



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.83 OF 2012**

**BETWEEN**

**PATRICK THOITHI KANYUIRA.....PETITIONER**

**AND**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The dispute herein arose from the decision by the Respondent contained in the letter dated 30<sup>th</sup> September 2008 directing the Petitioner to cease all construction of a building on all that property known as Nairobi L.R No. 209/11444 (*hereinafter* "the suit premises") and to immediately remove the buildings and structures thereon. Being aggrieved by that decision, the Petitioner instituted Judicial Review proceedings being moved to the High Court in Nairobi Misc Application No.86 of 2009, Republic v Managing Director, Kenya Airports Authority ex parte Patrick Thoithi Kanyuira (*hereinafter referred to as "the Judicial Review proceedings"*) seeking orders of certiorari and prohibition directed at the Respondent. In a Judgment delivered on 14<sup>th</sup> October 2010, the Court found that the said notice was proper and was issued within the powers of the Managing Director Kenya Airports Authority and so it dismissed the Judicial Review Application.

2. Following the above dismissal, the Petitioner filed ELC No.98 of 2011, Patrick Thoithi Kanyuira v The Managing Director Kenya Airports Authority seeking *inter-alia* declaratory orders to prevent the Respondent from demolishing the structures erected on the suit premises and a mandatory injunction to compel the Respondent to compensate the Petitioner for damages allegedly suffered. Before the suit could be heard and determined however, the Petitioner withdrew it and then filed the instant Petition.

3. I must state at the outset that there is no dispute that the Petitioner, Patrick Thoithi Kanyuira, is the registered proprietor of the suit premises and had started construction of housing units for residential use over the suit premises. He has allegedly expended a substantial amount of money (over Kshs.50,000,000/-) for that construction and he has claimed that he obtained that money through a credit facility from Savings and Loan Limited secured through a legal charge over the suit premises.

4. In making the demand contained in the letter of 30<sup>th</sup> September 2008, the Respondent claimed that it was during so in exercise of its powers under the **Kenya Airports Authority Act**, and so it ordered the Petitioner to stop any further construction and/or development of any manner upon the suit premises and

to demolish the buildings already erected thereon.

5. The Petitioner has now filed this Petition claiming that the Respondent has failed to compensate him for the losses he has suffered as a result of the said notice and demand made on 30<sup>th</sup> September 2008. He further claims that he has effectively being prevented from completing the construction and the actions of the Respondent thereby constitute a breach of his constitutional rights to property under **Article 40** of the **Constitution** He also claims that his right to fair administrative action under **Article 47** of the **Constitution** has also been violated and in his Petition dated 16<sup>th</sup> March 2012 he seeks declaratory orders and damages for loss he has allegedly suffered as a result of the Respondent's Notice. He specifically seeks the following orders;

***“(a) A declaration that the Respondent’s notice and order made on the 30<sup>th</sup> September 2008 constitutes breach of the Petitioners constitutional rights as more particularly set out at paragraph 11 of this Petition.***

***(b) A declaration that pursuant to the Respondent’s notice and order of the 30<sup>th</sup> September 2008 directed to the Plaintiff in respect to the developments made on the suit property, L.R No.209/11444 , the Respondent should compensate the Plaintiff for the loss and damages sustained as a consequence thereof.***

***(c) An order for compensation by the Respondent for loss and damages sustained in the sum of Kshs.992,336,004/-***

***(d) General damages.***

***(e) Costs of the Petition.”***

#### **The Petitioner’s Evidence**

6. In support of his case the Petitioner called five witnesses who testified on his behalf as follows;;

7. (PW1) Consolata Muthoni Muchogu, a Valuer by profession, produced a valuation report P Exhibit 1 on the property as at 8<sup>th</sup> February 2012 and which report states that the value of the suit premises as at that date was Kshs.214,614,047/-. PW2, Titus Mwangi Macharia, a registered Quantity Surveyor produced The of Quantities marked as P Exhibit 2 giving the value of the structures erected on the suit premises. PW3, Joseph Nambade, an Auditor, produced a written report and marked as P Exhibit 3 on the claim for loss of future earnings in the sum of Kshs.727,721,957/-. PW4, Shem Muraguri Macharia, an Architect, testified that the developments proposed to be made on the suit premises comprised 24 housing units for disposal by way of sale. PW 5 was the Petitioner who testified that he bought the suit premises in 2007 for development of residential houses and that he has obtained the Nairobi City Council and National Environmental Management Authority’s (NEMA) authority before he could start the construction but failed to obtain the approvals of the Respondent. PW 6, Christopher Kitonga, an employee at the Ministry of Lands and of the Physical Planning Department testified that the photocopy of Development plan produced in evidence had no legend indicating that it had emanated from the Department of Physical Planning. He instead produced in evidence the Master Plan as P Exhibit 16(a) and (b) relating to Nairobi South area and which shows that the area is meant for residential plots.

#### **The Petitioner’s Submissions**

8. The Petitioner filed written submissions dated 24<sup>th</sup> September 2012, 31<sup>st</sup> March 2014, 30<sup>th</sup> April 2014, 6<sup>th</sup> June 2014 and 18<sup>th</sup> May 2012. He also filed authorities to support his case. Mr. Muite Learned Senior Counsel for the Petitioner in his opening statement stated said that the suit premises have never belonged to the Respondent nor has it ever been set aside for public purposes and it has always been a residential property. He also claimed that the Respondent was in the process of expanding Wilson Airport from a Class B to a Class C Airport and that its runway which was 300 meters was being expanded to 510 meters

to include the suit premises. That by so doing, the Respondent ought to pay compensation to the Petitioner for the apparent acquisition of his property.

9. The Petitioner contended further that the suit premises are situated about 460m from the Wilson Airport which is a category 2B Airport and which requires a runway protection zone of 360m. He states that since the Respondent had proposed to upgrade Wilson Airport to a category 2C Airport which requires a runway protection zone of 570m and at the time of making the said decision his developments on the suit premises were ongoing, then he was entitled to compensation as the decision constituted deprivation of his property rights and interests in the suit premises.

10. He claimed that appropriation for purposes of compensation does not invariably imply possession or occupation by the State, State Organ or private person but it constitutes any actions that defeat the exercise of the rights and interests that an owner has over a subject parcel of land. Such appropriation he argued, arises when the State or concerned State Organ prevents the registered/beneficial owner from accessing or utilizing the subject property. He thus claims that to the extent that the Respondent's action prevents him from fully developing the suit premises and prohibits him from deriving any benefit from it, then he is entitled to adequate compensation. He indeed claims that the Respondent had effectively converted the Respondent's land into a runway which had enabled it to be elevated into a category 2C airport and in that regard he relies on the case of **Halal Meat Products Ltd v Attorney General (2005) e KLR** where the Court held *inter alia* that the actions of placing the suit land under the care of security forces constituted appropriation thus liable to pay compensation.

11. He submitted further that the right to develop the suit premises is a right over the land that he was effectively deprived of by the Respondent and relies on the cases of **Sound Equipment Ltd v Registrar of Titles & Another (2004) e KLR** and **Kuria Greens Limited v Registrar of Titles & Another (2011) e KLR** where it was held that the Court must protect the citizens from unlawful acquisition of their property by the State.

12. He further submitted that **Section 13(1)** of the **Kenya Airports Authority Act, Cap.395 Laws of Kenya** anticipates and provides for compensation where land is required by the Authority for its purposes and more so where such land is private land. He thus claimed that since the Respondent has appropriated his land for the purpose of upgrading and expanding the Wilson Airport then he is lawfully entitled to compensation.

13. It was also his position that **Section 15(3)** of the **Kenya Airports Authority Act** provides as a condition that any demolition of structures that are deemed to affect the operations of the Respondent must be precipitated by a Court order and the Court may also in appropriate cases grant an order for compensation. He cited the case of **Republic v Managing Director Kenya Airports Authority High Court Misc Applic No. 86 of 2009** to support that Submission.

14. He further claimed that the Respondent is estopped by its own representations from denying its liability to compensate the Petitioner for the loss and damages sustained by virtue of construction on the suit premises since the Respondent had formally indicated its willingness to offer land of equivalent value to the Petitioner as is indicated in its letter of 21<sup>st</sup> August 2009 which the Petitioner accepted by his letter dated 8<sup>th</sup> December 2008 and also in another letter dated 4<sup>th</sup> November 2008. He thus contends that the Respondent cannot now rescind that decision and conversely attempt to argue that the Petitioner is not entitled to compensation claimed.

15. It was the Petitioner's other contention that if the demolition notice served on him is allowed he stand to suffer loss and damages in the following terms; the value of the land, value on improvements thereon and loss of expected profits and future earnings. He claims that the award to be made to him should be reasonable so as to restore and reconstitute him to the position he was in before the notice was served and that the compensation to be awarded to him should be adequate, full and prompt. On this proposition, he relies on the cases of **Kanini Farm Ltd v Commissioner for Lands (1986) KLR 310**, **Bank of India v Commissioner of Lands & Another (2011) e KLR** and **Re an Award filed by the Collector (E.A) 264** which set out the principles applicable in apportioning the value of the improvements to land when

awarding an owner compensation for acquisition of his land.

16. On the arguments that the Respondent has powers to regulate developments around and in an airport and that was the power invoked in making of the order and notice dated 30<sup>th</sup> September 2008, the Petitioner contends as follows;

17. That the powers to impose restrictions on building on areas near an airport are vested, on the Director of Civil Aviation under the provisions of **Sections 9 and 10** of the **Civil Aviation Act, Chapter 394 Laws of Kenya**. That the Respondent's powers under **Section 15(3)** of the **Kenya Airports Authority Act** are to the extent that the exercise would lead to the demolition or modification of any building and would only be exercised upon an order and direction of a Court and in making such an order, the Court is enjoined to consider and award such compensation as it deems fit. That the Respondent having failed to take out any of the anticipated processes, cannot now sustain any opposition to the present Petition on the basis that the demand of 30<sup>th</sup> September 2008 was made in bonafide exercise of its powers under the said provisions of the law.

18. Secondly, he claimed that even if the demolition was made in public interest and that public interest supersedes individual interest, an individual who sacrifices his resources for the public good should be adequately compensated in accordance with the law. He relied in that regard on the case of; *Sea Star Malindi Ltd v Kenya Wildlife Services (2002) KLR* where it was held that the law has to be followed in getting private interest sacrificed over public interest.

19. Thirdly, on the claim that compensation in this context can only be made in the context and forum of arbitration, he submitted that the provisions of **Section 33** of the **Kenya Airports Act** do not apply to any claim for acquisition of land under **Section 13** of the **Act**. That **Section 33** does not contemplate arbitration proceedings over claims of land appropriation and that **Article 40(3) (b)(ii)** of the **Constitution** stipulates that in the matter of deprivation of a right or interest over land, such a claim has to be made to the High Court.

20. Lastly, it was the Petitioner's submission that the acts of the Respondent are in breach of the Petitioner's rights under **Article 27** of the **Constitution** which provides for equality and freedom from discrimination which extends to equal protection and equal benefit of the law as well as full and equal enjoyment of all rights and fundamental freedoms.

For the above reasons he seeks the orders elsewhere set out above.

### **The Respondent's Case**

21. The Respondent the Kenya Airports Authority, is an authority established under **Section 3** of the **Kenya Airports Authority Act** and incorporated as a body corporate. Its functions are stipulated under **Section 8** of the said Act and include inter alia powers to provide, develop and maintain such services and facilities as are in its opinion necessary or desirable for the efficient operation of aircraft.

22. It opposed the Petition through the Affidavit of Ms. Joy Nyagah, its Company Secretary, sworn on 11<sup>th</sup> May 2012. It also filed written Submissions dated 23<sup>rd</sup> April 2014 and 23<sup>rd</sup> May 2014 and in addition, it filed a List of Authorities dated 17<sup>th</sup> May 2012 and a Supplementary List dated 18<sup>th</sup> May 2014.

### **Respondent's Evidence**

23. In support of its case, the Respondent called 3 witnesses who testified on its behalf as follows;

24. RW1, Richard Kimeu Ngovi, the Wilson Airport Manager, testified that he is a trained pilot and has been in the aviation industry for over 30 years. He stated that Wilson Airport by design and usage is a category 2B airport and should therefore serve only category 2B airplanes. His evidence was that for the

safety of aircraft the Petitioner's property should not be developed as it falls within 1.6km of the airport and the suit premises falls within the aircraft flight funnel. RW2, Captain Gad Kamau, an Aviator (pilot) of over 30 years using a Cessna 206 5Y AUN demonstrated to the Court while undertaking these proceedings at Wilson Airport the need to secure the flight funnel. He took the Court through a simulation which showed that in the event of an engine failure after take-off, the only available option was to land on aircraft straight ahead and right into the suit premises because it is in the middle of the free zone recommended upon take off or landing by an aircraft RW 3, Captain Robert Chepkwony, a Pilot with the Kenya Police and with over 14 years experience testified that he had been involved in an accident near the suit premises and upon crashing his aircraft burst into flames as a result of landing on a rocky surface near the suit premises. Drawing from his experience, he stated that the Respondent has the mandate of ensuring that the runway protection zone was free of obstacles and the ground is kept soft in case of emergency crash landings. That the suit premises cannot be such a soft landing area.

### **The Respondent's Submissions**

25. It was the Respondent's Submissions that the propriety of its cessation order cannot be the subject of the proceedings since these proceedings are technically an appeal from the Judgment of Wendoh, J. in the Judicial Review proceedings where she had held that the Petitioner indeed received the letter dated 24<sup>th</sup> January 2008 from the Respondent denying him permission to develop the suit premises but he ignored it, further she held that the Respondent was not duly consulted before the Petitioner was issued with a license by National Environmental Management Authority (NEMA) yet it was an affected party and had powers to stop any construction or interference with the security and safety of aircrafts and in issuing the cessation order, the Respondent was exercising its statutory duty under the Act and thus could not be deemed to have acted without jurisdiction or *ultravires*. It was thus its submission that the Petitioner is re-litigating the same issues before a Court of concurrent jurisdiction and which action amounts to an abuse of the Court process as the issues raised are now *res judicata*. On that proposition it referred the Court to the case of **Ying Ho Company Ltd & 7 Others v The Secretary for Justice Hong Kong Special Administrative Region Action No. 10834 of 1998.**

26. It was its further submission that flowing from the Petitioner was the author of his own misfortune as he had failed to seek the approval from the Respondent at the outset and secondly, he failed to heed the indication by the Respondent made as early as 24<sup>th</sup> January 2008 that the development could not be approved. In the premises, the Respondent submitted that it was not available for the Petitioner to claim any compensation for any events or developments subsequent to 24<sup>th</sup> January 2008.

27. Further, that if indeed there was any compensation due to the Petitioner, it would only be available under the provisions of **Section 33(2) (a)** of the Act which provides for the determination of any claim for compensation by way of arbitration and any recourse to the High Court was available only as a challenge of the arbitral award. In addition, that this Court's jurisdiction was also only suspended pending the exhaustion of the alternative dispute resolution mechanisms provided for under the Act. It relied on the case of **Kenya Planters' Cooperative Union v Kenya Commercial Bank Ltd & 3 Others Petition No.8 of 2014** in support of that submission.

28. Apart from the above legal issues, it was the Respondent's contention that the Petitioner had failed to lay any lawful basis for compensation on three issues. Firstly, the cessation order had the effect of restricting the activities that could be carried out by the Petitioner on the property and it did not amount to a compulsory acquisition as it did not also extinguish the Petitioner's ownership rights. Secondly, that the cessation order was issued in public interest and as demonstrated during the site visit, the same was issued for the purposes of ensuring aviation safety and security and lastly, the restriction in the cessation did not take away all possible uses for the property. In that regard, the Respondent submitted the Petitioner had failed to demonstrate that the Respondent could not approve any other uses of the property that are not inconsistent with the aviation safety and security. It thus claimed that since the issuance of the cessation demand did not divest the Petitioner of the property, he cannot claim compensation arising from the Respondent's exercise of its statutory duty to control developments adjacent to or near the Wilson Airport for the public good.

29. It was its further submission that the Petitioner had failed to establish a valid basis for the Petition because he has failed to demonstrate how he was influenced by the Respondent to purchase the property, commence the development and borrow money from the bank and to enter into sale agreements with prospective purchasers of his housing units. That he cannot now claim compensation for losses allegedly suffered for his failure to comply with the set pre-requisites of the applicable law given that the Petitioner is an advocate of the High Court of Kenya he ought to have known the provisions of the law and abide by them. It also stated the Petitioner cannot now claim to benefit from his own wrong doing. Reliance on that point was made on the case of **Labh Singh Harman Singh Ltd v Ahmed Salim Ahmed Jeizan (2014) eKLR** where the Court held that no one was entitled to the aid of a Court of law when the disputed action had become necessary through his or her own fault. It submitted that given the facts of this case, the Petitioner cannot claim a violation of his right to dignity as he had received the financial facility from Commercial Banks and the deposits from prospective purchasers of the housing units well aware that Respondent had refused to grant the approvals required for the construction.

30. It was the Respondents argument therefore that the cessation order was not tantamount to compulsory acquisition of the property and that it was only restricted to the developments for which the approval had been sought and does not result in the loss of use of the property. That the Respondent in any event has no intention of acquiring the Petitioners property for the expansion of the Wilson Airport runway and that the Petitioner cannot rely on such claims because the evidence tendered on behalf of the Respondent disproved the existence of such plans. Further that, the Respondent has not taken any steps to acquire the suit premises and his attempts are an attempt to compel a public body to compensate a private individual for the performance of a statutory duty which is untenable. On that point it relied on the cases of **Natalie Campbell-Rodrigues & 4 Others v Attorney General of Jamaica Privy Council Appeal No. 40 of 2007 and Canadian Pacific Railway Company v City of Vancouver & Others (2006 1 S.C.R 227.**

31. On the issue of the claim for the value of buildings, developments and future earnings, the Respondent submitted that the documents produced by the Petitioner did not in any way support his case. That a perusal of the evidence tendered by the Petitioner including the Bill of Quantities showed that they are of no evidential Value as the valuer failed to set out the comparables taken into account in arriving at the values of the items in his report and that there were contradictories as to the values assigned to the developments by the Valuer and the Quantity Surveyor. Further, that once the Petitioner had claimed special damages then he had a duty to prove how they were arrived at strictly. That the estimates contained in the Bill of Quantities cannot be deemed to be the evidence in support of the claim for special damages and thus the said claim was unsustainable. Reliance on that point was made on the case of **Bamburi Portland Cement Company Ltd v Imranali Chandbhai Abulhussein Civil Appeal No. 83 of 1995.**

32. In addition, the Respondent contended that the claim for expected future earnings from the land and buildings could not be tolerated because the Petitioner neither made reference to it in the petition nor did he adduce evidence in support thereof and that the Accountant who testified for the Petitioner (PW3) had failed to supply the source of the figures he quoted and further that those figure even if they were a projection only, contradicted the Valuation Report and the Bill of Quantities and he also failed to produce in evidence the documents which he relied upon in making the projections on future earnings. The Respondent thus urged the Court to find that the claim for future earnings was unsubstantiated and reliance was placed on the case of **Nzoia Sugar Company Ltd v Capital Insurance Brokers Ltd Civil Appeal No. 86 of 2009** and the **National Conservation Forum v Attorney General (2013) eKLR** in espousing the position that a relief cannot be hinged on what could only be deemed as a hypothesis and speculation.

33. It was also the Respondent's submission that a claim for general damages for what the Petitioner describes as mental anguish cannot be sustained because the Petitioner had failed to demonstrate that the cessation order was unconstitutional or in breach of any of his fundamental rights and freedoms. Reliance in that regard was placed on the case of **Bank of Baroda (Kenya) v Timwood Products Ltd Civil Appeal No. 132 of 2001** where the criteria used in awarding general damages was set.

34. For the above reasons, the Respondent submitted that the Petitioner had failed to prove his claim

against it and that the Respondent and thus the Petition is unmeritorious and amounts to an abuse of the court process. It thus urged the Court to dismiss the Petition with Costs.

### **Determination**

35. Before I turn to determine the issues arising from the parties contentions as stated above, I am aware that parties submitted extensively on the jurisdiction of this Court to determine the merits or otherwise of this Petition. The Respondent has argued in that regard. That this Court does not have jurisdiction to determine this Petition as the matters raised in it are *res judicata* as the same have been subject of litigation in the Judicial Review proceedings being **HCC Misc Applic No. 86 of 2009**. Secondly, that even if the Court had jurisdiction, the dispute herein is not ripe for determination as the dispute resolution mechanism established under **Section 33(2)** of the **Kenya Airports Authority Act** which provides for the determination of any claim for compensation by way of arbitration has not been exhausted. That any recourse to the High Court therefore is only available as a challenge to any of the arbitral award made in the arbitration proceedings. I must therefore begin my determination of these twin issue of jurisdiction as jurisdiction is everything and without it the Court cannot take a further step - See **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1.**

### **Is the Petition res judicata?**

36. It was the Respondent's contention that the issues that are the subject matter of this Petition were raised in **HCC Misc Applic No. 86 of 2009** and were determined by Wendoh, J. and therefore the Petitioner could not file this Petition as a way of re-litigating those issues. That in the judgment dated 14<sup>th</sup> October 2014, the court already addressed the questions of; demolition of the structures in the suit premises, cessation notice, intended expansion, other developments within the vicinity of and their distance from the Wilson Airport and the position of the Petitioner's property in relation to the airport protection zone. That all those questions having been determined and findings made by the Court and the Petitioner having failed to appeal against those findings, then he could not now re-litigate them in this Petition.

### **The principle of res judicata**

37. The law on *res judicata* in Civil Law is clear as seen from the provisions of **Section 7** of the **Civil Procedure Act Cap 21 Laws of Kenya**. This Section provides thus;

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

These principles were applied by the Court of Appeal in the case of **Karia and Another v the Attorney General and Others (2005) 1EA 83** where the court elaborated that for *res judicata* to be invoked in a civil matter, the issue in a current suit must have been decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, or are litigating under the same title.

It therefore follows from the aforesaid that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was the principle that was upheld in **Omondi v National Bank of Kenya Ltd and Others (2001) EA 177** and I must also agree with the sentiments of Majanja, J. as he correctly stated the law in **Edwin Thuo v Attorney General and Anor Petition No. 212 of 2012** that the Court must be vigilant and guard against evading the doctrine of *res judicata* by introducing new causes of action. He stated as follows;

***“The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by***

***introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”***

38. Having so stated and whereas these principles are in our law books for good reason, their application in constitutional matters must be applied sparingly and the reasons for that are not far to find. I must therefore in that regard reiterate what this Court recently stated in **Okiya Omtatah Okiiti & Another v The Attorney General and Another Petition No. 593 of 2013** that;

***“Whereas these principles [res judicata] have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”***

39. Having stated as above, the issue then is whether the present Petition raises matters that are *res judicata*? On reflection, I do not think so on the whole. Whereas it can be said that the parties in this Petition as well as in the **HCC Misc Applic No. 86 of 2009** are the same save that in the Judicial Review Proceeding, the Managing Director of the Respondent is the one who had been sued, the other considerations are not as clear cut.

40. I say so because on the subject matter, the Petitioner in the Judicial Review Proceedings sought to challenge the propriety or otherwise of the order of the Respondent’s Managing Director made on the 30<sup>th</sup> September 2008. He had sought the following orders;

***“(1) That the Court be pleased to issue an order of certiorari to bring to the Court for purposes of its being quashed, the order of the Managing Director, KAA made on 30th September 2008 prohibiting the Applicant from undertaking any further developments on this property L.R. No.209/11444, Nairobi.***

***(2) That the Court be pleased to issue an order of certiorari to bring to this court for purposes of it being quashed the order of the Managing Director, KAA made on 3<sup>rd</sup> September 2008 requiring the Applicants to demolish and remove from the property, L.R. No.209/11444, maisonettes and all erections and developments made there within seven days of the said order.***

***(3) That the Court be pleased to issue an order of certiorari directed at the Managing Director KAA, to prohibit, restrain and bar him, his servants or agents from damaging or destroying or in any way interfere with the developments, building and sanction on the suit property.”***

41. As can be seen above, the Petitioner had sought orders of certiorari to quash the Managing Directors decision contained in the notice of 30<sup>th</sup> September 2008. There was no demand for compensation or a determination of the constitutionality of the actions of the Respondent. If I understood the Petitioner well, he in fact agrees that the notice was properly issued but he claims now his rights to property are likely to be infringed as he has not been compensated for the land and developments thereon. He has therefore invoked this Court’s jurisdiction under **Articles 22, 23 and 165(3) (b) of the Constitution**. That being so, whereas the facts are the same as those in **HCC Misc Applic No. 86 of 2009** I am not prepared to block the Petitioner from ventilating his claim for violation of his fundamental rights and freedoms as enshrined under **Articles 40 and 47 of the Constitution**. To sum up therefore and in the totality of the facts and evidence before me, I do not find that the Petition raises similar matters that were raised in **HCC Misc Applic No. 86 of 2009** and the doctrine of *res judicata* cannot therefore be invoked in this proceeding and I so find.

**The place of Section 33(2) of the Kenya Airports Authority Act**

42. Regarding the place of **Section 33(2)** of the **Kenya Airports Authority Act** which provides for the determination of any claim for compensation by way of arbitration, It was submitted that the Petitioner should have invoked the said **Section 33** to have his claim for compensation determined first before invoking the jurisdiction of this Court.

For avoidance of doubt, **Section 33** of this Act provides as follows;

***“(1) In the exercise of the powers conferred by Sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.***

***(2) Nothing in this Section shall be construed as entitling any person to compensation-***

***a. for any damage suffered unless he would have been entitled thereto otherwise than under this Section; or***

***(b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.”***

My interpretation of the above provision is very clear in regard to the present proceedings and it is my view that the Petitioner cannot claim compensation under **Section 33** because he has not satisfied the criteria established under the provisions of **Section 15(3)** which he is claiming under. **This Section** reads as follows;

***“Where any person erects any building which in any way interferes with the operation of any service provided by the Authority under this Act, the Authority may, unless such person has previously obtained the approval of the Managing Director for the erection of such building, or has modified it to the satisfaction of the Managing Director, apply to the High Court for an order for the demolition or modification of such building, or, as the case may require, for the payment to the Authority of the cost incurred in the resetting or replacement necessary to prevent such obstruction or danger and the Court at its discretion may grant such order as it may deem fit as to the payment of compensation as costs.”***

My reading of this Section reveals that one will only invoke the application of this Section when;

- i. The building erected interferes with the operations of any service provided by the Authority under the Act.
- ii. At the time of erecting the building, the owner of the building had not obtained the approval of the Managing Director for the erection of such a building.
- iii. Has not modified the buildings to the satisfaction of the managing director.
- iv. The Authority may apply to the High Court for an order for demolition or modification of such building.

44. Applying the provisions of the above Section to the instant case, the issue is whether the Petitioner had applied for approval from the Managing Director of the Respondent before starting his project. PW5 indeed confirmed in his testimony that the Petitioner had not sought the approval of the Respondent before commencing the development and stated as follows in that regard;

***“Regarding the present project, it was far from the airport and I did not need to go to them (Respondent) for approval as I had done previously. I knew the height of the building and Section 9 of the Kenya Civil Authority Act gives the Authority control over buildings around the airport.”***

Further to that admission Wendoh, J. in HCC Misc Applic No. 86 of 2009 made a finding on that issue and she expressed herself as follows;

*The correspondence exhibited by the Respondent in the letters JI 1, 2, 3, 4, 5 and 6 all go to demonstrate that the Applicant did seek the permission of the Managing Director KAA to develop the said plot but the same was declined on grounds that the plot was within the approach funnel in the main runway at Wilson Airport. The letter dated 10<sup>th</sup> January 2008 (JT 1) was addressed to the Manager, Wilson Airport by the Applicant himself and was copied to the Managing Director KAA. The Applicant cannot therefore contend that the Respondent exceeded his powers by advising him not to proceed with the construction project. Even if the Applicant continues with the project, the Respondents can move the High Court for an order of removal or demolition of the said construction. Would the Applicant rather proceed with the project which would be subject to demolition or comply with the direction given by the Respondent then seek compensation from KAA? It is true that under Section 10 of the Civil Aviation Act Cap 394 Laws of Kenya, if the Director considers that provision for the safety or efficiency of air navigation ought to be made by removal or reduction in height of any obstruction, he may, after consultation, by order and subject to any conditions specified in the order, require or authorize either the owner or occupant of the land on which the obstruction is situated or a person acting on his behalf to enter the land and carry out such work to give warning or reduce the height of the obstruction. The Director is also required to have it published to notify the persons with interest in the land of the order and has to stop any such work and direct on how compensation should be made or an arbitrator be appointed by the Court if the parties do not agree. Whereas it is true that the Director of the Civil Aviation has jurisdiction to make orders under Section 10 of the Civil Aviation Act, the Managing Director KAA too has the powers to stop any construction or interference with the security and safety of air craft. It is however not clear what he should do after the stoppage but I believe he can then move the Court for the necessary orders. The Applicant can therefore not deny that the Respondent lacked the authority to stop the construction. After all, the Applicant sought the said authority of KAA ON 10<sup>th</sup> January 2008 well after the said construction had commenced in 2007. By letter of 24<sup>th</sup> January 2008, the Applicant was informed that the development was not approved (JT 3). Again, by the further letter of the Respondent dated 19<sup>th</sup> March 2008 he was directed to stop the construction. That letter, was copied to the Managing Director, Kenya Airports Authority and the Director General Kenya Civil Aviation Authority. It is noteworthy that the Applicant sought advice as to his next cause of action. Despite all the warnings it seems the Applicants continued with the developments till 30<sup>th</sup> September 2008 when the Managing Director wrote the impugned letter or decision.”*

45. I am in agreement with the reasoning and finding of the learned Judge on that fact and I see no reason to depart from it as I consider it sound. Even if I was in disagreement I would still not depart from it because I am not sitting on appeal over that judgment.

46. Further, Mabeya, J. in World Duty Free Company Ltd v Kenya Airports Authority Civil Case No. 253 of 2012 while considering the applicability of Section 33 aforesaid stated as follows;

*“In my view therefore, Section 33 does not apply to all or every dispute under Section 12, 14, 15 and 16 of the Act. In order for that Section to apply, such a dispute must arise as a result of the following;*

- i. The Authority exercising its powers under Sections 12, 14, 15 and 16 of the Act,*
- ii. A person suffers damage as a result of such exercise of power, and*
- iii. That dispute be for compensation Indeed if this Court were to seek further assistance in trying to decipher the intention of Parliament, it may look at the marginal notes. A close look at the Section would reveal that the marginal notes reads “compensation.” It is not in dispute in my view, that a Court can use the marginal notes if necessary in construing a Section of a Statute.*

*Therefore, if help would be sought from the marginal notes to Section 33 of the Act, it is clear*

*that that Section deals with “compensation”.*

*Accordingly, my view is and I so hold, that if a dispute between a party and the Defendant is about compensation for a wrong done pursuant to the Defendant’s exercise of its powers under Sections 12, 14, 15 and 16 of the Act such a party is unsuited as the proper forum is not this Court but as set out by Section 33 of the Act.”*

I am in agreement that **Section 33** would not be applied in every dispute but that dispute must fall within the intentions deciphered from the particular Section be it 12, 14, 15 and 16 of the Act that the claimant would be claiming. It is therefore clear to my mind that the Petitioner cannot claim compensation under **Section 33** of the **Kenya Airports Authority Act** as he does not satisfy the criteria established thereunder and particularly under **Section 15** of the **Act**.

47. This therefore means that **Section 33** of the **Kenya Airports Authority** does not oust the jurisdiction of this Court and I therefore find that I am properly seized of the dispute now before the Court.

48. Having so held, the issue I must now consider is whether the Petitioner’s fundamental rights and freedoms have been violated.

### **Whether the Petitioner’s fundamental rights and freedoms have been violated**

#### **Right to property**

49. The Petitioner claimed that his fundamental right to own property under **Article 40** of the **Constitution** has been violated by the Respondent since the Respondent has failed to compensate him for the loss and damage he has suffered because of the stoppage of the construction he has undertaken on the suit premises. That the Respondent has in essence appropriated his land since it has prevented him from developing the same as he wishes has prohibited him from deriving any benefit arising from the suit premises.

50. In answer to that claim, it is not in dispute that the Petitioner is the registered proprietor of the suit premises and that he has all lawful rights over the same and contested issue therefore is whether the Petitioner’s rights to property under **Article 40(3)** of the **Constitution** have been violated. This Article states that;

“(1) ...

(2) ...

**(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—**
  - i. **requires prompt payment in full, of just compensation to the person; and**
  - ii. **allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(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.”**

51. The Constitution is therefore clear that no property shall be compulsorily acquired without compensation and the Petitioner had further pegged his claim on the provisions of **Section 13(1)** of the **Kenya Airways Authority Act** which provides for powers of the Authority to compulsorily acquire private land for its functions. This Sections states that;

***“(1) Where land is required by the Authority for purposes of the Authority, it may either-***

- a. If such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof:***

***Provided that notwithstanding the provisions of Section 6 of the Land Control Act, the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land; or***

- b. ...”***

52. Generally as can be seen from the above provisions, the Authority has been empowered to acquire private land for its purposes and Subsection 3 then demands that when such land has been so compulsorily acquired, compensation shall be paid by the Authority to the owner of the land in accordance with the provisions of the law under which the land was acquired. The issue therefore is whether the Petitioner’s property has been compulsorily acquired by the Respondent and whether he is entitled to compensation thereof.

53. RW 1 in his testimony stated that the Respondent had never sought at any time to acquire the Petitioner’s suit premises and had no intention of doing so. That the Respondent’s role was only limited to controlling the user of properties adjacent to or near the Wilson Airport. In that regard, I have seen the Notice issued to the Petitioner dated 30<sup>th</sup> September 2008 which states as follows;

**“Proposed Development on LR.209/11444 Adjacent to Wilson Airport**

***We are in receipt of your letter dated 15<sup>th</sup> September 2008 whose contents we have duly noted. The authority has previously written to your client instructing him to cease further development on the above parcel. However, he has unfortunately ignored such instructions despite clear explanation as to the necessity of keeping the parcel free of any development.***

***The proposed development falls on the threshold of Runway 025 of Wilson Airport where any development cannot be allowed. The erection of structures on the parcel continues to endanger the safety and security of aviation at the busy airport. This will not be tolerated whatsoever.***

***Further, the development is contrary to the provisions of the Kenya Airports Authority Act and the Civil Authority Act. It is also in conflict with the international requirements and standards as set by the International Civil Aviation Organisation, (ICAO) for airports within the category of Wilson Airport.***

***The Authority is also concerned that your client’s activities have continued to raise concerns from the stakeholders in the aviation industry over the impropriety of the development. This could have a negative impact on the immense revenue generation and economic potential of the airport.***

***We therefore demand that the construction works ceases henceforth and that your client must commence the removal of any erection on the parcel immediately. Further, be advised that we shall be proceeding to effect demolition and/or removal of any structures erected on the above parcel I accordance with the law ad at your client’s cost upon the lapse of Seven(7) days of this letter.”***

54. As is seen from the notice nowhere is it mentioned that the Respondent was invoking its powers under **Section 13(1)** of the **Kenya Airports Authority Act** and nowhere does the Notice state that the Respondent is intending or has acquired or is compulsorily taking over the suit premises. I am therefore in

agreement that the Notice of 30<sup>th</sup> September 2008 does not amount to compulsory acquisition of the law as was claimed by the Petitioner.

55. Indeed far from the truth, the contents of the notice are very clear that the Respondent only demanded, as it had done in previous notices, that the Petitioner should cease any construction and remove any structures erected on the suit premises. The Notice only had the effect of restricting the activities that could be carried out by the Petitioner on the suit premises and did not extinguish his ownership rights. But I also heard the Petitioner to be claiming that this restriction amounts to compulsory acquisition of his land because he cannot utilize it as he wishes. In that regard, have read the decision in ***Halal Meat Products Ltd v Attorney General (supra)*** relied upon by the Petitioner on this point and I must distinguish that authority because that as decision dealt with the issue of tenancy where the Government had failed to pay rentals or *mesne* profits for the use and occupation of an abattoir and had then failed to hand return possession to the land owner. The Applicant had thus sought a declaration that the said use, occupation, retention and detention amounted to compulsory acquisition and the Court found that the continued occupation of the premises by the Government was in contravention of **Section 75** of the **Constitution** which protected the right to property and the Applicant ought to be compensated thereby. In regard to the present Petition, the Respondent is not in occupancy of the Petitioner's suit premises and I have also found that the Respondent have no intention to compulsorily acquire the suit premises. That being the case, the doctrine of appropriation is of no use to the Petitioner's case.

56. Having found as I have above, the next issue in that context is whether the notice of 30<sup>th</sup> September 2008 was issued to the Petitioner in protection of public interest and whether the Respondent has the right to curtail the Petitioner's enjoyment of the suit premises. The answer to that question would be found in **Section 10** of the **Civil Aviation Act** which grants the Director General of the Kenya Civil Aviation Authority in consultation with the Managing Director of Kenya Airport Authority powers to stop any construction or any interference with the security and safety of an air craft. This **Section** reads as follows;

***“(1) If the Director General considers that provisions for the safety or efficiency of air navigation ought to be made-***

- a. ***Whether by lighting or otherwise for giving aircraft warning of the presence of any building, structure, tree or natural growth or formation on or in the vicinity of an aerodrome; or***
- b. ***By removal or reduction I height of any such obstruction,***

***He may by order, and subject to any conditions specified in the order, require or authorize either the owner or occupier of the land on which the obstruction is situated or any person acting on behalf of the Director General to enter upon the land and carry out such work as is necessary to enable the warning to be given or the obstruction to be reduced in height”***

Similarly **Section 14** of the **Kenya Airports Authority** grants the Authority the same powers. The Section states that;

***“(1) Any authorized employee of the Authority may, for the purposes of this Act, enter upon any land-***

- a. ***to survey such land or any portion thereof; or***
- b. ***to remove or cause to be removed any obstruction, materials, structures or buildings including slaughter-houses which are likely to attract birds that may be hazardous to aircraft operations.***

***(2) Any costs incurred by the Authority in pursuance of the provisions of subsection (1)(b) shall be wholly recoverable from the person responsible for such obstructions, materials, structures or buildings.***

***(3) Where any damage to land is occasioned by reason of the exercise of the powers conferred by subsection (1)(a), the owner or occupier of the land shall be entitled to compensation in***

***accordance with this Act.”***

57. It is therefore not in doubt that the Respondent has the authority to demand that the Petitioner should remove his buildings if they interfere with the safety of aircrafts. Indeed the Respondent's evidence supported the contention that the Petitioner's buildings were a threat to safety of the aircrafts operations and I agree with that evidence having taken part of that evidence at Wilson Airport and seen the simulation by Captain Gad Kariuki.

58. RW 1 also stated that the property was dangerous to aircraft safety as the recommended distance between the developments and the end of the runway based on the Manual of Aerodrome Standards had not been observed. RW 2 testimony demonstrated that the suit property was located on a flight path and the suit premises were right in the middle of the flight funnel. He demonstrated that in the event of an engine failure during takeoff, the only available option would be to land straight ahead and right into the property which would be dangerous as the aircraft would land into a hard object. That as part of the development Plan for Wilson Airport, the area where the property is located is supposed to remain vacant since it is an emergency landing area. RW 3 testified that he had previously been involved in a plane crash on 14<sup>th</sup> September 2009 which occurred next to the suit property. He confirmed that owing to his past experience the aircraft had crashed and burst into flames because it landed on a rocky surface. He summed up his evidence that the suit properties were ahead of runway 25/07 and were within the flight path and therefore posed a hazard to the users of Wilson Airport. The Petitioner failed to bring expert witnesses on aviation matter to counter the evidence of the said three witnesses and even in cross examination, nothing of substance came out of it so as to challenge the credibility of that testimony. I therefore believe all the Respondent's witnesses in that regard.

59. Furthermore, it is not contested that it is within the statutory mandate of the Respondent to control developments adjacent to or near an aerodrome for the security, safety of the air operations as well as the safety of the users of Wilson Airport and its environs specifically it is on that basis that I do not see any value that the Master Plan or the development of the suit premises would add to the Petition. To my mind it matters not whether the suit premises was designated in those maps as free space or not because the Respondent and the Civil Aviation Authority is the body statutorily mandated to ensure safety of air operations and so long as it has acted within its powers as confirmed by Wendoh, J. in the Judicial Review proceedings then the Court has no mandate to interfere thereof.

**Fair Administrative Action**

60. As to the allegation of violation of **Article 47** of the **Constitution**, the Petitioner did not lead any evidence nor did he make submissions on that issue. That is all there is to say on that aspect of the Petition and in any event from the evidence on record, the above right was not breached.

**Whether the reliefs sought can be granted.**

61. Looking at the Petition again and the orders sought, on prayer (a) I have found that the Petitioner's fundamental right to property under **Article 40** has not been violated. That being so there is no basis upon which this Court can make an order for compensation for the losses and damages allegedly sustained as sought under prayer (b), (c) and (d). Accordingly, there is nothing else left to be determined.

**Conclusion**

62. I have seen the developments plan and design of the ongoing developments on the Suit premises. As much as the Court emphasises with the Petitioner for the obviously immense losses he has incurred or he may incur, the Court's hands are tied. The law is very clear on the issues in contest and the Petitioner, being a lawyer, ought to have known better. Had he sought the Respondent's permission and or approval before starting construction in 2007 as required under the **Kenya Airports Authority Act**, he would not find himself in the situation he is now. Worse still, had he heeded the Respondents warning as at 24<sup>th</sup> January 2008 that the developments had not been approved and thus stopped all developments on the suit premises perhaps, the present proceedings would have been avoided. Indeed Wendoh, J. in ***HCC Misc***

Applic No. 86 of 2009 made the same observation as follows;

*“Firstly, he commenced the development before seeking authority form the Kenya Airports Act and Kenya Civil Aviation Act as required by law. Further to that, he defied all the warnings given by the Respondent that he stops the development. He should have halted the development so that the parties could know how to resolve the matter but he cannot act contrary to express provisions of the law and expect this Court to pat him on back and given him the orders sought. The Respondent was exercising a statutory duty under Cap.395 Laws of Kenya and cannot be said to have acted without jurisdiction or ultra vires, unlawfully or illegally.”*

63. Having held as I have done and looking at the Petition again I do not see what else is left for me to do in such a matter. But I recall the argument made by the Respondent that it had not completely shut down the Petitioner’s use of the property in any other way. That the Petitioner has not applied for approval of any other use of the property that may not be inconsistent with the provision of the Kenya Airports Authority Act. I also recall the provisions of **Section 15** of the **Kenya Airports Authority** as reproduced elsewhere above that the Managing Director of the Respondent may approve the plan as submitted or require for modification of the plan submitted. With that in mind, I do not think the Petitioner is not without any recourse. Let him engage the Respondent in an effort to get approval to carry out such developments which are not hazardous to the air operations or any user of Wilson Airport and also the intended occupants of his development on the suit premises

64. I am also aware that the issue as to whether the Respondent intends to expand Wilson Airport from category 2B to 2C thus requiring a runway protection zone of 570m instead of 360m kept on popping up. That issue was not addressed properly and no evidence was led to that effect. The Court cannot entertain that allegation and I say so because compulsory acquisition is not an easy task. It is a painful process which must be supported within the existing legal framework and the body intending to carry out that acquisition must justify the reasons for hardship likely to be caused to the owner of the subject property. To that end I am constrained to ask myself several questions, for instance where is the decision to acquire the suit premises? I heard the Petitioner to be relying on the letters annexed to the affidavit of Joy Nyagah where allegedly she exhibited the intention to upgrade Wilson Airport thus requiring the suit premises for that purpose. Is that a sufficient basis to claim compulsory acquisition? I do not think so. Where is the gazette notice stating that the Respondent intends to acquire the suit premises? I do not have answers to those issues and that is all in that regard. But if indeed that is the position and that the Respondent intends to acquire the Petitioner’s suit premises in accordance to the law, then at that time the Petitioner will be at liberty to apply for the necessary orders as against the Respondent.

65. It is obvious therefore that I see no merit in the Petition and it is hereby dismissed.

66. Given the nature of these proceedings, the best order would be one that necessitates each party to bear its own costs.

67. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Njenga for Petitioner

Miss Mate for Respondents

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**

**11/9/2014**