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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC NO. 164 OF 2021

MWAVUMBO GROUP RANCH…………………………………… PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION & 3 OTHERS…. …………...DEFENDANTS

JUDGEMENT

Introduction

1. The Plaintiff approached this Court vide a Plaint dated 30th September, 2019 and filed on 1st October, 2019, seeking the following orders: -

   a. **A declaration that the Plaintiff is entitled to the compensation for the portion of its land compulsorily acquired by the Defendant for the construction of the Standard Gauge Railway.**

   b. **Kshs. 1,011,947,000/= in compensation being the value of the suit property compulsorily acquired by the defendant for construction of the Standard Gauge Railway.**

c. **Any other Order(s) this Honourable Court may deem just to grant.**

d. **Costs of the Suit**

2. The 1st Defendant opposes this suit vide a Statement of Defence dated 6th October, 2023 and filed on 30th November, 2023. The 2nd Defendant on the other hand relies on a Statement of Defence dated 18th September, 2021 and filed on 19th October, 2021 while the 3rd and 4th Defendants rely on a Statement of Defence dated 29th December, 2022. The Defendants have denied all the averments by the Plaintiff.

Plaintiff's case

3. It is the Plaintiff's case that at all material times to this suit, they are the registered proprietor of all that parcel of land known as Kwale/Mwayambo/1 (the ranch), measuring approximately 24,908 Ha, situated within Mariakani area of Kwale County.

4. That the said ranch is one of the private parcels of land which were affected by the construction of Phase 1 of the Standard Gauge Railway, running from Mombasa to Nairobi.

5. That when the Government was compulsorily acquiring land from private land owners falling along the path of the said Standard Gauge Railway within the Kwale County, a survey

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was conducted on the portion of the Plaintiff's land (Kwale/Mwavumbo/1) which was identified by the 2nd Defendant to be taken by the Standard Gauge Railway and was found to be measuring approximately 174.646 Hectares, equivalent of 436.615 Acres and Gazetted vide Gazette Notice No. 4096, on 20th June, 2014. Later the plaintiff conducted its own survey through Ms. Pimatech Land Surveyors and Consultants and discovered that the actual area taken by the 1st Defendant for the said project is actually 178.0 Ha, which is approximately 439.90 Acres and not 174,646 Ha which was gazetted by the 1st Defendant.

6. By a letter dated 22nd March, 2015, the plaintiff brought the above to attention of the 1st Defendant the said gazetted acreage of its land taken for purposes of the construction of the said Standard Gauge Railway, and called upon its chairman to arrange to effect the compensation of the Ranch, and by its response, vide a letter dated 6th May 2015, the 1st Defendant laid all the responsibility of survey and compensation on the 2nd Defendant, and advised that the Plaintiff should consult it for advise whether there is any land compensable to the Ranch for the Commission (ie., 1st Defendant) to expedite

7. Upon liaising with the 2nd Defendant as was advised by the 1st Defendant, the 2nd Defendant, by its letter dated 6th July,

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2016, addressed to the Plaintiff, categorically stated that all the land was claimed by the respective project affected persons who settled along the corridor of the Standard Gauge Railway within the group ranch. There was therefore no extra land that is payable to the group ranch as requested, effectively declining.

8. They further aver that the subject land is a group ranch duly registered as such and incorporated under the then Land (Group Representative Act) Cap 287, and by a consent contained in a letter dated 30th July, 2015 by the National Land Commission, it was allowed to dissolve, thereby exempting the subject parcel of land from the operation of the Community Land Act, 2016, and by virtue of the provisions of the Second Schedule to the Act, on "provisions which are deemed to be contained in the Constitution of every group" every member of a group ranch share in the ownership of the group land in undivided share. Compensating therefore only the affected members did not remove them from the ranch but only caused an adjustment within the unaffected portion of the ranch to accommodate them. It was therefore unfair to compensate a few individuals to enable them move and settle in arrears occupied by the rest, and not compensating those affected by their resettlement. Furthermore, not the entire stretch which was taken for the said project was occupied.

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9. Further, that the subject land had been invaded by squatters, an issue which it has all along been dealing with, it is not certain whether it is the genuine members who were compensated or squatters, since it learnt of the said compensation through the aforesaid letters by the 1st and 2nd Defendants, the Plaintiff was never involved in identification of who was a genuine occupier and who was a squatter.

10. That it is the duly registered owner of the ranch herein, and the nature of its ownership is recognized by Article 63 (2) (a) of the Constitution of Kenya, and therefore it is a violation of Article 40(3) of the Constitution for the State to take away a portion of the said parcel of land without compensation as stipulated under Article 40(3) (b) (i) and Part VIII of the Land Act, 2012.

11. Furthermore, the compensation which was purportedly paid out to individuals who allegedly had their developments, crops and graves along the Standard Gauge Railway corridor, was a payment for damages caused to those individuals notwithstanding that they are not the land owners, but not a compensation stipulated under Article 40 (3) of the Constitution and Secs 111 & 115 of the Land Act, 2012, which is only payable to the land owners after ascertainment of their interests. Maintaining therefore, by

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the 2nd Defendant, that there is no extra land compensable to the group ranch after compensation of the project affected persons who settled along the corridor of the Standard Gauge Railway is somewhat misplaced and wanting in integrity.

12. The Plaintiff avers that this is not the first time a major government project is being undertaken through its ranch, as Kenya Pipeline Corporation had carried out a project of a similar magnitude, when a Mombasa-Nairobi pipeline passed across the subject ranch, and it was paid as the title holder, as well as those members whose development fell along the path of the said pipeline. It does not therefore understand why the State is treating it differently this time round.

13. The Plaintiff avers that by judgment delivered on 27th November, 2017 in ELC Constitutional Petition (Msa) No. 94 of 2016 the Environment & Land Court held that the facts surrounding the acquisition of the subject portion of the parcel of land herein raised no issue which could be considered by this court sitting as a constitutional court, and observed that the plaintiff should have instituted a suit, file a valuation report and present evidence on the compensation due, hence this suit.
14. The Plaintiff avers that it has since caused the portion which was compulsorily acquired by the defendants for the

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construction of the subject Standard Gauge Railway to be valued by Ms. Wesco property Consultants and found to be worth Kshs. 1,011,947,000/=. which it now claims.

15. In support of its case the Plaintiff called three witnesses. PW1 was Bartholomew C. Mwanyungu a Land Surveyor who carried out a survey on behalf of the Plaintiff and prepared a report dated 25/06/2019. He testified that the survey established that the area occupied by the railway line whose length was 29671 metres by 60 meters width was 178.03Ha translating to approximately 439.90 acres. That the width ran throughout the entire length and was the reserve. The report was produced as PEX9. The witness also produced the invoice for his services and informed the court his court attendance charges were Kshs.20,000/.

16. Cross examined by Mr. Karina Counsel on record for the 2nd defendant PW1 conceded he had not attached to the report a copy of the title, 2019 search for the suit property, letter of instructions and minutes of the ranch authorising his appointment. On why he had not attached his licence and academic certificates he explained it was not a requirement. He also agreed he had not attached an ETR to the invoice.

17. Cross examined by Mr. Mbuthia for the 1st defendant he reiterated he had not presented his 2019 licence but stated

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he had a current licence. He confirmed that the railway was in place during the survey. He did not compare the area stated in the report with what was gazetted by the 1st defendant. He did not use the acquisition map. He confirmed the SGR does not occupy the entire suit property. he stated the occupation was scattered and he did not inquire into the ownership of thereof. Ms. Rukiya state counsel did not cross examine this witness.

18. PW2 was William Yawa Chimega. He adopted his witness statement dated 1/8/2020 and produced the documents listed in the plaintiffs list of documents dated 30/9/2019 Pex 1 -12 except item 10 which was marked for identification. He told the court he was a member of the Plaintiffs transition committee and Chairman of the ranch. His witness statement rehashed what is in the plaint. He added that the acquired gazetted land measuring 174.646Ha is fenced and the plaintiff cannot do anything inside the fence. That the plaintiff was gazetted because they held a title to the land Kwale/Mwavumbo/1. They have never been requested to surrender the title for excision of the acquired section. The gazette notice did not list any names of Project Affected Persons (PAPS) to be compensated. He denied the PAPs in the 2nd defendants list were members of the plaintiff. He told the court the plaintiff has not been issued with any award.

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19. PW2 was cross examined by Mr. Karina for the 2nd defendant. He testified that the ranch was allowed to dissolve and the process of adjudication was ongoing. He conceded they had not produced a register of the Plaintiffs members neither has the same been sent to the 1st defendant.

20. The witness was also cross examined by Mr. Mbuthia and agreed that upon dissolution and subdivision each member will hold their land as resolved by the members on April 2015 before the SGR was built. PW2 stated that he saw the Notice for Inquiry though he did not attend the same. He stated that he did not know all the members of the ranch since it was big though he was aware some of the members were compensated for their houses, trees and graves. He stated the ranch has not surrendered the title because they have not been paid. He agreed that they hold title that includes land that has been acquired and thus belongs to the Government.

21. PW2 confirmed that some people who were compensated relocated to areas within the ranch. He conceded he had not presented a list of the squatters as well the register of members without which the court would not be able to identify the alleged squatters. The witness agreed he had also not presented a list of those who were not supposed to

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have been paid. He had no communication from those who alleged they have not been paid.

22. In re-examination the witness asserted there was no land compensation at all but only for structures, trees and graves

23. PW3 was Rashid H. Shake a valuer. He produced the report dated 11/9/2024 and acknowledgement of part payment of Kshs 150,000/- out of his fees of Kshs.500,000/- as PEx 13 & 14.

24. Cross examined by Mr. Mbuthia the witness confirmed that the railway was already in place as at the valuation date and it is a public utility. He told the court the report covered part of the land. He did not have a search certificate. He did not have a list of the specific people to be compensated as the compensation is to the group ranch. He defended the comparables used for the valuation as a good source since they were market transactions.

25. The witness was cross examined by Mr. Karina and conceded he did not have a letter of instruction, minutes authorizing his appointment. He conceded his report was 9 years post the land acquisition. He testified that he visited 440 acres for purposes of the report. That until the Plaintiff are compensated the land belongs to them. He conceded he had not attached a map to spot the comparables used nor

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their searches. He could not tell who was and was not compensated. He agreed he had not attached the ETR receipt for the part payment though he indicated his claim was for the full amount.

26. Cross examined by Mr. Waga state counsel PW3 testified that the 3rd Defendant is the only one who can confirm the Plaintiffs ownership of the land. He had not produced a search for the current status of the land nor a letter showing he was denied a search. While he was aware some people were compensated, he did not have the specific amounts. He also did not have a list of those not compensated.

27. With the foregoing the Plaintiffs case was marked as closed.

<u>1st Defendant's case</u>

28. The 1st Defendants case is the Plaintiff Group Ranch was dissolved and the suit land subdivided and registered privately in members names. Kwale/Mwavumbo/1 therefore ceased to exist upon dissolution of the group ranch and the Plaintiffs concede as much at Paragraph 11 of the Plaint herein.

29. That indeed during the Construction of the Mombasa-Nairobi Standard Gauge Railway, a specific portion of the suit land herein measuring 174.646 was gazetted for compulsory

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acquisition vide gazette notice number 4096 of 20th June 2014 and all the PAPs fully compensated by them.

30. That it only gazetted for acquisition 174.646 hectares and it only compulsorily acquired the same and duly compensated the project affected persons in full. In any event the survey for properties to be compulsorily acquired is done by them and the 2nd Defendant under the Land Act as the acquiring authorities and not private surveyors.

31. That further, compensation was only payable and was actually only paid out to persons along the Standard Gauge Railway corridor whose properties were compulsorily acquired and affected by the said project. The 1st Defendant was not acquiring the entire Ranch and compensation was only paid to persons affected by the project.

32. They further aver that they only compensated genuine and registered members of the Plaintiff whose properties were affected by the said project. However, the 1st Defendant did not call any witnesses.

2nd Defendant's case

33. The 2nd Defendant deny having any responsibility or obligation to pay compensation arising out of compulsory acquisition of the ranch, since the responsibility is by law vested on the 1st Defendant Commission and that it remitted

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to the National Land Commission all the funds required to pay compensation to all persons affected by compulsory acquisitions for the SGR project, and they were already paid.

34. They deny violating the Plaintiff's rights under Article 40 of the Constitution or at all.

35. That having remitted all the funds to the National Land Commission, the claim for compensation lies squarely against the National Land Commission, and not them because Section 125(1) of the Land Act imposes the obligation to pay compensation for compulsory acquisition on the National Land Commission and Section 117(1) of the Land Act imposes the obligation to pay interest for unpaid compensation on the National Land Commission.

36. They are a state corporation established under the Kenya Railways Corporation Act with no legal liability, obligation or duty to pay compensation arising out of compulsory acquisition.

37. They denied the jurisdiction of this Court. That jurisdiction to hear and determine issues on property and claims for compensation arising out of compulsory acquisition is vested on the National Land Commission's Inquiry established under Section 112 of the Land Act.

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38.DW1 was Edgar SSelebwa Lugunzu Senior Surveyor with the 2nd defendant. He adopted his witness statement dated 2/12/22 as his evidence in chief and produced the documents list in the 2nd defendants list of documents of even date and supplementary list dated 23/9/2024. Reiterating the pleadings DW1 stated they paid the individuals who presented themselves to the selection committee and demonstrated occupation. The witness took the court through all the exhibits in support of the 2nd Defendant's case. He testified that the group ranch never presented itself during the inquiry and inspection. Commenting on the supporting affidavit sworn by Johnson Mkala the witness pointed that once land has been subdivided it ceases to exist.

39.Cross examined by Mr. Simiyu for the Plaintiff the witness stated he did not have the minutes of the inquiry. He had not produced the documents presented by those who were compensated. Commenting on the list of the people who were compensated he conceded he had no evidence that the Plaintiffs confirmed they be compensated on behalf of the group ranch.

40.The 2nd defendants case was marked as closed.

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3rd and 4th Defendants' case

41. The 3rd and 4th Defendants case is that the Land Act 2012 vests the mandate to compulsorily acquire land required for public purposes or public use on behalf of the National or County Governments upon request to the National Land Commission and that they were not party to the discussions between the plaintiff and the 1st and 2nd Defendants and they are total strangers to the averments.

42. They state that they did not violate the Plaintiff's rights under Article 40 and that the obligation to pay for any compulsory acquisition rests upon the National Land Commission as provided for under the law and not them.

43. That the reliefs sought by the Plaintiff are neither available nor merited.

44. The 3rd and 4th defendant did not call any witnesses.

Parties' submissions

44. Only the Plaintiff and the 2nd Defendant filed their submissions in support of their respective cases.

Plaintiff's submissions

45. The plaintiffs identified a single issue for determination and that is whether or not the Plaintiff was compensated for the 178.03 Hectares compulsorily acquired by the

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Defendants vide Kenya Gazette Notice No. 4096 of 20th June, 2014 though the acreage indicated therein is 174.646 Hectares or 436.615 Acres.

46. They submitted that it is not in dispute that members of the Plaintiff directly affected by the construction of the Standard Gauge Railway in terms of destruction of their homes, graves, farms and other structures were paid for their structures destroyed and also to remove graves where the Standard Gauge Railway was to pass. However, no compensation in respect of land was ever made to the Plaintiff who is still the registered owner of parcel No. Kwale/ Mwavumbo/1 measuring approximately 24,908 Ha where the Standard Gauge Railway passed through.

47. That during hearing the Plaintiff's Chairman Mr Wilson Yawa Chimega displayed the Original Title Deed in Court which the Plaintiff still has and has not been surrendered to the Government of the Republic of Kenya for excision of 439.90 Acres already compulsorily acquired by the Defendants. And this begs the question: if indeed compensation for the portion of land compulsorily acquired for the construction of the Standard Gauge

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Railway, why is the Plaintiff still keeping the original title deed for the entire parcel of land?

48. That save that there is Gazette Notice No. 4096 of 20th June, 2014, no award was ever given by the Defendants. The Valuation Report produced as Exhibit No. 13 by Rashid H. Shake is not controverted in any way.

49. That it is not disputed is that the Plaintiff is the registered owner of the suit property. Though the Defendants tried to allege the Plaintiff as not being the registered owner, the contrary was never proved. The narrative peddled around by the Defendants that other persons were compensated does not hold. Being the custodian of the Land Register, and the guarantor of titles emanating from them, the Government was acutely aware that the suit property was privately owned by the Plaintiff.

50. That DW1, produced DEX-1 purporting to be a list of persons compensated over the land. Nothing from the list can assist the court arrive at a conclusion whether any money was paid out. No corroboration of the evidence on that list was done in the sense.

51. The Plaintiff relied on the following case laws: -

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Mutonyi& Ano =vs= Rep Cr Appeal No. 92 of 1981

Patrick Musimba v National Land Commission & 4 Others [2016] eKLR

Attorney General =vs= Zinj Ltd Pet. 1 of 2020

Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR

Sonko v Clerk, County Assembly of Nairobi City & 12 others [2022]

2nd Defendant's submission

52. The 2nd Defendant identified the following issues for determination;

1) Whether the Court has jurisdiction to hear and determine the claim in the Plaint dated 30/9/2019 as objected to vide paragraph 15 of the 2nd Defendant's Defence?
2) Whether the Plaintiff was the registered proprietor of the suit property Kwale/ Mwavumbo/I as alleged at paragraph 6 and 13 of the Plaint and denied at paragraph 3 and 10 of the 2nd Defendant's Defence?

3) Whether the acreage of the land compulsory acquired for the SGR project was 178.0 Ha as alleged at paragraph 8 of the Plaint or 174.646 Ha as indicated in the gazette notice dated 20/6/2014?

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4) Whether the 1st Defendant paid compensation for the compulsory acquisition of the suit property to squatters as alleged at paragraph 12 and 14 of the Plaint or to the persons truly interested in the suit property as pleaded at paragraphs 7, 8 and 9 of the 2nd Defendant's Defence?

5) Whether the value of the suit property was Kshs. 1,011,947,000/= as pleaded at paragraph 17 of the Plaint and denied at paragraph 14 of the 2nd Defendant's defence?

6) Whether the Plaintiff is entitled to payment of compensation of Kshs. 1,011,947,000/= as sought under prayers (a) and (b) of the Plaint?

7) Whether the 2nd Defendant has any legal duty to pay the Plaintiff the compensation of Kshs. 1,111,947,000/= as sought under prayers (a) and (b) of the Plaint?

8) Whether the Plaintiff is entitled to costs of the suit as sought under prayer (d) of the Plaint?

53. The 2nd Defendant filed submissions contending that this Court lacks jurisdiction to hear and determine the Plaintiff’s claim as pleaded in the Plaint dated 30th

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September 2019. Counsel submitted that the only relief sought by the Plaintiff is compensation arising from compulsory acquisition of land, a process exhaustively governed by the Land Act, 2012.

54. The 2nd Defendant filed submissions contending that this Court lacks jurisdiction to hear and determine the Plaintiff's claim as pleaded in the Plaint dated 30th September 2019. Counsel submitted that the only relief sought by the Plaintiff is compensation arising from compulsory acquisition of land, a process exhaustively governed by the Land Act, 2012.

55. Counsel argued that the Plaintiff failed to exhaust the mandatory statutory dispute resolution mechanisms provided under the Land Act before invoking the jurisdiction of this Court. In particular, Counsel submitted that under **Section 112 of the Land Act**, the National Land Commission (NLC) is vested with original jurisdiction to conduct inquiries and hear claims for compensation arising from compulsory acquisition.

56. Reliance was placed on ***Giciri Thuo & 5 Others v National Land Commission & 4 Others [2022] eKLR***, where the Court held that claims for

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compensation by persons interested in compulsorily acquired land must, in the first instance, be adjudicated through the inquiry mechanism contemplated under Section 112 of the Land Act.

57. Counsel further relied on the binding decision of the Court of Appeal in ***Mwavumbo Group Ranch v National Land Commission & 3 Others, Civil Appeal No. 115 of 2018***, delivered on 7th March 2019. In that decision, the Court of Appeal directed the Plaintiff herein to pursue its compensation claim through the procedures provided under Sections 112 to 120 of the Land Act, including invoking Section 116 where the grievance concerned compensation paid to alleged wrong persons.

58. It was submitted that despite the said express direction by the Court of Appeal, the Plaintiff failed to pursue its claim before the NLC inquiry and instead instituted the present suit, rendering it premature and incompetent.

59. Counsel further submitted that the Plaintiff equally failed to exhaust the appellate mechanism provided under **Section 133C of the Land Act**, which establishes the Land Acquisition Tribunal with

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jurisdiction to hear and determine disputes and appeals arising from decisions of the NLC relating to compulsory acquisition.

60. It was argued that by virtue of **Sections 133C (6) and (8)** of the Land Act, all disputes relating to compulsory acquisition must, in the first instance, be referred to the Tribunal, and that this Court's jurisdiction is limited to appellate jurisdiction on questions of law only under **Section 133D** of the Act.

61. Reliance was placed on **Missisipi Water Limited v Kenya Railways Corporation & Another [2023] KEELC**, **Benard Murage v Fine Serve Africa Limited & 3 Others [2015] eKLR**, and **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, on exhaustion.

62. It was further submitted that the Land Acquisition Tribunal became operational on 7th September 2023, prior to the hearing of this matter, and the Plaintiff had no lawful justification for failing to invoke its jurisdiction.

63. The 2nd Defendant submitted that the Plaintiff failed to prove, on a balance of probabilities, that it was the registered proprietor of land parcel

Kwale/Mwavumbo/1 at the time of compulsory acquisition. Counsel submitted that as at the time of acquisition in 2014 – 2015, the suit property existed as subdivided parcels with individual titles, and not as Kwale/Mwavumbo/1 as alleged. No official search or title document was produced by the Plaintiff to prove otherwise. It was therefore submitted that the Plaintiff lacked registered proprietorship at the material time and could not lawfully claim compensation as a landowner.

64. On the question of acreage, the 2nd Defendant submitted that the land compulsorily acquired measured **174.646 hectares** as published in the Gazette Notice dated 20th June 2014, and not 178.00 hectares as alleged by the Plaintiff. Counsel argued that the survey report relied upon by the Plaintiff was of no probative value, as the alleged surveyor failed to demonstrate professional qualification or licensing, did not attach the relevant Registry Index Maps (RIMs), title documents, or a letter of instructions. Reliance was placed on **Kandie v Joseph Chesire Chemuna t/a Avenue Butchery [2024] eKLR**, and **Mistry Jadva Parbat & Co. Limited v National Oil Corporation of Kenya [2023] eKLR**, It was therefore submitted that the Plaintiff failed

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to discharge the burden of proof regarding the alleged acreage of 178.00 hectares.

65. Counsel submitted that the Plaintiff’s own correspondence confirmed that its members had been compensated for land, developments, crops, and graves, and no evidence was adduced to support the allegation that compensation was paid to squatters.It was further submitted that the Plaintiff merely held land in trust for its members, who were the actual beneficial owners and were duly compensated.

66. On valuation, the 2nd Defendant submitted that the Plaintiff failed to prove that the suit land was worth **Kshs. 1,011,947,000/=** as claimed.Counsel argued that the valuation relied upon was conducted in 2024 and improperly factored in developments and infrastructure that did not exist at the time of acquisition in 2014, contrary to the principle that compensation must reflect market value at the date of acquisition. Counsel further submitted that the valuer was not called as a witness, rendering the valuation report inadmissible or of minimal probative value. Reliance was placed on **Elisha v Republic [2023] eKLR and Kenneth Mwenda Mutugi v Republic [2019] eKLR.**

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67. Counsel submitted that, in any event, the 2nd Defendant bears no legal duty to pay compensation, as that obligation is vested exclusively in the National Land Commission under **Section 125(1) of the Land Act**. Reliance was placed on ***Republic v National Land Commission & 2 Others ex parte Samuel M. N. Mweru & 5 Others [2018] eKLR*** and ***Geyser International Assets Limited v Attorney General & 3 Others [2021] eKLR***, where courts held that liability for payment of compensation lies solely with the NLC.

68. On costs, the 2nd Defendant submitted that costs should follow the event and be awarded in its favour, reliance being placed on ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR***.

ANALYSIS AND DETERMINATION

69. I have perused and considered the pleadings, the oral testimonies of the witnesses who testified and the evidence adduced herein. I have equally perused and considered the written submissions and authorities filed herein by the Learned Advocates for the parties. The following issues commend determination.

1) Whether this Court has jurisdiction to hear and determine this suit?

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2) Whether this matter is res judicata?
3) Whether the Plaintiff is entitled to the prayers for compensation for compulsory land acquisition?

Whether this court has jurisdiction to hear this matter?

70. It has been submitted by the 2nd Defendant that the jurisdiction to hear and determine this matter is vested in the National Land Commission. Jurisdiction is everything, without it a court must down its tools. See the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)**

71. Further, in the case of **Megvel Cartons Limited v Diesel Care Limited & 2 others (Application E008 of 2023) [2023] KESC 24 (KLR) (Civ) (21 April 2023) (Ruling)** the Supreme Court of Kenya held thus;-

> "We reiterate the well-known line, that jurisdiction is everything and that without it, a court has no power to make one more step; that a court's jurisdiction flows from either the Constitution or legislation or both; and that jurisdiction cannot be expanded through judicial craft or innovation"

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72. The question therefore is, is this court clothed with the necessary jurisdiction to entertain this suit? The 2nd Defendant submits that the Plaintiff did not exhaust the available remedies under Section 112 of the Land Act.

73. It is imperative that parties must exhaust all the remedies available or provided for under the law before moving to the courts. See **Muthinja & another v Henry & 1756 others (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR) (30 October 2015) (Judgment)** where it was held that

> "[…]It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

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74. Section 112 of the Land Act provides

112. (1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—

a. cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and

b. serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

(2) The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.

(3) At the hearing, the Commission shall—

c. make full inquiry into and determine who are the persons interested in the land; and (b) receive written claims of compensation from those interested in the land.

75. It is clear from section 112 of the Land Act that the National Land Commission is the first port of call when it comes to the hearing and determination of disputes

during the compulsory acquisition process. It is clothed with powers to exercise judicial authority. From the material placed before court, it is clear that a gazette notice was issued on 20th June, 2014 by the 1st Defendant on the compulsory acquisition of 174.646HA of Kwale/Mwavumbo/1. Upon issuance of the gazette notice, a public hearing/meeting was held at Kalalani chief's camp to hear and determine the issue of land ownership before any compensation could be done. This is confirmed by a letter dated 29th April, 2015 by the Plaintiff's chairperson Mbito Mongo and secretary Chimvua Kombo.

76. Additionally, the above was followed by letters addressed to the 1st Defendant among others a letter dated 22nd March, 2015 which was responded to vide a letter dated 6th May, 2015. Flowing from the above, it is clear that the Plaintiff exhausted all the available remedies as espoused under the Land Act, 2012.

77. Additionally, section 112 of the Land Act does not limit the jurisdiction of this court. Section 128 of the same Act provides: -

"**Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination**".

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78.The 2nd Defendant submits that there is created a Land Acquisition Tribunal which has powers to determine this claim. That the Plaintiff did not approach the said tribunal for determination of this matter before they rushed to court. It is worth noting that the Land Acquisition Tribunal was established **under part VIIIA** of **The Land Value (Amendment) Act, 2019** which introduced Section 133A to the Land Act. Clearly the said tribunal was established way after the acquisition and compensation had taken place. Moreover, at the time of filing these proceedings the court was seized of jurisdiction as the tribunal did not exist. Indeed the 2nd defendant confirms at paragraph 17 of its submissions that the Land Acquisition Tribunal became operational on 7/9/2023, vide gazette notice No. 11840 of 8/9/2023.

79.It is therefore my finding that this Court is clothed with the requisite jurisdiction to hear and determine this suit.

Whether this matter is res judicata?

80. The **Black's law Dictionary 10th Edition defines "res judicata"** *as*

"An issue that has been definitely settled by judicial decision…the three essentials are (1) an

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earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"

81. Section 7 of the Civil procedure Act provides

> "**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 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".**

82. Was this case substantially determined by both the High Court in Mombasa and the Court of Appeal?

83. In **John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)** the Court held as follows;

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For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a)There is a former judgment or order which was final;

b)The judgment or order was on merit;

c)The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d)There must be between the first and the second action identical parties, subject matter and cause of action.

84. It is with no doubt ELC Petition 94 of 2016 before the High Court at Mombasa and Civil Appeal No. 115 of 2018 involved the same parties and same issues which are before this Court. I have gone through the two judgements which has been produced by the 2nd Defendant as exhibits herein, it is clear that the main issues in those two cases were not ventilated on their merits. The case was dismissed for not raising constitutional issues and that it was simply an ELC matter.

85. It is the finding of this court that this suit is not res judicata ELC Petition 94 of 2016 before the High Court at Mombasa and Civil Appeal No. 115 of 2018.

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Whether the Plaintiff is entitled to the prayer for compensation for compulsory land acquisition?

86. It is the Plaintiff's case that the Defendants have violated its rights to own property under Article 40 of the Constitution. They submit that the National Land Commission did not follow the law in acquiring their land. That save for Gazette Notice No. 4096 of 20th June, 2014, no compensation was ever given by the Defendants.

87. Every person has the right to own property anywhere in the republic and no person can be deprived of his/her property arbitrarily. Article 40 of the constitution provides as follows:

a. **(1) 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—

(c) to arbitrarily deprive a person of property of any description or of any interest

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in, or right over, any property of any description; or

(d) 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) <u>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—</u>

b. <u>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</u>

c. <u>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—</u>

<u>requires prompt payment in full, of just compensation to the person; and</u>

(ii) <u>allows any person who has an interest in, or right over, that property a right of access to a court of law.</u>

(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.

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88. The Land Act 2012 Part VIII provides for the procedure for compulsory acquisition of land. The procedure has further been clarified by judges in various case laws a case in point is **Patrick Musimba v National Land Commission & 4 others [2016] KEHC 5956 (KLR)**

89. The Plaintiff asserts that their land was compulsorily acquired by the government for purposes of constructing the Mombasa Nairobi standard gauge railway without proper payment. That they are the registered owners of parcel number Kwale/Mwavumbo/1. That the alleged payment was made to some of their members including squatters only for their property/developments, graves and trees on the said land. This was reiterated by PW2 during his oral testimony.

90. Indeed, it is not in dispute in these proceedings that the Construction of the Mombasa-Nairobi Standard Gauge Railway was on a specific portion of the parcel number Kwale/Mwavumbo/1 which was gazetted for compulsory acquisition vide gazette notice number 4096 of 20th June 2014. The acreage acquired is in dispute though.

91. Arising from the provisions of Article 40 above a person to be compensated must demonstrate an interest in the land or title thereof and the details of how this is carried

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out are found in section 112 of the National Land Commission Act.

92. According to Section 107 of the Land Act, the National Land Commission (hereinafter referred to NLC) receives a request for the compulsory acquisition. Upon approval NLC is mandated to issue a gazette notice for the said acquisition. In this case NLC caused a notice to be published 20th June, 2014 in gazette Notice number 4606. Under section 112 of the same Act, the NLC is required to hold an inquiry to determine the true owners of the land to be acquired.

93. PW2 produced in evidence a letter dated 29th April, 2015 addressed to the chairman NLC by the Plaintiff. This letter was also produced by the 2nd Defendant as part of the annextures in the affidavit sworn by Mbito Mwongo in support of the petition (see 2nd defendants Supplementary list of documents dated 20/9/2024). My review of the said letter reveals that a hearing to determine the correct land owners to receive compensation was conducted on 21st February, 2015. This was in compliance with Section 112.

94. It is clear in these proceedings the true ownership of the land seems to be in dispute. At paragraph 3, the 2nd

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Defendant denied the allegation that the Plaintiff was at all material times the registered owner of the suit property. It is also the 2nd Defendants case that all the land where the construction of the SGR took place was claimed by the project affected persons who were duly compensated and there was no land left for compensation as evidenced in the letter dated 6/07/2015.

95. So, who is the correct land owner? The Plaintiffs interest on the land is based on the title and they claim as registered proprietors thereof. During the hearing PW2 produced a copy of the Land Certificate Title No number Kwale/Mwavumbo/1. The witness also displayed the Original Title Deed thereof. The 2nd Defendant also produced Land Certificate dated 26/3/1984 in its Supplementary list of documents. The title indicates Mwavumbo Group Ranch as the registered absolute proprietor and is dated 26th March, 1984.

96. PW2 also presented as part of the Plaintiffs document Gazette Notice 4096 showing the NLC intended to acquire for Kenya Railways Corporation 174.646 Ha off parcel Mwavumbo Group Ranch 1. The Notice is of 20th June 2014.

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97. Who is Mwavumbo Group Ranch. The Plaintiff adduced a copy of Certificate of Incorporation No. 0168(Pexh 1) showing the group was registered on 30th July, 2015. Based on the witness statement of PW2 (paragraph 8) which he adopted as his evidence in chief the same is registered under the Land Group Representative Act Cap 287 now repealed. At paragraph 13 of the plaint is pleaded that the nature of its ownership is recognised by article 63(2)(a) of the Constitution of Kenya and by dint of article 40 herein the state cannot take away a portion of their land without compensation. That it is a private land owner.

98. It is important at this juncture to find clarity on how the group representatives held the land. In my view I agree with the 2nd Defendants submission that the group representatives hold the land as trustees of the members of the ranch. PW2 confirmed in cross examination that indeed they hold the land as the officials on behalf of the members. PW2 cross examined by Mr. Mbuthia agreed that upon dissolution and subdivision each member will hold their land as resolved by the members on April 2015 before the SGR was built. This therefore displaces the proposition that the PAPs in the list of the people who were compensated

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ought to have confirmed in writing they be compensated on behalf of the group ranch.

99. It therefore follows that it is the members who were entitled to compensation and not the ranch as a unit. According to the Plaintiff's letter referenced adm/land/011/15 dated 22nd March, 2015 the Plaintiff confirms that some of its members affected by the compulsory acquisition exercise were paid for their houses and belongings. The 2nd Defendant produced in evidence in its bundle of documents dated 2/12/2022, the handover checklist dated 7/10/2016 and project affected persons who were paid from MWAVUMBO AREA running from page 1-17. The report gives the name, ID. No. Acquired Area in (HA); Grand Total/Award;Paid/Unpaid and status. The same is countersigned by the General Manager Finance Kenya Railways. I must emphasise that the acreage claimed and paid for is indicated in the matrix.

100. It is clear the National Land Commission does not deny that the affected persons were paid. Those that were not paid are indicated in the report above and the reasons given mostly of which was bounced cheques.

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101. The court had no evidence placed before it of a member of the ranch who raised a complaint that they were not paid. During cross examination there was an attempt by PW2 to discredit the names listed above indicating that some of the people paid were not members of the ranch. This may have been towards proving that payments were made to squatters. There was no material placed before court upon which the court would verify who was a member and who was a squatter. PW2 confirmed in cross examination that he had not tabled before court a register of the Plaintiffs' members neither did they send the same to the 1st Defendant.

102. Further it has been contended and emerged during PW2 evidence that some of the people who were compensated returned and occupied part of the ranch. No particulars or evidence was led in this regard. In my considered view based on this admission the responsibility lay upon the Plaintiff to remove them and not for the government to compensate the ranch when payment had already been effected.

103. It also emerged during PW2 oral testimony that it is not the entire stretch of the acquired land that was occupied and that therefore the Plaintiff was entitled to

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the payment. However, the plaintiff did not place before court evidence in terms of the exact acreage that was unoccupied for this purpose.

104. It is trite that he who alleges must prove and any person wishing a court to believe existence particular facts must prove the same. Section 107, 108 and 109 of the Evidence Act.

Section 107 reads;-

> ***Burden of proof.***
>
> ***(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***108. Incidence of burden.***
>
> ***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***
>
> ***109. Proof of particular fact.***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided***

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by any law that the proof of that fact shall lie on any particular person.

105. Coming back to the ownership of the land and the land certificate produced. The 2nd Defendant has submitted at length on this point referring to an earlier dispute pitting the plaintiff and some of its members.

106. I think it is the status of the land ownership and its registration that seems to raise concerns and which as a court I cannot wish away. The court was never led to any search certificate in respect of the suit property. PW1 affirmed in cross examination that he did not attach the search. PW3 also conceded he did not attach the same. While there were allegations that they were denied a search at the Lands Registry there was no evidence in this regard or that they applied for the same at all.

107. The Plaintiff urges that it was for the 3rd Defendant to clarify to the court the true ownership of the suit property. To me doubts were raised and there was nothing that stopped the Plaintiff from requesting for summons for the Land Registrar to be compelled to attend and clarify the ownership of the land.

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108. The courts concerns are further compounded by the testimony of PW2 who confirmed in cross examination that the ranch was allowed to dissolve and the process of adjudication was ongoing. It is trite that at the process of adjudication registration shall be based on the actual occupation on the ground and including the Land Occupied by the SGR but not the group ranch. Indeed, the Plaintiff applied to be dissolved on 20th July, 2015, a consent for dissolution was issued on 30th July, 2015. It is unclear whether after receiving the said consent the group was dissolved or not. If the group was dissolved as per the representatives' desire, to whom would the payment be made if any?

109. Based on the foregoing and the entirety of my analysis in this judgement I would be hesitant to grant an order for compensation if any to the Group ranch.

110. Further by granting the Plaintiff's an order for compensation, that will lead to double compensation. The compensation is not for the group representatives but for the members. If the members were already compensated, for whom is the Plaintiff demanding compensation for? No single member has been presented that claims not to have been paid for the

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portion they were occupying and was compulsorily acquired for the SGR project.

111. Moreover, compensation takes the form of restitution. It must take a person to the position they were before they were inconvenienced by the acquisition process. It must not lead to unjust enrichment or wastage of public resources. In this regard I drew insight from the decision **Kenya Anti-Corruption Commission Vs Gigiri Court Ltd & 3 Others (2025) KEELC 7315 (KLR)** where I note the decision aligns with constitutional and public finance principles against improvident disposition of public resources.

112. Based on the foregoing, the upshot of all the above is that the Plaintiff has failed to prove its claim on a balance of probabilities to be entitled to the orders sought.

113. Consequently, the suit be and is hereby dismissed.

114. It is trite that costs follow the event as provided under section 27 of the Civil Procedure Act. However, the grant of the same is also discretionary. I will be guided by Supreme Court of Kenya decision in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4**

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Others [2014] eKLR and invoke my discretion based on the fact that there seems to be a public interest in the matter. Consequently, each party shall bear its costs.

115. Orders accordingly.

Signed, Dated and **Delivered** this 6th day of **February 2026**

HON. LADY JUSTICE E. A. DENA
JUDGE
06.2.2026

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Odongo Holding Brief for Mr. Siminyu for the Plaintiffs

Mr. Ondabu appearing alongside Mr. Siminyu for the Plaintiff
No appearance for the 1st Defendant

Mr. Karina for the 2nd Defendant

No appearance for 3rd and 4th Defendants

Mr. Disii Court Assistant.

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