their capacity as citizens who have particular rights under the Constitution. The fact that they are shareholders of OSEL mutually reinforces their standing to bring the suit rather than bereaving them of that capacity.

19. In my view, the Petitioners are right on this score. They are entitled to challenge the actions of the Respondents on their own behalf. While the claims would be much stronger if maintained by OSEL for and on behalf of all the members, the nature of the claims by the Petitioners here are such that they can bring them on their own. This is because while their claims are pivoted on their shareholding at OSEL which gives them certain rights to enjoy Sigona House, their claim is not that of the company: their claim is that if the Respondents proceed as they plan, their individual constitutional rights under Articles 33, 35, 44 and 46 would be violated. These rights belong to, and are to be enjoyed by the Petitioners collectively with other citizens – and therefore they have a right to challenge the decisions of the Respondents on their own behalf.

20. In particular, the Petitioners claim that their right to culture is under threat. While that threat involves the demolition of Sigona House owned by OSEL, it goes beyond the core question of ownership and compensation because their claim is that the property has cultural value which they claim they have a right to enjoy as individuals and as a collective. Hence, the fact that their claim lies at the intersection of certain rights which are individually and collectively enjoyed as citizens and the private property rights of the OSEL transforms the potential claim from one purely challenging compulsory acquisition based on constitutionally protected right to the private property of OSEL to one challenging it based on various constitutional rights – including the right to culture – which inheres in the Petitioners as individuals and as a collective though emanating from the private property of OSEL. Hence, while OSEL could maintain the action on behalf of the Petitioners and others, they also have standing to bring an action independently.

21. To be clear, the actions (and non-actions) the Petitioners challenge here would interfere with their individual and collective constitutional rights if the Petitioners persuade the Court about their claims. While the property ownership of OSEL is necessary for their action to be maintainable, their cause of action as individuals both overlaps and exists independently of any claims OSEL might have. Indeed, OSEL itself would have to rely on the individual and collective rights of the Petitioners and others if it were to maintain the same action. To this extent, therefore, I have no hesitation in holding that the Petitioners have the necessary standing to sue in this matter.

C.2 IS LAND PARCEL NO. L.R. SIGONA/1937 ON WHICH SIGONA HOUSE IS SITUATE ONE OF THE PROPERTIES TO BE COMPULSORILY ACQUIRED?

22. The 1st Respondent has objected to the suit on the ground that the land known as LR No. Sigona/1937

which is the anchor property on which the Petitioners' suit is predicated is not one of the properties which was gazetted for compulsory acquisition pursuant to Gazette Notice No. No. CXVII-No. 12 dated 12/02/2016. The 1st Respondent would, therefore, on this basis alone, have the suit dismissed as frivolous and vexatious.

23. While the 1st Respondent is the public body charged with the function of compulsorily acquiring land for public purposes, it would appear that it is, on this score, either less than candid or not in the full picture. The 2nd Respondent, on whose behalf the land for the NUTRIP Road A104 Road Expansion Project will be acquired admits in no uncertain terms that parcel No. LR Sigona/1937 is one of the parcels that is targeted for compulsory acquisition. To dispose off this objection, it is only necessary to produce paragraphs 7- 11 of the Replying Affidavit of Eng. David Muchilwa:

> 7. That Sigona House building the subject matter of this Petition is adjacent to the Nakuru bound carriage way about 600 m ahead of Sigona Golf Club in SIgona Area on Plot No. Sigona/1937 formerly LR Sigona/1020 (Coordinates: 239889.70E, 9865256.84S.
>
> 8. That land acquisition is to be done on both sides of the road at the sections shown in the aforementioned drawing.
>
> 9. That to provide access to properties, service roads were provided at both ends of the lane road which led to the acquisitions of sections including the premises subject to this petition.
>
> 10. That by Gazette Notice No. 809 of 12th February, 2016, L.R. No. 4955/24 (Mother Title) was gazetted but had been subdivided giving rise to Plot No. Sigona/1937.
>
> 11. That the final designs of Rehabilitation and capacity enhancement of James Gichuru Road Junction to Rironi cut through Plot No. Sigona/1937 as shown in the land acquisitions drawings referred to above.

24. As this affidavit makes clear, the parcel known as LR Sigona/1937 is targeted for compulsory acquisition. This is further confirmed by a letter dated 22/03/2016 by the 2nd Respondent to the 1st Petitioner confirming that the 2nd Respondent was in consultations with the 1st Respondent to prepare an addendum to the list of parcels of land gazetted to include parcel no. LR Sigona/1937. The Petitioners' apprehensions are, therefore, well founded.

C.3. IS THE SUIT EMBARASSINGLY NON-SPECIFIC AND, THEREFORE, FATALLY DEFECTIVE?

25. The Respondents have vigorously argued that the Petition is fatally defective for failure to specifically demonstrate and prove the specific Articles of the Constitution that the Petitioners contend have been breached by the Respondents. They argue that the Respondents have not been able to identify any particular averments supported with the necessary evidence showing a breach of the specific Articles relied upon by the Petitioners. Relying on the case of ***Anarita Karimi Njeru Versus Republic (1976 – 80) 1 KLR 1272***in which the Court stipulated that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. In that case the Court observed that the rights under the Constitution are very specific and a petitioner who comes before the Court must set out with some level of particularity the specific right violated and the manner in which it is violated. In the instant case, the Respondents argue, the Petitioners have failed to argue, demonstrate and prove the extent to which the specific rights they allege to have been violated have been breached.

26. The Respondents further submitted that the High Court's jurisdiction under **Article 165(3) (b)** when moved under **Article 22** is to adjudicate on specific allegations of violation of human rights and fundamental freedoms protected under the Bill of Rights. To the extent that no such specific allegations of violations are made

27. In ***Anarita Karimi Njeru***, Justices Trevelyan and Hancox stated that:

> We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

28. The Respondents are, of course, right that our jurisprudence dictates that a party bringing a suit claiming a violation or the threatened violation of his constitutional rights must state with reasonable precision the right or fundamental freedom violated or threatened with violation. Additionally, the party must also then describe how the rights have been violated or threatened with violation. As our case law has established, this is not a technical requirement but a substantive test: to give the parties and the Court reasonable notice of the case the Petitioner is bringing; the alleged infringement of fundamental rights should not be left to conjecture and deductions. The Court of Appeal said as much in its rendition of the ***Anarita Karimi Njeru*** doctrine in ***Mumo Matemu -v- Trusted Society for Human Rights Alliance & 5 Others [2013] eKLR*:**

> We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.

29. The point, I believe, is the emphasis is on reasonable precision not absolute precision (see, for example, ***Kevin Turunga Ithagi –v- Hon. Justice Fred Ochieng & 5 Others (No.1) HCCP No.442 of 2015 [2015]eKLR***) or exactitude (see ***Mumo Matemu*** (supra)). The question is whether the Petition as framed gives reasonable notice of the Petitioners' claims to warrant the Court to exercise its jurisdiction and craft a meaningful remedy if the Petition is successful.

30. Looking at the five claims by the Petitioners which can be gleaned from their pleadings especially the prayers, even while utilizing the substantive test suggested above, it is difficult to say that three of them have been stated with any degree of precision at all:

> a. First, although the Petitioners allege that their right to freedom of expression guaranteed by Article 33 of the Constitution is violated by the NUTRIP Road A104 Road Expansion Project, they plead no specific facts at all to demonstrate that violation. Neither do they, in their pleadings demonstrate how their Article 33 rights have been violated or threatened with violation. As the Respondents argue, the manner of violation is purely left to conjecture. This specific claim is not sufficiently pleaded, specified or developed to be adjudicated and it is hereby dismissed.
>
> b. Second, the Petitioners allege that their right to enjoy their culture guaranteed under Article 44(2) of the Constitution will be contravened if the NUTRIP A104 Road Expansion Project Design is maintained as it is. They believe that their culture and heritage will only be preserved through the preservation of Sigona House and other historical sites around it. I believe that this specific claim is well pleaded with sufficient particularity to give notice to the Respondents about the exact nature of the claim. Thus, it satisfies the substantive test laid out in ***Anarita Karimi Njeru Case*** and restated in the ***Mumo Matemu Case***. This specific claim survives this threshold question and will proceed for substantive determination.
>
> c. Third, the Petitioners have pleaded that that their right to access to information guaranteed by Article 35(1) of the Constitution has been violated in the design and execution of NUTRIP Road A104 Road Expansion Project. However, even after a fully- fledged hearing it is not clear what

information the Petitioners wanted from the Respondents since it would appear that they had all the information they needed to challenge the decision and that what they sought to challenge are the substantive decisions made by the Respondents. Having failed to glean any specific claims which can be responded to in this regard, I find that this specific claim does not sufficiently specific to survive an ***Anarita Karimi Njeru test*** and is hereby dismissed on that score.

d. Fourth, the Petitioners allege that article 46(1)(a) and (b) of the Constitution regarding their consumer rights have been violated. Other than the enumeration of these articles appearing in the Petitioners' prayers, there is no other mention of these rights anywhere else in the Petition. Neither is there any indication of how those rights have been violated. It is clear that, as pleaded, this claim has not been established with reasonable precision to warrant adjudication by the Court. This particular claim is, therefore, dismissed.

e. Fifth, the Petitioners also allege that the design of the NUTRIP Road A104 Road Expansion is irrational because it is designed to pass in a route that will necessitate the demolition and destruction of many historical and cultural sites while the road could conceivably pass to the West of the designed road (which has already been acquired) which will obviate these destructions of these cultural sites. Additionally, in their view, redesigning the road would create a safer road leading to less accidents since the envisaged Zambezi Underpass, which will be maintained by the planned NUTRIP Road A104 Road Design, is a safety hazard. Prima facie, this claim is clear and specific enough to give notice of the Petitioners' claims to the Respondents. Consequently, it also passes muster under the ***Anarita Karimi Njeru test***.

31. Given the analysis above, it follows that the claims stated in paragraphs (b) and (e) above will proceed for further determination. The claims stated in paragraphs (a); (c) and (d) are hereby dismissed.

C.4. HAVE THE PETITIONERS ESTABLISHED A SUFFICIENT CASE FOR THE COURT TO STOP THE GOVERNMENT FROM

COMPULSORILY ACQUIRING LAND PARCEL LR SIGONA/1937?

32. Both the Petitioners and Respondents agree that the 1st and 2nd Respondent can compulsorily acquire the Sigona House Property provided that:

a. The acquisition is for a public purpose – and in this case it is not denied that the NUTRIP Road A104 Road Expansion is a public purpose.

b. There is prompt payment in full of just compensation for the property – which is not an issue in this case.

c. Any person who has an interest in, or right over that property has a right of access to a court of law – which is part of the current proceedings.

d. The acquisition is done in accordance with the Land Acquisition Act – which is not an issue in the case.

33. The Respondents argue that once the 1st and 2nd Respondent have met all the four conditions listed above, the Court cannot prevent an acquisition. There is, therefore, the Respondents argue, no reason for the Court to interfere with the State's power of eminent domain which is being exercised in the interests of the public.

34. The parties are in agreement that if Sigona House has historic value and is declared as a monument or protected building by the relevant Cabinet Secretary under section 25 of the National Museums and Heritage Act, then the suit property would not be liable to be compulsorily acquired for road purposes. However, they disagree on whether Sigona House should be declared as such a monument or protected building.

35. The Petitioners argue that Sigona House is an "an ancient building which was built way back during the 2nd World War" (Paragraph 13 of the Supporting Affidavit of the Petitioners) and that it is where the Petitioners and their age-mates received their basic education "under the tutelage of the legendary and illustrious teacher Madam Mrs. Wairire". According to the Petitioners, the Sigona House is

> "like Bethlehem" as they know "no other place in the world that binds [them] together better than Sigona House." They believe that Sigona House is a cultural artifact which should be preserved just like other ancient sites in Kenya like the Gede Ruins and Mombasa Old Town. Indeed, they believe it would be an act of discrimination for the Respondents not to protect Sigona House despite what they believe is its historic value.

36. The Respondents are, obviously, of different mind. The Respondents argue that no nexus between the right to culture, the suit property, the road project and the state's power to compulsorily acquire land has been demonstrated to warrant the curtailing of the State's power of eminent domain. The Respondents argue that the Petitioners have not demonstrated that the suit property has historic value. This is because, the law requires for sites valued as historic to be gazetted yet the suit property is not gazetted as a historic nor as a protected site as required by provisions of section 25 of the National Museums and Heritage Act Cap 216 of the laws of Kenya.

37. The 4th Respondent argues that the Petitioners approached it earlier in 2015 with a request to have Sigona House gazetted. However, the 4th Respondent conducted research with a iew to ascertain whether the subject building met the threshold for gazettment. The research concluded that Sigona House does not meet the criterion and the 4thRespondent, therefore determined that it will not request the Minister to act under section 25 of the National Museums and Heritage Act**.** The Report that was prepared by the 4th Respondent was forwarded to the Petitioners and the 2nd Respondent. It is attached to the Replying Affidavit of Eng. Denis Odeck. The Report dated 25/02/2016 concludes as follows:

> Following our finding after the field visit, we did not find any justification for the gazettement of the building (neither architectural nor historical, for its protection as a National Monument

38. Having reached this conclusion, the 4th Respondent closed the matter and informed the 2nd Respondent that there was no barrier to the suit property being subject to compulsory acquisition.

39. In the face of this, the Petitioners insist that the actions by the Respondents would amount to violations of their right to culture as articulated in Article 44(2) of the Constitution since the Sigona House constitutes part of their cultural heritage and it will be destroyed. The Petitioners, therefore, would like the Court to direct the 4th Respondent to reverse its conclusion that Sigona House does not merit the criterion for gazettement and require it to ask the Cabinet Secretary to gazette it. This would, then, preserve the building for their cultural enjoyment – and force the 2nd Respondent to re-design the road. For good measure, the Petitioners argue that it will be more cost-effective and safer anyway for the 2nd Respondent to re-design the road. Indeed, the Petitioners suspect that there is collusion among the Respondents to have the road expansion pass where it will require the demolition of Sigona House.

40. On their part, the Respondents argue that once the 4th Respondent has made its findings, under section 25 of the National Museums and Heritage Act, neither the Court nor any other person can require the Cabinet Minister to act in a particular way. This is because the power granted to the Cabinet Secretary is purely discretional: the 4th Respondent has discretion to assess any petition or request for gazettement, make its findings and accept or reject the request. Here, the Respondents argue, the 4th Respondent has exercised its discretion – and the Court cannot substitute its decision for that of the 4th Respondent.

41. What, then, emerges here is that there is little factual disagreement about what happened: The Petitioners duly requested the 4th Respondent to exercise its discretion, through the Cabinet Secretary, as donated by section 25 of the National Museums and Heritage Act to declare Sigona House a protected building. If the 4th Respondent had obliged, it follows that this would have saved Sigona House from compulsory acquisition and would have forced the 2nd Respondent to change the design of NUTRIP A104 Road Expansion Project. However, the 4th Respondent says that it duly considered the request by

the Petitioners, performed its due diligence and made a decision that Sigona House did not satisfy the criterion for gazettement as a protected building under section 25 as requested. The 4th Respondent, then, duly communicated its decision and reasons therefore to both the Petitioners and the 2nd Respondent hence paving the way for the compulsory acquisition.

42. The Petitioners do not contest that the 4th Respondent, through the Cabinet Secretary, is clothed with the authority and discretion to make the determination under section 25 of the National Museums and Heritage Act. Neither do they contest that a decision was made under the section and reasons given for the decision. As I understand them, the Petitioners are arguing, instead, that:

> a. It was wrong for the 4th Respondent to reach conclusions on the merits of the suitability of gazetting Sigona House as a Protected Building without the participation of the Petitioners and the public in the process of decision-making.
>
> b. The reasons given for refusing to gazette Sigona House as a Protected Building are irrational or unreasonable.

43. In other words, the gist of the present claim is, at its core, a challenge to the administrative decision made by the 4th Respondent. It follows that the most appropriate cause of action comprehensible to our jurisprudence and judicial practice should have been to seek Judicial Review against that decision to refuse to so gazette Sigona House. However, since under Article 23 of the Constitution Judicial Review is one of the remedies that the Court can fashion in response to a suit alleging a violation of fundamental rights and since under Article 47 of the Constitution the fusion (at least to a certain extent) of the two traditional branches of constitutional petitions and judicial review is contemplated, I do not consider it fatal or consequential that the present action is presented as a Constitutional Petition. The polycentricity of the issues and parties probably recommends the constitutional petition as the more optimum vehicle anyway.

44. I will, therefore, now turn to the substance of the Petitioners' complaints under the present heading. In my view, there are three specific sub-issues to be determined hereunder:

> a. First, was the decision by the 4th Respondent refusing to recommend the gazettement of Sigona House as a Protected Building under section 25 of the National Museums and Heritage Act reviewable for failure to include the participation of the Petitioners and the public in reaching that decision?
>
> b. Second, is that decision, otherwise, substantively irrational and unreasonable?
>
> c. Third, if either (a) or (b) or both above are in the affirmative, can an order of *mandamus* issue to order the 4th Respondent to act otherwise?

45. It is important to begin with the established parameters of judicial review orders of *mandamus* in Kenya. These were set out by the Court of Appeal in ***Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996*** as follows:

> The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. ***Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in***

question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...

46. Here, as analysed above, none of the parties contest that it is the discretion of the 4th Respondent, through the Cabinet Secretary to gazette Sigona House. As our case law has established, a Court cannot order or direct a public authority that is clothed with authority and discretion to act in a particular way. The position was aptly captured by Justice Mumbi Ngugi in ***Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011***thus:

> [A] Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of ***Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223***…. [I]t would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body …. for the court to substitute its own view from that of the [public body] to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision …. by issuing a mandamus to compel [a particular action by a public body] …. it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies.

47. Hence, where a public authority has acted in exercise of its discretion, the Court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See ***Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.***

48. In the instant case, the Petitioners have not, in my view, placed any evidence before the Court to lead to the conclusion, on a balance of probabilities, that the 4th Respondent acted irrationally or unreasonably or abused its discretion in refusing to recommend to the Cabinet Secretary that Sigona House should be gazette as a Protected Building. However, the Petitioners expressed a suspicion that the Respondents acted in collusion with each other to influence the decision of the 4th Respondent. They, however, had no proof to demonstrate that suspicion. If they could prove this, the Court could conclude that the 4th Respondent had unduly fettered its discretion or acted improperly in the exercise of its discretion. I am, therefore, unable to hold that the 4th Respondent acted irrationally or unreasonably in its substantive decision to refuse to recommend the gazettement of Sigona House as a Protected Building.

49. It is also true, however, that our case law has now established that a public body clothed with public authority is required to exercise its authority and discretion according to the dictates of the Constitution and in a manner that brings to life the values and spirit of our Transformative Constitution. This is the penumbral meaning given to the interpretation of Articles 10 and 47 of our Constitution respecting the need for all State organs, State officers, public officers and all persons whenever they make or apply

policy decisions or exercise discretion or authority granted by law to be bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability.

50. Hence, the Supreme Court, in ***Communications Commission of Kenya & others v Royal Media Services and Others Sup. Ct. Petition Nos. 14, 14A, 14B and 14C of 2014 (CCK)*** the Supreme Court observed at paragraph 368 that:

> The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10.

51. And Justice G.V. Odunga in ***Republic v Council of Legal Education Ex-parte Nyabira Oguta [2016] eKLR***, phrased it thus:

> Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality.

52. Hence, it is now well established that all State organs, State officers, and public officers are required, whenever they make or apply policy decisions or exercise discretion or authority granted by law to be bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. The Petitioners here complain that the 4th Respondent failed to adhere to these Constitutional values by refusing to consult them, involve them or in any manner involve the public in its process and determination. The Petitioners argue that it was improper for the 4th Respondent to act unilaterally – and that this gives rise to the reasonable suspicion that they colluded with the other Respondents hence giving rise to the reasonable conclusion that they acted improperly. The Petitioners, therefore, say that the credibility of their suspicion is demonstrated by the fact that the 4th Respondent did not consult or in any other way involve either them or members of the public in its investigations, process of making findings and reaching a conclusion regarding the merit-worthiness of Sigona House to be declared a Protected Building.

53. The 4th Respondent's response to this, as I understand it, is that it is not obligated to consult with the Petitioners or anybody in making its determination. It further argues that it would be impractical for the 4th Respondent to consult everybody who makes a request to it for a building to be gazetted as a Protected Building or monument. The law gives it the discretion to make that decision in its own wisdom and expertise.

54. Whereas I agree that the 4th Respondent has the sole authority and discretion to do the research and investigations and make a determination on whether to recommend to the Cabinet Secretary to gazette a particular building under section 25 of the National Museums and Heritage Act, I am of the view that the 4th Respondent is obligated to exercise that discretion and authority in accordance with the principles and values of the Constitution outlined in Article 10 of the Constitution. I am not persuaded that it is impractical or that it leads to a fetter on its discretion for the 4th Respondent to go about its obligations under section 25 of the National Museums and Heritage Act in a manner that satisfies the values and principles of the Constitution including public participation, inclusiveness, transparency and accountability. The 4th Respondent can establish its own procedures and processes that are proportional to the context in which it operates but it cannot oust the operationalization of these Constitutional values and principles on the mere claim that they are impractical.

55. Having established that the 4th Respondent was bound to tailor its processes for determination under section 25 of the National Museums and Heritage Act so as to accord to the Principles and Values of the

Constitution under Article 10 including public participation, inclusiveness, transparency, and accountability and those in Article 47 including the need to give a party who will be affected by a decision an opportunity to be heard, I will next determine if the process used here met these Constitutional requirements.

56. Here, the 4th Respondent says it received a petition by the Petitioners dated 29/09/2015 requesting that the 4th Respondent gazette Sigona House as a Protected Building or monument. The 4th Respondent by sending a team of two of its staff members for a site visit on 26/01/2016. At the conclusion of the site visit and evaluation, the two staff members prepared a report in which it concluded that there was no justification for the gazettement of Sigona House as a Protected Building or National Monument.

57. By its very description of the process followed and by a perusal of the sparse report filed, it is obvious that there was no attempt whatsoever to involve the Petitioners or the public or other interested persons in the determination process. The Report, conclusion and recommendations are based solely on the site visit investigations, analysis and determinations by the two members of staff of the 4th Respondent who visited the site on 26/02/2016.

58. It is obvious that this process does not comport with the decision-making scheme that is now required of public bodies by the Principles and Values of our Transformative Constitution as enumerated above. The Petitioners are of the view that Sigona House has immense cultural and historical value to them and others. Its existence, the Petitioners feel, is important for them to fully enjoy their Article 44 rights to culture. It behooved the 4th Respondent to structure a process of policy making respecting its worthiness of protection as a building in a way that it would adhere to the Principles and Values of the Constitution – including, to the applicable extent, the hearing of the views of the Petitioners and any other members of the public who are affected and may have a view on the question. I do not find anything impractical in structuring such a process. It is not even demanded that the process would have taken more than the one day it took to conduct the site visit. Here, two staff members visited the site without even giving notice to the Petitioners that they will be visiting, made their observations and reached their conclusions without hearing any views at all from the Petitioners or any other affected parties.

59. Consequently, it is my finding that the process of determination whether to recommend Sigona House for gazettement as a Protected Building under section 25 of the National Museums and Heritage Act did not comport with the Principles and Values of the Constitution enumerated in Article 10 as read together with Article 47 of the Constitution.

60. What, then, are the implications of this finding? I agree with Counsel for the 4th Respondent that the Court cannot substitute its decision for that of the 4th Respondent. Indeed, the Court does not have the technical competence or the relevant information to make that determination. All the Court can do is to order the 4th Respondent to remake the decision following a process that comports with the Principles and Values of the Constitution. At a minimum, that process must include a structured process that records and takes into consideration the views of the Petitioners and all other stakeholders. In view of the fact that the claimed right here is right to culture which is collectively enjoyed, the process must include a vehicle to consider views of members of the public.

61. To be clear, there is no guarantee or requirement that the 4th Respondent will reach a different conclusion. The ultimate decision still rests on the 4th Respondent as the body clothed with the authority and discretion to make it.

This decision only respects the process through which that decision is made. Indeed, the very essence of the principles of public participation, inclusiveness, transparency and accountability is that a decision cannot be prejudged and an inclusive process may change the quality and outcome of a decision.

62. It goes without saying that if the 4th Respondent confirms its decision, after following due process, that Sigona House does not fit the criterion for gazettement, there will be no need to interfere with the compulsory land acquisition. Conversely, if the 4th Respondent recommends Sigona House for gazettement as a Protected Building, it follows that the land will be unavailable for compulsory

acquisition.

C.5 ARE THE PETITIONERS OTHERWISE ENTITLED TO ORDERS TO VARY THE DESIGN OF NUTRIP A104 ROAD EXPANSION?

63. The last issue the Court needs to deal with is whether, apart from the *per se* question of the potential status of Sigona House as a Protected Building, the Petitioners are entitled to orders directing the 2nd Respondent to reconsider the route and design chosen for NUTRIP A104 Road Expansion Project.

64. The Petitioners have claimed that the road design is irrational in the sense that, as designed, the 2nd Respondent will be forced to demolish not only Sigona House but also other ancient or historical sites – including a historical Pastoral Centre (PCEA Pastoral Institute formerly known as Zambezi Motel), a historical church (built jointly by the ACK and PCEA churches) and two historical petrol stations (formerly Mobil and Esso Petrol Stations). The Petitioners also claim that the present road design is less safe because it the Zambezi Underpass and pedestrian crossing are mis-located and they cause a lot of accidents. Lastly, the Petitioners claim that the road design is irrational because it avoids an obvious route which would have utilised land for road reserves which was already paid for by the 2nd Respondent way back in 1988. The Petitioners suspect that there is undue influence on the part of a Mr. Muchane who allegedly works for the World Bank which is financing the Road Expansion. The Petitioners claim that the 2nd Respondent had already acquired and paid for land belonging to Mr. Muchane's father in 1988 and it would be far more economical and rational for the new road design to utilise the land so acquired. The Petitioners are persuaded that the road design that will necessitate the demolition of Sigona House was arrived at due to the irrelevant considerations of needing to preserve Mr. Muchane's parcel of land. The Petitioners, therefore, pray for a Court order directing the 2nd Respondent to vary the Road Design to avoid the ancient sites and historical buildings.

65. The analysis above (on gazettement of Sigona House as a Protected Building discussed under heading C.4) indicates when a Court can interfere with a decision of public body which is clothed with the authority and discretion to make a certain decision. The bottom line is that the Court is quite deferential and will only interfere in exceptional circumstances. Even where it does, it will never substitute its decision for that of the technocratic body charged with the authority and function to make the decision. All the Court will do is direct that the public body makes a decision in accordance with the law where breach thereof has been demonstrated. The Court has so directed the 4th Respondent with respect to the gazettement of Sigona House as a Protected Building.

66. The finding and holding respecting the gazettement of Sigona House is based on an analysis of the materials placed before the Court which led to the ineluctable conclusion that the 4th Respondent did not act in consonance with the Principles and Values of the Constitution. However, while the Petitioners have made grave allegations regarding the design and route of NUTRIP A104 Road Expansion Project, they have not placed sufficient evidence to prove that the 2nd Respondent was actuated by irrelevant considerations in the design of NUTRIP A104 Road Expansion Project as claimed. Indeed, the Court concludes that Petitioners' claims in this regard have not been established on a balance of probabilities for the following reasons:

a. First, none of the sites and buildings that the Petitioners say are ancient and are, therefore cultural heritage, have been so declared by the relevant statutory authority to wit the 4th Respondent. Indeed, there has been no known attempt to have them so declared other than the Petitioners' attempts to have Sigona House so declared. The argument, then, that the road design ought to be changed owing to these other buildings being of historic value is unavailing. The Petitioners have not placed any materials before the Court to demonstrate that there are active proceedings or actions under way to declare these other sites as cultural monuments or Protected Buildings.

b. Second, there is no indication that the registered owners of these other sites which the Petitioners want to be preserved want them to be so preserved. The cultural rights of the Petitioners respecting these other sites is much more attenuated as is the apparent argument of the historic value of these other sites.

c. Third, no evidence other than the say-so of the Petitioners that the present design is unsafe and leads to more accidents than would happen if the design was changed. It is important to recall that the authority to determine the safety and economy of road designs resides in the 2nd Respondent. The Courts would not normally second-guess decisions made pursuant to the lawful exercise of that discretion or authority. To put the matter starkly, the Petitioners are asking the Court to substitute the 2nd opinions on road safety of the agency that has the expertise and authority to make those decisions with the Petitioners' opinions on the same.

d. Fourth, no evidence that the 2nd Respondent already has acquired alternative land for the road expansion was placed before the Court as proxy for the argument that the 2nd Respondent had ulterior motives in settling on the current design of NUTRIP A104 Road Expansion Project. Without this evidence, the Petitioner is merely asking the Court to proceed on a leap of faith.

67. It is important to say that the 2nd Respondent is not susceptible to the arguments of flawed process in making its decision on the design of NUTRIP A104 Road Expansion Project that the 4th Respondent is guilty of (with respect to the decision not to recommend Sigona House for gazettement). In the case of the 2nd Respondent, it is clear that it took deliberate steps to consult and involve all the stakeholders before settling on the Road Design. In particular, it emerged from the Court documents that the 2nd Respondents took the following steps:

a. It arranged for its consultant, Eser Consultant, to visit the site and meet with the management of OSEL.

b. Its officers had meetings and consultations with the 4th Respondent respecting the status of Sigona House as a Protected Building.

c. The 2nd Respondent organized for a public forum on 23/06/2015 to discuss with members of the public the NUTRIP A104 Road Expansion Design and heard views from the members of the public.

d. Upon receiving a petition from the Petitioners regarding the Road Design, the 2nd Respondent invited the Petitioners for a meeting on 13/11/2015 at their office in Nairobi and engaged them about the Road Design.

68. Given these undisputed facts, it is not possible to conclude that the 2nd Respondent failed to invite the participation of the public or the Petitioners in NUTRIP A104 Road Expansion Project. It is important to clarify that the 2nd Respondent is not obligated to accept the views of the Petitioners or any other stakeholders respecting the Road Expansion Design. The ultimate discretion resides in the 2nd Respondent and only it can make the final decision after considering all views received. Its obligation is to listen to the views of the Petitioners and the other stakeholders – not to adhere to them. Once the process is above reproach, the Petitioners can only challenge the substantive decision upon showing of one of the eight reasons enumerated above in paragraph 47. As I have found above, however, the Petitioners have not placed sufficient evidence before the Court to lead to a finding that any of those reasons have been found.

69.Consequently, I find and hold that the Petitioners have not demonstrated to the Court, to the required standard of proof that the 2nd Respondent acted improperly or failed to follow due process to a degree necessitating a finding that NUTRIP A104 Road Expansion Project Design violated the Constitutional rights of the Petitioners and should, therefore, be remedied. The 2nd Respondent, as the body clothed with mandate to manage, develop, rehabilitate and maintain national roads had the authority and discretion to design NUTRIP A104 Road Expansion Project and without a showing of anything procedurally or substantively improper in that design, the Court will not interfere with the exercise of that authority and discretion. The Petitioners' claim in this regard is, therefore, dismissed.

D. <u>FINAL ORDERS AND DISPOSITION</u>

70. In the end, therefore, the consequential findings and orders of the Court are as follows:

a. The Petitioners have standing to bring the present suit.

b. At least two of the five claims (as analysed above) were sufficiently specific to pass muster to proceed for full adjudication by the Court under the judicial doctrines developed in our jurisprudence.

c. The 4th Respondent (The National Museums of Kenya) failed to structure a process which would ensure that the Principles and Values of the Constitution including Public Participation, inclusiveness, and fair hearing as enumerated in this decision were taken into consideration in its decision to decline to recommend to the Cabinet Secretary to gazette Sigona House as a Protected Building under section 25 of the National Museums and Heritage Act. As such, the decision arrived at by the 4th Respondent in this regard is, to that extent, invalidated.

d. Following (c) above, the 4th Respondent (the National Museums of Kenya) is hereby required to, within thirty (30) days of today, structure a process which will hear and consider the views of the Petitioners, other stakeholders and the public regarding the status of Sigona House as a cultural heritage and whether it meets the criterion for gazettement as a Protected House under section 25 of the National Museums and Heritage Act. At a minimum, that process must include a structured process for receiving the views of the Petitioners and other stakeholders. The 4th Respondent must, then, communicate its final decision and the reasons therefore to the Petitioners and any other interested parties.

e. Other than the above tailored orders, all the other prayers requested in the Amended Petition dated 21/09/2016 are hereby dismissed.

f. Given the analysis above, it is my finding that these proceedings were brought in the public interest and in good faith. As such, I make no order as to costs. Each party will bear its own costs.

71. Those shall be the orders of the Court.

Dated and delivered at Kiambu this 9th day of January, 2017.

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JOEL NGUGI

JUDGE