



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC PETITION NO.3 OF 2019

IN THE MATTER ARTICLES 10, 22, 23, 162(2) AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND CONTRAVENTION OF FUNDAMENTAL

RIGHTS AND FREEDOMS UNDER ARTICLES 10, 40, 47 AND 50(1) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF LANDS ACT CAP 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT 2012

AND

IN THE MATTER OF THE THREATENED EVICTION AND TRESPASS BY THE RESPONDENTS, OF THE PETITIONER'S PROPERTY AND ITS TENANTS' BUSINESSES ON L.R.NO.12503 NANYUKI

BETWEEN

BRAEBURN SCHOOLS LIMITED.....PETITIONER

VERSUS

COUNTY COMMISSIONER, LAIKIPIA COUNTY.....1st RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

INDUSTRY, TRADE AND CO-OPERATIVES.....2nd RESPONDENT

THE CABINET SECRETARY, MINING OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....3rd RESPONDENT

INSPECTOR GENERAL OF POLICE.....4th RESPONDENT

NATIONAL LAND COMMISSION.....5th RESPONDENT

ATTORNEY GENERAL.....6th RESPONDENT

JUDGEMENT

1. On the 7th August 2019 the Petitioner herein filed a Notice of Motion under a Certificate of Urgency dated an equal date to which they sought interim injunctive orders against the Respondents herein.
2. On the 8th August 2019, the Court having considered the contents of the said Application, certified the same as urgent thereby issuing interim orders restraining the Respondents from interfering with the subject suit No. LR No 12503 situate within Nanyuki Township, pending the hearing and determination of the Application inter-parties.
3. While awaiting the hearing of motion, and pursuant to the filing of responses to the Motion, the Petitioners filed yet another Application dated the 10th September 2019 seeking to have contempt proceedings against the 1st and 4th Respondents for being in contempt of the orders issued on the 8th August 2019.
4. The Court then directed that the Application for contempt of Court orders be heard in the first instance on the 17th October 2019 on which day both Counsel for the Petitioner and the State Counsel for the 1st, 2nd, 3rd, 4th and 6th Respondents, in the absence of Counsel for the 5th Respondent, had informed that Court that parties had reached a consent which had compromised both the Applications dated 7th August 2019 and 10th September 2019. They thus sought for the consent dated the 17th October 2019 to be adopted as the order of the Court and for a mention date to confirm compliance. The Court obliged them.
5. On the 20th February 2020 when the matter came up for mention, neither of the Respondents had filed their responses to the petition where the State Counsel sought for leave of 21 days to enable him receive further instructions and/or documents to enable them file their comprehensive response thereto. The Court granted the Respondents leave of 21 days to file their responses with a rider that should the 21 days lapse without the Respondents filing their responses, the petition would be deemed as unopposed wherein the Petitioners would be at liberty to file their written submissions to the Petition. The matter was scheduled for a further mention date to confirm compliance.
6. Come the 13th May 2020, the Respondents had yet to comply with the orders of the Court to file their responses to the petition to which the Court directed the Petitioners to file their written submissions and gave the 4th of June 2020 as a mention date to confirm compliance.
7. The Petitioners complied and filed their written submissions on the 4th June 2020 and as at the time I write this judgment, the Respondents, despite service, have neither filed their respective responses nor their written submissions to the petition.
8. The Petition before me is challenging the Constitutional validity of the action of the 1st Respondent and its agents who on acting on the directions and sanction of the 2nd, 3rd and 4th Respondents, invaded and evicted them together with their tenants from their property being LR No 12503 situate within Nanyuki Township, without any reason or Notice whatsoever. That the said action by the 1st, 2nd, 3rd and 4th Respondents which transpired on the 23rd July 2019, had violated the Petitioner's Constitutional rights which is protected under Articles 40, 47, 50(1) and 68(v) of the Constitution
9. It was for the aforesaid reason that the Petitioners in their Petition filed in Court on the 7th August, 2019 sought the following reliefs:
 - i) Conservatory and declaratory orders in form of a permanent injunction restraining the Respondents and any other public officer(s) acting on their instructions and of the Government of Kenya as a whole, from entering, breaking, demolishing, destroying, evicting, defacing, flattening or in any way interfering with the buildings, developments and all amenities or the smooth operation and running of and the peaceful possession of the Petitioner's property on L.R. No. 12503 Nanyuki.
 - ii) A declaration that the 1st, 2nd, 3rd and 4th Respondents' actions and their agents of invading the Petitioner's property L.R. No. 12503 Nanyuki on the 23/07/2019, violates the rights of the Petitioner and that the Respondent's actions and threatened actions are unconstitutional, invalid and an abuse of the mandate, power and due process entrusted to the Respondents and the Government under the Constitution.
 - iii) A declaration that the entry and trespass of the Petitioner's property in unlawful, unconstitutional and violates the Constitutional freedoms of the Petitioner.
 - iv) A declaration that the eviction of the Petitioner and its tenants from L.R. No. 12503 Nanyuki constitutes a violation of the Petitioner's Constitutional rights to the use and occupation of the property and the freedom from arbitrary loss of property or of peaceful occupation.
 - v) A declaration that the eviction of the Petitioner from L.R. No. 12503 Nanyuki by the Respondents constitutes a violation of the Petitioner's Constitutional rights to fair administrative action and further to a fair hearing prior to the making of any decision against the Petitioner.
 - vi) General damages for disturbance, trespass, loss of rent and income resulting from the threatened eviction and disruption on the Petitioner's property L.R. No. 12503 Nanyuki.
 - vii) A conservatory order restraining, prohibiting and restricting the Respondents and any other persons acting on their behalf from interfering with the Petitioner's title and ownership and peaceful possession over L.R. No. 12503 Nanyuki.
 - viii) Costs and incidental to the petition herein.
10. The Petition is unopposed as the Respondents have not filed their Replying Affidavit.

Petitioner's submission.

11. The Petitioners' submission is that it is the lawful and registered owner of all that parcel of land known as No. LR No 12503 situate within Nanyuki Township since the 28th September 2009, having purchased the same from Kenya Fiber Corporation (in receivership) for a valuable consideration of Ksh 40,000,000/=

12. That Kenya Fiber Corporation (in receivership) had placed an advertisement in the dailies inviting bids for the purchase of the industrial complex in Nanyuki wherein on the 15th May 2009, the Petitioner through its sister company Riaraview Development Company Limited tendered an offer to purchase the complex at the amount of Ksh. 40,000,000/=.

13. An acceptance of offer had been communicated by Kenya Fiber Corporation (in receivership) to Riaraview Development Company Limited on 20th May 2009 where the company was to deposit 10% of the sale price in the name of IDB Capital Limited.

14. That vide a letter dated 10th and June 2009 Riaraview Development Company Limited not only enclosed a check of four million shillings (4,000,000/=) being the deposit but also advised the Receiver Manager that the subsequent paperwork should be in the name of Braeburn Schools Limited, the Petitioner herein. The balance of Ksh 36,141,018/= was to be paid by the Petitioner on the 18th and September 2009.

15. That from the date of transfer of the suit property on the 28th September 2009 to the 23rd to July 2009, the Petitioner had enjoyed quiet possession and had dutifully paid the land rates and rent over the suit property wherein it had also leased part of the premises to Messer DIP Station Limited, Auto and Industrial Holdings Limited, Ecofuels Kenya Limited, Atlas Eco Construction Limited and Mugumo Works to carry and conduct lawful business within the premises.

16. That on the 23rd July 2019, the 1st Respondent without any color of right or notice invaded the Petitioner's suit property and evicted it together with its tenants without availing any reason whatsoever. It is the Petitioner's submission that the actions of the 1st Respondent and its agents was ordered, sanctioned and/or authorized with the knowledge of the 2nd, 3rd and 4th Respondents.

17. That the action of the Respondents in invading the suit property on 23rd July 2019 was in contravention of Articles 47 and 50(1) of the Constitution and fair administrative action for reasons that;

- i. The Petitioner was not granted any formal notice prior to the illegal invasion of 23rd July 2019
- ii. The Petitioner is to date not aware why the 1st Respondent invaded the private property belonging to the Petitioner
- iii. There was no hearing that was accorded by the Respondents prior to invading the suit property on the 23rd July 2019.
- iv. That the whimsical actions of descending on the suit property after 1700 hours was a clear indication of bad faith and malice.
- v. That the Petitioner was not accorded any opportunity to make representations to the Respondents prior to the illegal actions of the 23rd July 2019.

18. The Petitioner's submission was that the Respondents were also in violation of its rights under Article 40 and Article 60(v) of the Constitution while reneging their fettered powers as envisioned by Article 10 of the Constitution. It was their submission that the Respondents did not have any right to invade the suit property on the 23rd July 2019.

19. That the consent recorded by that parties on the 17th October 2019, was confirmation that indeed there had been trespass/invasion of the suit property from the 23rd July 2019 to 17th October 2019 wherein after the recording of the consent, the contingent of police officers had left the suit properties.

20. The Petitioner framed their issues for the determination as follows;

- i. Whether the Respondents invaded and had trespassed on the Petitioners' parcel of land known as No. LR No 12503 Nanyuki on the 23rd July 2019.
- ii. Whether there was any justiciable reason for the Respondents' invasion on 23rd July 2019
- iii. Whether the due process was followed by the Respondents prior to the entry of land known as No. LR No 12503 Nanyuki on 23rd July 2019
- iv. Whether the Petitioners are entitled to reliefs tabulated in the petition.

21. The Petitioner submitted that failure by the Respondents to file any response to the petition dated the 7th August 2019 would be construed to mean that the facts as set out in the petition were uncontroverted.

22. That in the absence of any evidence led by the Respondents, the Petitioners had a good title to No. LR No 12503 Nanyuki. The submission was buttressed by the persuasive decision in the case of Milka Muthoni Wagoco vs County Council of Kirinyaga & 2 Others [2017] eKLR.

23. That their titles to No. LR No 12503 (IR No. 1160730) Nanyuki which had been annexed to their petition was protected by virtue of section 26(1) (a) & (b) of the Land Registration Act and no evidence had been led before the Court to prove that the same was a forgery or had been acquired illegally and un-procedurally or through a corrupt scheme. The Petitioners relied on the decided case in David Mawura

Mawngi vs County Government of Kiambu & Another [2019] eKLR which had cited the case of Kiplangat Shelisheli Mutarakwa vs Joseph Rotich Kones [2018] eKLR.

24. That the provisions of Articles 40(1) of the Constitution were clear and therefore their right to own property under the said provision of the Constitution had been infringed by the Respondents during their illegal invasion and trespass by a contingent of police officers on their property on 23rd July 2019 and which trespass continued for a period of (3) three months up to when the consent was recorded on 17th October 2019.

25. The Petitioners further submitted that their right to fair administrative action as enshrined under Articles 47 and 50 of the Constitution as well as Section 4(3) of the Administrative Actions Act had been deliberately disregarded by the Respondents when they had arbitrary and whimsically stormed into their parcel of land and stationing a contingent of police officers in disregard to due process.

26. That the Petitioner had neither been served with any notice, accorded any opportunity to be heard and make its representations or given any reason for the arbitrary action before the said invasion by the Respondents. Reliance was placed on the decided case of Peter Okenagwa Oyaro vs National Land Commission & Another [2019] eKLR.

27. The Petitioners also sought that since they had good title which had not been impugned by the Respondents and since they were a bona fide purchaser for value without any notice of fraud or illegality of the suit land, that the Court do protect them. They relied on the case in Elizabeth Wambui Githinji & 29 Others v Kenya urban roads authority & 4 Others [2019] eKLR.

28. That as bona fide purchasers, according to the Ugandan case in Katende vs Haridar & Company Limited [2008] 2 EA 173, they had proved that they were innocent purchaser and had acquired properties for value and without notice and that the 1st, 2nd, 3rd and 4th Respondents, while carrying out their illegal actions of trespass on their property on the 23rd of July 2019, acted in excess of their Constitutional mandate as expected under Article 10 of the Constitution.

29. The Petitioner sought for the reliefs as prayed in their petition

Analyses and determination

30. I have anxiously considered the content of the Petitioner's Petition as well as the supporting affidavit, and written submission, and the relevant provisions of the law and authorities herein cited. It must be remembered that as at the time I retire to write this Judgment, the Respondents are yet to file their response to the petition. I find the issues arising for determination are as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether any of the Petitioners' Constitutional rights had been infringed.
- iii. Whether the Petitioner is entitled to the orders sought in the Petition.

31. From the pleadings and documents filed in this suit, it is clear that the Petitioner is challenging the Constitutional validity of the action of the 1st Respondent and its agents who on acting on the directions and sanction of the 2nd, 3rd and 4th Respondents and without any reason or notice whatsoever had invaded and evicted them together with their tenants from their property being LR No 12503 situate within Nanyuki Township.

32. The Petitioners' submission is that Kenya Fiber Corporation (in receivership) had placed an advertisement in the dailies inviting bids for the purchase of an industrial complex in Nanyuki wherein on the 15th May 2009, the Petitioner through its sister company Riaraview Development Company Limited tendered an offer to purchase the complex and the amount of Ksh. 40,000,000/=. An acceptance of offer had been communicated by Kenya Fiber Corporation (in receivership) to Riaraview Development Company Limited on 20th May 2009 where the Company was also deposited 10% of the sale price in the name of IDB Capital Limited.

33. That vide a letter dated 10th June 2009 Riaraview Development Company Limited not only enclosed a check of four million shillings (4,000,000/=) being the deposit but also advised the Receiver Manager that the subsequent paperwork should be in the name of Braeburn Schools Limited, the Petitioner herein. The balance of Ksh 36,141,018/= was then paid by the Petitioner on the 18th and September 2009. On the 28 September 2009, the Petitioner became the lawful and registered owner of the suit parcel of land known as No. LR No 12503 situate within Nanyuki Township having purchased the same from Kenya Fiber Corporation (in receivership) for of a valuable consideration of Ksh 40,000,000/=

34. That from the date of transfer of the suit property on the 28th September 2009 to the 23rd to July 2009 the Petitioner had enjoyed quiet possession and had dutifully paid the land rates and rent over the suit property wherein it had also leased part of the premises to Messer DIP Station Limited, Auto and Industrial Holdings Limited, Ecofuels Kenya Limited, Atlas Eco Construction Limited and Mugumo Works, to carry and conduct their lawful business within the premises.

35. On the evening of the 23rd July 2019, the 1st Respondent and its agents who were acting on the directions and sanction of the 2nd, 3rd and 4th Respondents, invaded and evicted the Petitioner together with their tenants from the suit property without any color of right, reason, or notice whatsoever.

36. The Petitioner contends that the acts by the Respondents in the circumstances were unlawful, unjust and in contravention of its Constitutional rights as enshrined under Articles **40, 47, and 50** of the Constitution.

37. Fundamental rights and freedoms are specifically set out in Chapter Four of the Constitution which rights and freedoms are individually identifiable and defined from Article 26 to 51 of the Constitution.

38. I must hasten to point out that it is for the Petitioner to prove on a balance of probabilities that its fundamental freedoms and rights as protected by or under the Constitution have been violated by not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272 where it was held, in the words of the Justices Trevelyan and Hancox 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.

39. From the above captioned Petition, the Petitioner has alleged, by setting out with a reasonable degree of precision that its Constitutional rights envisaged under Articles 40, 47 and 50 (1) of the Constitution had been violated by the 1st 2nd 3rd and 4th Respondents herein. For ease of reference, I shall set out the said provisions of the law as;

40. Article 40 of the Constitution provides a follows;

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) 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—

requires prompt payment in full, of just compensation to the person; and

allows any person who has an interest in, or right over, that property a right of access to a Court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

41. From the pleadings and documents filed in this suit, facts which were uncontroverted, it is clear that pursuant to an advertisement for sale by Kenya Fiber Corporation (in receivership), the Petitioner through its sister company Riaraview Development company limited purchased the complex/suit property for Ksh 40,000,000/= wherein they had subsequently procured a good title to it and which title has not been impugned by the Respondents.

42. That since they were bona fide purchasers for value without any notice of fraud or illegality, the 1st 2nd 3rd and 4th Respondents' illegal invasion and trespass on their property on 23rd July 2019, which trespass continued for a period of (3) three months and in the process evicted them together with their tenants from their property being LR No 12503, constituted the deprivation of their right to own property contrary to Article 40 of the Constitution.

43. Indeed the consent that had been entered into by the parties on the 17th October 2019 to the effect that, *the Respondents do forthwith from the date of the consent order withdrawal of the contingent of police officers stationed on LR No 12503 registered in the name of the Petitioner herein*, had been proof enough that there had been trespass on the Petitioner's parcel of land by the Respondents.

44. The thrust of **Article 40** is to protect proprietary rights under the law. Such rights are governed by statutes and in this case section 26(1) (a) & (b) of the Land Registration Act. The Petitioner's case is grounded on the fact that it has an absolute and indefeasible title under the land *Registration Act* that it is capable of being protected under **Article 40** and that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law see the Court of Appeal decision in Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 Others [1997] eKLR.

45. **The Article 40(3) of the Constitution** provides the terms under which the land can be compulsorily acquired by the State but the requirement of due process is underpinned by several provisions of the Constitution for example in **Article 40(2) (a)** which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description.

46. Article 47 of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

47. Article 50 of the Constitution provides that:

(1) Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

48. Section 4 of the Fair Administrative Actions Act provides that:

Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing

49. The Petitioner's further grievance was that the Respondents herein had violated their right in respect to **Article 47 and 50** of the Constitution as well as **section 4** of the Fair Administrative Actions Act. **Article 47(1)** of the Constitution provides every person with the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 50(1)** grants every person the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court , or if appropriate,

another independent and impartial tribunal or body. **Section 4** of the Fair Administrative Actions Act resonates with **Article 47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

50. In the case in *Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others* [2013]eKLR the Court held that:

‘Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.’

51. From the reading of the provisions of the law as well as the above captioned holding of the Court, it is clear that even where property is said to have been illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the Petitioner from enjoying the incidents of ownership of the land.

52. If the Respondents had a claim over the suit land, which claim the Court has not been furnished with, there having been no response to the Petition filed, then they owed the Petitioners the right to be heard by the issuance of notice and sufficient information to enable them prepare and/or present their case. The Petitioners ought to have been furnished, in good time, with information, including reports and documents in possession of the Respondents to enable them prepare and/or act appropriately to defend their title to the suit property. The Petitioners herein have raised issue that having been the bonafide purchasers for value for the suit land, they had not been heard before the adverse action and decision of the Respondents storming into their parcel of land, evicting them and their tenants from therein, before stationing a contingent of police officers for 3 months on their land in disregard to due process.

53. The provision of section 24(a) and 25(1) of the Land Registration Act No. 3 of 2012 outlines the interests and rights of a registered proprietor as follows;

Section 24(a) provides that:

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

Section 25(1) provides that;

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

54. The law is very clear on the position of a holder of a title deed in respect of land. **Section 26(1)** of the **Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible ownerand the title of that proprietor shall not be subject to challenge...”

55. These provisions empowered the Petitioner, by virtue of being registered as the owner of the suit land, with vested rights and privileges therein and which no person could interfere with unless it had been shown that the said title was procured on the grounds of fraud or misrepresentation.

56. No such evidence was brought before the Court as there was no response had been filed by the Respondents. The Petitioner’s evidence therefore remained uncontroverted to which effect I find that the Respondents herein did trespass on the Petitioner’s suit land on the 23rd July 2019 and that the Petitioner herein is entitled to damages.

57. **Section 3 (1) of the Trespass Act**, provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

58. In the case of **Philip Ayaya Aluchio v Crispinus Ngayo** [2014]eKLR the Court held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No.

App. 1999).

59. The Petitioner he has not adduced any evidence as to the value of their property after the trespass which makes it difficult to assess the general damages however in the case of **Mikidadi –vs- Khaigan and Another [2004] eKLR 496** the Court held that:

“Exemplary damages are only to be awarded in limited instances namely. (a) oppressive, arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

60. Indeed, I find that there having not been any evidence adduced to show that the Title Deed for the suit land herein was procured by the Petitioner fraudulently, or by misrepresentative or through a corrupt scheme, I find that scales of justice tilt towards a finding in favour of the Petitioner and allow the petition as prayed In addition and taking into consideration that the Respondents’ trespass on the Petitioner’s suit land constituted an *oppressive arbitrary and unconstitutional action by servants of Government I award the Petitioner damages of one million (Ksh 1,000,000/=) as prayed.*

61. *Cost at a lower scale since the petition was undefended.*

It is so ordered.

Dated and delivered at Nyeri this 23rd day of July 2020

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE