**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC PETITION CASE NO. 8 OF 2018**

**ANTHONY MILIMU LUBULELLAH..........................PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF KAKAMEGA**

**LAND REGISTRAR KAKAMEGA COUNTY**

**ATTORNEY GENERAL..........................................RESPONDENTS**

**JUDGEMENT**

The petitioner submits that he is the registered proprietor of a leasehold interest in title number Kakamega Municipality/Block III/2 comprising 0.5342 of a hectare or thereabouts by virtue of a lease granted by the County Council of Kakamega for a term of 99 years from the 1st day of March, 1992, subject to the annual rent of Ksh. 22,000/=. The plaintiff was issued with a certificate of lease on 7th April, 1992 in respect of that property. The Kakamega Municipal Council by local arrangement collected both the Land Rent and Rates in respect of the said property and was at all times therefore obliged to account for all payments in respect of land rent to the County Council of Kakamega. The petitioner religiously paid Land Rent and Rates for the property as required of him. However in January, 2002 or thereabouts official's servants or agents of the Kakamega Municipal Council invaded or wrongfully entered the said property and levelled the same in preparation to move Kakamega Market Kiosk Operators onto the said property. When the petitioner protested the Kakamega Municipal Council's Officials namely Gilbert Nandwa (Town Clerk), Mathias Shichele (Finance), Laban Omwelema (Administration), Yuna Musungu (Inspectorate), Maurice Mwarili, Paul Injendi and Richard Lukalia acknowledged that Kakamega Municipal Council's servants and personnel had moved onto the plot under the mistaken belief that the same was Public Land. The said Municipal Council undertook to stop their actions on the said property forthwith.

Again in March, 2004 or thereabouts, the same Kakamega Municipal Council moved market Kiosk Operators onto the said property stating that they had been compelled by a court order to translocate the said Kiosk Operators to the petitioner's plot. They nevertheless failed to furnish the petitioner with the relevant proceedings or court order in respect of which the petitioner was neither a party nor heard. The said Market Kiosk Operators remained on the suit property at the control of the Kakamega Municipal Council for almost 8 years. During this entire period the said Kakamega Municipal Council collected daily rental charges from the said Market Kiosk Operators who were eventually removed in mid 2012 or thereabouts, when the said plot again remained vacant. During that period the petitioner was not then apprehensive that the said Municipal Council intended to permanently deprive him of the suit property. On 6th October, 2005 the Kakamega Municipal Council rejected a cheque made out by the petitioner towards rates and land rent and purported to state that its demand notices for rates for the previous years

had been sent to the petitioner in error as the plot was a public utility plot that had been illegally allocated. The petitioner was never supplied with any documentary basis for this allegation. The said Kakamega Municipal Council laid an unsubstantiated challenge to the petitioner's property but no further action was taken in this regard, leading the petitioner to infer malice in the said unsubstantiated allegations. The petitioner states that the said property has never been public land and the Kakamega Municipal Council therefore had no power or authority to unilaterally declare the same as such or to use the same without compensation to the petitioner. The Municipal Council further purported to plan the petitioner's property for parking facilities in the pretence that the petitioner would be given an alternative site. This was only but a strategy to deprive the petitioner of the suit property, as in fact no alternative property was ever offered to the petitioner, neither did the Council progress any further plans for an amicable settlement. The said Kakamega Municipal Council purported to reference its Finance Committee for a refund of rates and land rent paid by the petitioner for the plot. At no time was the petitioner consulted or given any hearing on matters concerning the suit property. Further although the Kakamega Municipal Council had threatened legal action in recovery of rates, no such legal action was ever commenced against the petitioner. The petitioner pleads that the Kakamega Municipal Council's actions or decisions in regard to the petitioner's property were and remain null and void ab initio. In the meanwhile the said Kakamega Municipal Council continued claiming rates and ground rent from the petitioner including advertising the petitioner among rates and ground rent defaulters in the local newspapers. The council is estopped from denying the petitioner's title on the basis of its own internal decisions as the petitioner was neither involved nor heard.

By operation of the law, the County Government of Kakamega is deemed to be the proper successor of the Kakamega Municipal Council and the County Council of Kakamega, after the promulgation of the Constitution of Kenya 2010. In November, 2017 the 1st respondent Kakamega County Government moved its equipment onto the said plot and later in January, 2018 or thereabouts started levelling the same. During the said period the 1st respondent permitted its visitors, servants and agents to use the said plot as a parking serving its adjacent to Bukhungu Stadium, without the petitioner's permission or consent. The 1st respondent has therefore used the petitioner's property for its benefit without any compensation to the petitioner. The 1st respondent has further proceeded in October, 2018 or thereabouts to fence the suit property with a stone wall and to provide for three additional gates for use as part of the Bukhungu Stadium. This occupation and fencing of the suit property is illegal and in disregard of the petitioner's property rights. The 1st respondent has by its aforesaid actions infringed or contravened the petitioner's property rights under the Constitution of Kenya 2010 and its actions in so far as the same are designed to arbitrarily deprive the petitioner of the suit property are unconstitutional, null and void. The petitioner further states that neither the state nor the 1st respondent has the right or power under any law to deprive the petitioner of the suit property without reference to Article 40 (3) of the Constitution of Kenya, 2010. The petitioner acknowledges that he is obligated to pay rates and land rent for the suit property but due to the wrongful use of the property the dispute in respect of the amount of rates and land rent payable has to be reconciled negotiated and settled between the parties. The same dispute persist to date, as it is unconscionable for the 1st respondent to claim rates and land rent for the suit property for the period it has had illegal use or benefit of the suit property and these are factors to be taken into account by the honourable court. The 1st respondent stubbornly refuses to entertain the petitioner's claim to an offset for rates and rent on the basis of the Municipal Council's wrongful occupation of the suit property. When the Kakamega Municipal Council moved the Kiosk Operators from the plot the petitioner's grievance was diminished hence the status quo persisted until the 1st respondent's actions of October, 2018. The title to the suit property is in the name of the petitioner even as per an official search conducted on 20th November, 2018. At no time has the title to the property been alienated or otherwise changed so as to reflect any change of ownership. The petitioner is nevertheless apprehensive that the 1st respondent's illegal acts of October, 2018 are likely to adversely affect his title, and hence has enjoined the 2nd and 3rd respondents to the petition out of prudence. The honourable court has jurisdiction which extends to the determination of the dispute between the parties in relation to the suit property including the enforcement of the petitioner's fundamental rights and freedoms under Article 22 of the Constitution and enforcement of Article 258 of the said Constitution. In view of the flagrant abuse and contravention of the petitioner's property rights and the construction of a stone and steel wall around the suit property, coupled with the

levelling constructing of three gates and the paving of the property with cabro blocks, the 1st respondent's contraventions are not consistent with the need for any demand notice or intimation of intention to sue. Consequently no such notice has been served, as the 1st respondent has no colour of right and therefore ought to know that its presence on the said property is illegal and wrongful. The petitioner urges this honourable court to grant the reliefs sought herein under its wide Constitutional powers in the interests of justice. The petitioner therefore humbly prays for the following reliefs against the respondents jointly and severally;

(a) That a declaration be issued that the petitioner is the registered proprietor of the suit property and his fundamental rights as the registered proprietor of the suit property ought to be respected upheld and defended.

(b) That a declaration be issued to declare that the entry onto, occupation and acquisition of the suit property is in contravention and violation of Article 40 (3) of the Constitution of Kenya 2010 and therefore wrongful illegal and unconstitutional

(c) That an order of mandatory injunction be issued to compel the 1st respondent to dismantle and remove the stone wall, grills, gates and cabro paving blocks and any structures, machinery or persons placed or being upon the suit property by the 1st respondent, so as to restore the suit property to its former condition.

(d) That an order of permanent injunction be issued restraining the 1st respondent from entering upon or remaining upon the suit property or using the same for any purpose whatsoever which is inconsistent with the petitioner’s property rights whether by itself, its employees, servants or agents, or its visitors or others claiming through it.

(e) That the 1st and 2nd respondent be restrained by permanent injunction from alienating, dealing with or otherwise changing the registration status of the suit property or otherwise interfering with the petitioner’s title in the suit property.

(f) That mesne profits for wrongful use of the petitioner’s property.

(g) That general damages.

(h) That other or alternative remedy as this honourable court may deem apt to grant.

(i) That costs of this suit.

The 1st respondent submitted that, the orders sought in the application are incapable of being granted. That while it is true that the lease plot in dispute in registered in the name of the applicant, the other averments in the affidavit of the applicant are misleading. That all the leases including that of the applicant have special conditions which are supposed to be met by the lessees. That clause (2) of the lease on the special conditions and state that the applicant failed to submit to the Local Authority the requirements thereof and failed to erect any buildings on the leased land as is required and the provision is couched in mandatory terms and in failure of the erection aforementioned, the lessor reserved a right to re-enter into and upon the land or any part thereof and the lease shall cease. That in reference to the above, the applicant’s lease ceased six (6) months from the time he acquired it after he failed to comply with the mandatory provisions. That demand for rates was the right of the lessor and the responsibility of the lessee as per the special terms on the lease agreement (Annexture 5 on the applicant’s affidavit). That annexture 10 are receipts not for survey but for rates and it is unknown when the applicant paid survey fees and to whom and suffice is to state that the applicant defaulted even in the rates payment and upto date he is in arrears of Ksh. 11, 855,316.19 (Annexed herewith marked ‘SCI’ is a copy of the Demand Notice). That there is no invasion on the leased property in January, 2002 as alleged and if there was which is denied then the applicant did not make any complaint anywhere for action by the respondent and in any event as stated above, the respondent had a right of entry since the plot remained undeveloped for

over twenty four (24) months contrary to the lease conditions attached to the lease. That if there was any involvement of Market Kiosk Operators onto the suit property by Kakamega Municipal Council, which allegation is not supported by any tangible evidence, then it was due to the fact that the same remained undeveloped beyond the period required for development by the contract. That if the cheque by the applicant to the 1st respondent was rejected on 6th October, 2005, then that is the time the applicant would have sought redress in court and the petition herein being a matter based on land is statutory barred and should not be entertained by this court. That even though rent and rates were claimed from the applicant by the 1st respondent, he never paid the same and the same has accrued to Ksh. 11,855,316.19. That if the applicant knew he had any claim over the suit property, then, he would have laid the same within the requisite time before twelve (12) years and it is clear that from the foregoing the applicant has never utilized the suit property for a period of over twelve (12) years. That the applicant having failed to develop the suit land as required and the 1st respondent having acquired entry and made extensive developments, the prayers sought in injunction cannot be granted. That the 1st respondent has never refused to entertain the applicant's claim to offset rates and rent as none has ever been presented before it and none has been shown to this court either. That the applicant still refused to comply with the conditions of the lease at all times and cannot state that status quo persisted until October, 2018 and status quo in this case is meant to have always title in favour of the 1st respondent. That as stated in the applicant's petition, application and affidavit, from 1992 the applicant has never at any given time occupied, developed and or possessed the suit land and the application herein is statutory barred and the same should be dismissed.

**Analysis and Determination**

Upon consideration of the Petition dated the 14th December 2018 including the supporting affidavit and replying affidavits as well as submissions filed herein (2nd and 3rd respondent did not file any substantive response to the petition), the following are the issues for determination;

- Whether the petition is statutorily time barred;
- Whether or not the title of the suit land held by the petitioners is valid and lawful;
- Whether the Petitioners' fundamental rights and freedoms have been infringed upon;
- Whether the Petitioner is entitled to Compensation; and
- Who should bear the costs of the Petition?

On whether the petition is statutorily time barred, it has been submitted by the respondents that the petitioner has been indolent and are guilty of laches, the cause of action having arose more than 12 years ago and it is clear that from the foregoing the applicant has never utilized the suit property for a period of over twelve (12) years. That the applicant having failed to develop the suit land as required and the 1st respondent having acquired entry and made extensive developments, the prayers sought in injunction cannot be granted. This leads me to the following question, **does the Constitutional Claim founded on Bill of Rights have a time limit?**

In the case of **Peter M. Kariuki v Attorney General (2014) eKLR, C.A at Nairobi** *Civil Appeal No. 79 OF 2012,* the learned judge, Kiage, M'Inoti, & J. Mohammed JJ.A observed as follows;

> **"We have already adverted to the fact that the appellant filed his constitutional petition some twenty three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.**

**In** *KAMLESH MANSUKLAL DAMJI PATTNI & ANOTHER V REPUBLIC (supra),* **the High Court noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay".**

In the case of **Peter Ngari Kagume & 7 Others v Attorney General (2016) eKLR, H.C at Nairobi,** *Constitutional Application 128 of 2006* stated as follows;

**"It is correct that section 84(1) of the constitution does not contain any time limit for filing constitutional applications such as the petition herein but a closer scrutiny of the way the section is couched grants the Petitioners the right to seek redress in the High Court. The Petitioners' rights are captured by the words " . . . person (or that other person) may apply to the High Court for redress." Whenever, there is no time limit stipulated for doing a certain legitimate act, the court should be able to examine whether the party insisting on taking the action is within a reasonable time otherwise confusion and uncertainty will clog good administrative policies intended for good governance and public interest.**

**Going by the above, assuming that the Petitioners' rights and freedoms were violated in August 1982 to March 1983, would it be reasonable for the Petitioners to file their claim in court about twenty four (24) years thereafter simply because there is no time limitation in section 84 of the Constitution? The foregoing question is germane and it determines this petition to a great extent.**

**According to the Petitioners, there is nothing wrong with the Petition having been filed about 24 years after the cause of action arose as there is no express limitation of the period within which to file the constitutional application. The Petitioners relied on the decision in a case decided at Trinidad and Tobago a Commonwealth jurisdiction, DURITY v ATTORNEY GENERAL [2002] UKPC 20. In the said case it was held inter alia:-**

> **"The inherent jurisdiction of the High Court to prevent abuse of its process applied as much to constitutional proceedings as it did to other proceedings. The grant or refusal of a remedy in a constitutional proceedings was a matter in respect of which the court had judicial discretion. The constitution contained no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow to hold that by that limitation of constitutional proceedings was subject to a rigid and short bar - the very clearest language was needed before a court could properly so conclude."**

And in the case of **David Gitau Njau & 9 others vs Attorney General (2013) eKLR, H.C at Nairobi,** *Petition No.340 OF 2012***,** the court stated as follows;

**"Despite my position on this issue as can be seen above, I strongly believe that I must hereby state that I am not persuaded by the authority of Peter Ngari Kagume & Others v Attorney General (supra) cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply in my view did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breaches occurs but for obvious reasons, I am clear in my mind that there is no limitation period imposed by the Repealed Constitution and the rules made thereunder under Section 84 for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case".**

In the case of Re Estate of Thomas Kipkosgei Yator & Another (Deceased) (2016) eKLR, the court held that;

> *"It is my considered view that bearing the nature of the claim herein and the period of delay, approximately 30 years and the circumstances surrounding the petition and the persons alleged to have been behind the process and the fact that there is no clear provision of the period of time for commencing such petitions the petition is not defeated by laches."*

**I find from the above case law that the Constitution does not provide for time limit within which to file a claim founded on violation of the constitutional rights under the Bill of Rights. Be that as it may, the length of delay in bringing such a claim is material depending on the circumstances of the case and the nature of the claim. This petition is therefore not time barred.**

The petitioner submitted that he is the registered proprietor of a leasehold interest in title number Kakamega Municipality/Block III/2 comprising 0.5342 of a hectare or thereabouts by virtue of a lease granted by the County Council of Kakamega for a term of 99 years from the 1st day of March, 1992, subject to the annual rent of Ksh. 22,000/=. The plaintiff was issued with a certificate of lease on 7th April, 1992 in respect of that property.

The 1st respondent does not dispute that the petitioner is the registered proprietor of the suit land however that all the leases including that of the applicant have special conditions which are supposed to be met by the lessees. That clause (2) of the lease on the special conditions and state that the applicant failed to submit to the Local Authority the requirements thereof and failed to erect any buildings on the leased land as is required and the provision is couched in mandatory terms and in failure of the erection aforementioned, the lessor reserved a right to re-enter into and upon the land or any part thereof and the lease shall cease. That in reference to the above, the applicant's lease ceased six (6) months from the time he acquired it after he failed to comply with the mandatory provisions.

I find that even if the petitioner as per clause (2) of the lease on the special conditions the applicant failed to submit to the Local Authority the requirements thereof and failed to erect any buildings on the leased land as is required, he had a right to fair hearing. That pursuant to Article 47 of the Constitutional and the provisions of the Fair Administrative Action, Act, Act No. 4 of 2015, the petitioners have a right to fair administrative action. That pursuant to Article 50 (1) of the Constitution, the petitioners have a right to a fair hearing. The issue of sanctity of title has been discussed in the case of Joseph N. K. Arap Ngok…Vs…Justice Moijo Ole Keiuwa & 4 Others, Civil Appl. No.60 of 1996, the Court of Appeal held that:-

> *"It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held."*

The above position was also held in the case of Wreck Motor Enterprise vs The Commissioner of Lands & Others (1997), where the Court of Appeal also held that:-

> *"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held."*

This is the position held by the Court of Appeal in the case of Dr. Joseph Arap Ngok Vs Justice Moijo Ole Keiwua & 5 Others (supra), where the Court held that:-

> *"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership*

*of property in Kenya would be placed in jeopardy".*

See the case of David Peterson Kiengo & 2 Others Vs Kariuki Thuo, Machakos HCCC No.180 of 2011, where the Court held that:-

> *"The Registered Lands Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration. The state maintains a Central Register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring an interest".*

In the instant case, the certificate of title herein was issued by the lands officials. Given that the history and root of this title can be traced, the Court finds and holds that the petitioners herein hold a good title to the suit property which title has not been cancelled and/or revoked.

The 1st respondent submitted that the petitioner defaulted in the rates payment and upto date he is in arrears of Ksh. 11, 855,316.19 (Annexed herewith marked 'SCI' is a copy of the Demand Notice). Following the legal doctrine of estoppel, the 1st respondent is estopped from now denying that the petitioner is now not the legal owner of the suit land. On 6th October, 2005 the Kakamega Municipal Council rejected a cheque made out by the petitioner towards rates and land rent and purported to state that its demand Notices for Rates for the previous years had been sent to the petitioner in error as the plot was a public utility plot that had been illegally allocated. On the issue of whether the suit land is public or private *Article 64 of the Kenya Constitution states as follows;*

> *"Private land.*
>
> *64. Private land consists of —*
>
> *(a) registered land held by any person under any freehold tenure;*
>
> *(b) land held by any person under leasehold tenure; and*
>
> *(c) any other land declared private land under an Act of Parliament."*

The petitioners' title is therefore private land and not public as per the above provisions of the law. It is clear from the submissions that the 1st respondent permitted its visitors, servants and agents to use the said plot as a parking serving its adjacent to Bukhungu Stadium, without the petitioner's permission or consent. The 1st respondent has therefore used the petitioner's property for its benefit without any compensation to the petitioner. This to me seems to be a case of compulsory acquisition of land.

Under **Section 24, 25** and **26** of the **Land Registration Act 2012** upheld the indefeasibility of title:

Section 24 stipulates as follows;

> *Subject to this Act—*
>
> *(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and*
>
> *(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and*

*privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

Section 25 of the act provides;

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

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

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

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

Section 26 is to the effect that;

*Certificate of title to be held as conclusive evidence of proprietorship*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

It has not been proved that the petitioners were guilty of any fraud or misrepresentation or that they obtained the certificate of title illegally, unprocedurally or through a corrupt scheme. For the principle of indefeasibility the court looked at the cases of *Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of* **1997; Wreck Motor Enterprises vs Commissioner of Lands & 3 Others (1997) eKLR;** *and* **Eunice Grace Njambi Kamau & Another vs Attorney** *General & 5 Others (2013) eKLR.* From the above provisions of the law and cases cited I find that the Petitioner has a disclosed a legal interest capable of protection under the law. It is also evident from the submissions in this case that the 1st respondent has converted the land of the petitioners for use by the general public.

*The petitioners have produced a certificate of lease obtained from the County Government of Kakamega* land which this court found to be a valid and legal title. As was stated by Mutungi, J in the case of Virendra Ramji Gudka & 3 Others –v- Attorney General (2014) eKLR,

*"Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act".*

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

*40. (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—*

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

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

*(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*

*(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*

*(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.*

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

*"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."*

Acquisition by the Government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act.** The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012. The p*rocess of compulsory acquisition was laid down in* the decided case of **Patrick Musimba vs National Land Commission & 4 others (2016) eKLR** where the court held as follows;

*"Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.*

*Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.*

*As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.*

*The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.*

*The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.*

*Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.*

*On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.*

*The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.*

*If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.*

*The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.*

*The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative."*

In the present case, I find that the respondents have not followed the laid down procedure. The action by the 1st respondent of converting the suit property into a parking lot was arbitrary.

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

*"… Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article*

*17(1) which states that everyone has the right to own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly…"*

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

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

As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation (1941) 2 KB 26,40:

> *"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".*

In that regard, in the case of Raticliffe vs Evans (1892) QB 524 with regard to damages, the Court stated that;

> *"…The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendaty…"*

In the case of Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In Arnacherry Limited v Attorney General (2014) eKLR the court held that;

> *"This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing."*

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

From the above law, cited authorities and my observations, the Respondents have not proved in any way how their actions are in accordance with the law hence their actions are illegal. The Respondents' actions are in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence the petitioner has a right to compensation. On the claim of mesne profit no evidence has been exhibited to this court neither have there been any expected income exhibited to this court to attract an award under this head. The claim of general damages has also not been proved and the same will not be awarded. Hon. Justice J.L Onguto in the case of Patrick Musimba vs. The National Land Commission and 5 Others Petition No. 613 of

2014 stated in the judgment that,

> *"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation".*

The suit land is in Kakamega town and adjacent to Bukhungu Stadium Milimani Estate. The petitioners also annexed photos of the same. The petitioner annexed numerous correspondence with the Respondents on the same. The 1st respondent in a letter dated 2005 alleges the same to be public land, however the lease was issued to the petitioner way back in 1992! I find this was private land and the petitioner is entitled to compensation. I find that the 1st respondent has proceeded to fence the suit property with a stone wall and provided for three additional gates for use as part of the Bukhungu Stadium. This occupation and fencing of the suit property is illegal and in disregard of the petitioner's property rights. I find that the 1st respondent has infringed or contravened the petitioner's property rights under the Constitution of Kenya 2010. I find that the respondents have violated Article 40 of the Constitution by expropriating the petitioner's property and converting it into public use without compensating the petitioner. The prayer for mesne profits were not proved and will therefore not be awarded. I find that the petition is merited and I grant the following orders;

1. That a declaration be issued to declare that the entry onto, occupation and acquisition of the suit property is in contravention and violation of Article 40 (3) of the Constitution of Kenya 2010 and therefore wrongful illegal and unconstitutional

2. The Respondents are ordered to adequately compensate the petitioner for compulsorily acquiring his property.

3. Cost of the petition to be borne by the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**