



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 112 OF 2016

THE NATIONAL LAND COMMISSION.....APPLICANT

VERSUS

THE ESTATE OF SISIWA ARAP MALAKWEN.....1ST INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

This is another case of historical injustice committed by the government of Kenya in the yester years against a family in the Uasin Gishu County this time against the family of Malakwen Arap Sisiwa, hereinafter referred to as the Sisiwa family. Fortunately for the family, the state, through **the National Land Commission (hereinafter referred to as the applicant)** realized the injustice and has moved to address the injustice by filing this reference, though belatedly, under Articles 25 (v), 40(3) (b), 259, 19, 20, 22, 23, 24, 50(1) and (e), 60, 61, 62(1) (c), 62(22) (3), 63, 67 (2)(a) and (e), (3), 249 of the Constitution of Kenya and Section 128 of the Land Act No. 6 of 2012 following a complaint through a demand letter dated 15th April, 2014 and received on 30th April, 2014, containing a notice from Mr. Musa Sisiwa, one of the administrators of the estate of Malakwen Arap Sisiwa for compensation towards compulsory acquisition of the parcel of land number, L.R. 772/4/2 Huruma Estate, Eldoret Town Uasin Gishu County, Rift Valley Region vide Gazette Notices 1458 and 1459 and measuring 100 acres, which land was acquired by the Kenya Government way back in 1978.

The indisputable facts of the matter according to all parties are that the parcel of land was compulsorily acquired by the government and after acquisition, the Government immediately took possession of the property vide a caveat registered on 7th September, 1978 under Section 19(2) of the repealed Compulsory Acquisition Act, paving way for a number of subsequent Government installations including construction of Huruma Sub-District Hospital; Kenya Uganda road; an oil pipeline; an access road to Eldoret Sewage treatment plant; setting aside land for Huruma Public grounds; public recreational facilities such as a football pitch and a blue print for Uasin Gishu County Government, formerly Eldoret Municipal Council. The land, measuring 100 acres is situate in Eldoret West District in Huruma Estate hosts other ongoing Uasin Gishu County Government projects to wit access road to the sewer plant and a public toilet.

The Sisiwa family, through its duly appointed representatives have presented a claim to the applicant for compensation for compulsory acquisition over all that property described as LR 776/4/2. The applicant, pursuant to Section 5 of the National Land Act, 2012, initiated investigations by appointing a Commission Committee following the complaint by the administrators of the estate of Malakwen Arap

Sisiwa, with intention to recommend appropriate redress. The Committee of the commission undertook investigations including perusal and examination of all the official and legal documents relevant to the subject parcel of land

The applicant's reference to this Honourable Court is to seek determination of issues to enable completion of the 1978 compulsory acquisition process and to enable the applicant to resolve the complaint amicably with the Interested Party; in the interest of justice and public good. It is also to further enable the Uasin Gishu County government to actualize programmes set out in its development blue print as set out in their letter dated 10th February, 2015. It is evident that by Gazette Notice Numbers 1458 and 1459 dated 19th May, 1978, the Government of Kenya acquired and took possession of the subject parcel on 9th September, 1978, under the Land Acquisition Act 1968 (Repealed) for residential, industrial and ancillary purposes. The subject parcel of land number L.R. 766/4/2 was compulsorily acquired and possession taken by the government of the Republic of Kenya in 1978 without compensating the Sisiwa family the legal owner/s.

According to the available facts, the first formal registration instrument to subject parcel L.R. No. 772/4/2 was registered on the 1st day of June, 1909 under the Colonial government. The property was then granted by then Colonial Government to one G. A. GROSS on the 30th day of December 1909. The property is recorded to have changed hands through different individuals and was finally placed in ownership of one Maria Margaretha Erasmus, the wife and Executrix of the Estate of one Abel Hendrick Erasmus in 1963. In the year 1963, the said Maria Margaretha Erasmus sold the subject parcel of land L. R. No. 772/4/2 to the Settlement Fund Trustees (SFT) for a consideration.

In the year 1964, the Settlement Fund Trustees sold the subject property to one Malakwen Arap Sisiwa, financed through a registered mortgage in favour of M/s Agricultural Finance Co-operation. The Government of the Republic of Kenya then registered a Caveat dated 12th January, 1978 claiming absolute interest following a notice of compulsory acquisition through Kenya Gazette Notice Numbers 1458 and 1459 dated 19th May, 1978. The caveat by the government subsists to-date, according to the records available in the Central Registry in Nairobi; and that various government entities have over time since the compulsory acquisition by the Government placed various government installations on the property. The Government of Kenya acquired the subject parcel under the Land Acquisition Act 1968 (Repealed) for residential, industrial and ancillary purposes and took possession through a duly registered caveat.

A notice was issued by the Registrar of Titles for caveat on subject parcel L.R. 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region by the Government of Kenya and possession taken by the Registrar of Titles. The notice dated 20.9.1978 was addressed to Malakwen Arap Sisiwa; to the effect that he was to stop any dealings in the parcels of land and that the government had taken possession under the Land Acquisition Act. In a letter from a Legal Officer for Settlement Funds Trustees (SFT) Eldoret office to the Interested Party, there is clear demonstration that, even after the acquisition, Malakwen Arap Sisiwa remained the registered owner. Later, the Government of Kenya vide a Gazette Notice Number 345 and dated 8.2.1980 reversed and varied a cohort of acquisitions following which; the Registrar of Titles, by way of a letter dated 19.3.1981, notified and directed to the Director of Surveys to lift the caution. The variation, however, did not lift or vary the acquisition.

There is a set of documents indicating the property in issue was to be registered in the name of the Interested Party (Sisiwa Arap Malakwen). However, investigations by the applicant revealed that there is a parcel of land described as reference number Eldoret Municipality Block 15/236 in a parallel Land register in Uasin Gishu Land Registry in the name of Rural Housing Estates Limited having been registered in 1983. The parcel of land described as reference number ELDORET MUNICIPALITY BLOCK 15/236 appears in terms of geographical and survey placement, with the same position as the subject parcel number LR 776/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region

The transactions and formal registration over the above reference parcel Number ELDORET

MUNICIPALITY BLOCK 15/236 appears to have commenced through an alleged conversion of the registration regime from Government Lands Act (GLA) to Registered Lands Act (RLA) and a creation of a parallel Register over the property whilst the initial register remained in force. Further investigations in both the former Municipal Council of Eldoret and the Uasin Gishu District Lands Registry relating this parallel register, which the Applicant believes was a result of a fraudulent process of conversion and amalgamation of land and change of registration regime from RTA to LRA under CAP 300. As a result, 4 parcels of land (L.R 773/1, L.R 775/1, L.R 776/4/1 and L.R 776/4/2) were amalgamated into ELD/MUN / BLOCK 15/236 and the subject parcel number, L.R 776/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region acquired new designation as ELD/MUN/BLOCK 15/236

There is no evidence of surrender anywhere in the records available at the Uasin Gishu County Registry or indeed in the Central Registry to facilitate the conversion. The parcel number ELD.MUN BLOCK15/3 appearing in the Eldoret Municipal records and Uasin Gishu District Land Registry did not have verifiable connection to the original parcels L.R 773/ 1, L.R 775/1, and L. R 776/4/1 and neither did it have any basis in the consolidated parcels nor did ELDORET MUNICIPALITY BLOCK 15/236 have any connection with the subject parcel LR 776/4/2.

The applicant established that the registration parcel number ELD.MUN BLOCK 15/236 and whose registered owner appears as Rural Housing Estates Limited, had been discovered by the then Commissioner of Lands and the Chief Land Registrar to have been irregular and fraudulent, following which, they recommended closure of the register and prosecution of the perpetrators. The title in the register, appears to have arisen from an initial unexplained lease to the said Rural Housing Estates Limited.

Whereas a caveat was registered by the Registrar of Titles under instructions from the Commissioner of lands as per Section 6 (1) of the then Compulsory Acquisition Act and a notice of taking possession by Government absolutely issued to the registered owner, Malakwen Arap Sisiwa in 1978, other subsequent dealings were made beginning in 1980. Change of registration regimes including transfer from parcel, namely: Malakwen Arap Sisiwa to Eldoret Properties to Rural Housing Estates, subdivisions of the 100 Acres to 54 parcels, charges to several banks were carried under suspicious circumstances, considering that there was an existing caveat in place contrary to Article 40 (6) of the Constitution of Kenya.

The applicant cites irregularities and fraudulent activities appertaining to the land. The applicant cites the provision of **Article 40 sub-Article 3 of the Constitution of Kenya** which provides that the State shall not deprive a person of property of any description or any interest in or right over property of any description unless the deprivation 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 5 or is for a public purpose or in public interest and is carried out in accordance with the Constitution or any act of parliament. The applicant cites the provisions of Article 40(6) whose gist is that the rights under the Article do not extend to any property that has been found to be unlawfully acquired.

Section 111(1) and 2 of the Land Act No. 6 of 2012, which provides that if land is compulsorily acquired under the act just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. The acquiring body is supposed to deposit the compensation funds with the commission.

The applicant further cites section **107(7) of the Land Act, 2012** which provides that interested persons shall include persons whose interest appears in the land registry and the spouse or spouses of any such person as well as any such person actually occupying such land including the spouse or spouses of any such person.

According to the applicant, the administrator of the Estate of the deceased owner Malakwen Arap Sisiwa claim Kshs.5,232,790,769.49 (**Five Billion Two Hundred Thirty Two Million, Seven Hundred Ninety Thousand Seven Hundred Sixty Nine and Forty Nine Cents**) being the value at current market rates of the subject parcel of land. Kshs.706,874,291.40 (**Seven Hundred Six Million Eight Hundred Seventy Four Thousand Two Hundred Ninety One and Forty Cents**) being mesne profits and valuation costs of

Kshs.17,365,828.60 (***Seventeen Million Three Hundred Sixty Five Thousand Eight Hundred Twenty Eight and Sixty Cents***) and Kshs.17,142,500 (***Seventeen Million One Hundred Fourty Two Thousand Five Hundred Only***) as compensation for loss of use. The total sum of claim is Kshs.6,057,330,888.89 (***Six Billion Fifty Seven Million Three Hundred Thirty Thousand Eight Hundred Eighty Eight and Eighty Nine Cents***).

One of the issues arising is which level of Government should pay the compensation. It is the Applicant's position that if and when this Honorable Court determines compensation, the National Government shall compensate from the consolidated funds since the acquisition was made before the County Governments came into force and the money for compensation had already been allocated by the then National Government vide the then Commissioner of Lands' letter dated 3rd May 1978 to the Permanent Secretary, Ministry of lands & Settlement. The Commissioner of Lands was also seeking written authority from the then Minister that the acquisition was justified and direction given for acquisition as provided in Section 6(1) of the Compulsory Acquisition Act 1968 (Repealed.)

It is evident that the compulsory acquisition of the subject parcel L. R. No 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region took place by the Government of the Republic of Kenya through Gazette Notice Numbers 1458 & 1459 dated 19th May, 1978 expressing its intention to acquire the subject parcels of land for inter alia industrial, residential, shopping and ancillary purposes. The written authority was given by the then Minister of Lands and Settlement, whereby he directed the then Commissioner of Lands to acquire the land compulsorily under Section 6(2) of the Compulsory Acquisition Act of 1968. A caveat was placed on the subject property on 7th September, 1978 claiming absolute ownership and a notice in that regard issued to the 1st interested party Malakwen Arap Sisiwa. The Government immediately took possession of the property, paving way for a number of subsequent Government installations including construction of; Huruma Sub-District hospital; Kenya Uganda road; an oil pipeline; an access road to Eldoret sewage treatment plant; setting aside land for Huruma Public grounds. The caveat placed on the property by the Government is still in force since 1978 to date. There is no dispute that land, L. R 776/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region was compulsorily acquired, and such, ownership by the Interested Party of the acquired parcel is not in contention. The Interested Party is the current registered owner of the subject parcel and no other Interested Party or interested parties staked any claim on the property to the Applicant or the defunct office of the Commissioner of Lands.

The other issue for determination is in relation to compensation to the lawful owner, who is the 1st Interested Party herein, following the compulsory acquisition and provisions under Section 107 (7) of the Land Act, 2012. According to the data available regarding registration instruments that are on record, the subject parcel of land has consistently been held by the Interested Party and therefore, the caveat placed by the Government from 1978 could not possibly have been transferred to any third party without taking out the original caveat of 1978.

The applicant found that the existence of a different set of documents has been under independent criminal investigations and proceedings by the DCIO since the year 2000, while internal investigations report of 2004, particularly by one Senior Lands Registrar, a Mr. Mudimbia showed that no legal conversion, nor surrender of the original title to the parcel of land, L. R 772/4/2 Huruma Area, Eldoret West District, Uasin Gishu Division, Rift Valley County had been done since 1978. The applicant's position is therefore that the Interested Party's demand for compensation resulting from compulsory acquisition of the subject parcel is grounded on the basis that there has never been compensation to the Interested Party and neither has the Interested Party alienated the same to any other party/ parties whatsoever and therefore this Honorable Court should look into the claim. The applicant thus, presents this reference to this Honorable Court to determine the issue of actual compensation, damages and loss of mesne profits to the real owner of the property for determination Under Section 127 of the Land Act. The reference herein seeks determination of the following issues:

1. Who is the person/ s with legally verifiable interest in the parcel of land, L. R 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region?

2. What is the extent or nature of Interested Party's interest considering that the subject parcel of land number L.R 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region was legally and consistently held by the Interested Party up until compulsory acquisition, caveat placement and use by the Government of Kenya in 1978?

3. To whom is compensation payable, considering that the parent title holder of parcel of land number L.R 772/4/2, Mr. Sisiwa Arap Malakwen, died in February, 1998, having been the registered title holder at the time of compulsory acquisition in 1978 and whose estate is under four administrators and considering that he is survived by four wives and many dependants?

4. What is the condition of the parcel of land, L. R 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region considering that there has been change of use from agricultural to commercial as well as residential?

5. What is the amount of compensation due to the Interested Party since 1978, when the Kenya Government compulsorily acquired, put a caveat and put into use the parcel of land, L. R 772/4/2 Huruma Area, Uasin Gishu Division, Eldoret West District, Rift Valley County?

6. Whether this Honorable Court shall order compensation in terms, as demanded by the Interested Party totaling to Kshs.6,057,330,888.89 (Six billion, fifty seven million, three hundred and thirty thousand, eight hundred and eighty eight and sixty cents only), whose breakdown is: Kshs.5,232,790.49 (Five Million Two Hundred Thirty Two Seven Hundred Ninety and Fourty Nine Cents) on account of the current market value of the subject parcel, L.R 772/4/2 Huruma Estate, Eldoret Town, Uasin Gishu County, Rift Valley Region since 1978, as compensation and loss of use; and Kshs.706,874,291.40 on account of mesne profits and valuation costs of Ksh.17,365,828.60?

7. Whether this Honorable Court will, in the alternative and subject to Section 111 (2) of the Land Act, 2012 as well as Article 40 of the Constitution and considering that the Applicant has not made any rules to regulate the assessment of compensation, and further considering that this is the first and probably the only reference since the promulgation of the Constitution of Kenya, 2010 and taking into account the fact that the Historical Injustices Bill has not been enacted; be minded to order for compensation and/or to give directions as it will deem just, fair and reasonable?

8. What is the remedy to the parent title holder of parcel of land L.R 772/4/2 in this reference if the Kenya Government, for any reason, fails to compensate? Whether this Honorable Court can determine the alternative remedies based on historical injustices and as demanded by the Interested Party including; immediately lifting the caveat; renewing the Interested Party's lease; giving vacant possession; and paying mesne profits for the last 38 years on account of Kenya Government acquisition use and profits?

9. Which arm of the Government of Kenya ought to pay compensation to the Interested Party? Whether the National Government should pay for compensation from the consolidated funds, considering, the acquisition was made before the establishment of County Governments by the Constitution, 2010; and that; the money for compensation had already been allocated by the Government as evidenced by the then Commissioner of Lands letter dated 3rd May 1978 to the then Permanent Secretary, Ministry of lands & Settlement?

10. Whether this Honorable Court will be minded to determine the question of valuation and on which valuation the Applicant ought to base the compensation claim, considering that there are varied valuation reports.

11. Whether this Court will be minded to determine the period within which compensation shall be paid to the Interested Party and the mode by which compensation, following compulsory acquisition of the subject parcel of land number, L. R 772/4/2 Huruma Estate, Eldoret Town,

Uasin Gishu County, Rift Valley Region will be paid taking into account that Section 111 (1) of the Land Act No.6 of 2012 stipulates that if land is acquired compulsorily, just compensation shall be paid promptly in full, to all persons whose interest in the land has been determined?

12. Who bears the costs of the Reference, considering that on a without prejudice to the powers of this Honorable Court, the costs of any reference to the Court as Under Section 127 (2) of the Land Act, 2012, this Honorable Court shall determine and give direction in the circumstances, and where the court does not give direction, the National Land Commission meets the cost?

13. Whether this Honorable Court will be minded to order that the Attorney General of the Republic of Kenya to be enjoined as an Interested Party, being the Principal Legal Advisor to the Government as stipulated in Article 156 (4) of the Constitution of Kenya?

The Interested Parties' position as per the affidavit of Hassan Sisiwa is that on 15th April 2014, the 1st interested party instructed the counsel on record herein to issue a Demand Notice to the National Land Commission the Applicant herein; demanding compensation or restitution of their lawful land. The Commission/Applicant responded to the notice on 11th June, 2014 acknowledging receipt of their letter and to inform them that they would conduct investigation and or inquiry. That later, they received a letter dated 23rd March 2015 from the Commission inviting them to a consultative meeting on 2nd April 2015. In the meeting, the Commission confirmed that the claim was credible except that they had not forwarded a Valuation Report. They were advised to do a Valuation of the property in order for the Commission to further act on the claim.

The Valuation Report was then prepared and forwarded to the Commissioner vide the letter dated the 27th May 2015. The said letter also contained a notice to the Commission to the effect that they had revised their claim as follows:

Present value of 1978 Compensation Kshs.

Loss of user Kshs. 706,874,291 .40

Total -----Kshs.

The basis upon which the sum claimed was revised is that as at the time of issuing the demand notice dated 15th April 2014, a valuation had not been done and the sum claimed was only in approximation. It was only upon valuation by a Professional Valuer that they realized that the true value of the subject land was Kshs.5,939,665,060.89 (***Five Billion Nine Hundred Thirty Nine Million, Six Hundred and Sixty Five Thousand Sixty and Eighty Nine Cents***) and not as earlier estimated. In essence, the 1st interested party agrees with the averments made by the applicant on liability.

According to the 1st interested party the 1st issue for determination is who has verifiable interest in land parcel L/R 776/4/2 and what is the nature and extent of the Interested Party's interest and lastly, to whom compensation should be paid. The facts as stated by the said interested party are that on 26th September 1964, Malakwen Arap Sisiwa (deceased) signed an agreement in the form of an indenture conveying ownership of the parcel of land herein in his favour having purchased the same from the Settlement Fund Trustees. On the 8th December 1964, an assignment was entered in the register of land parcel L/R 776/4/2 in favour of Malakwen Arap Sisiwa (deceased).

A current search shows that the land is registered in the name of Malakwen Arap Sisiwa (deceased) except that there is an encumbrance in the nature of a Caveat registered by the Government on 7th September 1978 claiming absolute ownership by virtue of taking possession under Land Acquisition Act (repealed). The deceased interest in the subject land was absolute and indivisible, having purchased the same alone and all debt due to the Settlement Fund Trustees having been fully repaid. Malakwen Arap Sisiwa (deceased), who has been proved to be the registered owner of the subject land passed on in 1998.

The family filed succession cause ELD H.C. SUC NO. 167/1998, in which Letters of Administration were issued to Musa Kitur, Salim Sisiwa, Sophia Sisiwa and Hassan Sisiwa, the first 2 being my siblings, the 3rd is one of the deceased's widows and himself. Since Malakwen Arap Sisiwa, the registered owner is deceased, and them as the heirs and legal Administrators of the deceased's estate have staked this claim on behalf of the deceased's estate, it then follows that any compensation should be payable to them as the Administrators of the deceased's estate herein.

The 1st interested party further states that the other issue to be determined is which Valuation Report is applicable in determining the amount of compensation payable to the Interested Party and the amount of compensation payable and in the alternative whether an Order for compensation should be made in such manner as the Court should direct and lastly which arm of Government should pay and within what period of time should such Order be satisfied.

The 1st interested party believes that if the Government acquired the subject land pursuant to the provisions of section 6 (l) (a) and or section 19 (2) of the Land Acquisition Act Cap. 295 (repealed), took possession and has developed it without compensation, the issue left for determination is the amount of compensation payable in the circumstance. He cites Article 40 of the Kenya Constitution 2010 and Article 75 of the independence constitution provide that if private land is compulsorily acquired for public purpose, then fair and just compensation shall be promptly paid and Section 113, 114 and 162 of the Land Act 2012, as read with Section 8 and Section 25(1) of the Land Acquisition Act (repealed), that provides for full and prompt payment of compensation of persons affected by the acquisition.

The principles Upon Which Compensation Is to be Determined are in Schedule 2 of section 9 (3) & section 23 of the Land Acquisition Act (repealed), which provide that in determining amount of compensation, the compensating authority should consider Market value, damage sustained, Change of residence, damage genuinely resulting from diminution of the profits of the land, In addition to the compensation determined, 15% of the compensation payable shall be added therein for disturbance. Section 16(i) of the Land Acquisition Act (repealed) further provides that if compensation is not paid before taking possession, the Commission shall pay interest on the amount awarded at a rate not less than 6% from time of taking possession to the time of payment. Provisions for professional fees shall also be made.

The 1st interested party Valuer advices as that observing the afore principles, the amount of compensation payable to us as the Interested Party works out as follows;-

a. Present Value of 1 978 CompensationKshs.0,769.49

b. Loss of User (mesne profit)Kshs. 706,874,291.40 **Total Kshs.**

ii) The valuer is also entitled to his professional fees for the service rendered;

a. Valuer's professional fees on assessing Loss of Use Kshs. 2,327,335.40

b. Valuer's professional fees on Valuation ReportKshs.

Total Kshs.

As to which arm of Government should pay the compensation —if any, he avers that the National Government should pay because the decision was made in 1978 when devolved Governments had not come into place. The program was executed by the then Commissioner of Lands as a national initiative that involved major towns across the country. Prior to the acquisition, approval from the Minister for Lands was sought and granted. The funding should therefore be sourced from the Consolidated Funds given that it is from this current account that all Government expenditures are drawn. Further, he states that compensation is long overdue. They are desirous of having the same paid in the earliest instance in keeping with the letter and spirit of Article 40 (3) (b) (i) of the Kenya Constitution 2010, which provides

that just and prompt payment of compensation shall be made to the owner of the land so acquired.

The interested party prays that should the Government fail to compensate it or if the Government, for whatever reason, is unable to pay them, then they will only be too glad to have their land back. They will expect the Government to lift the Caveat that has been in place since September, 1978 and extend the Lease term that expired during the subsistence of the said Caveat and render vacant possession of the suit land and pay mesne profit as per the valuation report. Costs should follow the event. The Interested Party is entitled to costs which shall be payable based on the sum awarded and as per the applicable Advocates Remuneration Order.

The 2nd Interested Party states through the affidavit of Joseph Ngumbi, State Counsel in the Office of the Attorney General that that on 25th October, 2016 and 11th November, 2016, they issued instructions to the County Land Valuer and Chief Government Valuer to conduct a second Valuation Report for LR NO. 776/4/2. That on 24th November, 2016 they received the second Valuation Report from the Director, Land Valuation and that as per the Valuation Report the compensation payable now to the 1st interested party is Kshs. 83,569,925/= (Eighty-Three Million, Five Hundred Sixty-Nine Thousand, Nine Hundred Twenty-Five) only.

DETERMINATION

Before delving into this issue, the court has a duty to make a finding on the relevant law. The constitution of Kenya 2010 is applicable in this dispute pursuant to **Article 263 which provides that the constitution of Kenya 2010** was to come into force immediately on promulgation by the president of Kenya or on the expiry of 14 days from the date of publication in the gazette of the final result of the referendum ratifying the constitution whichever would be earlier and therefore the rights violated under the legal regime of the former constitution of Kenya can be adjudicated under the constitution of Kenya, 2010 (***repealed***) and that **Article 260 of the constitution of Kenya 2010** implies that the constitution in force before the effective date stood repealed on the effective date subject to the sixth schedule wherein **section 6 of the sixth schedule of the said constitution** provides for rights duties and obligation of the state and that the said provision is crystal clear that except where the contrary is expressly provided for by the constitution all rights and obligations, however arising, of the government or the republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the republic under the constitution.

The 1st interested party's rights were violated when the government compulsorily acquired his land but failed to compensate the family. This was contrary to section 75 of the repealed constitution of Kenya that provides: -

75 (1) No property of any description was to be compulsorily taken possession of, and no interest in or right over property of any description was to be compulsorily acquired except with the following conditions are satisfied: -

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsory taken possession of or whose interest in or right over any property is compulsorily acquired shall have

a right of direct access to the High Court for-

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High court, having jurisdiction under any law to determine that matter.

Article 40 sub-Article 3 of the Constitution of Kenya provides that the State shall not deprive a person of property of any description or any interest in or right over property of any description unless the deprivation 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 5 or is for a public purpose or in public interest and is carried out in accordance with the Constitution or any act of parliament that requires prompt payment in full, of just compensation to the person and allows any person who has an interest in, or a right over, the property a right to access a court of law. The import of the provisions of Article 40(6) is that the rights under the Article do not extend to any property that has been found to be unlawfully acquired.

Article 40 of the Constitution of Kenya and section 75 of the repealed Constitution have the same intention of protecting the inalienable right to own land and to access the court if the right is violated and for prompt payment of compensation. This right is also enshrined in the **Article 17 of the Universal Declaration of Human Rights 1948** whose gist is that everyone has the right to own property alone as well as in association with others.

I have considered the reference and do find that the applicant and the 2nd interested parties admit that the 1st interested party is entitled to compensation the only issue for determination is the value of the property in dispute. The first valuation report prepared by the 1st Interested Party values the property in dispute referred to as the land reference number 776/4/2 LR Number H9 folio 499/26 file 5541, Eldoret Municipality. The purpose of valuation was for compensation as at the date of valuation. The valuation report indicates that the open market value as at 2015 was Kshs.3,277,500,000 (**Three Billion Two Hundred Seventy Seven Million Five Hundred Thousand Only**) whilst the open market value as at 1978 was Kshs.7,475,000 (Seven Million Four Hundred Seventy Five Thousand Only). The present value as at 1978 for compensation is Kshs.5,232,790,769.49 (**Five Billion Two Hundred Thirty Two Million Seven Hundred Ninety Thousand Seven Hundred Sixty Nine and Fourty Nine Cents Only**) whereas the recommended value for compensation is Kshs.5,232,790,769.49 (**Five Billion Two Hundred Thirty Two Million Seven Hundred Ninety Seven Hundred Sixty Nine and Fourty Nine Only**)

According to the valuation report of the Afriland Valuers, the property is located 3.5 kilometres West of Eldoret Municipality and has part of Eldoret Malaba road and measures 100 acres. As per the official search, the property is registered in the name of Malakwen Arap Sisiwa. The property is developed with Government Institution such as Huruma District Hospital Building. It has public play grounds, toilets and squatter development. I have looked at the report and assessment of loss of benefits of use on the suit property by the Afriland Valuers Ltd which puts loss of use incurred by the owners over the property LR Number 776/4/2 for 100 acres for a period of 35 years at Kshs.706,874,291.40 (**Seven Hundred Six Million Eight Hundred Seventy-Four Thousand Two Hundred Ninety-One and Forty Cents Only**). The Attorney General through affidavit of Joseph Ngumbi states that the land was valued by the County Chief Government Valier. As for the valuation report, the compensation payable now to the 1st Interested Party is Kshs.83,569,925 (**Eighty-Three Million Five Hundred Sixty-Nine Thousand Nine Hundred Twenty-Five Only**). The claim by the 1st interested party crystalizes into special damages that should specifically pleaded and specifically proved.

My predecessors have already set the jurisprudence in awarding special damages and therefore I do not need to reinvent the wheel. Moreover, courts in England have also set the principles of granting special damages. In that regard in the case of *Radcliffe 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 pedantry..."

In the Ugandan case of *Jephtar& Sons Construction & Engineering Works Ltd vs The Attorney General* HCT-00-CV-CS-0699-2006, the court held that;

"...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably *Sietco vs Noble Builders U Ltd SCCA No. 31 of 1995* is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit..."

Further, in the Lesotho case of *Mosisili vs Editor, Mirror Newspaper and Others* Case No. CIV/T/275/2001 the Court pointed out that;

"...it has been said that generally, it serves little purpose to refer to other cases where damages have been awarded since seldom is one case similar to another. What the cases offer are general guiding principles which by no means are exhaustive either. In the final analysis, a judge makes an award that he thinks meets the justice of the case."

In addition, and specifically with regard to special damages, the Court in the case of *Zacharia Waweru Thumbi vs Samuel Njoroge* Civil Appeal No. 445 of 2003 stated that;

"...The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717 and 721, where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag. J.A. — held:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved. ...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. "...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims, the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test... I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too

low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid-2001, I find no sufficient reason to interfere with the Learned Magistrate's award of KShs.180,000/- (One Hundred Eighty Thousand Only) under the head of general damages. Accordingly, I uphold the lower court's award..."

In the Ugandan case of Mawenzi Investments Ltd vs Top Finance Co. Ltd & Another HCCS NO 02 OF 2013, the Court stated thus;

.. Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury's Laws of England, 4th ED Vol. 12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of Kyambadde v. Mpigi District Administration [1983] HCB 44, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly... Assessment for general damages is based on the principle of *restitutio in integrum* according to East African Court of Appeal in the case of Dharamshi vs. Karsan [1974] 1 EA 41. The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury's laws of England fourth edition (reissue) volume 12(1) and paragraph 802 thereof damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered... " (see also Robert Cuossens v Attorney General Civil Appeal No. 8 of 1999).

Similarly, in Haji Asuman Mutekanqa vs Equator Growers(u) Limited (Civil Appeal No.7 Of 1995), the Court noted thus;

"...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter patties or ex parte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less. As the learned author stated in MC Gregor on Damages Edition page 1028, the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However, with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in Monarch S.S. Co. V Karlshanus Oliefabriker (1949) AC. 196 at 221 as being: "damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event, it is laid down that the special fact must be communicated by and between the parties. "

These principles have never been overturned and therefore I do associate myself with the findings of the judges. Going back therefore to the reference before me, I have already found that the Petitioner's right to

property under Article 40 of the Constitution had been violated as he was not compensated at all. I have considered the two valuation reports and do find that the 1st Interested Party has arrived at a very high figure of Kshs.5,232,790,769.49 (**Five Billion Two Hundred Thirty Two Million Seven Hundred Ninety Thousand Seven Sixty Nine and Fourty Nine Cents Only**) as value of property and Kshs.706,874,291.40 (**Seven Hundred Six Million Eight Hundred Seventy Four Thousand Two Hundred Ninety One and Fourty Cents Only**) as loss of user. The 2nd Interested Party has arrived at a very low figure of Kshs.83,569,925 (**Eighty Three Million Five Hundred Sixty Nine Thousand Nine Hundred Twenty Five Only**). The value of the property as at 19.5.1978 was Kshs.575,000 (**Five Hundred Seventy-Five Thousand Only**) according to records produced by the Attorney General. Afriland Valuers have not shown how they arrived at the figure of Kshs.7,475,000 (**Seven Million Four Hundred Seventy Five Thousand Only**) as at 1978. I do find that the valuation report by Afriland Ltd is not reasonable in terms of the value of the property for purposes of compensation under the Land Act as the figure quoted is too high, though the property is prime land that is located in a popular commercial and residential part of Eldoret municipality with residential, commercial, light industries, government establishments and the Huruma District Hospital and that the land borders the Eldoret Malaba Highway. The report by Afriland ltd is nearer the truth compared to the report by the Chief Government Valuer and do order that the 1st Interested Party be paid in compensation of Kshs. 2,850,000,000 (**Two Billion Eight Hundred Fifty Million Only**) as just compensation being the value of the property measuring 100 acres in Eldoret town. On loss of user, I do find that the Interested Party has established that he had the right to the property and that his right of user was deprived. I do find that compensation of Ksh.100,000,000 (**One Hundred Million Only**) is sufficient for loss of user of the property for 36 years.

Ultimately, I do award the 1st Interested Party Kshs.2,950,000,000 (**Two Billion Nine Hundred Fifty Million Only**) as the amount payable as compensation for compulsory acquisition of his parcel of land in 1978. Moreover, I do order that the Interested Parties be paid Kshs.7,000,000 (**Seven Million Only**) as costs of the valuation report. The amount to be paid by the national government promptly as required by the constitution.

The person with identifiable and verifiable legal interest are Sofia Cherotich Sisiwa, Hassan Kipkorir Sisiwa and Salim Kiptoo Sisiwa as the personal representatives of the late Malakwen Sisiwa. This court hereby Orders that the compensation be paid by the national government as the county government was not in existence at the time the parcel of land was compulsorily acquired. Costs of the reference be borne by the national land commission. Orders accordingly.

In conclusion, I do say that the Sisiwa family's journey seeking for justice that began more than 36 years ago when their land measuring 100 acres in Eldoret Town was compulsorily acquired by the government of Kenya in exercise of its police powers on land without compensation has now come to an end though Malakwen Arap Sisiwa the patriarch did not live to see justice and therefore died complaining as justice delayed is justice denied.

I do thank Getrude Angote learned counsel for applicant, Mr. Ngumbi learned state counsel for the honorable Attorney General, and Mr. Kipnyekwei, learned counsel for the interested party for ably representing the parties herein.

Dated and delivered at Eldoret this 23rd day of October, 2017.

A. OMBWAYO

JUDGE