



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.124 OF 2014**

**JACKSON KARIUKI KAHUNGURA.....1<sup>ST</sup> PLAINTIFF**

**RUTH WAMBUI CHEGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HON. JOHN KARANJA KIHAGI.....1<sup>ST</sup> DEFENDANT**

**ROBINSON KUTO.....2<sup>ND</sup> DEFENDANT**

**RACHAEL WANJIKU MAINA.....3<sup>RD</sup> DEFENDANT**

**MUTISYA MUTUKU.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**AND**

**KARAGITA LANDING BEACH SELF HELP**

**GROUP.....INTERESTED PARTIES**

**JUDGMENT**

*(Suit by plaintiffs claiming damages for invasion of their land and for permanent injunction; suit land abutting Lake Naivasha; a declaration made by Chairman of Parliamentary Lands Committee that the suit land is a public access to Lake Naivasha; land subsequently invaded by the public following the said declaration; whether suit land is a public access road; suit land noted in early maps as a private road serving parcels across the Moi South Lake Road; suit land later made a stand-alone parcel of land; suit land has never been a public road or public land; no jurisdiction for the said Chairman to have declared it a public road; suit land is a private road; public having no right to access the same; no right for public to invade private property; plaintiffs suffering damages arising out of the invasion; 2nd defendant liable to the plaintiffs for damages; judgment entered for the plaintiffs)*

**PART A: INTRODUCTION AND PLEADINGS**

1. This suit was commenced by way of a plaint which was filed on 8 May 2018, amended on 19 May 2015, and further amended on 2 November 2015. In the further amended plaint, the plaintiffs pleaded that they are the registered owners of the land parcel LR No. 396/39 measuring 1.163 Hectares, and which land is located at Naivasha, off the Moi South Lake Road (hereinafter referred to as "the suit land"). It is a property that the plaintiffs aver that they purchased on 6 November 2011, from the previous registered owner, one Pritam Singh Panesar. Upon purchase, the plaintiffs pleaded that they took possession and commenced farming activities on the land. It is pleaded that on 2 May 2014, the 1st defendant who was at the time the Member of Parliament (MP) for Naivasha, alongside the 2nd, 3rd, and 4th defendants, in the company of other members of parliament and a multitude of members of the public, visited the suit property and after holding a short public meeting, the 1st defendant declared that the said land is a corridor meant for use by the public and he declared the said corridor officially open for use. It is pleaded that upon receiving this information, the 1st plaintiff, who was then in Nairobi, drove to Naivasha in an attempt to resolve the matter, and while in Nakuru, on the following day 3 May 2014, he was informed that the 2nd defendant, in the company of other members of the public, upon the instructions of the 1st and 3rd defendants, had broken through the gate of the suit property, so that the same may be used by the public pursuant to the purported official opening of the same by the 1st defendant the previous day. The plaintiffs have averred that this has caused them great damage and loss which they particularized at Kshs. 14, 071,314.88/=, comprising of damage to

structures on the land, and costs of bird keeping at another site.

2. The plaintiffs have asked for the following orders :-

*(a) A permanent injunction restraining the 1st, 2nd, 3rd and 4th defendants by themselves, their followers, their agents, servants and/or employees from trespassing, entering, breaking into or in any other way interfering with the plaintiffs' quiet possession and enjoyment of the Land parcel No. 396/39 located at Naivasha off Moi South Lake Road.*

*(b) Special damages for destroyed properties amounting to Kshs. 14,071,314.88/=*

*(c) General damages for trespass.*

*(d) Costs of this suit.*

*(e) Any other and/or further order that the Court may deem fit to grant.*

3. It is worth mentioning that alongside the plaint, the plaintiffs did file an application for injunction, which application was considered and allowed. However, there have been complaints that the order of injunction has been continuously violated, a matter which I will revisit at a later part of this judgment.

4. The 1st, 2nd and 3rd defendants entered appearance through the law firm of M/s Odhiambo & Odhiambo Advocates and filed a joint statement of defence which they later amended. It is pleaded in the said amended defence, that the suit property is a public access road, and that no one can purport to enter into private contracts to dispose off public land as the same would be void. It is further pleaded that no private individual can claim any proprietary rights over the suit land, and that any occupation of the same, is contrary to law and public policy. It is pleaded that on 2 May 2014, the National Assembly Land Committee, visited the suit property on official duty and after deliberations, the Chairman of the Committee on Lands ordered that the gate which had been erected on the suit property be permanently opened for the public, as the suit property is a public access corridor. It is averred that it is the Parliamentary Committee that visited the suit property and declared it a public road, and as such, the defendants cannot be held liable for any alleged damages as claimed by the plaintiff. It is further pleaded that the 1st defendant, being a member of parliament duly elected to protect the interests of his constituents, enjoys the privileges provided under the Parliamentary Privileges Act, and action against him is ill advised. The other issues raised in the plaint were otherwise denied and the plaintiffs put to strict proof.

5. The 4th defendant, at the time of filing suit, was the then OCPD of Naivasha and the State Law Office filed a defence on his behalf. It is pleaded in the 4th defendant's defence, inter alia, that it is true that on 4 May 2014, the 1st, 2nd and 3rd defendants in the company of other members of parliament, did visit the suit property. It is further pleaded that there were indeed chaos and that the presence of police officers was to maintain peace. It is averred that at no time did the 4th defendant interfere with the plaintiffs' ownership and possession of the suit land.

6. In the course of the case, three persons, who described themselves as being representatives of Karagita Landing Beach Self Help Group, filed an application to be enjoined as interested parties in the matter. That application was allowed, on the reasoning that the said self-help group were fishermen who were the ones most likely to be affected by any judgment of this court. The interested parties, through their appointed counsel have thus been active participants in this suit.

## **PART B : EVIDENCE OF THE PARTIES**

### ***(i) The plaintiffs' evidence***

7. PW-1 was one Peter Francis Njoroge, a Surveyor working with the Ministry of Lands and Housing. His evidence was that the suit property is private land. He provided a history of the said land, and stated that its genesis was a subdivision, done in the year 1920, of a land parcel LR No. 396. This parcel, LR No. 396, was subdivided into 11 parcels of land which were identified as LR Nos. 396/1 to 396/10 with the 11th parcel being described as 396/R ("R" here meaning "remainder"). Although described as "remainder", PW-1 explained that it was a land parcel which could be owned, and the reference to "remainder", may have been because there were other reservations, such as road reserves. PW-1 produced the survey plan of 1920 as an exhibit (plaintiffs' exhibit No.1 hereinafter also referred to as "the 1920 map") . He stated that this "remainder" parcel, was later subdivided into several parcels of land. The first subdivision was in the year 1931, specifically, on 3 October 1931. This subdivision gave rise to the parcels of land numbers 396/19 to 396/22. He testified that the property in dispute, was reflected in the survey map of 1938 as part of the "remainder", which map he also produced as an exhibit (plaintiffs' exhibit No.2 also herein referred to as "the 1938 map") . He stated that the disputed land is captured in a Deed Plan No. 36569, a deed plan for the parcel LR No. 396/25, where part of the suit land was designated as "road", which road, he explained was a private road, and not a public road. He testified that if the said road was a public road, it would have been issued with a different number by itself and there would also be a surrender to the Government, which had not been done by the year 1938.

8. The witness continued to state that another survey was done in the year 1949, which subdivided the land parcel LR No. 396/25 into 11 parcels of land, the suit land still being left as part of the "remainder" plot. He explained that there is a "brace" in the map, the purpose of which is to indicate, that the land parcel on one side of the road continues on the opposite side of the road. He also produced the 1949 map as an exhibit (plaintiffs' exhibit No.3 or simply "the 1949 map"). A further survey was done in the year 1984 which produced 6 parcels of land, among them the disputed land, now being a stand-alone plot described as LR No. 396/39, the same description that it bears to date. This 1984 survey was a subdivision of the parcel LR No. 396/38 and it produced the land parcels No. 396/39, 40, 41, 42, 43, and 44. The "brace" was then removed. There was also removal of a "brace" in a neighbouring land parcel No. 396/41, and another road was created, in the parcel No. 396/40, to serve 3 parcels of land. This 1984 map was also produced as an exhibit (plaintiffs' exhibit No.4, or simply "the 1984 map"). He mentioned that there were other surveys done in the years 1971 and 1977 by one J.S Vaughan, a surveyor, for purposes of re-establishing

beacons, which he also produced as exhibits (plaintiff's exhibits 5 and 6 also described here as "the 1971" and "the 1977 map"). He closed his evidence in chief by reiterating that the suit land is private land and there was no indication of any road reserve within it.

9. Cross-examined by Mr. Aim, learned counsel for the 1st - 3rd defendants, he testified that the plot was demarcated as a private road serving the parcel LR No. 396/R and he explained that a private road is private property. He could not however tell if the Government reserved itself any portion of the land. He explained that there was no "brace" in the 1920 map as the remaining land was very big. He stated that there was no surrender of any portion of the land to the Government. He testified that public roads are also surveyed and there are plans for them. According to their records, the suit land has never been public land.

10. Cross-examined by Mr. Gakinya, learned counsel for the interested parties, he testified that there is no public land between the lake (Lake Naivasha) and any private land, the boundaries of the private land going all the way to the lake. The Lake boundary is marked by what he referred to as a "contour", which is a line in the survey map, indicating the lake boundary. He explained that a "brace" was not put in the initial survey maps because of the scale. He stated that the map of 1938 did not have a "brace" but the Deed Plan of 1938 had a "brace", although he did not have the said Deed Plan with him.

11. PW-2 was one Simon Ngigi Kiarie. He testified that he is resident on the suit land, having been a friend of the 1st plaintiff. He generally takes care of the plaintiffs' land and of the agricultural activities therein. He is basically, the farmhand of the plaintiffs. He mentioned that he came into the farm in the year 2008. On the land the plaintiffs reared cattle, goats, ducks and several species of birds. There was also planted flowers for export. Initially, only one side of the land was being utilized, but in the year 2010-2011, the plaintiffs increased the size of land being used and extended it upto the lake, and put up an electric fence to ward off hippos. They then started planting crops on this area.

12. He testified that in the month of May, 2014, he was within the suit land with other workers when they heard a lot of noise. They came out and saw about 40 cars and about 500 people coming towards the farm, chanting that they want the gate opened. He could identify the 2nd defendant as one of the persons in the crowd. He saw that the situation was tense and he pretended to be part of the crowd. He then called the 1st plaintiff to ask what he should do, and he was instructed to open the gate, which he did. The multitude of people then moved into the land and went up to the lake destroying some gates in the process. The crowd then came back to the gate (main gate) and a person who he later learnt is a Member of Parliament (MP) addressed them, stating that the road has now been opened by the Kenyan Parliament, and if anyone has an issue, he should address the same to Parliament. He was instructed never to close the gate and he complied. The 1st plaintiff came on a later day and closed the gate. A chaotic crowd then gathered, but it was calmed down by the OCS, and things toned down until it emerged that a court order had been issued blocking the road. It is then that a large crowd of people came and destroyed the gate. He mentioned that the police did come but they were overwhelmed. The crowd overran the farm, and vandalized it, taking away implements and animals. Some items were also burnt and flowers on the farm were destroyed. He stated that people now use the road within the suit land to access the lake. He testified that there is usually calm in the area, but when an order is issued by court, chaos and riots erupt in Karagita, where the land is situated. He testified that in the course of the year 2015, the 1st defendant again came onto the land with a big crowd, and told the police that they have no business on the land, and should vacate it; the gate and shelter next to it were destroyed. He testified that they cannot now continue with their activities as before.

13. Cross-examined by Mr. Aim for the 1st defendant, he testified that there was nothing destroyed on the first day that the crowd came with the Members of Parliament, but the destruction was on a later date. Cross-examined by Mr. Kirui for the State, he mentioned that police are usually deployed, but problems arise every time the court issues an order. Cross-examined by Mr. Gakinya for the interested parties, he stated that the area had been a bush and there were no activities on it before it was cleared. He stated that now the fishermen have made an access through the farm. The place is open for boat owners and fish poachers, and also thieves, who take advantage of the fishermen's presence. Re-examined, he did reiterate that no destruction took place on the first day of the visit, but the destruction took place later, when the 1st plaintiff attempted to close the road after obtaining a court order.

14. The 1st plaintiff testified as PW-3. He mentioned that he purchased the suit land on 29 August 2012. He produced the sale agreement, transfer document and search, as exhibits. He testified that on 2 May 2014, he was called by PW-2, who informed him that the 1st - 3rd defendants, alongside other MPs and members of the public, had come to the gate and the 1st defendant had ordered it opened and declared the land to be public utility. He travelled from Nairobi and met the MPs in a Naivasha hotel, where he showed them his documents. He stated that the 1st defendant said that he was sorry as he was not aware that he (the 1st plaintiff) had the documents for the land. They agreed to meet later at a Nakuru hotel (the following day), but he could not reach him, as his phone was off. He was later called by PW-2 and informed that members of the public have broken the gate. It is then that he filed this case and managed to obtain an injunction.

15. He testified that when he obtained the first order of injunction, the 1st defendant and the MCA of the area, one Mr. Warothe, ordered more destruction and the gate house was destroyed. He observed that every time he got a court order, there would be more destruction. He stated that he made repairs on 13 May 2014, at a cost of Kshs. 3,101, 644.88/=. He also had to relocate his animals and birds from the suit land. He mentioned that he had over 200 species of birds which he took them to a centre for them to be taken care of. He pays Kshs. 30/= per bird per day and he produced some invoices for the same. He stated that there was a third destruction and he had to spend Kshs. 345,000/= to weld iron gates on 17 December 2014. He further offered that his electric fence, which cost him Kshs. 968,600/= to put up, was destroyed on 17 December 2014. His borehole pump, which cost him Kshs. 357,280/=, was similarly destroyed on the same day. When the electric fence was destroyed, he put up another at a cost of Kshs. 3,850,858/= and he produced some receipts and invoices. He also repaired his borehole and pump at a cost of kshs. 382,800/=. He stated that in total, he claims kshs. 14,071,314.88/= in damages.

16. He testified that the 2nd defendant approached him on 3 May 2014, and told him that he is the Chairman of Karagita Beach, and was in charge of all persons passing through the suit land. He stated that he has never been called to testify by any Parliamentary Select Committee and neither has he seen any report of Parliament over the suit land.

17. Cross-examined by Mr. Aim, he confirmed that he was not present when the MPs and the crowd first came to the suit land and he relied on information received from his farm hand. Cross-examined by Mr. Kirui for the State, he testified that there were no chaos on the first day of the MPs' visit, but chaos erupted on the following day. He testified that the OCS (Mr. Mutisya, the 4th defendant), called people from Karagita, including one from among the interested party (a Mr. Joseph Kamau), and also called him a land grabber. He stated that the police never protected him even when the said Kamau and the 2nd defendant, were pushing him into his car. He did not think that even to date, the

police have protected him. Cross-examined by Mr. Gakinya, he stated that he has two parcels of land in the same place, the latter of which is the suit land. He mentioned that he did not attend the Land Control Board nor the Municipal Council of Naivasha for a clearance certificate, as he left his advocates to handle the transaction. He stated that he is the one who made the road across his land as it was just a bush there before.

18. With the above evidence, the plaintiffs closed their case.

**(ii) The defendants' evidence**

19. DW-1 was Hon. John Karanja Kihagi, the first defendant, who was then the MP for Naivasha Constituency. He is also a licenced surveyor. He recalled that on 2 May 2014, The Committee of Lands of the National Assembly, of which he was a member, visited Naivasha Constituency, and one of the issues that arose were access corridors. The Committee decided to visit two of these corridors, one in Karagita and the other in Manera. He produced the Hansard Report as an exhibit. He stated that The Committee proceeded to the suit land and requested the caretaker to open the gate, which he did, and The Committee walked down the road up to the lake. The Chairman then inspected the maps, made a ruling that the road was a public road, and directed that it be opened. He also declared that anybody aggrieved by the ruling should sue the Public Assembly. After making the ruling, he instructed the caretaker not to open the gate again. He stated that on that evening, while at their hotel, the 1st plaintiff approached him, but he advised him that he can meet the Chairman of the Committee the following day in Nakuru so that he can be given a hearing. They did not meet the following day, but the following week, they did meet in Nairobi, where he guided him on how to approach the Committee. He denied instructing the 2nd defendant to do anything on the suit land and mentioned that he did not know him closely. He stated that on 9 January 2015, he recorded a statement at Naivasha Police Station on the destruction of property, but he has neither been summoned since then, nor charged with any offence, as the police were satisfied with his explanation. The previous day, he had passed by the suit land, and he saw a large crowd of excited people but he left the scene. He was informed later that evening that some destruction had occurred.

20. He testified that the plaintiffs' investments are on the adjacent land parcel LR No. 3996/67 which abuts the suit land. He stated that as a qualified surveyor, in his own expert opinion, the suit land is a 60 feet access road, which is in the survey map of 1920. He produced this as a defence exhibit (defence exhibit No.3). He testified that this was a stand-alone road, without connection to any land and there was no "brace". He testified that there was nothing to show that this road was part of LR No. 396/R. He mentioned that this is the same position as in the 1931 map which he also produced as an exhibit (defence exhibit 4). It was his evidence that it is Surveyor Vaughan who declared that the suit land is not a road, but to him, this was mischievous, as the survey which Mr. Vaughan did, of 1971, was only meant to establish the beacons, and the surveyor could not introduce a new parcel of land. It was his view that the "brace" should have been there *ab initio*, from the year 1920, and should also have been in the map of 1931, but could not suddenly appear in the map of 1971. He further testified that the 1971 map, with a "brace", does not indicate the dimensions of the land braced. His opinion was that because there was no "brace" initially, the land was part of the road reserve. He stated that in the 1920 map, the road has a Deed Plan number 36569 and ordinarily, no title would issue for a road but the Deed Plan is surrendered to the Government. He testified that it was in 1971 that the road was annexed to LR No. 39/38, and in 1984, given the title LR No. 396/39, which to him was improper, and a fraudulent acquisition of public land. It was his opinion that the suit land is purely a public access to the lake. He stated that no procedure to alienate the suit land from public hands was ever undertaken.

21. Cross-examined by Mr. Gakinya, he testified that in 1971, the road reserve was annexed to LR No. 396/38, but the suit land was intact as a road, although Mr. Vaughan did write "not a road", which he thought was unusual, as maps do not usually have such disclaimers. He mentioned a survey done in 2008 by Mr. Vaughan, which brought forth the land LR No. 396/67, again owned by the plaintiffs.

22. Cross-examined by Mr. Karanja for the plaintiffs, he testified inter alia, that he is the one who raised concern, as MP of Naivasha, to the Lands Committee of Parliament, about roads of access to Lake Naivasha. He also sat in the same Committee. The Committee did rule that this was a public road, but did not hear the plaintiffs, before making this declaration. He stated that it was after the pronouncement by the Chairman of the Committee ( Hon. Alex Mwiru), that the gate was opened. He was aware that there have been interference by members of the public despite the court order of injunction. On his part, he denied advising the public to disobey the court order. He thought that the search of the suit land, produced by the plaintiffs as their exhibit, was not authentic, as there is no title to the suit land, although he did admit that he has not been to the Lands Office to peruse the file or get a search himself. He testified that in 1971, Mr. Vaughan amalgamated the road with the land parcel No. 396/38 and made this road to be part of LR No. 396/38. He asserted that Mr. Vaughan could not do this as he was only mean to re-establish beacons. He agreed that the National Assembly does not cancel titles which is done through a court process. He testified that there was no invasion after the declaration by the Chairman that this was a public road. The gate was opened and the public walked through. He stated that the gate was destroyed the following day (3 May 2014). He did not see any serious farming on the suit land save for some maize and beans. He questioned why the Deed Plan of 1984 was not registered until the year 2012, and although he conceded that there was no time limit for this, he thought that the delay raised suspicions.

Re-examined, he testified that the survey of 1971 was not meant to create any proprietary interest, but by introducing the "brace", Mr. Vaughan did create a proprietary interest of about 3 acres. He stated that as MP, he never had general authority over the residents of Naivasha and reiterated that he did not authorize any destruction of property.

23. DW-2 was Chief Inspector Mutisya Mutuku, the 4th defendant. At the time he gave evidence, he was no longer attached at Naivasha and was in a different station. He recalled that on 2 May 2014, the Parliamentary Committee visited Naivasha and made declarations in respect of various road reserves that had been converted into private land. He stated that immediately, members of the public went to the suit land and demolished the gate. The police were alerted and proceeded to the scene. They found that members of the public had already demolished the gate and barricaded the Moi South Lake Road. He, alongside his officers, managed to contain the situation, and opened up the road for traffic.

24. Cross-examined by Mr. Karanja for the plaintiffs, he confirmed that there was no access through the suit land before the visit by the Parliamentary Committee. It is from the time of declaration, that the public demolished the gate, and created a road of access to the lake. He could not identify the members of the public present. He testified that he was aware that the gate was demolished a second time. He himself did not go inside the land, and could not tell what was on it, although he did become aware that there was livestock on the land. He did state

that the destruction was on the following day.

**(iii) Additional evidence availed on request of the court**

25. After hearing this evidence, I felt the need to have Mr. Vaughan called as a witness, to shed light on the survey that he did in 1971, since I was of the view that this would assist the court in deciding on this matter. He did attend, and according to him, the property was originally set up in the 1930s and has always been in private hands. He testified that it was for a long time part of LR No. 396 and that the South Lake Road went through this land. The property was initially owned by 3 persons who subdivided it amongst themselves, and a separate title issued to the suit land, and sold to the plaintiffs. He stated that the land was previously used as a pipeline, for purposes of pumping water from the lake, to the parcels of land across the road. He testified that he has undertaken several surveys for re-establishment of beacons and also subdivided an adjacent land owned by the plaintiffs.

26. Questioned by Mr. Karanja for the plaintiffs, he stated that LR No. 396/38 (one of the earlier subdivisions of LR No. 396/R) was situated on both sides of the road (Moi South Lake road). He stated that the suit land was a strip of land going towards the lake and was part of the parcel LR No. 396/38. He explained that this parcel No. 38, is what was left of the "remainder". It was his opinion that if the Government wanted the strip surrendered, they would have done so. According to him, the suit land has never been a public road.

27. Questioned by Mr. Aim, he offered that he qualified as a surveyor in the year 1961 although he did start working as a surveyor in the year 1952. He stated that the suit land was initially used for pumping water and was a 60 foot corridor which had a big pipe , a pump house and a trench. He confirmed that the 1971 survey that he did, was for re-establishment of the beacons. He denied introducing the "braces" in the 1971 survey, and stated that he placed them, because they were in the earlier survey plan. He testified that he followed the deed plan of the parcel No. 38, and mentioned that it was probably the survey department which put the "braces". He acknowledged that the 1920 survey showed a 60 foot road, but stated that it belonged to LR No. 396 all the time, and was never acquired by the Government.

28. Questioned by Mr. Gakinya for the interested parties, he mentioned that he owns a land parcel No. 8, which is in the 1920 survey map, and which has never been subdivided. He reiterated that he placed the "braces" in the 1971 survey following the Deed Plan of the "remainder", which went all the way across the road (Moi South Lake road). He explained that this road was left for access to the lake by the people who owned the other land across the main road.

29. After he had testified, I ordered the hearing of the matter closed and invited counsel to make written submissions. In the meantime, I did think to myself that it may be useful to call for the Deed Plans to LR Nos. 396, 396/R, 396/38 and the Deed Plan No. 36569, which had been mentioned, but not produced by any party in evidence, and I did later re-open the matter for the production of these Deed plans, and called for the Director of Surveys to produce the same. The Director, in compliance with the summons, did send a witness who happened to be PW-1. He mentioned that he could only manage to get the Deed Plan to the LR No. 396/38 which is a Deed Plan No. 74431, dated 10 November 1959. He stated that this land parcel, LR No. 396/38, was on both sides of the main Moi South Lake road and went all the way to the lake shore. On whether or not the said Deed Plan indicated a road, he asserted that there is no road, and on plotting the road on the deed plan, he stated that it showed the same to be part of LR No. 396/38. He pointed to a "brace" linking the disputed land with the LR No. 396/38.

30. Questioned by Mr. Aim for the 1st-4th defendants, he stated that before creation of the suit land (parcel No. 396/39) there were two "braces". There was also a road of 60 feet which was surrendered.

31. I gave the witness more time to get the other deed plans but he came back and said that he was unable to trace them and I closed the hearing of the matter. I then invited counsel to make their submissions.

**PART C : SUBMISSIONS OF COUNSEL**

32. In his written submissions, Mr. Aim, learned counsel for the 1st -3rd defendants, identified two issues for determination, namely, whether the plaintiff has proved his claim for special damages, and secondly, whether a permanent injunction should issue restraining the public from accessing the suit land. On the first issue, he submitted inter alia that special damages must not only be pleaded but must be proved. He pointed out that some receipts produced to prove damage are of the years 2011 and 2012, way before the damage occurred, yet they were supposed to prove repairs to the gate. He further submitted that the receipts were wrongly produced without calling their maker in contravention of Section 35 of the Evidence Act and should not be given probative value. He added that the receipts were not stamped contrary to the Stamp Duty Act, CAP 490, Laws of Kenya and thus not admissible. He argued that his clients had nothing to do with the destruction on the suit land as the suit land was opened up to the public by the Chairman of the Lands Committee. He also was of the view that there are contradictions in the plaintiffs' evidence, of when the properties were allegedly destroyed, and whether there was anything on the suit land to be destroyed. He further submitted that no licences for transporting birds were ever produced to prove that the plaintiffs moved their birds for safekeeping.

33. On the second limb, he was of the opinion that the surveyors in favour of the plaintiff were at pains to explain how the suit land, which was a road, was introduced as private property in the 1971 maps. He submitted that Mr. Vaughan could not convincingly explain why he introduced "braces". He thought that the suit land suddenly appeared in the 1978 map as private property after the "braces" were fraudulently introduced in a survey that was only meant to re-establish the beacons. He was of the view that the suit land has never ceased being public land.

34. Mr. Aim referred me to various authorities which I have considered.

35. On the part of the 4th and 5th defendants, Mr. Kirui, learned counsel, inter alia submitted that the role of the police was to contain riots and demonstrations and they were never involved in any form of destruction of property. He submitted that no police service in the world can provide absolute protection to all individuals and their property. He was of the view that the plaintiffs have not proved their case against the 4th defendant and the case should be dismissed with costs.

36. On his part, Mr. Hari Gakinya, for the interested parties, inter alia submitted that his clients have all along been using the beach for fishing and recreation. He submitted that it would have been expected for the plaintiff to call the previous title holder which he never did. He submitted that, in his evidence, PW-3 stated that he never obtained consent of the Land Control Board yet the land is agricultural in nature, and also did not produce the clearance certificates from the local authority. He was of the view that the sale transaction runs afoul the Land Control Act and should be declared a nullity. He thought that the whole sale transaction was suspect. He further submitted that the plaintiffs failed to prove how the suit land stopped being a road and was converted to private land. He referred me to some authorities to assert the point that without the consent of the Land Control Board, a transaction over agricultural land is void.

37. In his written submissions, Mr. Lawrence Karanja, learned counsel for the plaintiffs, was of the view that the evidence pointed at the suit land being a private, and not, a public road. He submitted that there was no basis for the Lands Committee to arrive at the conclusion that the suit property was public land. He further submitted that there was no consultation and/or communication to the plaintiffs and the unilateral declaration led to the destruction of the plaintiffs' property. He was of opinion that it was callous and insensitive for the defendants to act as they did. He submitted that there was a breach of natural justice, for the plaintiffs were never heard, and he referred me to various authorities on the right to be heard. He submitted that the plaintiffs' interest to the suit land are protected by law and he referred me to Section 26 of the Land Registration Act, 2012 and Article 40 of the Constitution. He submitted that the defendants cannot rely on the defence of public interest. He was of opinion that the plaintiffs have proved the special damages pleaded. On the argument that unstamped receipts have no value, he submitted that it is not the position that payments in respect of services rendered must be stamped, and was of the view that it is the receiver of the payment who has a duty to stamp the receipt, and not the payee.

#### **PART D : ANALYSIS AND DECISION**

38. I have carefully gone through the pleadings, the evidence, and the submissions of counsel. In my view, five things need to be determined being :-

- (i) Is the suit land a public access road or is it private property ?**
- (ii) Are the interested parties or indeed other members of the public entitled to use the suit land as an access road or otherwise ?**
- (iii) Was there any damage occasioned to the plaintiffs' property and if so, what is their quantifiable loss?**
- (iv) Can the plaintiffs be given any award if the receipts are not stamped ?**
- (v) Are the defendants liable to pay damages to the plaintiffs ?**

39. I will deal with these issues systematically.

#### ***Issue 1 : is the suit land a public access road or is it private property ?***

40. The main question in this case is whether or not the suit land is a public access road or is private property. The plaintiffs claim ownership of the suit land and wish to have it declared their property, whereas the position of the defendants, at least the 1st -3rd defendants, and the interested parties, is that the suit land is a public access road, or a public access corridor to Lake Naivasha, at Karagita beach. Both parties relied on various survey maps to support their respective positions. From the evidence that is before me, I have ascertained the following facts, which indeed are not disputed, regarding the survey maps:-

- (a) That the whole land where the suit land is located, was originally referred to as LR No. 396.**
- (b) That in the year 1920, the land parcel LR No. 396 was subdivided into 11 parcels of land described as LR Numbers 396/1 to 396/10 and the eleventh parcel was described as LR No. 396/R.**
- (c) That the suit land arose out of a series of subdivisions of the parcel LR No. 396/R.**
- (d) That the suit land was at some point accommodated within the land parcel LR No. 396/38.**
- (h) That the land parcel LR No. 396/38 was subdivided to give rise to the land parcels LR Nos. 396/39 (the suit land), 49,41,42, 43 and 44.**

41. It is the above chronology of subdivisions which gave rise to the suit land.

42. I have seen that in the early survey maps of 1920, 1931 and 1938, the suit land was noted as a 60 foot road. The controversy is whether this road was private, serving the larger original parcel of land, being that this larger parcel of land went across the road (Moi South Lake Road), or whether it is a public road, open for use by the public. The answer to this is discernible by following the subdivision surveys, and the Deed Plan No. 74431 of 10 November 1959, which is a Deed Plan of LR No. 396/38.

43. I have seen in the first survey map of 1920, that the suit land is indicated as a 60 foot road of access through the deed plan No. 36569. This Deed Plan was however not produced as an exhibit. The 1920 map (drawn by Mr. Nightingale) by itself cannot tell us whether or not the suit land was a private or public road. Nevertheless, I have seen for myself that the remainder land parcel 396/R was on both sides of the now Moi South Lake road, despite there being no "brace" (quotation marks hereinafter removed) drawn in the map to indicate this. It is

obvious to me that the parcel 396/R comprised of at least three portions; two portions abutting Lake Naivasha and separated by the parcels of land which were then the subdivisions LR No. 396/1 - 10, and the third portion, being across the Moi South Lake road. Despite this fact, which is clear from the 1920 map, there are no braces to show that it is the same land across the road. I have seen the suit land, on the 1920 map, indicated as "road" but as I have said, it is not possible to tell from looking at this map alone, whether it was part of the remainder, a private road, or a public road. For this, we have to have a further look at the subsequent maps.

44. The next map that I have is the 1931 map drawn by H.C Long. I have looked at it, and from what I can deduce, the remainder land was actually in at least 4 portions, the 4th portion, which was not clear in the 1920 map, being a triangular shaped parcel of land abutting the Moi South Lake Road towards the lakeside. In this 1931 map, there is a brace, indicating that this triangular parcel of land is actually part of the "remainder" land. By this time, the "remainder" land had been subdivided into various portions, including, 396/17/R (which was not on the lake side but across the Moi South Lake road) and where fell the triangular parcel of land towards the lakeside. The other parcels, from what I can see, include the parcels LR No. 396/18 on one side of the older subdivisions (LR Nos. 396/1-396/10), and on the other side of these old subdivisions, the parcels Nos. LR No. 396/17/6, 396/17/5, 396/17/4, 396/17/3, 396/16, LR No. 6292/1, LR No. 6292/2, LR No. 396/12, and LR No. 396/13, LR No. 396/17/1. The suit land is right there in the map, still indicated as a 60 foot road, but again, there being no brace and no parcel number for it, it is not clear whether it was a private or public road. To show what kind of road it was, we have to go further to the later maps.

45. The next map is the 1949 map (plaintiff's exhibit No. 3). This is a very important map. From it, I can see the land parcel LR No. 396/25/R. This land parcel LR No. 396/25/R is shown to be largely across the Moi South Lake Road (away from the lakeside), but there are two braces, to two portions of land on the opposite side (the lakeside). One brace attaches the land parcel LR No. 396/25/R, to the triangular parcel of land, and the second brace, and this is very significant to us, attaches the land parcel LR No. 396/25/R to the 60 foot road (which is the land in dispute). It is clear, by looking at this map, that the suit land was thus part of the land parcel LR No. 396/25/R. There can be no other conclusion given the brace that is on the said map. It means that the land in dispute at some point was comprised within the land parcel LR No. 396/25/R.

46. This position is confirmed in the 1959 Deed Plan No. 74431. By this time, the land parcel LR No. 396/25/R had been subdivided, the largest portion of which was LR No. 396/38, and Deed Plan No. 74431, is the Deed Plan to this parcel LR No. 396/38. This Deed Plan also has two braces, one attaching LR No. 396/38 to the triangular shaped land across the Moi South Lake road, and the second brace, attaching LR No. 396/38, to the land in dispute. It follows that the suit land (the land in dispute), was thus part of LR No. 396/38 and was not an independent road or parcel of land as at the year 1959.

47. The position pressed by the 1st defendant, is that the braces were introduced by Mr. Vaughan in the year 1971, when he was doing a re-establishment survey, but this clearly, after looking at the map of 1949 and the deed plan of 1959, cannot be the case. Those braces were already there before the year 1971. It is correct to state that Mr. Vaughan's survey drawing of 1971, does indicate two braces, one to the triangular parcel of land and the other to the suit land, but as I have demonstrated, it is wrong to allege that it was Mr. Vaughan who for the first time introduced these braces. Mr. Vaughan's survey plan simply followed the previous survey map of 1949, and the deed plan of 1959. In Mr. Vaughan's survey plan, the suit land and the triangular parcel of land (on the lakeside) are indicated, through the use of braces, as being part of LR No. 396/38, the larger portion of which was across the road. That is exactly what is in the 1949 map and the 1959 Deed Plan. Thus, Mr. Vaughan did nothing new; he never introduced the suit land as a new parcel of land as claimed by the 1st defendant. In this 1971 survey, the suit land is now not shown as a 60 foot road, but as part of LR No. 396/38, which as I have said, was nothing new, as it simply followed the 1949 map and the 1959 Deed Plan.

48. It is this land parcel No. 396/38 which was subdivided to produce the suit land. The subdivision is clear in the 1984 map (plaintiff's exhibit No. 4). It shows that after subdivision, the triangular parcel of land (towards the lakeside of Moi South Lake road) now acquired its own identity as LR No. 396/41. The suit land also acquired its own title, being LR No. 396/39. The braces were then removed, since now, these two independent parcels of land, wholly being on one side of the road (the lakeside) had no attachment to any parcel of land across the road. What happened across the road was a further subdivision to bring forth LR Nos. 396/42, 396/43, and 396/44, all of which were now wholly situated on the opposite side of the road, and being so situated, there are no braces, attaching them to any land towards the lakeside. I have seen that after its subdivision, the braces were removed, meaning that all subdivisions remained on one side of the road.

49. The 1st defendant also tried to make heavy weather of Mr. Vaughan's writings on the maps, showing that the suit land is "not a road", which he said he found suspicious, as in his view, it is uncommon to have such disclaimers in survey maps. On my part, I see nothing wrong with these comments. In fact, it does appear to me, that in the surveys done by Mr. Vaughan, he has a penchant of making elaborate writings. I have seen, for example, in this same 2008 map, that Mr. Vaughan, has indicated the position of his own house in the map shown as "my own house" (he does own the parcel LR No. 396/8 which was among the first subdivisions of 1920). I have also seen writings indicating that across the road "this section is now VERY high density RESIDENTIAL-with tiny plots". This reveals how the surveyor used to do his work, and although not conventional, there is nothing wrong in such writings, which in fact are pretty revealing on the nature of the land.

50. My above analysis of the survey maps bring me to only one conclusion. The suit land was never a public road. It was a private road used to serve the larger parcel No. 396, and later after subdivision, it served the parcel LR No. 396/38 which ran across the road. After subdivision of LR No. 396/38, the suit land became a stand-alone plot, described as LR No. 396/39. I have not been shown anything to indicate that the disputed land was ever a public utility plot or road. Neither have I been shown anything, which demonstrates that the Government acquired this land, so that it forms part of a public utility.

51. The evidence of PW-1, who is a Government officer cannot also be wished away. PW-1 basically presented the view of the Government. The position of the Government is that the land in dispute is private land and not a public road. Now, this is the Government saying this, and it is not an empty statement, but has documentary support. I find it ironical, that while the 1st-3rd defendants and the interested parties, want to insist that this is a Government road, the same Government, of which they wish to impose the road, has disowned this road and has no interest in it.

52. I think it is time that people stopped speculating, that such and such land is a public utility and proceed to harass owners of such parcels of land. You must have concrete evidence to table before making such allegations.

53. It was also very wrong for the Parliamentary Committee on Lands, to make a declaration that the suit land was a public utility. They never called the plaintiffs to tell their side of the story or rebut the speculation that the said land was public utility land. But even worse, they never had any jurisdiction to make such a pronouncement. They should have known and acted better. It is not a simple matter to declare that somebody's private land is public utility land, because, the public is easily moved by such pronouncements, and after that, people start thinking with their emotions rather than their heads, and reason is completely thrown out of the window. I would have thought that members of parliament, given their Honorary tag, would act honourably and more reasonably. I am really shocked at the way they conducted themselves and the way in which they made the pronouncements that they did. How does one person simply stand and say, "this is now public utility. Public, be free to use it as you wish". That was a most careless, callous, unreasonable, and totally outlandish pronouncement. It was a populist statement by a politician, made in the most careless manner, and completely without jurisdiction.

54. I think I have said enough on the first issue. I only reiterate that the suit land HAS NEVER BEEN and IS NOT public land, public utility land, a public access road, nor a public corridor to access the lake. It has ALWAYS BEEN and it STILL IS private land. Whoever declared it a public utility land, misled the public, and misinterpreted the survey maps drawn in respect of the area under dispute. I ask the public not to be swayed by such pronouncements and steer clear of this land. It is private land.

55. Before I close on this first issue, there was a matter raised by Mr. Gakinya, for the interested parties, that the transaction vide which the plaintiffs acquired title, was void for want of Land Control Board consent. I am afraid that this is not an issue to be decided in this matter. It was never raised in the pleadings and a party cannot purport to raise issues which are not pleaded during submissions. If anybody wants to contest the ownership of the plaintiffs of the suit land, they are free to file pleadings of their own, which will be decided on merits. It is not necessary for me to say more on that argument and I will move on to the second issue.

**Issue 2 : Are the interested parties or indeed other members of the public entitled to use the suit land as an access road or otherwise ?**

56. I have already held that the suit land is private land and not public land. I have seen that the plaintiffs have title to the suit property, and being title holders, they are protected by law. Under Article 40 of the Constitution, a person has a right to own property anywhere in the Republic of Kenya. The Land Registration Act, Act No. 3 of 2012, provides under Section 25, the rights of a proprietor of land. The said provision of law is drawn as follows :-

*Rights of a proprietor.*

25. (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.*

57. It will be seen from the above that a proprietor of land holds all privileges and appurtenances relating to the land that he owns. These rights are exclusive to the proprietor and include the right of use, the right of ingress and egress, and the right to exclusive possession. No other person, unless with the permission of the title holder, can claim these rights. It is therefore wrong for the interested parties, or indeed any member of the public, to purport to exercise these rights over property which is privately owned. I want to make it clear, that the defendants, the interested parties, and indeed members of the public, have absolutely no right to enter the suit land, or use the suit land to access Lake Naivasha, or possess, or use the suit land in any other way. The suit land is private property owned by the plaintiffs, and nobody, other than the plaintiffs, has a right to use or enjoy the same. It will be an act of trespass, which is criminal by itself, for any other person, other than the plaintiffs, to claim that they have rights over the suit land.

58. It was claimed that this is a landing beach, but I am not persuaded. The boundaries of the suit land go all the way to the lake as indicated by the contour in the map. That is, the land is as big as the lake will allow and any beach therein is privately owned by the plaintiffs. There is therefore no public beach or public landing area for boats. All the land from the road to the water of the lake belongs to the plaintiffs and is privately owned.

59. On this second issue, I therefore hold that the defendants, interested parties, and members of the public, or other persons, are not entitled to use the suit land as an access road or otherwise and must keep away from the same and respect private property.

**Issue 3: Was there any damage to the plaintiffs' property and if so, what is their quantifiable loss ?**

60. It is the plaintiffs' case that there was serious damage to the suit property. The plaintiffs have quantified their loss as follows :-

*(a) Cost of repair of main gate - Kshs. 1,822,405.00/=*

*(b) Cost of repair of RC Wall - Kshs. 3,104,644.88/=*

*(c) Cost of Bird Keeping at Stedmak Gardens @540,000/= per quarter since June 2014 to date - Kshs. 3,240,000/=.*

(d) Cost of welding of iron gates - Kshs. 345,000/=

(e) Cost of electrical installation - Kshs. 968,600/=

(f) Cost of repairs of submissile (sic) borehole pump - Kshs. 357,280/=

(g) Cost of repairs and installation of borehole electric pump - Kshs. 382,800/=

(h) Cost of repair and installation of electric fence - Kshs. 3,850,585/=

**TOTAL - Kshs. 14, 071, 314.88/=**

61. I have evaluated the evidence, and I am persuaded that indeed there was damage to the suit property. The fact that there was damage to the suit property is not really contested by the defendants, although of course they have raised issues, on the extent of the loss incurred by the plaintiffs. I have sufficient evidence to reach the conclusion that the entry gate and a sentry house was damaged. The evidence of the 1st plaintiff, that there was also damage to the borehole, pump, and electric fence is also not controverted, and I am persuaded, on a balance of probabilities, that these were also damaged. It was claimed by DW-1 in his evidence, that there were no investments on the suit land but the investments were on the other land. From the evidence tabled, the plaintiff of course owned adjacent land, but he did use both of them as one portion of land after his latter acquisition of the suit land. It is no defence that the properties damaged are geographically on the other parcel of land. Whatever loss was caused, was a direct consequence of the invasion of the suit land.

62. In his evidence, the 1st plaintiff testified that he had used Kshs. 1,822,405/= to put up the main gate and he presented three receipts to prove that he indeed paid this sum. I have no evidence to contradict this and I am persuaded that the plaintiffs used the sum of Kshs. 1,822,405/= to put up the main gate. There is evidence that this gate was destroyed and the 1st plaintiff testified that he embarked on repairs after the same was damaged. He stated that he used the sum of Kshs. 3,101,644.88/= to repair the same and he produced receipts to prove that he made these payments. There could have been an error as the invoice shows Kshs. 3,104,644.88/= and the receipts produced (two receipts of Kshs. 1,522,323/= ) add up to Kshs. 3,104,646/=. If I follow the receipts, Kshs. 3,104,646/= was actually expended to repair the gate. The 1st plaintiff affirmed that there was a further destruction and he had to use Kshs. 345,000/= to put up an iron gate. He produced receipts to cover these amounts and I am persuaded that indeed the plaintiffs used the sum of Kshs. 345,000/= to put up a metal gate. The plaintiffs also produced an invoice and receipts to show that they used the sum of Kshs. 968,600/= to put up an electric fence in the year 2011. This again is not controverted and I am persuaded that this sum was indeed expended for this purpose. The 1st plaintiff in his evidence also stated that there was damage to their borehole pump which he had to repair at a cost of Kshs. 357,280/= and he produced a receipt for this. I am persuaded that this amount of money was expended. The 1st plaintiff testified that he had to redo the electric fence at a cost of Kshs. 3,850,585/= after the damage that occurred in the year 2014. He produced the invoices and receipts and I am persuaded that he expended this sum of money. It was said that there was further destruction to the borehole and pump, for which the plaintiffs had to spend Kshs.382,800/=, and an invoice and receipts were produced. I am persuaded that this amount of money was used.

63. What then is the actual damage to the plaintiffs? Firstly on the gate, the plaintiffs said that they had initially used the sum of Kshs. 1,822,405/= to put it up in the year 2011. After the same was damaged, they used the sum of Kshs. 3,101,646/= (although what is pleaded is Kshs. 3,101,644.88/=) and another Kshs. 345,000/= for a steel gate. Well, the plaintiffs cannot now claim both Kshs. 1,822,405/= and the latter Kshs. 3,101,644.88/= and Kshs. 345,000/=. If I award them both, then they will have been compensated twice, for you would assume that the repair cost put back the main gate in the state that it was before destruction. I think the plaintiffs can only be entitled to what they expended pursuant to the damage , and I will give what was pleaded which is Kshs. 3,101,644.88/= and Kshs. 345,000/=, thus in total, under this head, Kshs. 3,446,644.88/=. I award this sum for damage to the gate. It has not escaped me that it is more than the initial outlay, but then we have to consider inflation, and at times it is in fact more expensive to do repair work than a starter job. I see no problem with this award. On the damage to the electric fence, again, using the same principal as above, I will award Kshs. Kshs. 3,850,585/= and ignore the initial outlay of Kshs. 968,600/=. For the pump house damage, the plaintiffs had to do repairs twice over. They are entitled to the costs of each repair. The first time, they used Kshs. 357,280/= and the second time they used Kshs. 382,800/=. What they spent in total is Kshs. 740,080/=.

64. What I would therefore consider as having lost by the plaintiffs is as follows :-

**(i) For the main gate - Kshs. 3,446,644.88/=**

**(ii) For the electric fence - Kshs. 3,850,585/=**

**(iii) For the borehole and borehole pumps - Kshs. 740,080**

**Total Loss - Kshs. 8,037,309.88/=**

65. What they have lost in monetary terms on the physical damage to their property is Kshs. 8,037,309.88/=. There is another claim for the sum of Kshs. 540,000/= for every quarter of the year, being the expenses that the plaintiffs claim they use for having transferred their birds to a sanctuary for upkeep. I have a bit of a problem with this claim. Now, if the plaintiffs kept these birds in their own farm, they would still have used some money for their upkeep. The plaintiffs did not tell me what they would have spent if they kept the birds in their farm and not in the bird sanctuary. I therefore do not know whether or not the plaintiffs went at any additional expense by keeping their birds in the sanctuary and not in their farm, for the difference between what they would have spent and what they spend in the bird sanctuary, is what would have constituted their net loss. Without the benefit of that evidence, I am afraid that I am not persuaded that the plaintiffs have gone at any loss by keeping their birds in a bird sanctuary and not in their farm. For that reason, I do not think that the plaintiffs have proved to me any loss that they have suffered for keeping their birds in a bird sanctuary, and I cannot make any award under this head.

66. The loss that the plaintiffs have proved is thus Kshs. 8,037,309.88/= .

**Issue 4 : Can the plaintiffs be given any award if the receipts are not stamped ?**

67. An issue has arisen that the plaintiffs cannot claim these monies, because first, the receipts were not produced by their maker, contrary to Section 35 of the Evidence Act, and secondly, the receipts that they produced are not stamped as required by the Stamp Duty Act.

68. On the first contest, I see no issue. No objection was raised in the course of hearing, that the plaintiff cannot produce the receipts because he is not the maker of the same. As it is, the receipts have already been produced in evidence, and form part of the record, and it is now too late to raise an objection on their production.

69. On the second contest, that the receipts are not stamped, I was referred to the provisions of 19 (1) but I feel the need to set down the whole of Section 19 so as to get the context. The same is drawn as follows :-

*Production of Instruments in Evidence and Instruments not duly Stamped*

**19. (1)** Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except -

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty, **unless it is duly stamped.**

(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions -

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) in any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;

(c) in all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence.

(4) If any person is empowered or required by any written law to act upon, file, enrol or register a duplicate or copy of any instrument, and if the original of that instrument would require to be duly stamped if acted upon, filed, enrolled or registered by that person, that person may call for the production of the original instrument or for evidence to his satisfaction that it was duly stamped, and no person shall act upon, file, enrol or register any such duplicate or copy without production of the original instrument duly stamped or of evidence thereof.

(5) The penalty on stamping any instrument out of time referred to in paragraph (c) of subsection (3) shall be ten shillings in respect of every twenty shillings and of any fractional part of twenty shillings of the duty chargeable thereon and in respect of every period of three months or any part of such a period after the expiration of the time within or before which the instrument should have been stamped.

70. What in this case is said to have needed a stamp are the receipts produced by the plaintiff. I have gone through the receipts and I do observe that some receipts were stamped but some are not. The receipts for repair of the gate wall (where the plaintiff claimed Kshs. 3,104,644.88/=) are stamped. They are two receipts of Kshs. 1,552,323/= each, so there can be no contest over this claim. But what about the receipts that have not been stamped ? I have carefully gone through the Stamp Duty Act, and some decided cases on this point. It is true that the Stamp Duty Act, does require that receipts be stamped. The provision is not in Section 19 but in Section 88 which is drawn as follows :-

**88. (1)** Any person receiving any money of one hundred shillings or upwards in amount, or any bill of exchange or promissory note for an amount of one hundred shillings or upwards, or receiving in satisfaction or part satisfaction of a debt any movable property of one hundred shillings or upwards in value, shall, on demand by the person paying or delivering the money, bill, note or property, give a duly stamped receipt for it.

(2) If any person -

(a) fails to give a receipt, as required by subsection (1); or

(b) gives a receipt liable to duty and not duly stamped; or

(c) in any case where a receipt would be liable to duty, refuses to give a receipt duly stamped; or

(d) upon a payment to the amount of one hundred shillings or upwards, gives a receipt for a sum not amounting to one hundred shillings, or separates or divides the amount paid with intent to evade the duty, he shall be guilty of an offence and liable to a fine not exceeding two thousand shillings.

71. From the above, the duty to stamp the receipt is not that of the recipient but that of the issuer of the receipt. One could object to production of the receipt if not stamped, so that it may be stamped, but once introduced as evidence, the court cannot close its eyes and assume that no such expense was ever incurred. This indeed appears to be the approach taken by several judges. In the case of **Beatrice Ndungwa Makau vs Nairobi City Council & Another, High Court at Nairobi, Civil Appeal No. 1 of 2007, (2012) eKLR**, the trial magistrate court refused to make an award of special damages on the reason that the receipts produced were not stamped. On appeal, Onyancha J, stated as follows :-

*"In rejecting the evidence contained in the receipts produced by the appellant, the trial magistrate used the ground that the receipts were not revenue-stamped. However, that reason was one for rejecting the receipts from being produced. However, neither the Respondents nor the court objected to production. Once the evidence was properly produced in my view, it would be difficult for the court to close its eyes and brain to the evidence they contained or represented. In my opinion, the court should not have ignored properly admitted evidence of the appellant, which were in any case, not rejected by the respondents."*

72. The learned Judge proceeded to make the award on special damages based on these unstamped receipts.

Emukule J, in the case of **Benedeta Wanjiku Kimani (Suing as the administrator of the Estate of Samwel Njenga Ngunjiri (deceased) vs Changwon Cheboi & Another, High Court at Nakuru, Civil Suit No. 373 of 2008 (2013) eKLR**, also faced a situation where a claim for special damages was made and the receipts produced did not have revenue stamps. The judge was of the following view :-

*"18.03 I have indeed looked at the invoices, and receipts, and they indeed do not appear to bear any copy of a revenue stamp affixed to them. That does not however conclusively determine that the Plaintiff did not pay for the various services rendered in the course of the deceased's hospitalisation, or for his funeral expenses."*

*18.04 In my view it is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed them. Lastly having admitted the receipts by consent, the Defendant's counsel is estopped from challenging their admission by way of submission."*

*18.05 In the result therefore, I allow Plaintiff's claim in the sum of Ksh 75,650/= as special damages."*

73. What transpired above is what we have in this case. There was no objection to the production of the receipts, and I am in agreement, as averred by Emukule J above, that the defence is now estopped from challenging them at this stage.

74. In my humble view, Courts need to be slow before denying someone an award for money that he must have spent, just because a receipt, for which the duty to stamp is not his, has not been stamped. Why should the court prejudice you for the omission of somebody else and on something that you have no duty to do? If say, you broke your leg following an accident, and there is ample and undisputed evidence that you spent so many nights in a hospital, and you underwent surgery, and you spent Kshs. 500,000/= for which the hospital has issued you with a receipt but has not stamped it, surely should you be denied this money, of which there is no doubt that you have spent, just because the hospital has not stamped the receipt? We have to look at the justice of the case and not technicalities. Maybe the most I can do, if there is an objection at the time of production, is to ask you to ensure that the receipt will be stamped.

75. In any event, we have to understand the essence of a receipt. A receipt is among the documents that show that a certain amount of money was spent for a certain purpose. But it cannot be said that proof of expenditure is solely and exclusively based on a receipt. A court can infer expenditure based on the evidence that is before it, and it does not mean that without a receipt, no court can allow any claimed expenditure. You have to look at the totality of the evidence. If the circumstances are appropriate, there is no bar to making an award even based on oral evidence or judicial notice. In our case, apart from the receipts, there are invoices, and there is no controversy as to whether or not repairs were undertaken pursuant to the invoices. Even if the receipts which have not been stamped are to be disregarded, I could still make an award based on what has been invoiced, either as a sum of money that has been spent or will inevitably be spent, or as money that would reasonably have been expected to be spent.

76. Thus, the objection that this court cannot make an award based on the contention that some receipts were not stamped, must fail. My conclusion on this point is that the plaintiff has proved damages in the sum of Kshs. 8,037,309.88/=.

#### **Issue 5 : Are the defendants liable to pay damages to the plaintiffs ?**

77. I already set out the pleadings at the beginning of this judgment and it is not necessary to reiterate the same. But just to emphasize on what is pleaded as attaching liability to the defendants, the plaintiffs at paragraph 11, 15, 17 and 18, of the plaint have pleaded as follows :-

*11. On or around 2nd May 2014 the 1st, 2nd, 3rd and 4th defendants in the company of other members of Parliament and a multitude of members of the public visited Land Parcel Number 396/39 located at Naivasha off Moi South Lake Road and after*

*holding a short public meeting thereof the 1st defendant declared that the said land is a corridor meant for use by the public and that he had declared the corridor officially opened for use.*

*15. Whilst at Waterbuck Hotel at 11.30am the 1st plaintiff received a call from his employees who informed him that on the instruction of the 1st and 3rd defendants the 2nd defendant in the company of other members of the public had broken through the gate of the plaintiff's parcel of land in Naivasha pursuant to the purported official opening of the same by the 1st defendant for use as a public corridor to access the lake shores and they were demolishing the structures surrounding the said parcel of land causing the plaintiffs great damage and loss.*

*17. The 1st plaintiff then subsequently drove to Naivasha at around 5.30pm where he met the 2nd defendant together with others and whereof the said 2nd defendant declared himself to be Chairman of the local residents with instructions from the 1st and 3rd defendants to ensure that the purported corridor was not only opened but that it remained open for the purpose of use by members of the public.*

*18. The 2nd defendant together with other members of the public who he called his members threatened to cause physical harm on the 1st and 2nd plaintiffs together with their children and soon thereafter the 4th defendant arrived and declared that he was there to ensure that the plaintiffs' parcel of land remained opened for use by the public to access the shores of lake Naivasha.*

78. I have felt the need to set out in full the above pleadings for they are core on the element of liability for the damage caused. Maybe at this juncture, it is important to point out that the 3rd defendant is the Minister of Lands, of Nakuru County.

79. It will be seen from the pleadings, that the plaintiffs aver that it is the 1st defendant who declared that the suit land is a public corridor and declared it officially opened. The evidence of PW-2 is that there was a declaration on 2 May 2014, by a member of Parliament (not specified who) that the suit land is a public corridor. He did mention that at a later date in the year 2015, after a court order had been issued in favour of the plaintiffs, the 1st defendant came with a big crowd and told the police that they have no work on the suit land and should vacate. It is then that the gate and shelter next to it were destroyed. He also mentioned that the 2nd defendant was present and also a Mr. Kilo, when the declaration was made. He however did not name any other names. According to the evidence of the 1st plaintiff, it is the 1st defendant who made the declaration that the suit land is public land. He also testified that after the order of injunction, the 1st defendant and an MCA, a Mr. Warothe, ordered destruction of the suit property. He did state that the 2nd defendant came to him when he visited the land on 3 May 2014, and told him that he is the Chairman of Karagita Beach and that he was in charge of all people passing on the suit land. He also confronted him for a physical fight. On the same day in the evening, he did state that Mr. Mutisya, the 4th defendant called people from Karagita, and a crowd came. Among them were a Mr. Joseph Kamau, of the interested parties, and Mr. Kuto, the 2nd defendant.

80. On his part, the 1st defendant in his evidence, denied any involvement, save that he was among the Committee members that visited the suit land. He produced a Hansard Report to demonstrate that he was not the one who made the declaration that the suit land is public land. He was certainly not present on 3 May 2014, when the actual destruction was done, but was in Nakuru, with the rest of the Committee. He also denied instructing Mr. Kuto (the 2nd defendant) to do anything on the land. On 8 January 2015, when there was further destruction, he stated that he only passed by the area and that he tried to calm down the crowd and asked them to desist from violence. He mentioned that this is exactly what he stated when he was summoned by the police to write a statement, which statement he produced as an exhibit.

81. I have considered all this evidence and looked at the Hansard Report. It is true as stated by the 1st defendant, that it is not him who made the declaration that the suit land is public land. That declaration was actually made by Hon. Alex Mwiru, the Chairman of the Committee on Lands. I have no reason to doubt the Hansard Report, and it is therefore not correct to state that it is the 1st defendant, who made the declaration that the suit land is public land. The 1st defendant was also not present when the first destruction was done on 3rd May 2014 and he has denied instructing the 2nd defendant to do any damage. In fact he did state that the 2nd defendant is not a person that is very well known to him.

82. After weighing this evidence, I will give benefit of doubt to the 1st defendant. He certainly has some sort of connection to what transpired, but I do not have concrete evidence, that he was involved in the destruction of the plaintiffs' property or he encouraged the destruction of the same. There is some doubt and he benefits from that doubt. The person who made the declaration was not sued and I think that was a huge omission by the plaintiffs. Hon. Alex Mwiru is not a party to this suit and I cannot make any order against him. Given the above, I absolve the 1st defendant from liability. In the same vein, I give benefit of doubt to the 4th defendant. He is a police officer and I am persuaded by his explanation, that he only came to provide security and that he tried his best in the circumstances.

83. I also absolve the 3rd defendant from liability. Save for being present when the Committee visited the suit land on 2 May 2014, there is nothing else that attaches her to the damage that was caused upon the plaintiffs land.

84. But I am unable to absolve the 2nd defendant from liability. He was present on 3rd May 2014 and he appears to have led the crowd to destroy the plaintiffs' gate. He did not bother to testify and give his side of the story, meaning that all that has been said against him remains uncontroverted. He cannot escape liability. Any person who by himself destroys another person's property or who incites and leads others to destroy other people's property must be held liable for any damage that he, or those he has led, cause.

85. I therefore find the 2nd defendant liable to pay the plaintiffs the damages that I have assessed which amounted to Kshs. 8,037,309.88/=. I am also of the view that the police need to conduct investigations as to whether or not he may be liable for criminal sanctions as well. The conduct of the 2nd defendant also makes me award against him the sum of Kshs. 500,000/= being damages for trespass into the plaintiffs' land.

## **PART E : CONCLUDING REMARKS AND FINAL ORDERS**

86. I must state, that nobody has any right to invade any person's property or encourage any destruction of such property. If anybody has any claim over property, the avenue that such person has, is not to invade such property, or move a crowd to invade it. The avenue is to file a case

in court and ask the court to make a pronouncement on that property. It is time that we moved away from behaving as if we have no laws in this country, and it is time for us to put our foot down and insist that there is no place for anarchy, and no room for anyone to take the law into his/her own hands. We cannot operate as a civilized society if we do not follow these basic norms.

87. I had earlier mentioned that there were orders of injunction made, of which I reserved my comments for later. I think this is a good opportunity for me to say what I wished to say. An order was issued by this court and the same appears to have been largely ignored. In fact there was a move, if not a deliberate incitement of the public, to disobey the order of injunction. Anybody who was involved in the disobedience of the order of injunction should be ashamed of himself/herself. Court orders assert a person's right and it is upon all persons to ensure that the rights of any person are protected. You never know, but at some point, you could very well be the person upon whom a court has pronounced a right, and you would naturally wish to have your rights protected. In the same way that you would wish to have your rights protected, you must also be ready to respect another person's right. There is absolutely no space for disobedience of court orders. We cannot live in a society where people do what they want, or do what they believe is right. We must be guided by the law and must be ready to respect any order issued by the court. If one is aggrieved by an order of court, there are avenues for redress, but there is no avenue for disobedience. I ask, nay, expect, that the orders that I have made today, will be respected and that the plaintiffs will be allowed to enjoy their private property in peace. If at all the public or any party, wish to have the plaintiffs property acquired for public use, there are avenues for that, which they can initiate, but they cannot with impunity violate the plaintiffs' right to use and enjoy their property as provided by law. Any violation of the plaintiffs' proprietary rights must be met with the full force of the law.

88. I believe that I have dealt with all issues save for costs. In as much as I have not entered judgment against the 1st, 3rd, 4th and 5th defendants, I think the plaintiffs had a reason to believe that they were part of the party that caused the invasion and destruction of their property. I therefore make no order as to costs, for or against, in respect of the 1st, 3rd, 4th and 5th defendants. The 2nd defendant will however be liable to pay the plaintiffs' costs of this suit.

89. I now make the following final orders :-

***(a) That the land parcel LR No. 396/39 has never been, and is not, public land, and it is not a public access corridor to Lake Naivasha. It is instead a stand-alone parcel of land privately owned by the plaintiffs.***

***(b) That there is not within the land parcel LR No. 396/39, any public road, or public access corridor to Lake Naivasha.***

***(c) That the land parcel LR No. 396/39 and any road/roads within this parcel of land are private property, and nobody, other than the plaintiffs as owners of the said land, has any right to enter, be upon, or use, any part of the said land parcel LR No. 396/39.***

***(d) That a permanent injunction is hereby issued, restraining the defendants, the interested parties, and indeed any person not authorized by the plaintiffs, from entering, being upon, trespassing into, or in any other way interfering with the quiet possession and use by the plaintiffs of the land parcel LR No. 396/39.***

***(e) That judgment is entered for the plaintiffs against the 2nd defendant for special damages in the sum of Kshs. 8,037,309.88/= which sum shall attract interest from the time of filing of the further amended plaint.***

***(f) That judgment is entered for the plaintiffs against the 2nd defendant in the sum of Kshs. 500,000/= being general damages for trespass which sum shall attract interest from the date of this judgment.***

***(g) That costs of this suit are awarded to the plaintiff as against the 2nd defendant, and there is no award made for or against the 1st, 3rd, 4th and 5th defendants and the interested parties.***

90. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 25<sup>TH</sup> day of April 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. D. Gatonye, instructed by M/s Mirugi Kariuki & Company Advocates, for the plaintiffs.

Mr. C. Odhundo, instructed by M/s Odhiambo & Odhiambo Advocates, for the 1<sup>st</sup> – 3<sup>rd</sup> defendants, and holding brief for Mr. K. Kirui of the State Law Office, for the 4<sup>th</sup> and 5<sup>th</sup> defendants.

Court Assistant: Nelima Janepher.