



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

E.L.C PETITION NO 5 OF 2018

IN THE MATTER OF ARTICLE 22 (1) & (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 10,19,20,21,22,23,24 AND 25 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF WATER ACT, 2002 (REPEALED), AND WATER ACT, 2016

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT, 2016

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE LAND (ASSESSMENT OF JUST COMPENSATION) RULES, 2017

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,35,40,47,48,50,60 (1) (b), 232 AND 249 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

STEPHEN MBUGUA GITUTHI.....1ST PETITIONER

EUNICE NJERI NYOIKE.....2ND PETITIONER

ALLAN MWANGI MAINA.....3RD PETITIONER

(All Petitioners Suing on their own behalf and on behalf of 57 other Petitioners)

VS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

ATHI WATER SERVICES BOARD.....2ND RESPONDENT

JUDGMENT

The background

1. The 1st, 2nd and 3rd Petitioners are the registered owners and or beneficial owners of all those parcels of land known as LOC 1/RWEGETHA/552, CHANIA/NGORONGO/3762 and LOC 1/KIRIAINI/196 respectively (herein referred to as the suit lands). The Petitioners have sued on their own behalf and on behalf of 57 (as per the petition) other registered owners and or beneficial owners of various parcels of land located in Ngethu, Rwegetha and Kiriani villages in Kiambu and Murang'a Counties. However, the authority to the Petitioners to act marked "SMG1" attached to the supporting affidavit sworn by 1st Petitioner on 29/8/18 only discloses 51 claimants, inclusive of the 3 Petitioners, out of which only 50 signed the authority aforementioned.
2. The Petitioners aver that they have various improvements on the suit lands such as residential houses, crops, trees, and animal structures
3. The 1st Respondent, the National Land Commission has authority to carry out compulsory acquisition of private land required for public purposes and for a public institution.
4. The 2nd Respondent is a Water Services Board established under section 51 of the Water Act, 2002.
5. The water pipeline wayleave project entails the construction of linked tunnel from Thika Dam to Kigoro treatment works to Gigiri tanks.
6. To achieve its objectives, the 2nd Respondent has been mandated to construct pipelines to convey the water to its destination as explained above. This has necessitated the acquisition of private land by the 1st Respondent for purposes of laying the pipeline along its way.

Interlocutory orders and proceedings

7. By consent of the parties, interim orders were granted on the 26/9/18 restraining the Respondents from taking possession and or interfering with the peaceful ownership and occupation of the suit premises by the Respondents for 7 days pending discussions of an out of Court settlement in respect to the motion dated 29/8/18. The said orders lapsed and were not extended.
8. Upon the lapse of the interim orders aforesaid, the Petitioner appears to have abandoned its Notice of Motion dated the 29/8/18 in favour of the full hearing of the main petition. On the 16/1/19 the 2nd Petitioner sought leave to file notice to cross examine the Petitioners, however they also abandoned the course of action on the 14/2/19 despite leave having been granted by the honourable Court.
9. Finally, by consent of the parties, the petition proceeded by way of written submissions with limited highlighting allowed by the Court.

The case for the Petitioners.

10. The Petitioners claim that in the year 2015 they learnt from rumours in the villages that the 2nd Respondent had floated a proposal to construct what they refer to as the pipeline project and that a wayleave would be created across the suit premises. They then instructed their advocates who wrote to the 2nd Respondent on 8.10.2015 and 28.06.2016 seeking information on the project particularly in respect to maps and plans of the proposed project, crop and structural damage assessment report and current valuations of the suit properties. That the 2nd Respondent failed to provide the information requested despite several reminders thereafter which they believe was an express violation of their right to access to information protected under Article 35 (1) of the Constitution and section 4(1) of the Access to Information Act 2016.
11. The Petitioners aver that vide three gazette notices dated the 18/11/2016, 03/11/2017 and 9/3/18, the 1st Respondent sought to acquire the suit properties on behalf of the 2nd Respondent for purposes of construction of the pipeline project.
12. That the said gazette notices were in relation to creation of rights of way (wayleave) only on the suit properties and claims that the Respondents flouted the mandatory procedure of creating wayleaves as set out in Sections 143 -149 of the Land Act, 2012.
13. That the 1st Respondent failed to serve them with notices to acquire and inquiries to facilitate their attendance and presentation of their claims to the 1st Respondent. That inquiries were done at different centers in which their advocates were harassed by the Respondents and not allowed to raise their objections. That the Petitioners were intimidated by the police and the local administration for instructing their Advocates and the Respondents coerced them into accepting the awards. That the claims and representations presented by their advocates to the 1st Respondent were not considered as the 1st Respondent had predetermined awards. That the awards were inordinately low and not commensurate to the current valuation of the Petitioner's properties and developments thereon. That no reasons were given for the said awards. That no prompt and just compensation has been paid to the Petitioners for the acquisition of their lands and the 1st Respondent ignored their valuation in arriving at the award for compensation.
14. That the acquisition of some of their properties will entail demolition of residential homes, blockage of access road to their residential homes, destruction of improvements done on their land, some passing less than 5 feet from the residential homes thus diminishing the value

of the suit properties for their intended use and affecting their livelihoods.

15. The Petitioners have enlisted the various alleged breaches and violation of their Constitutional rights by the Respondents. That the Respondents acted in breach of principles of good governance particularly the principle of public participation, accountability and rule of law for denying the Petitioners access to information they requested, for barring them from participating in the inquiries, for attempting to deny the Petitioners legal representation and generally conducting the acquisition process in secrecy.

16. As to the right to access to information that the Petitioners were kept in the dark before the commencement of the project and failure to be provided with the documentation they called for in 2015 onwards hampered their right to access to justice at the impugned inquiries. That after the inquiries their quest for information vide a letter dated the 16/5/17 in respect to the valuation report and the reasons for the awards were ignored.

17. In respect to their rights under Article 40 of the Constitution, they allege that the intended acquisition without just and prompt compensation undermines their right to own property, which is under threat by the Respondents. That the acquisition was unlawful, un-procedural and illegal scheme by the Respondents geared towards depriving him of his property. That the inquiries conducted were a sham as notices were not issued to them and they were not heard on their claim for compensation.

18. As regards their right to fair administrative action under Article 47 of the Constitution, the Petitioners claim the Respondents contravened that right for withholding information from them since the year 2015, for failing to postpone the inquiry meetings that were held without their notice and for using the local authorities to intimidate and harass the Petitioners and their advocates. That the conduct of the Respondents raises questions on the legality of the awards they made.

19. That the Respondents' failure to provide all the information requested and the reasons for the awards and for conducting sham inquiries violated the Petitioner's right to access to justice.

20. Lastly as regards their right to a fair hearing under Article 50(1) of the Constitution the Respondents breached their said right for sitting as the judges during the inquiries hence making the inquiries partial and not independent coupled with all the other misdoings by the Respondents alleged here above.

21. The Petitioners' sought the following prayers;

a. The Honourable Court be pleased to hold and declare that the Respondents infringed and violated the Petitioners' rights of access to information.

b. The Honourable Court be pleased to order the Respondents to provide the Petitioners with the following information in respect of the Pipeline Project and the acquisitions of the Suit Properties and Improvements.

i. Pertinent information regarding the Project, including the gazette map/plan of the proposed pipeline and the valuation reports for the items under compensation;

ii. All relevant Kenya Gazette notices;

iii. Copies of the notices served upon the Petitioner, with evidence of service;

iv. Copies of the notices served upon the County Governments, with evidence of service;

v. Written reasons for the awards issued to the Petitioners, including the rates (and the valuation report) used in making the awards;

vi. Proof of the opening of the special account and depositing of the Petitioners' compensation into the account; and,

vii. Any other pertinent information as the Honourable Court may please.

c. The Honourable Court be pleased to hold and declare that the purported acquisition of the Suit Properties and Improvements undertaken by the Respondents was carried *ultra vires* the Constitution, and Statutory law, thus infringing and violating the Petitioners' rights to property.

d. The Honourable Court be pleased to hold and declare that the Respondents threatened, denied, infringed and violated the Petitioners' right to prompt payment of just compensation.

e. The Honourable Court be pleased to hold and declare that the Respondents breached the Petitioner's legitimate expectations that they would receive prompt payment of just compensation upon acquisition of the Suit Properties and Improvements as by law provided.

f. The Honourable Court be pleased to hold and declare that the Respondents denied, threatened, violated and infringed the Petitioners' rights to fair administrative action.

g. The Honourable Court be pleased to hold and declare that the Respondents denied, threatened, violated and infringed the

Petitioners' rights of access to justice.

- h. The Honourable Court be pleased to hold and declare that the Respondents denied, threatened, violated and infringed the Petitioners' rights to a fair hearing.
- i. The Honourable Court be pleased to hold that the 1st Respondent by failing to providing written reasons made the awards without good reason.
- j. The Honourable Court be pleased to hold and declare Gazette Notice No. 9589 dated 18th November 2016, Gazette Notice No. 10870 of 3rd November 2017, Gazette Notice No. 2188 of 9th March 2018, and Gazette Notice Number 2189 dated 9th March 2018 as illegal, irregular, unprocedural, unconstitutional and void for all intents and purposes.
- k. An order of Certiorari do issue removing into this Honourable Court for purposes of being quashed the Gazette Notice No. 9589 dated 18th November 2016, Gazette Notice No. 10870 of 3rd November 2017, Gazette Notice No. 2188 of 9th March 2018, and Gazette Notice Number 2189 dated 9th March 2018, as well as the Awards dated 11th April 2018, 12th April 2018, 13th April 2018, 23rd April 2018 and 31st April 2018.
- l. The Honourable Court be pleased to hold and declare that the Awards dated 11th April 2018, 12th April 2018, 13th April 2018, 23rd April 2018 and 31st April 2018 by the 1st Respondent are illegal, irregular, unprocedural, unconstitutional and void for all intents and purposes.
- m. In the alternative to prayers (j), (k) and (l) above, the Honourable Court be pleased to order the 1st Respondent to conduct fresh inquiries as to compensation for the Petitioners in accordance with the Constitution and the Land Act, 2012 and any other relevant law.
- n. In further alternative to prayers (j), (k) and (l) above, the Honourable Court be pleased to order a joint valuation of the Suit Properties and Improvements between the Respondents and the Petitioners in accordance with the Constitution and the Land Act, 2012, and any other relevant law and such joint valuation to form the basis of compensation to the Petitioners.
- o. The Honourable Court be pleased to order the Respondents to shoulder the costs of any valuer or expert engaged by the Petitioners, and the costs of any joint valuation.
- p. An order of Prohibition be and is hereby issued prohibiting the Respondents, their servants, agents in any manner whatsoever from revoking or lodging any easement, caution or caveat or restriction whatsoever on the titles to the Suit Properties, or trespassing on, transferring and/or registering any change in ownership of the Suit Properties and Improvements to any person or persons unless due process is followed and prompt payment of just compensation made to the Petitioners.
- q. An order of permanent injunction directed at the Respondents, their agents, officers or any person whosoever or howsoever acting on their behalf from interfering in any way whatsoever with the Petitioners' ownership and occupation of the Suit Properties and Improvements unless due process is followed and prompt payment of just compensation made to the Petitioners.
- r. An Order of prohibition directed at Respondents, their agents, officers or any person whosoever or howsoever acting on their behalf from summoning, serving, negotiating, paying, dealing or communicating directly with the Petitioners or in any other way interfering with the legal representation of Petitioners without the consent and directions of the Advocates.
- s. The Honourable Court be pleased to award the Petitioners general damages against the Respondents jointly and severally for losses and inconveniences suffered by the Petitioners;
- t. The Honourable Court be pleased to award the Petitioners exemplary damages against the Respondents for blatant breach of the Petitioners' fundamental rights;
- u. The costs consequent upon this Petition be borne by the Respondents.
- v. The Honourable Court do award interest on (s), (t) and (u) at the prevailing Court rate of 14% from the date of filing of the suit till payment in full.
- w. The Honourable Court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the Petitioners' fundamental rights

22. In his Supporting Affidavit, the 1st Petitioner with authority from the other Petitioners largely reiterates the averments made in the petition, he lists the number of developments he has done on his land. He states that on 8/10/2015 and 18/6/16 through their lawyers on record they sought disclosed information from the 2nd Respondent. That particulars of the information were; complete maps or plans for the proposed project showing the areas of the lands that would be affected, crop and structural assessment reports for each of the parcels that the project would affect, current valuations of the lands and improvements. That this information as crucial to enable them exercise their rights and make informed decision during the acquisition of the lands by the 1st Respondent. He deposed that the 2nd Respondents failed to provide the requested information keeping them in the dark in respect to the project and yet their lands were going to be affected. That on the 27/2/17 the 1st Respondent acknowledged that it had copies of the said plans but referred them to the 2nd Respondent who refused to avail the same.

He contends that this action was a denial threat or violation of their right to prompt and just compensation as well as contrary to Art 10 of the Constitution.

23. He stated that prior to 2015, the 2nd Respondent entered into their lands without any consent or purpose of the entry or information of the project which prompted them to lodge a complaint with the Commission on Administration of Justice (CAJ) and Economic & Anti-Corruption Commission (EACC) on 6/12/17.

24. That following the publication of the gazette notices by the 1st Respondent to acquire the right of way, the 1st Respondent failed to serve the Petitioners and the County Governments of Kiambu and Murang'a as provided by section 144(4) of the Land Act. That it also failed to proceed under section 146 of the Act which required it *inter alia* to make recommendations to the Cabinet Secretary who is expected under the Act to create the way leaves, if, satisfied that it was proper.

25. He contended that the 1st Respondent failed to serve them or their advocates with the notices of inquiries and as a result learnt through village rumours 3 days to the inquiry and therefore was unable to prepare his claim of representation. A request to the 1st Respondent to adjourn the inquiry to allow them prepare was rejected by Dr Salome Munubi, the director of Valuation of the 1st Respondent. That he attended the inquiry at 12/4/18 with his advocates which turned out to be a charade and a sham, where the Petitioners *inter alia* were harassed and intimidated by the staffers of the Respondents in concert with the local administrators and the police; their advocates were threatened with arrest during the inquiries; their claim of representations were not considered; were given a predetermined blanket awards without the breakdown of how the values were assessed; no reasons were given for the awards and compensation; did not provide written reason for the outright rejection of the values of the land and improvements given to the 1st Respondent by the Petitioners during the inquiries.

26. That they declined to accept the awards.

27. He deposed that immediately thereafter they commissioned a valuer to give a sample valuation of one of the suit lands and KALRO for assessment of the crops thereon. This is contained in a valuation report dated August 2018. That post the inquiry, they again sought for information from the Respondents and *inter alia* demanded to be given the valuation reports for lands and improvements as well as the written reasons for the awards which was not provided by the Respondents. That on 30/7/18, the 1st Respondent issued them with a 14-day notice to take possession of the lands prompting them to file suit in disregard to their rights to prompt and just compensation having been made. That the forceful takeover has led to obstruction and demolition of some of the houses and structures of the Petitioners such as land parcels No.s 1112, 275, 1064, 3766. In some instances, he averred the proximity of the pipeline is less than 5 feet from the houses causing nuisance to the owners and occupiers of the houses. He added that evidence which is the basis of valuation of the structures and land may be destroyed in the process. That the issue of severance of the lands was not addressed as seen in the case of Parcel No 567 which land has been impaired as a result in diminutive and uneconomic size. Sources of livelihood, he argued is being impacted by the taking over.

28. He is however not opposed to the acquisition of his land, as long as, he receives a fair, just, and prompt compensation for it.

29. In his Supporting Affidavit, Stephen Njoroge adopted the contents of the supporting affidavit of the 1st Petitioner and in addition deposed that he has made several developments on his land including planting food crops and constructed various structures thereon. That the pipeline project shall cut right across his main house which means his home will be demolished rendering his family destitute. That the remaining portion of his land will be inadequate for intended use. That he has been denied information regarding the pipeline and the opportunity to be heard and make representations for just payment. That though he was presented with an award of Kshs 502, 483 for his parcel No 567, no reasons for the decision were given.

30. He contends that he is not opposed to the acquisition of his land, as long as, he receives a fair, just, and prompt compensation for it and the same is done in accordance with the law.

31. Simon Mungai Ndung'u, associated himself entirely with the evidence of the 1st Petitioner. He stated that the suit land parcel No 275 is his only source of income and the taking over without just payment will affect his ability to educate his child as well as medicare for his sick wife. Further that the pipeline cuts through his front yard outside the main house causing cracks and weakening the structure of his house, let alone the severance of the plot generally.

32. Like the other two, he is not opposed to the compulsory acquisition of the wayleave as long as just compensation is done in adherence to the dictates of the Constitution and the law.

33. Like the three deponents above Teresia Waithira Njoroge associated herself with the contents of their supporting affidavits and further stated that on 30/8/16 the Respondent's contractors cut down trees and tea over an area of 15 meters instead of the 9 meters earlier measured and contrary to the gazetted measurements. That no award has been made for the extra 6 meters strip of land as well as destroyed crops and trees. She too does not oppose the compulsory acquisition of the land but the same must be done in compliance with the law and just compensation.

The case of the 1st Respondent.

34. The 1st Respondent in opposition to the petition tendered its evidence vide a replying affidavit sworn by Brian Okol, its Deputy Director, Legal Affairs and Enforcement. In it, he reiterates the constitutional mandate of the 1st Respondent, to acquire land required for public purposes on behalf of the 2nd Respondent, in the instant case for purposes of construction a water pipeline wayleave from Thika Dam (Ndakaini) to Kigoro treatment plant. In pursuance to the provisions of section 112 of the Land Act, he avers that the 1st Respondent gave the necessary notices vide the Kenya Gazette of its intention to compulsorily acquire land for the creation of a right of way (water pipeline wayleave) to interested persons. That inspections, enquiries and valuations of the affected parcels as well as issuance of awards to the project

affected persons (PAPs) was carried out. The exercise of sensitization and issuance of awards took place on various dates and venues along the pipeline route.

35. That while undertaking the valuation exercise, the 1st Respondent took into account various principles of valuation among them being the market value of the land, damage sustained or likely to be sustained on the land and to the PAPs, reasonable expenses incidental to change of residence, damage resulting from diminution of profits and the amount of compensation awarded was increased by 15% of the market value is added for disturbance. He deponed that these are contained in the principles of valuation as set out in the Land (Assessment of Just Compensation Rules), 2017 Legal Notice No.283 the Land Act (No.6 of 2012). That in determining the value of the land the 1st Respondent used the current market value of the land as at the date of the publication of the notice of intention to acquire the land as per the Government standards.

36. In respect to crop valuation that it applied rates as contained in the Forest Act of 2005 (Legal Notice No 21 of 26/2/16). It also supplemented the crop valuation with the Crop and Technology Crop Compensation Rates for Kiambu County issued by the Ministry of Agriculture and Livestock Fisheries and Irrigation of the said County to determine the crop market values, which are usually available to the public.

37. That in conclusion of the valuation exercise, an award is prepared and given to the PAPs who may accept or reject the same. That the Petitioners herein declined the award and proceeded to file the suit. In a nutshell the 1st Respondent avers that they duly followed the law through the acquisition process.

Petitioners Response to the 1st Respondents Replying Affidavit.

38. In response to the 1st Respondent's affidavit aforementioned the Petitioners through the affidavit of Stephen Mbugua Gituthi contends that their averments in the Petition are unopposed. In further response to the affidavit of Brian Ikol, the deponent stated that the Respondents trespassed into their lands without obtaining their consent or issuing the requisite notices. That though they attended the inquiries accompanied by their advocates they were not served with the notices. He further faulted the 1st Respondent in not disclosing how the values were assessed and or a valuation report in support of market values in compliance with Assessment of the just compensation Rules, 2017.

39. In addition he stated that the Forest Act was meant for management of forest resources whilst the crops on the suit lands were agricultural crops on agricultural land; They also challenged the accuracy of the valuation done by the Respondents for failing to capture the various developments on each suit land; And points out the strict requirement under the Land Act requiring valuations for acquisition of land to be done by a licensed valuer; They argue that the rates prepared by Kiambu county would not be applicable to the lands in Murang'a county; That the 1st Respondent failed to evidence any valuation on the suit properties and improvements including various maturity levels sizes and productivity of the crops. They make reference to the valuation reports they acquired from a licensed valuer which they contend is a true reflection of the current market rate of their properties to show their properties were greatly undervalued by the Respondents.

40. That the Petitioner's valuation report dated the 16/9/18 is a true reflection of the market values of the land and improvements thereon. He deponed that they declined to accept the awards by the 1st Respondent because they were denied crucial information such as the valuation assessment of the land and improvements or the basis of the award and compensation.

41. In further response to the affidavit of Stephen Mbugua Gituthi, the 1st Respondent through its deponent namely Joash Oindo sworn on the 28/2/19 avers that the documents it relied upon are legal and public documents and challenges the valuations provided by the Petitioners for being excessively exaggerated and for failing to base their calculations on laid down statutory standards and failing to give comparative valuations for similar and recent valuations. And urged the Court to dismiss the Petitioner's case with costs.

The case for the 2nd Respondent.

42. The 2nd Respondent opposed the petition through the replying affidavit of Martha Wanjiku sworn on 21/9/18 in which she deponed that all the PAPS along the pipeline were sensitized on the project from the years 2015-2016. The PAPS were identified and engaged in the survey and valuation of the lands along the pipeline where upon completion the report was submitted to the 1st Respondent for wayleave acquisition. The 2nd Respondent in line with its mandate deposited the monies into the 1st Respondents account for the compensation of the land owners. The 2nd Respondent undertook sensitization meetings to disseminate information to the PAPs, the Petitioners included. That most of the PAPs were compensated upon which a 14-day notices of taking possession was issued by the 1st Respondent to pave way for the contractor to commence construction of the pipeline. It is their belief that the compensation to the Petitioners was accomplished in accordance with the procedure and therefore the application by the Petitioners is frivolous vexations and should be dismissed.

The written submissions.

43. The Petitioners begun by addressing the issue of whether the process of compulsory acquisition was procedurally conducted in accordance with the Constitution and the law, the Petitioners submitted that inquiry notices were gazetted under section 112 (1) (b) of the Land Act but they were not served as required in law and only got to know it from the rumors in their villages. They assert that they eventually got to attend the inquiries despite not being served with the notices but claim that at the meetings they were intimidated and harassed by the Respondents with intention to coerce them to accept the awards given. Further that the inquiry forums were not quasi-judicial and they describe the meetings to have been a charade and a sham.

44. In regard to the awards and valuation the Petitioners contend that several crucial details were omitted on the rates used and the basis for the valuation. Also, the lack of clear guide of the award items that were compensated. The failure to consider the valuations provided by the Petitioners and the reports relied on by the Petitioners particularly the one from KALRO that gave specific values for macadamia and

avocados and that of the licenced valuer namely Zanconsult valuers and Management company limited. They argued that the award of compensation given by the 1st Respondent is inordinately low, below market value and failed to take into account the provisions of the Constitution and the Land Act (Assessment of just Compensation) Rules 2017, taking into consideration the value of the property and the developments thereon.

45. The Petitioners submitted that the Respondents violated their right not to be arbitrary deprived of their property or the interest therein by the Respondents' failure to follow the procedure for creating wayleaves as set out under section 143 through to 149 and part VIII of the Land act, 2012. That the contractors on the ground have continued to clear and demolish developments on a 15 meter corridor which is in excess of the gazetted 9 metres. That the Respondents failed to provide valuations from a registered valuer and required under section 148 of the land act and dismisses the figures from Kiambu County and the Forests Act used by the Respondents in making their valuations. They are convinced that their right to property was violated further by the Respondents' refusal to provide reasons for the awards as requested by the Petitioners.

46. The Petitioners also fault the Respondents for taking possession of the premises before setting up an interest accruing special account into which the compensation monies would be deposited as mandatorily required under section 117(1) of the Land Act and emphasized under section 115 and 120 of the land act. The Respondents have failed to provide details of the special account despite many requests from the Petitioners. They contend that due to that failure the possession and the ongoing works on the suit premises are therefore illegal.

47. In respect to their right to access information the Petitioners' argued that the same is protected vide Article 35 of the Constitution and the blatant ignorance of the Petitioners' letters to the Respondents requesting for various pieces of information in respect to the project both before the commencement of the acquisition process and after the awards were made, as required under section 8 of the Access to Information Act, was a gross violation of their said right. They relied on the Court of Appeal decision in **Timothy Njoya vs. Attorney General & Another [2017]eklr in which the Court held that;**

“...still we entertain no doubt that the right to information is critical to the attainment of transparent and accountable government and is an enabler to the attainment and enjoyment of other rights by citizens. It has been recognized expressly in the Constitution of Kenya 2010, under article 35....”

48. The failure to be given access to information required both before the commencement of the acquisition process and after the awards were given and failure of proper public participation during the inquiries and the discrimination meted out on the Petitioners, violated their right to fair administrative action as enacted under Article 47 of the Constitution.

49. Further that the foregoing paragraphs here above show that the Respondents generally acted in breach of the Petitioners' right to a fair hearing and compounded it by breaching the rules of natural justice in the manner in which the inquiries were conducted which saw the 1st and 2nd Respondent sit together as judges during the inquiries to make decisions in their own cause.

50. The Petitioners' were categorical that they were not opposed to the compulsory acquisition of their lands, that their objection was centered on the violation of their various constitutional rights expanded here above, the breach of procedure by the Respondents in the acquisition process, the violation of their right to fair and prompt compensation and they demand joint valuations to be done.

51. The 1st Respondent in its submissions relied on its replying affidavit and reiterated that the acquisition process was carried out in accordance of the law and was confident that the awards made were fair.

52. In further support to its contention that it acted within the law, the 1st Respondent contended that the State is vested with the right to eminent domain under article 40 (3) of the Constitution, which is the inherent power to acquire privately owned land for public purposes subject to reasonable compensation. It cited the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 others vs. Kenya National Highways Authority [2014] Eklr** in which the Court in appreciation of the right to eminent domain upheld the right of compulsory acquisition as an overriding interest and held that the plaintiffs would not stand in the way if their property is identified as required for a public purpose so long as the same is conducted within the law.

53. The 1st Respondent submits that the acquisition process was conducted in accordance with the law as set out under part VIII of the land Act, 2012 and that the required notices under section 112 of the Act were duly issued. That in adherence to that procedure various gazette notice Nos. 9598 of 2016, 10870 of 2017 and 2188, 2189 and 2190 in 2018 for creation of water pipeline wayleave were issued. Inquiries were thereafter conducted in which the Petitioners were in attendance.

54. The 1st Respondent relied on the case of **Patrick Musimba Vs National Land Commission & 4 others (2016) EKLr** that settled the process and the steps to be followed in compulsory acquisition of land.

55. The 1st Respondent is opposed to the prayer for joint valuations on basis that more than three quarters of the PAPs have since received their awards and are convinced that the application of different principles would occasion injustice.

56. In regards to the prayers sought, the 1st Respondents are of the view that granting the same would usurp the constitutional mandate of the 1st Respondent. Secondly that the Petitioners' have failed to plead with reasonable precision the alleged contravention of their constitutional rights.

57. The 2nd Respondent points out the law on the procedure in respect to wayleaves is embedded under sections 143,144 and 148(1) of the Land Act and asserts that due process was strictly followed.

58. That it is common ground that gazette notices were duly published vide various Kenya gazette which are in the public domain, stipulating both the intention to acquire the said parcels of land and inviting the affected owners of land to the inquiries. It is also not contested that inquiries were indeed held on various dates at various venues in which the Petitioners were in attendance. In the premises the 2nd Respondents argue that the Petitioners' claim of lack of service of notices and denial of access to information is a fallacy.

59. In opposition to the prayer for joint valuation, the 2nd Respondent argued that the Petitioners' failed to challenge both the process of arriving at the awards and the values of the awards during the inquiries. It makes reference to the supporting affidavit of the Petitioners' at pages 91-255 marked as 'SMG17' merely issued a blanket statement of "nimekataa" without offering reasons for rejecting the awards.

60. The 2nd Respondent is convinced that due to the failure by the Petitioners to contest the values given to them in the awards during the inquiries and in the pleadings herein they are estopped from challenging the valuation reports given by the 1st Respondent. In its last limb the 2nd Respondent in an attempt to persuade the Court that the public interest outweighs the individual rights of the Petitioners' herein, stated that the project is aimed at providing water to millions of Kenyans in the City of Nairobi and its environs and any delay will occasion the tax payer additional costs.

Highlighting of written submissions.

61. Oral submissions were made by each of the parties' counsels who attended to the highlighting of their respective submissions which I have considered.

Analysis and determination.

62. A brief background of the petition is as follows; the Petitioners are the registered and or beneficial owners of the suit lands as evidenced by the annexed copies of titles. They claim to have learnt of the proposed pipeline project from the grapevine in the village way before its commencement in 2015 to which they immediately instructed their advocates on record to call for various information from the Respondents which request was ignored. That at the commencement of the acquisition process, the 1st Respondent did gazette its intention to acquire their suit lands vide gazette notice No.s 9598 of 2016, 10870 of 2017 and 2188 and 2189 in 2018 which the Petitioners claim to have not been served with. The Petitioners are aggrieved with the manner in which the said inquiries were conducted, the lack of proper public participation, the failure by the 1st Respondent to tender any valuations for their properties and failure to give reasons for the awards. They allege that due to denial of access to information by the Respondents they were unable to make substantive representations at the inquiries. They also accused the Respondents of harassment and intimidation with the intention of coercing them to accept the awards. In view of the above the Petitioners' case is anchored on the violation of the Petitioners' constitutional rights, the breach of procedure in the process of acquisition as well as the lack/inadequate compensation offered by the 1st Respondent.

63. It is not in dispute that the 1st Respondent did publish the gazette notices of intention to acquire the suit lands for the purposes of creation of a wayleave corridor for the construction of water pipeline wayleave from Thika Dam to Gigiri tanks on behalf of the 2nd Respondent. That thereafter the 1st Respondent issued the notice of inquiry to be conducted at various venues and time. That the Respondents also produced list of attendees to the enquiries, data collection sheets and lists of awards given in which the names of the Petitioners are indicated.

64. The 1st and 2nd Respondents assert that it conducted the acquisition process in adherence to the law and arrived at a fair and just valuation which took into account the principles of valuation as set out in the Land (assessment of just compensation), Rules 2017.

65. What is a wayleave? The Black's law dictionary defines a wayleave as;

“.. a right of way over or through land for the carriage of minerals from a mine or quarry. It is an easement, being a species of the class called “rights of way, “and is generally created by express grant or reservation”

66. I have reviewed and considered the petition, the affidavit evidence, the annexures, the rival submissions (both oral and written), case law where supplied, all the materials placed before the Court, the issues framed separately by the parties, the questions I shall seek to answer are;

67. As to whether the 1st Respondent was entitled to take compulsory acquisition of the Petitioners land for public purposes, it is trite that the state enjoys the power of eminent domain. Eminent domain, otherwise referred to as compulsory acquisition of land, is the government's power to take privately owned land compulsorily for public use. Such power inherent in the state can compel the transfer of private property from private hands for purposes of reallocating the same to a public use.

68. The power of eminent domain donated to the state by the Constitution is exercisable under Article 40 (3) of the Constitution which provides as follows: -

“(3) The State shall not deprive a person of property of any description, or any interest in; or right over property of any description unless the deprivation:-

- a. results from an inquisition of land or a conversion of an interest in land or title to land in accordance with Chapter five; or
- b. is for 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.”

69. To meet the objects of Art 40(3), the provisions of compulsory acquisition of a right of way (wayleave) are provided for in section 143-149 of the Land Act, 2012 read together with the Land (assessment of just compensation) Rules 2017, which were enacted following the repeal of the Land Acquisition Act.

70. Sections 107-133 of the said statute provides for compulsory acquisition of interests in land. An interest in land in my view includes a right of way, also known as a wayleave.

71. The 1st Respondent is a national commission created under Chapter 15 of the Constitution in respect to commissions and independent offices. It is an independent Commission established under Article 67 (1) of the Constitution. The operational mandate of the 1st Respondent is derived from National Land Commission Act No. 5 of 2012 which authorises the 1st Respondent to manage public land on behalf of the National and County Governments. Additionally, in accordance of Article 40(3) of the Constitution and Part VIII and X of the Land Act, No. 6 of 2012, the 1st Respondent has authority to carry out compulsory acquisition of private land required for public purposes and for a public institution.

72. Art 249 of the Constitution sets out the objects of such a commission as three-fold; to protect the sovereignty of the people of Kenya; to secure the observance of all state organs of democratic values and principles and to promote constitutionalism or in other words the rule of law. In exercising its mandate as set out in para 73, it is imperative for the 1st Respondent to bring to bear these objects.

73. It is the finding of the Court that the 1st Respondent in publishing an intention to acquire a right of way for purposes of the water pipeline was in line with the provisions of the Constitution and in furtherance of the right to exercise eminent domain residual in the state.

74. As to whether the acquisition of the wayleave is in compliance with the law, Article 40 of the Constitution guarantees every person the right to property. It protects a person from arbitrary deprivation of his property by the State or any person. This right can only be limited as provided by law.

75. The 1st Respondent is empowered under section 143,144 and 146 of the Land Act to create a public right of way also known as a wayleave for the benefit of the National Government or the County Government, a Local Authority or any corporate body to facilitate the functions of such bodies. The provisions are captured as follows;

Section 144 (1) of the Act, provides that:-

“Unless the commission is proposing on its own motion to create a way leave, an application, for the creation of a way leave shall be made by any state department, or the county government, or public authority or corporate body to the commission.”

Section 144 (4) of the Act provides that the applicant for a way leave shall serve a notice of its application for the creation of a way leave to all persons occupying the land over which the way leave is sought, the County Government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed way leave.

Section 146 of the Act requires the commission after 90 days from the date of the service of the notice to consider all information and all representations and objections received pursuant to the said notices and recommend to the Cabinet Secretary whether to carry out a public inquiry into the representations and objections or refer the application for the way leave to the County Government or to initiate and facilitate negotiations with the persons who have made representations on the application with the applicant with a view to reaching a consensus on the application. The Cabinet Secretary is supposed to determine whether or not to create a wayleave after considering as the case may be the recommendations of the commission, or the advice of the County Government or the outcome of any negotiations that may have been reached between the applicant for the right of way and those who had made representations or objections. If the Cabinet Secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya Gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the Cabinet Secretary to the Court on a point of law.

Section 148 (1) of the Act provides that compensation shall be payable to any person for the use of land of which the person is in lawful or actual occupation as a way leave which compensation shall be based on the value of the land as determined by a qualified valuer.

Section 148 (4) of the Act places the duty to pay compensation upon the state department, County Government, public authority or corporate body that has applied for the way leave. This section provides further that that duty shall be complied with promptly.

Section 148 (5) of the Act gives the person who is dissatisfied with the compensation offered to apply to Court to determine the amount payable and the method of making payment.

76. The Respondents have proceeded under the provisions of sections 107- 112 in respect to the compulsory acquisition of land. Counsel for the 1st Respondent admitted that they placed reliance on sections 107-133 following the repeal of the Wayleaves Act. She admitted that the correct provisions would be that of the creation of a wayleave as set out in section 143-149 of the Land Act. She however did not give a plausible reason why the 1st Respondent failed to adhere to the provisions of the Act. The provisions of the repealed Wayleaves Act were amplified and enacted in sections 143-149 of the Land Act.

77. The Procedure under the public right of way or wayleave is that the 1st Respondent has 90 days from the date of the service of the notice to consider all the information, representations and objections received from all persons served with the said notices. The point of departure from that of acquisition of land is that in an acquisition of wayleave, public inquiries are not provided for. Section 144(4), unlike the provisions under 112(1) does not prescribe the manner or format in which the notice should take. The latter states that the notice must be published in a gazette or county gazette notice. The Court is prepared to accept the notice issued in this case as sufficient for the purposes of Section 144(4).

78. Once the commission receives the information, representations and objections, it makes recommendations to the Cabinet Secretary whether to appoint a public enquiry to consider on the representations and objections or refer the matter to the County Government for its opinion on whether to approve the application or initiate and facilitate negotiations between the claimants and the applicant.

79. Going by the provisions cited above, it is clear that the Act has an elaborate procedure to be followed when one wants to create a way leave over private land. It is on record that the requisite notices (notice to acquire right of way alongside the maps and the notice of inquiry) were issued and publicized through the Kenya gazettes referred to earlier. That said, there was no evidence of notice to the County Government, receipt of information, representations or objections from the persons notified, recommendations to the Cabinet Secretary, decision of the Cabinet Secretary on the recommendations and publication of the said decision were undertaken. The law placed an obligation upon the 1st Respondent and the Cabinet Secretary to consider the representations received and make a decision thereon which decision had to be communicated to the Petitioners. The Respondents did not produce evidence to show that the Cabinet Secretary made an order creating a way leave (right of way) in favour of the 2nd Respondent and its publication thereof.

80. Failure by the 1st Respondent to comply with the mandatory procedure set out herein above leads to the conclusion that no way leave was created in favour of the 2nd Respondent in the manner contemplated and provided for by the law.

81. As to whether the offer of payment to the Petitioners was valid, Section 147(1) provides that;

“ if the Cabinet secretary has made an order to create a public right of way the commission shall cause all the necessary documents, plans demarcations and surveys compensation in respect of the public right of way subject to the provisions of this section, of the route of that public right of way to be delivered to the Registrar to enable the Registrar to exercise the powers under this section.

The creation of the right of way therefore precedes the activities such as interalia demarcation, survey, compensation in respect to the right of way. The Petitioners have in evidence stated that most of the PAPs did take the awards given to them as compensation and that the Petitioners refused to accept the awards. Given the wording of the proviso stated above, the 1st question is if there is no evidence of the creation of a way leave by the Cabinet Secretary, would an obligation arise on the part of the 1st Respondent to offer any payment to the Petitioners? Secondly, did a right to receive any payments arise in respect to the Petitioners? I think not. It is my view that the obligation to pay on the part of the 1st Respondent would arise upon the creation of the right of way, which is not the case here.

82. As to whether the Petitioners were served with the notice to acquire a wayleave, in the instant case the 1st Respondent issued notices in the Kenya Gazette on 16/11/16 (No 9589), 3/11/17 (No 10870) resting on the one dated the 9/3/18 (No 2188) – intention to create a way leave- pursuant to section 143, 144 and 162 of the Land Act. To actualize its intention, it went ahead and issued another notice No 2189 on 9/3/18 giving the dates and venues that the public inquiry was to take place; Ndakaini dam social hall on 9/4/18; Kairegi Tea buying centre on 10/4/18; Kiarianin Tea buying centre on 11/4/18 ; Rwegetha Chiefs office on 12/4/18; Ngethu social hall on the 13/4/18. All the meetings were to start at 9.30 am. Alongside the said notice, was a directive that went as follows;

“every person interested in the affected land is required to deliver to the National Land Commission on or before the day of inquiry a written claim to compensation , copy of ID, PIN, land ownership documents and bank account details. The commission offices are in Athi House, Nairobi 3rd floor Room 305 1st Ngong Avenue”.

83. The question is whether the 1st and 2nd Respondent served notice to the Petitioners as to its intention to acquire the right of way as well as to hold the inquiries. The Petitioners have averred that they learnt about the inquiry from the village grapevine 3 days before the impugned inquiry. They hold the position that they were not served. They admit that they attended the inquiry but due to the failure to be served with the notice, they were not able to prepare their claims in advance. They argue that they however got their lawyers to prepare some representations which they aver was not considered by the 1st Respondent.

84. On receipt of all the information presented under the Act, the 1st Respondent was required to consider the information, objections and representations made by any person served with the notice and recommend the appropriate options to the Cabinet Secretary. It is understood that even the County Government is included.

85. Section 131 of the Land Act provides on how service ought to be done either by personal service, registered post, affixing on the residents or business premises of the person interalia. Further section 151 empowers the 1st Respondent to effect service through substituted service if it is satisfied that the person cannot be served through the traditional forms of service, that is to say personal service or by post. The commission itself may order service to be effected through affixation of a copy on the land, at the offices of the country Government if it is public land or publishing a copy of the notice in the Kenya Gazette or in one of the newspapers circulating in Kenya.

86. Section 144 (4) states that the 1st Respondent shall serve notice on the all person occupying the land, the county Government, all persons in occupation of the land and other interested persons. The tone of the section is a command.

87. I have perused the PAPs sensitization and issuance of gazette notices of inquiry held at Rwegetha, Ngethu Social Hall, Kiriani Tea

Buying centre, interalia, and note that out of 51 Petitioners, 24 were issued with notices of inquiries for which they signed. These meetings took place on the 5/4/18. 10 of the Petitioners do not appear on the Gazette Notice of intention to acquire and inquiry. Other Petitioners are indicated to have collected the inquiries through agents and the local chief's interalia. The Petitioners did not challenge these documents on record.

88. The finding of the Court is that the Petitioners were served with the notices albeit fashioned as notice of inquiry. From the evidence on record, it is obvious that the notices clearly spelt out the reason for the acquisition of the wayleave and requested the petitioners to submit their written claims to compensation. The Court is of the view that this notice duly complied with the provisions of section 144(4) of the Act. Needless to add, it is admitted by the Petitioners variously that they were aware of the project since 2015 during the inspections and the valuation of their lands by the 2nd Respondent.

89. The importance of notice of inquiry as captured by analogy in the case of Patrick **Musimba Vs National Land Commission & 4 others (2016) Eklr**, is to allow the claimant to prepare his claim for presentation to the acquirer for purposes of assessing the due compensation.

90. The Respondents have claimed that despite the Petitioners being present at the inquiry, they did not present any written claims for consideration and that there was nothing for the commission to consider. The Petitioners have not placed evidence before the Court in rebuttal. This could have been in form of a written claim of the value of their land and improvements and any other objections they wished to raise.

91. It is clear that the Petitioners did not submit any claims and representations to the 1st Respondent as per the directions given in the Kenya Gazette No 2189 which they had notice of. That said, however, in the face of lack of evidence that indeed a wayleave was created, submission of claims may not have amounted to much.

92. As to whether the Petitioners were supplied with the information on the documents in relation to the acquisition, the Petitioners allege that through their advocates they did ask for information as way back as 2015 through to 2017 from the Respondents in vain. That on 8/10/15 and 28/6/16, they sought information in writing in respect to the plans and maps showing the demarcation of the areas likely to be affected by the project, crops and structural damage report for each parcel of land current valuations of land and improvements in respect to the Petitioners. That the 1st Respondent admitted having the plans in their custody but referred them to the 2nd Respondent to get copies at a fee. That both declined to avail the documents. They contend that they wrote several letters which went unattended resting on the one dated the 16/5/18 demanding for interalia information regarding the project including valuation reports of the suit land and improvements and the written reasons for the awards. That no response has been received to date.

93. The Respondents stated that information was disseminated and given to all the PAPs, the Petitioners included, during the project sensitization and disclosure of awards meetings to which the Petitioners attended.

94. Art 35 of the Constitution provides that every citizen has a right to access to information held by the state and information held by another person and required for the exercise for or protection of any right or fundamental freedom. The notices issued in 2016, 17 and 2018 disclosed that plans of the affected lands may be inspected during office hours at the offices of the National Land Commission, Arthi House, Thika, Muranga and Gatundu county land offices and at Arthi Water Services Board, Nairobi. The Petitioners have not denied that they were refused to inspect the plans in these disclosed venues. The Court takes this to be reasonable in satisfaction of the Respondents duty to supply information in respect to the Petitioner's request for plans and maps. The Petitioners were not entirely helpless or kept in the dark as far as the plans and maps of the project route were concerned.

95. The Petitioners have informed the Court that they are not challenging the data collection sheets. The data collection forms are the basis from which the valuation of the lands and the improvements on the land are done. There are data collection sheets on record signed by the Petitioners. They are admitted to be prepared by the 2nd Respondent during the inspection of the land which is done in conjunction and consent of the land owner and in the presence of the local administration. It therefore follows that the Petitioners had been availed the data relevant to prepare their claims for presentation at the inquiry.

96. The Court finds that the Petitioner had access and was supplied with the information needed to prepare his claim of compensation.

97. It is further observed that the Petitioners have not pleaded or appealed against the awards in their petition.

98. Art 47(2) of the Constitution that provide that if a right or fundamental freedom of a person has been or is likely to be adversely affected by the administrative action, the person has a right to be given written reasons for the action. This duty in my view was satisfied in the manner the Petitioners were availed the information as stated above. I find no ground to fault the Respondents in that regard.

99. As regards the Petitioners right to be heard, it is their contention that they were denied the right to be heard at the inquiry. That they were subjected to harassment and intimidation by the staff of the Respondents. That their plea to adjourn the inquiry was flatly rejected by the 1st Respondent.

100. The right to be heard stems from Art 48 which provide that the state shall ensure access to justice for all persons at a cost that is reasonable and shall not impeded access to justice. Art 50 guarantees every person the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court of law or independent tribunal or body. Access to a Court of law is one of the preconditions to the exercise of eminent domain under art 40(b) (ii).

101. Section 112 (4) provides that the 1st Respondent may postpone an inquiry or adjourn the hearing of an inquiry for sufficient cause. The Petitioners have averred that they requested for an adjournment of the inquiry to enable them prepare a claim but it was rejected. The Petitioners did not lay evidence before the Court to support these averments. They therefore remain unsupported.

102. It is the view of the Court that the Petitioners have not proved any violation of their rights to information and or right to be heard.

103. As to whether the Petitioners are entitled to an order for a joint valuation, prior to the inquiries the commission is to carry out the preliminaries in respect to the land which would be affected by the wayleave. Some of the preliminaries are the inspection and valuation of the land. Section 148 (1) provides that the valuation is based on the value of the land as determined by a qualified valuer. The Court is of the view that a joint valuation cannot be granted as no basis has been laid for it. Given that the Petitioners have not challenged the awards at all, what will a joint valuation serve?. They are challenging the process of acquisition of the wayleave. The Court declines to entertain this prayer.

104. As to whether the Petitioners are entitled to a prohibition, it is accepted that the 1st Respondent has taken over possession of the land and the project works are ongoing/completed in some areas. The Constitution demands that just and prompt payment in full should be made before depriving any person of his land. It is also true that the Petitioners have not been compensated. The Court also heard that the construction of the way leave is ongoing and is complete in most areas, the ends of justice will be served by the orders that I shall give at the end.

105. In respect to the prayers for general and or exemplary damages, it is in evidence that the Petitioners are not opposed to the compulsory acquisition of their lands for purposes of the creation of the wayleave. They did not present any representations objections and or claims to the 1st Respondent in which their claims were to be considered and they are not challenging the awards except by way of a joint valuation. The matter of quantum or otherwise of the compensation is not in issue.

106. As to who meets the costs of the Petition, the Respondents had a legal obligation to perform a public duty in accordance with the law. In the instant case they failed. I order that the costs of the Petition be met by the Respondents jointly.

107. Going by the holdings of the Court in the preceding paras and to meet the justice of the case, the Court makes the following orders;

- a. A declaration is hereby made that the acquisition of the Suit Properties and Improvements undertaken by the Respondents was carried *ultra vires* the Constitution, and Statutory law, thus infringing and violating the Petitioners' rights to property.
- b. An order of Prohibition be and is hereby issued prohibiting the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (wayleave) in favour of the 2nd Respondent unless due process is followed and prompt payment of just compensation is made to the Petitioners.
- c. The following prayers are declined; a, b,d e,f,g,h,i j, k, l,m,n, o, q, r, s, t and w.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Njuguna Muri for the 1st – 3rd Petitioners

1st Respondent – Absent

Ms Maina HB for Mulekyo for the 2nd Respondents

Irene and Njeri, Court Assistants