



Alba Petroleum Limited v National Land Commission & 4 others (Constitutional Petition 36 of 2022) [2024] KEELC 1267 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1267 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CONSTITUTIONAL PETITION 36 OF 2022

LL NAIKUNI, J

FEBRUARY 26, 2024

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 24, 40, AND 60 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: BREACH OF THE PROVISIONS OF SECTIONS, 111,113 AND 120 OF THE LAND ACT, 2012

AND

IN THE MATTER OF: RULES 3, 4,10,11 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW

BETWEEN

ALBA PETROLEUM LIMITED.....PETITIONER

-VERSUS-

- THE NATIONAL LAND COMMISSION.....1ST RESPONDENT**
- KENYA NATIONAL HIGHWAY AUTHORITY.....2ND RESPONDENT**
- NATIONAL MUSEUMS OF KENYA.....3RD RESPONDENT**
- THE LAND REGISTRAR, MOMBASA.....4TH RESPONDENT**
- THE HON. ATTORNEY GENERAL.....5TH RESPONDENT**

BETWEEN

ALBA PETROLEUM LIMITED PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT



KENYA NATIONAL HIGHWAY AUTHORITY	2 ND RESPONDENT
NATIONAL MUSEUMS OF KENYA	3 RD RESPONDENT
THE LAND REGISTRAR, MOMBASA	4 TH RESPONDENT
THE HON. ATTORNEY GENERAL	5 TH RESPONDENT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court is with regard to the filed Constitution Petition dated 9th November, 2022 by Alba Petroleum Limited, the Petitioner against the National Land Commission, Kenya National Highways Authority, the Land Registrar – Mombasa and the Hon. Attorney General, the 1st, 2nd, 3rd, 4th and 5th Respondents herein. *The Constitution* Petition is brought under the dint of the provisions of Articles 22,23, 24, 40, 60 and 162 (2) (b) of *the Constitution* of Kenya 2010, Sections 111, 113 and 120 of the *Land Act* No. 6 of 2012 and Rules 3, 4, 10, 11 and 20 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 and all other enabling powers and provisions of the law.
2. Upon service of the Petition, the 4th and 5th Respondents entered appearance through a Memorandum of Appearance dated 17th November, 2022 and replies filed on 24th November, 2022. The Honourable Court will be dealing with the replies at the appropriate time of this Judgement hereof.
3. Suffice it to say, it is significant to take judicial notice that for some time now this Court was informed and the records will bear me right that parties had been embroiled and engaged in an attempt to resolve this matter amicably through negotiations with a view of attaining an out of Court settlement. The Honourable Court would encourage this initiative as it was in tandem with the Alternative Dispute Judicial Dispute System (AJS) pursuant to the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 2011. I guess its after the said negotiations became a cropper that the Court was called upon to adjudicate on the matter on its own merit whatsoever.

II. The Petitioner’s Case

4. The Petitioner sought for the following orders:-
 - a. A declaration be and is hereby issued that the 1st Respondent’s decision to grant the 2nd Respondent access to the Petitioner’s suit properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108(Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County as contained in the 1st Respondent’s notice dated 21st October 2022 before paying just compensation to the Petitioner is illegal, unconstitutional, null and void.
 - b. A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents by their actions pleaded in this petition have breached and violated and/or threatened to breach and violate the Petitioner’s constitutional right.
 - c. An order of mandatory injunction and/or mandamus be and is hereby issued to compel the 1st and 2nd Respondents to pay just and full compensation to the Petitioner for the compulsory acquisition of the Petitioner’s properties known as MSA/MS/ Block 1/107(Mombasa/



Mainland South/Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block I/108) situate in Likoni in Mombasa County within thirty (30) days of this order or such other reasonable time as the court may determine.

- d. An order of permanent injunction be and is hereby issued prohibiting and restraining the Respondents, whether by themselves, agents, employees, contractors, servants and/or whomsoever is acting under their authority or instruction, from accessing, entering onto, developing, undertaking any constructions works, taking over possession and ownership of and/or in any manner whatsoever interfering with the Petitioner's properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107)and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County before full and just compensation is paid to the Petitioner.
- e. An order of permanent injunction be and is hereby issued to restrain the 4th Respondent from registering any restriction, entry or transaction regarding the compulsory acquisition of the Petitioner's suit properties known properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108(Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County by the Government and the Respondents before full and just compensation is paid to the Petitioner.
- f. Costs of this Petition be borne by the 1st, 2nd and 3rd Respondents jointly and severally.
- g. Any further relief or orders that this Honourable Court shall deem just and fit to grant.

III. The Legal foundation of the Petition

5. The Petition was founded on the following legal basis:-

- a. Under the provision of Section 111 (1) of the [Land Act](#), No. 6 of 2012, the 1st Respondent is obligated to pay to the Petitioner adequate, just, full and prompt compensation for the compulsory acquisition of the Petitioner's properties. The 1st Respondent violated the provision of Section 111 (1) of the [Land Act](#), No. 6 by failing to pay compensation to the Petitioner yet directing the 2nd Respondent to take possession of the Petitioner's properties.
- b. Under the provision of Section 113 (1) of the [Land Act](#), the 1st Respondent was mandated to prepare a written award of compensation to the Petitioner upon conclusion of the inquiry which was conducted on 23rd February 2022. The 1st Respondent violated the provision of Section 113 (1) of the [Land Act](#) by failing to issue a written award of compensation to the Petitioner despite the inquiry having been conducted and concluded about nine (9) months ago.
- c. Under the provision of Section 120 (1) of the [Land Act](#), the 1st Respondent was authorized to take possession of land after the amount of the first offer of compensation has been paid. There is no compensation that had been paid to the Petitioner despite the gazettelement of the compulsory acquisition of the Petitioner's properties having been published one year ago.
- d. Under the provision of Section 120 (2) of the [Land Act](#), the 1st Respondent was allowed to take possession of land on the following conditions:
 - i. There was an urgent necessity for the acquisition of land.
 - ii. It would be contrary to the public interest for the acquisition to be delayed.
 - iii. The land in question was uncultivated or pasture or arable land.



- iv. Possession was taken upon expiration of fifteen (15) days from the date of publication of the notice of intention to acquire the land.
- e. In the instant case, the 1st Respondent's notice of acquisition of the suit properties dated 21st October, 2022 was illegal, unjustified and contrary to the provision of Section 120 (2) of the Land Act because of the following reasons:
 - i. The acquisition process was commenced way back in November 2021, one year ago and there was no urgent necessity to take possession of the suit properties because the Respondents are the ones who had been indolent and had delayed with the acquisition and compensation process for one year. Further, the construction of Gate Bridge Project had not commenced and has not been commissioned by the National Government so as to justify the 2nd Respondent's action and step/move to "access the site to commence construction works with immediate effect."
 - ii. The suit properties were not uncultivated or pasture or arable land which was the only nature of land that the 1st Respondent was permitted to take possession of under the provision of Section 120 (2) of the *Land Act*. The suit properties were developed plots within an urban setting of the County of Mombasa.
 - iii. The acquisition process had taken over one year which delay had been caused by the 1st Respondent's failure to offer or make compensation award to the Petitioner. The delay had been inordinate and had been caused by the Respondents themselves and the Respondents could not now claim that the acquisition would be delayed against public interest. Since they had delayed the acquisition process for over one year, the Respondents should expedite the compensation process and not purport to invoke the provision of Section 120 (2) of the *Land Act* as a remedy for the Respondents' own delay under the guise of urgent necessity, there was nothing urgent in the subject compulsory acquisition process of the suit properties otherwise the Respondents would have concluded the process without delaying for one year.
 - iv. The notice of intention to acquire the suit properties was published on 11th November, 2021. A period of fifteen (15) days from the said date expired long ago (on 26th November 2021). Effectively, the Respondents had taken possession of the suit properties without paying compensation to the Petitioner because the effective date indicated in the notice dated notice dated 21st October, 2022 had long expired (15 days from 26th November, 2021 expired on 11th December 2021).
- f. There was no urgency to justify taking possession of the suit properties before compensation award was made and paid to the Petitioner. Other than the Petitioner's properties, no other property in the area where the Gate Bridge Project was intended to be constructed had been gazetted or compulsorily acquired by the Government. It was not logical or justified to only take possession of the Petitioner's suit properties yet the rest of the land where the project was intended to be constructed had not yet been acquired or even gazetted. The fact that the Respondents were only keen on taking over possession of the Petitioner's properties and not any other property within the area mapped up for the Gate Bridge Project was an indication of ill motive intended to dispossess the Petitioner of its rightfully owned properties without following the due procedure and without paying due compensation.



- g. For the reasons of illegality pleaded above, the Respondents' take-over of the suit property as per the 1st Respondent's notice dated 21st October 2022 was illegal, null and void for want of payment in full of just compensation to the Petitioner.

IV. The Constitutional Foundation of the Petition

6. The Petition also was founded on the following Constitutional provisions:
- i. Article 60 (1) (b) of *the Constitution* of Kenya, 2010 requires that land in Kenya be held, managed and used in a manner that guarantees land rights. The Respondents have violated Article 60 (1) (b) of *the Constitution* of Kenya by moving to compulsorily acquire the Petitioner's properties without paying just compensation in full and in prompt manner or at all.
 - ii. Under Article 40 (1) of *the Constitution* of Kenya, 2010, the Petitioner has the right to own the suit properties and not to be arbitrarily deprived of the same or to be restricted from enjoyment of the same.
 - iii. Further, under Article 40(3) of *the Constitution* of Kenya, the State is prohibited from depriving the Petitioner of its interest and right over the suit properties unless just compensation is paid in full to the Petitioner.
 - iv. The Respondents' decision to take possession of the suit properties without paying compensation to the Petitioner using the notice dated 21st October 2022 is in violation of the Petitioner's rights to own property under Article 40 of *the Constitution* of Kenya for the reasons that:
 - i. The Petitioner has not been paid just compensation or at all.
 - ii. Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010 requires prompt payment of compensation before taking possession of land by way of compulsory acquisition. Article 40 (3) (b)(i) of *the Constitution* requires prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents have taken possession of the Petitioner's properties, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to just compensation.
 - iii. requires prompt and full payment of compensation before taking possession of land by way of compulsory acquisition. By delaying the payment of compensation to the Petitioner by nearly one year, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to payment in full of just compensation.
 - v. Since the 1st and 2nd Respondents had taken possession of the suit properties, it is imperative that they pay just compensation to the Petitioner promptly as mandated by the provision of Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010.
 - vi. The 4th Respondent herein had threatened to register a restriction on the register of the Petitioner's properties on instructions of and in favour of the 1st, 2nd and 3rd Respondents on the basis that the Petitioner's properties had been compulsorily acquired by the Government.



- vii. The 4th Respondent had no colour of right to register any interest and make any entry that was adverse to the Petitioner's title to the suit properties without the Petitioner's consent.

V. Brief Facts

7. The brief facts of the filed Petition are that the Petitioner is the registered owner of two properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block(/108) situate in Likoni in Mombasa County (hereinafter "the Suit Properties"). The Petitioner had at all material times to the filing of this suit had an elaborate plan and vision to develop a multi-billion project on the suit properties. Vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. Vide another Gazette Notice No. 199 dated 14th January 2022, the 1st Respondent on behalf of the 2nd Respondent gave notice that the inquiry to hear claims to compensation for the land required for construction of Mombasa Gate Bridge Project in respect of the suit properties would be held on 23rd February 2022.
8. The inquiry was conducted on 23rd February 2022 as per the said Gazette Notice No. 199 during which the Petitioner made representations on compensation (Compensation Claim) which were acknowledged by the 1st Respondent. Further, vide a letter dated 23rd June 2022, the 1st Respondent also acknowledged receipt of the Petitioner's Compensation Claim. Despite receiving the Petitioner's Compensation Claim, the 1st Respondent deliberately declined to make compensation award to the Petitioner. Instead, the 1st Respondent, while knowing well that the suit properties belong to the Petitioner, vide a letter dated 22nd July 2022, the 1st Respondent made very wild, generalized and unsubstantiated allegation that the suit properties were designed as the Existing Site for the Kenya Navy, Mtongwe. The allegation was made as an excuse to delay and avoid making compensation award to the Petitioner.
9. The Petitioner responded to the 1st Respondent's allegations vide letters dated 19th September, 2022 and 11th October, 2022 in which the Petitioner clarified that the Petitioner is the owner of the suit properties and attached documents to support the Petitioner's ownership thereof. Despite the clarification by the Petitioner that it is the legal owner of the suit properties, the 1st Respondent still declined to make compensation award to the Petitioner. Meanwhile, without making any compensation award to the Petitioner, the 1st, 2nd and 3rd Respondents made numerous attempts to illegally and forcefully take over ownership and possession of the suit properties from the Petitioner without following the law and procedure as pleaded hereunder.
10. Vide a letter dated 12th October 2022, the 2nd Respondent invited the Petitioner to attend a joint entry into the suit properties together with the 3rd Respondent and the National Government which entry was scheduled to take place on 13th October 2022. The Petitioner declined the 2nd Respondent's request for joint entry and communicated the refusal vide a letter dated 12th October 2022. Vide undated letter sent to the Petitioner via email on 14th October 2022, the 3rd Respondent requested to access the suit properties for one (1) week up to and including 22nd October 2022. The Petitioner vide a letter dated 15th October 2022 once again declined the request in the manner proposed by the 3rd Respondent and only granted access on the following conditions:
- i. Access be limited to purpose of undertaking documentation of the cultural heritage assessment.
 - ii. There be no excavation or digging of the suit properties.



- iii. Access should not be construed as handing over possession of the suit properties to the Respondents.
11. On 14th October, 2022, officers and representatives of Japanese Nationals from JICA Study Team, Engineers and Surveyors from the 2nd Respondent and officials from the 3rd Respondent visited the Petitioner's offices and held a meeting in which they explained that the 2nd Respondent was desirous of commencing the Gate Bridge Project and that the 3rd Respondent intended to demolish the buildings on the suit properties to pave way for the implementation of the Gate Bridge Project. In the said meeting, the Petitioner clearly indicated that it would not allow entry onto or yield possession of the suit properties until its compensation was processed. The Petitioner's position as pleaded in this paragraph was communicated vide the Petitioner's letter dated 18th October, 2022. Knowing well that the Petitioner was reluctant and had indeed declined to grant unlimited access and to cede possession and ownership of the suit properties to the Respondents before receiving a compensation award, the Respondents changed their tact and approach so as to achieve their ill-intentioned goal of illegally taking over the suit properties from the Petitioner without a compensation award having been made by the 1st Respondent. Vide a notice dated 21st October, 2022, the 1st Respondent invoked the provision of Section 120 (2) of the Land Act and unilaterally took possession of the suit properties by granting access of the same to the 2nd Respondent to commence construction works thereon with immediate effect.
12. The Petition was grounded on the facts, testimonies and the averments made out on the face of the Petition and further 32 Paragraphed affidavit in support of the Petition of ALNOOR HABIB JIWAN the 2nd Petitioner and director of the 1st Petitioner and the 27 annexures marked as "AJ 1 to AJ 15" annexed hereto. He averred that:-
- a. The Petitioner was the registered owner of two properties known as MSA/MS/Block 1/107 (Mombasa/Mainland South/ Block V/107) and MSA/MS/Block 1/108 (Mombasa/Mainland South/ Block V/108) situate in Likoni in Mombasa County (hereinafter "the suit properties"). Annexed in the affidavit and jointly marked as "AJ 2" are true copies of the respective Title Deeds.
 - b. The Petitioner had at all material times had an elaborate plan and vision to develop a multi-billion project on the suit properties.
 - c. Vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. Annexed in the affidavit and marked as "AJ 3" is a true copy of Gazette Notice No.12299.
 - d. Vide another Gazette Notice No. 199 dated 14th January 2022, the 1st Respondent on behalf of the 2nd Respondent gave notice that the inquiry to hear claims to compensation for the land required for construction of Mombasa Gate Bridge Project in respect of the suit properties would be held on 23rd February 2022. Annexed in the affidavit and marked as "AJ 4" is a true copy of Gazette Notice No.199.
 - e. The inquiry was conducted on 23rd February 2022 as per the said Gazette Notice No. 199 during which the Petitioner made representations on compensation (Compensation Claim), Annexed in the affidavit and marked as "AJ - 5" was a true copy the Petitioner's letter to that effect.



- f. The 1st Respondent acknowledged the Petitioner's representation on the face of the letter.
- g. Further, vide a letter dated 23rd June 2022 but received by the Petitioner via WhatsApp on 5th October 2022, the 1st Respondent acknowledged receipt of the Petitioner's Compensation Claim. Annexed in the affidavit and marked as "AJ - 6" was a true copy of the Respondent's letter dated 23rd June 2022.
- h. Despite receiving the Petitioner's Compensation Claim, the 1st Respondent deliberately declined to make compensation award to the Petitioner.
- i. Instead, the 1st Respondent, while well aware that the suit properties belonged to the Petitioner made very wild, generalized and unsubstantiated allegation that the suit properties were designed as the Existing Site for the Kenya Navy, Mtongwe. The allegation was made as an excuse to delay and avoid making compensation award to the Petitioner.
- j. The Petitioner addressed the 1st Respondent's allegations vide letters dated 19th September 2022 and 11th October 2022 in which the Petitioner was categorical that the Petitioner was the owner of the suit properties and attached documents to support the Petitioner's ownership thereof. Annexed in the affidavit and jointly marked as "AJ - 7" were true copies of the Petitioner's letters dated 19th September, 2022 and 11th October, 2022.
- k. The 1st Respondent made its unsubstantiated allegations real when it reduced the same into writing in a backdated letter dated 22nd July, 2022 but received by the Petitioner via WhatsApp on 5th October 2022. Annexed in the affidavit and marked as "AJ - 8" was a true copy of the Respondent's letter dated 22nd July, 2022.
- l. Despite the clarification by the Petitioner that it was the legal owner of the suit properties, the 1st Respondent still declined to make compensation award to the Petitioner. Meanwhile, without making any compensation award to the Petitioner, the 1st, 2nd and 3rd Respondents made many attempts to illegally and forcefully take over ownership and possession of the suit properties from the Petitioner without following the law and procedure as pleaded hereunder.
- m. Vide a letter dated 12th October, 2022, the 2nd Respondent invited the Petitioner to attend a joint entry into the suit properties together with the 3rd Respondent and the National Government which entry was scheduled to take place on 13th October, 2022. Annexed herewith and marked as "AJ - 9" was a true copy of the 2nd Respondent's letter dated 12th October, 2022. The Petitioner declined the 2nd Respondent's request for joint entry and communicated the refusal vide a letter dated 12th October, 2022. Annexed in the affidavit and marked as "AJ - 10" was a true copy of the Petitioner's letter dated 12th October, 2022.
- n. On 14th October, 2022, officers and representatives of Japanese Nationals from JICA Study Team, Engineers and Surveyors from the 2nd Respondent and officials from the 3rd Respondent visited the Petitioner's offices and held a meeting in which they explained that the 2nd Respondent was desirous of commencing the Gate Bridge Project and that the 3rd Respondent intended to demolish the buildings on the suit properties to pave way for the implementation of the Gate Bridge Project. Annexed in the affidavit and marked as "AJ - 11" was a true copy of the attendance sheet for the said meeting.
- o. In the said meeting, the Petitioner clearly indicated that it would not allow entry onto or yield possession of the suit properties until its compensation was processed. Vide undated letter sent to the Petitioner via email on 14th October, 2022, the 3rd Respondent requested to access the



suit properties for one (1) week up to and including 22nd October, 2022. Annexed herewith and marked as “AJ - 12” was a true copy of the 3rd Respondent’s undated letter.

- p. Once again, vide a letter dated 15th October, 2022 the Petitioner declined the request in the manner proposed by the 3rd Respondent and only granted access on the following conditions:
- i. Access be limited to purpose of undertaking documentation of the cultural heritage assessment.
 - ii. There be no excavation or digging of the suit properties.
 - iii. Access should not be construed as handing over possession of the suit properties to the Respondents.

Annexed herewith and marked as “AJ - 13” was a true copy of the Petitioner’s letter dated 15th October, 2022.

- q. The Petitioner’s refusal to grant access was communicated vide the Petitioner’s letter dated 18th October, 2022. Annexed in the affidavit and marked as “AJ - 14” was a true copy of the Petitioner’s letter dated 18th October, 2022. Knowing well that the Petitioner was reluctant and had indeed declined to grant unlimited access and to cede possession and ownership of the suit properties to the Respondents before receiving an compensation award, the Respondents changed their tact and approach so as to achieve their ill-intentioned goal of illegally taking over the suit properties from the Petitioner without a compensation award having been made by the 1st Respondent.
- r. Vide a notice dated 21st October, 2022, the 1st Respondent invoked thee provision of Section 120 (2) of the [Land Act](#), No, 6 of 2012 and indicated its intention to take possession of the suit properties by granting access to the 2nd Respondent to commence construction works thereon with immediate effect. Annexed in the affidavit and marked as “AJ - 15” was a true copy of the 1st Respondent’s notice dated 21st October, 2022.
- s. The 1st Respondent’s actions were in violation of the land and statute as pleaded in the Petition and the application filed herewith. The 1st Respondent’s notice of intention to acquire the suit properties dated 21st October, 2022 was illegal and contrary to the provision of Section 120 (2) of the [Land Act](#) because of the following reasons:
- i. The acquisition process was commenced way back in November 2021, one year ago and there was no urgent necessity to take possession of the suit properties because the Respondents are the ones who had been indolent and had delayed with the acquisition and compensation process for one year. Further, the construction of Gate Bridge Project had not commenced and had not been commissioned by the National Government so as to justify the 2nd Respondent’s intention to “access the site to commence construction works with immediate effect.”
 - ii. The suit properties were not uncultivated or pasture or arable land which was the only nature of land that the 1st Respondent was permitted to take possession of under the proviso of Section 120 (2) of the [Land Act](#). The suit properties were developed plots within an urban setting of the County of Mombasa.
 - iii. The acquisition process had taken over one year which delay had been caused by the 1st Respondent’s failure to offer or make compensation award to the Petitioner. The delay had been inordinate and caused by the Respondents themselves. Thus,



the Respondents could not now claim that the acquisition would be delayed against public interest. Since they had delayed the acquisition process for over one year, the Respondents should expedite the compensation process and not purport to invoke the provision of Section 120 (2) of the *Land Act* as a remedy for the Respondents' own delay under the guise of urgent necessity. There was nothing urgent in the subject compulsory acquisition process of the suit properties otherwise the Respondents would have concluded the process without delaying for one year.

- iv. There was no urgency to justify taking possession of the suit properties before compensation award was made to the Petitioner. Other than the Petitioner's properties, no other property in the area where the Gate Bridge Project was intended to be constructed had been gazetted or compulsorily acquired by the Government. It was not logical or justified to only take possession of the Petitioner's suit properties yet the rest of the land where the project was intended to be constructed had not yet been acquired or even gazetted. The fact that the Respondents were only keen on taking over possession of the Petitioner's properties and not any other property within the area mapped up for the Gate Bridge Project was an indication of ill motive intended to dispossess the Petitioner of its rightfully owned properties without following the due procedure and without paying due compensation.
- v. The notice of intention to acquire the suit properties was published on 11th November, 2021. A period of fifteen (15) days from the said date expired long ago (on 26th November, 2021). Effectively, the Respondents had taken possession of the suit properties without paying compensation to the Petitioner because the effective date indicated in the notice dated notice dated 21st October 2022 had long expired (15day from 26th November, 2021 expired on 11th December, 2021).
- t. The Respondents' actions were in breach of the Petitioner's constitutional rights as pleaded in the Petition and application.
- u. The Respondents' decision to take possession of the suit properties without paying compensation to the Petitioner using the notice dated 21st October, 2022 which was itself inviolation of the Petitioner's rights to own property under the provision of Article 40 of *the Constitution* of Kenya for the reasons that:
 - i. The Petitioner had not been paid just compensation or at all.
 - ii. The notice dated 21st October 2022 through which the Respondents expressed intention take possession of the suit properties could not be used as the basis and justification for the compulsory acquisition of the suit properties from the Petitioner without first paying just compensation to the Petitioner in full.
 - iii. Article 40 (3) (b)(i) of *the Constitution* requires prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents are threatening to take possession of the suit properties, the Respondents have violated or threaten to violate the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to just compensation.
 - v. The 4th Respondent herein had threatened to register a restriction on the register of the Petitioner's properties on instructions of and in favour of the 1st, 2nd and 3rd Respondents on the basis that the Petitioner's properties had been compulsorily



acquired by the Government. The 4th Respondent had no colour of right to register any interest and make any entry that is adverse to the Petitioner's title to the suit properties without the Petitioner's consent.

VI. Submissions

13. On 6th July, 2023 in the presence of both parties the Court directed that the Petition be dispensed off by way of written submissions. Pursuant to that on 31st October, 2023 after the Honourable Court confirmed compliance the Honourable Court reserved a Judgment date on notice accordingly.
14. On 19th June, 2023 in the presence of both parties the Court directed that the Petition be dispensed off by way of written submissions. Pursuant to that on 17th October, 2023 after the Honourable Court confirmed compliance the Honourable Court issued a Judgment date on notice accordingly.

A. The Written Submission by the Petitioner

15. The Petitioner through the Law firm of Messrs. Oluga & Company Advocates filed their written submission dated 10th July, 2023. Mr. Oluga Advocate commenced his submissions by providing the background to be main Petition to have been filed dated 9th November 2022 and was found at pages 59 to 70 of the Petitioner's bundle of documents. The Petition was supported by the affidavit of ALNOOR JIWAN which was also in support of the application for conservatory orders. The Petitioner is the registered owner of two suit properties.
16. Vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. The 1st Respondent conducted an inquiry (as required by law before compensation) on 23rd February 2022 during which the Petitioner made representations on compensation (Compensation Claim) which were acknowledged by the 1st Respondent. Despite receiving the Petitioner's Compensation Claim, the 1st Respondent deliberately declined to make compensation award to the Petitioner. Instead, the 1st Respondent, while knowing well that the suit properties belong to the Petitioner, vide a letter dated 22nd July 2022, the 1st Respondent made very wild, generalized and unsubstantiated allegation that the suit properties were designed as the Existing Site for the Kenya Navy, Mtongwe. The allegation was made as an excuse to delay and avoid making compensation award to the Petitioner.
17. The Learned Counsel argued that the fact that the Petitioner is the lawful owner of the suit properties was clarified to the 1st Respondent not only by the Petitioner but also by the relevant Government offices as well as the 1st Respondent's own officers. Despite being informed in no uncertain terms that the Petitioner is the lawful owner of the suit properties, the 1st Respondent declined, and continue to decline to date, to make compensation award to the Petitioner. Without making any compensation award to the Petitioner, the 1st, 2nd and 3rd Respondents illegally and forcefully took over ownership and possession of the suit properties from the Petitioner without following the law and procedure relating to compulsory acquisition.
18. Vide a notice dated 21st October 2022, the 1st Respondent invoked the provision Section 120 (2) of the [Land Act](#) and unilaterally took possession of the suit properties by granting access of the same to the 2nd Respondent to commence construction works thereon with immediate effect. It was the Respondents' action of taking possession of the Petitioner's suit properties that prompted to the Petitioner to file this Petition to seek redress. The Petitioner sought for the orders as stated out in the Main Petition.



19. The Learned Counsel argued that contemporaneously with the Petition, the Petitioner filed an application for conservatory orders dated 9th November 2022. However, the said application was compromised on 6th July 2023 by consent of all parties to pave way for hearing of the main petition. The 1st Respondent responded to the petition through a Replying Affidavit sworn by Danson Njenga sworn on 24th April 2023. The 2nd Respondent filed a notice of preliminary objection dated 28th November 2022 as well as a Replying Affidavit by Robert Itambo but the objection and affidavit were both in respect of the Petitioner's application for conservatory orders dated 9th November 2022 and not in respect of the main petition. The Learned Counsel therefore did not submit on the issues raised in the 2nd Respondent's Replying Affidavit and notice of preliminary objection since the same have been overtaken by events following the abandonment of the application. As far as the Petitioner was concerned, the 2nd Respondent never filed any response to the main Petition. The 2nd Respondent responded to the Petition vide a Replying Affidavit sworn by Samwel K. Mwangi and filed by the Attorney General.
20. The Learned Counsel relied on the following two (2) issues for determination as follows. Firstly, whether the Petitioner is the lawful owner of the suit properties, the Learned Counsel submitted that the correspondences attached to the Petition show that the reason why the 1st Respondent has not paid compensation to the Petitioner is because of allegations that the suit properties did not belong to the Petitioner. At paragraph 10 of the Replying Affidavit filed by NLC, it is pleaded that the 1st Respondent could not issue an award of compensation following receipt of a letter dated 12th July 2022 from the Director of Physical Planning that the suit properties were part of land that was donated to the Navy by the colonial government and the site for Kenya Navy, Mtongwe Land. The reason cited by the 1st Respondent for failing to pay compensation to the Petitioner has no basis because the Petitioner is the lawful owner of the suit properties.
21. The Learned Counsel relied on entirely on the documents annexed to the Petitioner's Supporting Affidavit sworn by Alnoor Jiwan, the documents annexed to the 1st Respondent's Replying Affidavit sworn by Danson Njenga and the documents annexed to the Replying Affidavit sworn by Samwel K. Mwangi and filed by the Attorney General. In addition to the Petitioner's Supporting Affidavit, we are relying on the Replying Affidavit filed by NLC and the Attorney General (AG) because they both support the issues raised in the petition. It will be remembered that the main reason why the 1st Respondent failed to make an award and pay compensation to the Petitioner was because of the allegations that the suit properties do not belong to the Petitioner but are instead belong to the Kenya Navy and were designed as the Existing Site for the Kenya Navy, Mtongwe. The fact that the suit properties lawfully belong to the Petitioner is confirmed by the Replying Affidavits filed by the NLC and the AG.
22. At paragraph 14 of the Replying Affidavit sworn by Samwel K. Mwangi, the deponent pleaded as follows:

“ THAT currently, records held at the lands registry reflect that the petitioner is the registered owner of Mombasa/ Mainland South/Block 1/107 and Mombasa/ Mainland South/Block 1/108.”
23. At paragraph 5 of the NLC's Replying Affidavit, the deponent admits that the suit properties are “registered in favour of the Petitioner.”
24. The transfer of the suit properties to the Petitioner is further confirmed at paragraph 13 (g) of the Replying Affidavit of NLC. Other than the averments made in the body of the Replying Affidavit



of NLC, the reports annexed to the said Replying Affidavit confirm that the Petitioner is the lawful owner of the suit properties. In the letter by NLC dated 31st August 2022 (page 16 of NLC's Replying Affidavit), NLC states in the last paragraph thereof that the Ministry of Defence/Kenya Navy did not lay claim over the suit properties during inquiry. If indeed the suit properties belonged to Kenya Navy, the Ministry of Defence would have laid claim over the same during the inquiry. Most fundamentally, in a Survey Report dated April 2023 prepared by NLC (one Sospeter Ohanya), it is expressly indicated that the Petitioner's suit properties are distinct and separate from the Kenya Navy land as follows:

- “4. Findings
0
4. ...
1
4. Ownership Status
2
Records from the Ministry of Lands at Ardhi House and searches obtained independently by the NLC from the Registry section-Mombasa confirmed that the land is owned by Alba Petroleum limited.
4. ..
3
4. Spatial location
4
The special analysis confirmed that the land does not fall within Mtongwe Barracks Land. It was established that Barracks Land is falling within Mombasa/Mainland South Block IV registration unit while the proposed project traverse through Mombasa/Mainland South Block 1. These are two distinct registration zones. The Navy Land Parcel and the two other land parcels are actually separated by a creek (Mweza Creek).
5. Conclusion
0
The three parcels are distinct. There is no overlap between the two land parcels and Mtongwe Navy land according to the survey and analysis. There appears to have been a mix-up between Block 1 and Block IV but having the same parcel numbers. In view of this, the owner of land parcels MSA/MS/Block 1/107 & MSA/MS/Block 1/108 has interest to be duly compensated in accordance with the law...” (Underlining ours. See page 69 and 78 of the Replying Affidavit by NLC).

25. Also annexed to NLC's Replying Affidavit at page 79 is another report-Due Diligence Report dated November 2022. The said Report makes the following conclusions:

- “3. On Site Observations
5
It is clear that the Ministry of Lands made some mix-ups between the Kenya Navy plots and the Alba Properties plots...
4. Conclusion
0
There seems to have been a mix-up between Block 1 and Block iv but having the same parcel numbers.
5. Recommendations
0
The NLC should move forward with its compensation process...”



26. Therefore, the Learned Counsel submitted that it was clear that NLC's own reports not only confirmed that the suit properties belong to the Petitioner and was distinct and separate from the land owned by Kenya Navy. The issue of ownership of the suit property is therefore firmly settled in favour of the Petitioner.
27. Secondly, on the issue as to whether the orders sought in the Petition should be granted. The Learned Counsel argued that most of the documents filed by the Petitioner were the same ones filed by the 1st Respondent - the National Land Commission and the 4th Respondent the Attorney General". It was therefore not difficult to see why the orders sought in the Petition should be granted. At paragraph 15 of its Replying Affidavit, the 1st Respondent pleaded that under the provision of Section 115 of the Land Act, NLC was barred from making any compensation once a dispute has been brought to its attention but admits that compensation can be paid once the dispute is resolved. The allegation that the suit properties belonged to the Kenya Navy was resolved and was no longer a dispute. The dispute was resolved by NLC's own officers as well as the evidence from the Lands Registry. Therefore, there was no just reason why the NLC could not compensate the Petitioner since the dispute had been resolved.
28. According to the Learned Counsel, under the provision of Section 111 (1) of the Land Act, the 1st Respondent was obligated to pay to the Petitioner just compensation promptly and in full for the compulsory acquisition of the Petitioner's properties. The 1st Respondent violated the provision of Section 111 (1) of the Land Act by failing to pay compensation to the Petitioner even after its own officers confirmed that the suit properties belong to the Petitioner. Under section 113 (1) of the Land Act, the 1st Respondent was mandated to prepare a written award of compensation to the Petitioner upon conclusion of the inquiry which was conducted on 23rd February 2022. The 1st Respondent violated the provision of Section 113 (1) of the Land Act by failing to issue a written award of compensation to the Petitioner despite the inquiry having been conducted and concluded about nine (9) months ago. Under the provision of Section 120 (1) of the Land Act, the 1st Respondent was authorized to take possession of land after the amount of the first offer of compensation had been paid. It was not in dispute that there was no compensation that had been paid to the Petitioner despite the gazette of the compulsory acquisition of the Petitioner's properties having been published one year ago. Under section 120 (2) of the Land Act, the 1st Respondent was allowed to take possession of land on the following conditions:
- i. There was an urgent necessity for the acquisition of land.
 - ii. It would be contrary to the public interest for the acquisition to be delayed.
 - iii. The land in question was uncultivated or pasture or arable land.
 - iv. Possession was taken upon expiration of fifteen (15) days from the date of publication of the notice of intention to acquire the land.
29. In the instant case, the 1st Respondent's notice of acquisition of the suit properties dated 21st October 2022 was illegal, unjustified and contrary to the provision of Section 120 (2) of the Land Act because of the following reasons:
- a. The acquisition process was commenced way back in November 2021, almost two years ago and there was no urgent necessity to take possession of the suit properties because the Respondents were the ones who had been indolent and had delayed with the acquisition and compensation process for that long. Further, the construction of Gate Bridge Project had not commenced and has not been commissioned by the National Government so as to justify the



2nd Respondent's action and step/move to “access the site to commence construction works with immediate effect.”

- b. The suit properties were not uncultivated or pasture or arable land which was the only nature of land that the 1st Respondent was permitted to take possession of under the provision of Section 120 (2) of the Land Act. The suit properties were developed plots within an urban setting of Mombasa County.
 - c. The acquisition process had taken almost two years which is inordinate delay had been caused by the 1st Respondent's failure to offer or make compensation award to the Petitioner. The delay had been caused by the Respondents themselves and the Respondents could not now claim that the acquisition would be delayed against public interest. Since they had delayed the acquisition process for almost two years, the Respondents should expedite the compensation process and not purport to invoke the provision of Section 120 (2) of the Land Act as a remedy for the Respondents' own delay under the guise of urgent necessity. There was nothing urgent in the subject compulsory acquisition process of the suit properties otherwise the Respondents would have concluded the process without delaying for one year.
 - d. The notice of intention to acquire the suit properties was published on 11th November 2021. A period of fifteen (15) days from the said date expired long ago (on 26th November 2021). Effectively, the Respondents had taken possession of the suit properties without paying compensation to the Petitioner because the effective date indicated in the notice dated notice dated 21st October 2022 has long expired (15 days from 26th November 2021 expired on 11th December 2021).
30. According to the Learned Counsel, there was no urgency to justify taking possession of the suit properties before compensation award is made and paid to the Petitioner. Other than the Petitioner's properties, no other property in the area where the Gate Bridge Project was intended to be constructed had been compulsorily acquired by the Government. It had not logical or justified to only take possession of the Petitioner's suit properties in isolation yet the rest of the land where the road was intended to pass through has not yet been acquired. The fact that the Respondents were only keen on taking over possession of the Petitioner's properties and not any other property within the area mapped up for the Gate Bridge Project was an indication of ill motive intended to dispossess the Petitioner of its rightfully owned properties without following the due procedure and without paying due compensation. For the reasons of illegality pleaded above, the Respondents' take-over of the suit property as per the 1st Respondent's notice dated 21st October 2022 is illegal, null and void for want of payment in full of just compensation to the Petitioner.
31. On the issue of breach of the Petitioner's Constitutional Rights, the Learned Counsel submitted that Article 60 (1) (b) of the Constitution of Kenya, 2010 requires that land in Kenya be held, managed and used in a manner that guarantees land rights. The Respondents have violated Article 60 (1) (b) of the Constitution of Kenya by moving to compulsorily acquire the Petitioner's properties without paying just compensation in full and in prompt manner or at all. Under Article 40 (1) of the Constitution of Kenya, 2010, the Petitioner had the right to own the suit properties and not to be arbitrarily deprived of the same or to be restricted from enjoyment of the same. Further, under Article 40 (3) of the Constitution of Kenya, the State was prohibited from depriving the Petitioner of its interest and right over the suit properties unless just compensation was paid in full to the Petitioner.
32. The Respondents' decision to take possession of the suit properties without paying compensation to the Petitioner using the notice dated 21st October 2022 was in violation of the Petitioner's rights to own property under Article 40 of the Constitution of Kenya for the reasons that:



- i. The Petitioner had not been paid just compensation or at all.
 - ii. Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010 requires prompt payment of compensation before taking possession of land by way of compulsory acquisition. Article 40 (3) (b)(i) of *the Constitution* required prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents had taken possession of the Petitioner's properties, the Respondents had violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(I) of *the Constitution* which entitled the Petitioner to Just compensation.
 - iii. Article 40 (3) (b)(1) of *the Constitution* of Kenya, 2010 requires prompt and full payment of compensation before taking possession of land by way of compulsory acquisition. By delaying the payment of compensation to the Petitioner by nearly one year, the Respondents had violated the Petitioner's rights as guaranteed by Article 40 (3)(b)(i) of *the Constitution* which entitled the Petitioner to payment in full of just compensation.
33. The Learned Counsel contended that since the 1st and 2nd Respondents had taken possession of the suit properties, it was imperative that they pay just compensation to the Petitioner promptly as mandated by Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010. To buttress on this point, the Learned Counsel relied on the case of:- "Fort Properties Ltd – Versus - Attorney General & 2 others [2021]eKLR" where this same court (Justice LL. Naikuni) stated as follows:
- “
- “46. Suffice to it say, the main quest in the matter is compensation. As was stated by Scott L.J. in relation to compulsory acquisition in the case of “Horn - VS- Sunderland Corporation [1941]. 2KB 2640 “The word “Compensation” is almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equated his pecuniary detriment, the compensation would not be equivalent to the compulsory”
- Based on the above legal expose, the Law demands that where land has been acquired compulsory from an owner that just compensation is to be paid in full to the said affected person(s). This is in line with the Constitutional requirement under Article 40 (3) of *the Constitution* of Kenya and that person should not be deprived of their property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.”
34. The Learned Counsel urged the Honourable Court to compensate the Petitioner. The complaint against the 4th Respondent was that the 4th Respondent threatened to register a restriction on the register of the Petitioner's properties on instructions of and in favour of the 1st, 2nd and 3rd Respondents on the basis that the Petitioner's properties had been compulsorily acquired by the Government. The 4th Respondent had no colour of right to register any interest and make any entry that was adverse to the Petitioner's title to the suit properties without the Petitioner's consent.
35. In conclusion, the Learned Counsel urged the Honourable Court to grant the reliefs sought in the Petition which had not been really opposed by the Respondents considering the glaring admissions in the Replying Affidavits as well as the annexed reports showing that the suit properties belonged to the Petitioner and the recommendation that the Petitioner be paid compensation.



B. The Written Submissions by the 1st Respondent

36. The 1st Respondent through the Senior Litigation Counsel, S. Mbuthia, filed their written submission dated 2nd October, 2023. Mr. S. Mbuthia Advocate commenced his submissions by stating that the Petition dated 9th November, 2022 was opposed by the 1st Respondent. In so doing, the 1st Respondent would rely on Replying Affidavit of Danson Njenga filed on 24th April, 2023 and the submissions herein. The Factual foundation of the dispute had been well thrashed out in the said Replying Affidavit of Mr. Njenga and the 1st Respondent would humbly in the interest of precious judicial time not regurgitate what was already on record.
37. In his submissions, the Learned Counsel relied on the following three (3) issues to be considered for determination.

Firstly, on the issue of whether the Petition raises any constitutional issues. In other words, he submitted extensively on the Doctrine of Constitutional Avoidance. The Learned Counsel averred that what was before the Honourable Court no matter how camouflaged was a simple claim for money that had since been “baptized” a Petition. It raised no Constitutional issues and the proper forum for determination of the dispute herein was a Civil Court or an Appeal to Land Acquisition Tribunal under the provision of Sections 133A and 133 (c) of the *Land Act*, No. 6 of 2012. To buttress on the question of what constituted a constitutional question, he relied on a case where the issue was ably illuminated being the case of: -“South African case of Fredericks & Others – Versus - MEC for Education and Training, Eastern Cape & Others (2002) 23 ILJ 81 (CC)” in which Justice O’Regan recalling the Constitutional Court’s observations in “S – Versus - Boesak {2001} (1) SA 912 (CC)” stated that;

“*The Constitution* provides no definition of “constitutional matter. “What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: If regard is had to the provisions of *the Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.....,the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.

38. It was the Learned Counsel’s submission that no pure Constitutional issues had been made out in the Petition for determination by this Honourable Court and mere quoting of *the Constitution* and Constitutional provisions never made make it a Petition that disclosed pure Constitutional issues. He further cited the Court of Appeal case of:-“Gabriel Mutava & 2 Ors. – Versus - Managing Director Kenya Ports Authority & Another (2016) eKLR” underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation was not open for every



claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

“ Then there is the case of Speaker of the National Assembly – Versus - James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“.....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.....”

39. Additionally, the Learned Counsel asserted that the principle of constitutional avoidance as enunciated in the South African case of “S – Versus – Mhlungu” and adopted with approval by the Court of Appeal in the case of:-“Communications Commission of Kenya & 5 Others – Versus - Royal Media Service Limited & Others {2014} eKLR” stipulates that where it was possible to decide any case, civil or criminal, without reaching a constitutional issue that course should be followed. The Learned Counsel invited this Honourable Court to be so persuaded and exercise the principle of Constitutional avoidance since no constitutional questions had been raised in the Petition.

40. Secondly, was on the exhaustion of remedies. The Learned Counsel submitted that the Land Value (Amendment) Act 2019 amended the *Land Act* and introduces the provision of Section 133A of the *Land Act* which established the Land Acquisition Tribunal with a mandate inter alia under Section 133(C) to:-

(1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.

41. Section 133 (8)of the said *Land Act* further provides that:-

“ the Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the *Fair Administrative Action Act* or any other law.”

42. Section 133 (6) is emphatic that:-

“ despite the provisions of Sections 127,128 and 148 (5), a matter relating to compulsory acquisition of land or.....,shall, in the first instance, be referred to the Tribunal.”

43. The entire Petition as framed could ably be determined by the Land Acquisition Tribunal which in any event was the body with original and Appellate jurisdiction at first instance. Notably the Tribunal was clothed with jurisdiction to determine complaints arising under Articles 23 (2) and 47 (3) of *the Constitution* and apply the Fair Administrative Actions Act and any other law. This effectively meant that the Tribunal could determine violation of Constitutional rights and exercise supervisory jurisdiction as well as Appellate jurisdiction over the decisions, acts or omissions of the 1st Respondent herein in the first instance. The provision of Section 133 (6) uses the mandatory term “shall” to underscore that all disputes relating to compulsory acquisition shall at first instance be determined by the Tribunal.



44. To buttress on this legal position, the Counsel referred Court to the case of:- “Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank and 2 others, Supreme Court Application No.2 of 2011[2012]eKLR” the Supreme Court stated as follows on jurisdiction:

“ A court's Jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.. where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

45. He further cited the provision of Section 9 (2), (3) of the *Fair Administrative Action Act* provides that where there existed internal mechanisms for dispute resolution such mechanisms must be exhausted before a party moves to Court; they read as follows:-

“(2)The High Court or a subordinate court under Sub - Section (1)shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a sub - ordinate Court shall, if it is not satisfied that the remedies referred to in Sub - section(2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

46. This Honourable Court is a Court of equal Status as the High Court and it is effectively subject to the above provisions of the *Fair Administrative Action Act*. The Learned Counsel stated that it may be argued that before Court today was a Petition and not a Judicial Review Application and as such the provisions of the *Fair Administrative Action Act* do not apply but Article 23(3)of *the Constitution* under which the Instant Petition is framed provides as follows:-

“(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-(a)a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

47. Accordingly, the provisions of the *Fair Administrative Action Act* apply to this Petition on account of the provision of Article 23 (3) (f).In the case of:- “Speaker of the National Assembly – Versus - James Njenga Karume (Supra), the Court of Appeal held as follows:

“In our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of



Parliament, that procedure should be strictly followed. We observe without expressing a conclusive view that Order 53 of the Civil Procedure Rules cannot oust clear Constitutional and Statutory provisions.”

48. Again in the case of:- “International Centre for Policy and Conflict & 5 Others – Versus - the Attorney General & 4 others (2013) eKLR”, the court held thus:-

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of *the Constitution* in general must exercise restraint. It must first give an opportunity to the relevant Constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.....”

49. Further, in the case of:- “Francis Actan Parsimei & Others – Versus - National Alliance Party and others Nairobi Petition No. 356 of 2012 (unreported)” the court emphasized the principle that:

“Where *the constitution* and or a statute establishes a dispute resolution procedure, then that procedure must be used.”

50. The importance of the doctrine of exhaustion of remedies provided by statute was further emphasized by the court in the case of “Geoffrey Muthinja & Another – Versus - Samuel Muguna Henry & Others (2015) eKLR” where the Court of Appeal in dismissing an appeal before it stated as follows;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be of the last resort and not the first port of call the moment a storm brews.....the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts.”

51. Having failed and/or ignored to avail themselves of the available remedies under the provision of Section 133 of the *Land Act*, the Petitioners herein could not be permitted to sidestep an important statutory requirement. Again, the High Court in “Francis Mutuku – Versus - Wiper Democratic Party Kenya & 2 others, Nairobi High Court Pet. 597 of 2014 [2015] eKLR” declined jurisdiction over a Petition because the parties had not exhausted the dispute resolution mechanisms under the *Political Parties Act*.

52. The Learned Counsel emphasized on the point that the Courts had severally and correctly pronounced themselves on the issue of exhaustion of available remedies. There existed numerous court precedents where courts had held that it was imperative where a dispute resolution mechanism existed outside courts, the same be exhausted before the jurisdiction of the court was invoked, and, that, courts ought to be a for a last resort and not the first port of call the moment a storm brews. The Counsel cited the case of:- “Samson Chembe Vuko – Versus - Nelson Kilumo & 2 others [2016] eKLR” the Court of Appeal, citing other decisions with approval, among them: “Speaker of the National Assembly – Versus - Karume [2008] 1 KLR 425” where the Court of Appeal held, “inter alia:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be strictly followed.”

53. He averred that the doctrine of exhaustion of internal dispute resolution mechanisms was now of esteemed juridical lineage in Kenya. It was old water and it was most felicitously stated by the Court



of Appeal in the case of:- “Mutanga Tea & Coffee Company Ltd -Versus - Shikara Limited & Another [2015]eKLR” where the Court of Appeal held as follows:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or the Act of Parliament, that procedure should be followed.....And further held as follows.....

“.....this court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the court made the often quoted statement: “where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.(See also Kones – Versus - Republic & Another Ex parte Kimani Wanyoike & 4 Others[2008] eKLR (ER) 296. It is readily apparent that in the above cited cases the court was speaking on issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court. The basis for that view is first, that Article 159 (2) (e) of *the Constitution* has expressly recognized alternative forms of alternatives dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article 159 (2) (c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reaching of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165 (3) (a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost-effective manner.....

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159 (2) (c) and the very raison d'être of the mechanisms provided under the two Acts.....”

54. The Counsel in addition referred Court to the case of:- “Mason Services Limited – Versus - Parklands Baptist Church Registered Trustees & Another [2018]eKLR” further held that:

“a party seeking Judicial Review remedy must exhaust the review and appeal remedies available under the applicable laws, and, to here the interest of justice, exhaustion of those



remedies is not a viable route, the applicant is obligated to move the court for an exemption order.”

55. It was his contention that the Court of Appeal provided the constitutional rationale and basis for the doctrine in “Geoffey Muthinja Kabiru & 2 Others – Versus - Samuel Munga Henry & 1756 Others”, where it stated that:-

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

56. Lastly and more relevant, the Counsel argued that the Court of Appeal in the case of “Mwavumbo Group Ranch – Versus - National Land Commission & 3 others (2019)eKLR” which related to compulsory acquisition similarly held that:-

“The issues raised needed adducing of evidence as to how much compensation was payable; which people had been paid and for what interest in the affected land etc. These were issues that were ill suited for ventilation through a constitutional petition. They are to say the least not constitutional issues. As stated earlier, where Parliament has expressly prescribed a method or process of dispute resolution, parties must defer to it and eschew running to the constitutional or other courts for recourse. Clothing an ordinary dispute with constitutional regalia does not necessarily transform it to a constitutional dispute.”

57. It was the Learned Counsel’s submission that the instant Petition was an ordinary claim for money and the same can be resolved through an ordinary suit for recovery of money or through the process set out in the provision of Section 133 of the *Land Act* and there were no Constitutional issues raised in the Petition or public interest concerns for determination by this Honourable Court.

58. Thirdly, on whether the threshold for grant of the orders sought in the Petition had been met. The Learned Counsel submitted that “the locus classicus’ on whether the orders sought can be granted is the case of “Anarita Karimi Njeru – Versus - Republic No.1 (1979)I KLR, 54” and which was echoed in the case of “Mumo Matemo – Versus - Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013)eKLR”: the court said:

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

59. In the case of:- “Mumo Matemu Case”, the Court said:

“.....the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are tenets of substantive



justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

60. According to the Learned Counsel, the Petition lacked specificity, the Petitioner was not clear whether he was inviting this Court to determine whether they were the owner of the suit land or he was seeking compensation. According to the Counsel, this Petition raised no constitutional issues and nomatter how clothed this Petition was simply a camouflaged civil suit for a claim for moneywhich claim fell outside the realms of this Honourable Court.
61. Fourthly, on the existence of a dispute and the import of Section 115 of the *Land Act*. The Learned Counsel submitted that in the Replying Affidavit of Danson Njenga, the 1st Respondent had stated that it could not issue an award of compensation to the Petitioner following receipt of a letter dated 12th July, 2022 from the Director of Physical Planning that the two parcels of land were part of land that was donated to then Royal Navy by the colonial government and the site fall on Kenya Navy, Mtongwe land. Vide a letter dated 12th July, 2022, the 1st Respondent wrote to the Petitioners and informed them of the said information and sought for particulars and evidence of ownership of the suit properties by the Petitioners.
62. Further on 28th February, 2023, the Cabinet Secretary, Ministry of Defence wrote to the Chairman of the 1st Respondent, requiring the 1st Respondent to investigate circumstances under which the suit properties were transferred from the Lord Commissioner of Admiralty to the Petitioners herein. The Learned Counsel submitted that there was a dispute that had been disclosed to the 1st Respondent pitting the Kenya Defence Forces (Navy) on one hand and the Petitioner herein on the other. The dispute was twofold in the sense that there was a question of who was the bona fide owner of the suit land and secondly whether the suit land was public land vested in the Navy as a successor in title to the Royal Navy or the same was private land. The other question would be how public land that had been donated to the Royal Navy would be legally transferred to the Petitioners herein.
63. According to the Learned Counsel, they had submitted on weighty issues that fell on the jurisdiction of this Honourable Court and they cannot be resolved through a Petition. These were issues that required a trial where evidence was called and tested and the Court pronounced itself on the same before the issues of compensation could be addressed.
64. Fifthly, on payment of the compensation. The Learned Counsel argued that the provision of Section 115 of the *Land Act* provided as such on this head. It was after notice of an award had been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where:-
 - “(1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where-
 - (a) there is no person competent to receive’ payment; or
 - (b) the person entitled does not consent to receive the amount awarded; or
 - (c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.



- (2) In any of the cases referred to in paragraphs (a), (b) and (c) of subsection (1), the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly.”

It was the Learned Counsel’s submission that a dispute had been disclosed and compensation could only be payable once the dispute above is resolved.

65. Sixthly, on whether the 1st Respondent had formally taken possession of the suit land, the Learned Counsel submitted that it must be underscored that pursuant to the Conservatory orders issued by this Honourable Court, the 1st and 2nd Respondents had not been able to take possession of the suit land at a great cost to the Kenyan public who would be forced to pay additional costs for the delay in the implementation of the project.
66. Be that as it may, the provisions of Section 120 of the Land Act are clear on how formal taking of possession was to be done. Section 120 provides thus:-

“ 120. Formal taking of possession.

- (1) After an award has been made, the Commission may take possession of the respective land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless.
- (2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of the land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).”

67. In the instant case, an award of compensation had not been issued to the Petitioner due to the dispute over the ownership of the suit property and the applicable provisions of the law was Section 120(2) of the land Act. It was not in dispute that the Notice of intention to acquire the property was issued on 11th November, 2021 and fifteen days had since lapsed entitling the 1st Respondent to take possession of the land the fact that no award had been made notwithstanding. The project was of urgent necessity like all other public purpose projects for the reasons that the public urgently required the facility since the cable stayed bridge was to link Mombasa Island and South Mainland (Likoni Area) and largely mitigate traffic congestion and facilitate efficient transportation and logistics around the Mombasa area. The congestion and the security concerned posed by the Likoni Ferry was a matter of public notoriety. Secondly, the project lie any other funded project would attract additional costs in idle machinery and equipment, breach of contract and penal consequences that could be mitigated by taking early possession of the land. It was obvious that the amendment to this Section of the law was to guard against such eventualities and ensure that public funds were prudently used as per the provisions of Article 201 of the Constitution.



68. Seventhly, on the whether the parameters for the payment of compensation had been met. The Learned Counsel submitted that the provision of Section 112 of the Land Act requires an award of compensation be made by the 1st Respondent before compensation was done. The award was the basis of compensation and it clearly outlines the size and value of land compulsorily being acquired. In this case, the same had not been issued owing to the outstanding dispute and on this head, the compensation could not be made until the dispute is resolved and an award issued. Afortiori, the provision of Section 119 of the Land Act imposed very stringent conditions to be met before compensation could be paid in the following terms;

“(a) Payment of compensation shall be made only upon the exercise of due diligence which shall include final survey and the determination of acreage, boundaries, ownership and value”

69. It was the Learned Counsel’s submission that final survey had not been conducted and neither had the boundaries and acreage of the land been determined through the final survey. Therefore, according to him, compensation was lawfully not due to the Petitioner. The Petitioner retained the use and possession of the land. It was yet to be officially vested in government after they surrendered their ownership documents. As Justice Mativo would say in HC Petition 530 of 2016, “..The parties have come to the Court too early.”

70. Underscoring the centrality of jurisdiction, Nyarangi, J.A. in the celebrated case of “Owners of Motor Vessel ‘Lillian S’ – Versus - Caltex Oil(Kenya)Limited [1989]KLR 1” expressed himself as follows on the issue of jurisdiction:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings..”

71. More strongly, the Counsel averred that the Land Value (Amendment) Act, 2019 amended Section 2 of the Land Act to define “prompt payment” of compensation to mean;

“prompt” means within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission;

72. The 1st Respondent was yet to take possession of the land and it was well within the timelines prescribed by Section 2 of the Land Act on what constitutes prompt payment of compensation and therefore no cause of action had been established by the Petitioners.

73. Eighthly, on whether interest was payable on the circumstances. The Learned Counsel submitted that the issue of interest was provided for under the provision of Section 117 of the Land Act which provides as follows:-

“(1) If the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest on the amount awarded at the base lending rate set by the Central Bank of Kenya and prevailing at that time from the time of taking possession until the time of payment.”

74. It was clear that interest only became payable from the date of taking possession until the time of payment. He reiterated that the 1st Respondent was yet to take possession of the land and in the circumstances,- interest was not yet due and accumulating. Interest would only start accruing once the



1st Respondent took possession of the land. The land remained under the possession and use of the Petitioners. If this Court was inclined to award interest to the Petitioners, then the justice of the case, the Petitioners would be required to account for and pay to the 1st Respondent; the prevailing rent and any mesne profits generated from the continued occupation and use of the land up to the period when the notice of taking possession would issue.

75. In conclusion, the Learned Counsel asserted that it must also be pointed out that subject to the conservatory orders issued by this Honourable court, the 1st and 2nd Respondent remained barred from taking possession or interfering with the land and interest could not hence be said to accrue. The Petitioners were simply approbating and reprobating on this head. They prayed for the Petition to be dismissed with costs.

C. The Written Submissions by the 2nd Respondent

76. The 2nd Respondent through the Law firm of Messrs. Rachier & Amollo LLP Advocates filed their written submissions dated 17th August, 2023 and a Supplementary Submissions dated 23rd December, 2023 and which the Court has taken into consideration herein. Mr. Ligunya Advocate commenced his submissions by calling for this Honourable Court to exercise its mind towards the question of lawful compulsory acquisition of land. What principles applied to the process, who ought to be liable to compensate an owner of private land and what reliefs are available. Further, this Honourable Court would need to determine the Preliminary Objection dated 28th November 2022 and the proper procedure in instituting suits against the 2nd Respondent.
77. On the brief facts, the Learned Counsel submitted that vide a Petition dated 9th November 2022 filed contemporaneously with a Notice of Motion under Certificate of Urgency, the Petitioner instituted the main suit seeking several orders as against the Respondents inter alia; declaration of violation of rights, a mandatory injunction for payment of just and full compensation and permanent injunctions restraining the Respondents from in any way interfering with their properties. The same was premised on the suit properties which were gazetted for compulsory acquisition vide Gazette Notice No. 12299 dated 11th November 2021 for purpose of the Mombasa Gateway Project. The 2nd Respondent filed its Preliminary Objection dated the 28th November 2022 stating that the Petitioner had failed to comply with the provision of Section 67 of the [Kenya Roads Act](#), 2007 in instituting the said suit and Notice of Motion Application as against it.
78. The Learned Counsel relied on the following four (4) issues to be considered for determination. These were Firstly, whether the 2nd Respondent was entitled to submit on matters of law. On the issue of whether the 2nd Respondent was entitled to submit on matter of law, it was not disputed that the 2nd Respondent had inadvertently failed to file its Reply to the main Petition. This however was occasioned by the start and stop negotiations and processes in this matter which initially was focused on the application and the Preliminary Objection raised. It was in this regard that it by-passed Counsel to seek leave to file its substantive reply. Notwithstanding the inadvertent lapse, the 2nd Respondent still retained its right to submit on points of law. To buttress on this point of law, he referred Court to the case of:- “Kenya Agricultural and Livestock Research Organization - Versus - Leah Okoko & another [2022] eKLR” it was held with regards to points of law that;
28. Finally, this court observes that points of law can be raised at any time of the proceedings in a case before it. Points of law need not be pleaded as parties are only expected to plead facts and submit on points of law. In my view, there is no prejudice and none was demonstrated, to be occasioned to the appellant if the application is allowed.



As such, the Learned Counsel submitted that the 2nd Respondent had a right to submit on points of law which it would proceed to do.

79. Secondly, whether the Preliminary Objection dated 28th November 2022 was merited. The Learned Counsel contended that the record showed that when this matter came up for mention for directions on the 6th of July 2023, the Honourable Court directed that the Petitioner's Notice of Motion Application be compromised to pave way for hearing of the main petition and parties to file written submissions on both the Preliminary Objection and the main petition. The Honourable Court further directed that the matter be mentioned on the 4th October 2023 for compliance and highlighting of submissions if need be. It was the Application that was compromised and not the Preliminary Objection. The Objection was to the propriety of the institution of this suit in its entirety. As such, it related to both the application and the main Petition and remained a live issue to be determined by this court.
80. The Petitioner in their submissions opted not to submit on the Preliminary Objection and consequently, the Learned Counsel submitted that the same stood unopposed. Nonetheless, the Learned Counsel proceeded to submit on the merits of the same. A Preliminary Objection must be raised on a pure point of law. That was to say that the facts raised by the opposing party were presumed to be correct. Further, a Preliminary Objection must be one that was capable of dispensing with the suit or entirely. The Learned Counsel referred to In "the locus classicus" case of "Mukhisa Biscuit Manufacturers Ltd. – Versus - West End Distributors Ltd. [1969] E.A. 696" the Court of Appeal as it then was, held:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.” as per Sir Charles New Bold.

81. He stated that the provision of Section 67 of the *Kenya Roads Act*, No. 2 of 2007 was instructive in the procedure to be followed when suing the 2nd Respondent:

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

- (a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent;

82. According to the Learned Counsel, from the preceding provision, it was clear that the Petitioner was mandated by law to have served a written notice to the 2nd Respondent before instituting this suit.



The mandatory nature of this provision was considered in the case of:- “Kenya National Highways Authority – Versus - Geoffrey Muga [2021] eKLR”, where Nyakundi R. as he then was held:-

“As the provisions of Section 67 of the Act are mandatory no Court is empowered to dispense with the notice under the guise of judicial discretion.

More importantly, such notice if duly served upon the appellant/defendant in the main suit, would provide an opportunity for a response which is both a right and a legitimate expectation in adjudication of suits. The right to make an initial response in relation to the intended suit by a public agency or corporation manifestly falls within the safeguards for fair administrative action in the terms of Article 47 of *the Constitution*. Rights of such a kind moreover are actionable within the framework of judicial powers in relation to the quasi-judicial powers of statutory agencies. (See Supreme Court discourse in Mumo Matemu – Versus - Trusted Society of Human Rights Alliance CA No.29 of 2014).

It is crystal clear that under the statute.....in Kenya notice to the Authority of 30 days is an essential procedural jurisdiction before commencement of any suit before a Court of Law. Had the legislature intended the Court to by-pass the provisions to exercise jurisdiction over such suits against the Authority. It would have said so in clear and unambiguous language.

These provisions are in respect of the legal capacity and locus standi of the party deserved of suing the public agency herein referred as the Authority. The Section therefore falls within the category of existing Law that enjoys constitutional protection. The Courts under the Constitutional dispensation

are required in exercising jurisdiction in Article 50 (1) of *the Constitution* to enforce such existing Law in accordance with *the Constitution*.

As a threshold question, the application of Section 67 of the Act would be necessary to consider that the jurisdiction of the Court is subject to prior notice being served to the Director General of the appellant. Neither the Court nor a party to the suit has power to circumvent that procedural jurisdiction. [Emphasis ours]

83. It is clear that had the Petitioner served the required notice on the 2nd Respondent prior to instituting this suit it would have afforded the 2nd Respondent an opportunity to respond and possibly resolve the dispute out of court. The possibility of resolving this dispute out of court is evidenced by the letter from the Petitioner's advocates proposing compromising the suit as the issue of ownership had been resolved. To infringe on the 2nd Respondent's right to fair administrative action and to totally disregard the statutorily mandated processes is a fatal defect that cannot be cured by this court. Further, what constitutes a valid notice under the said provision was considered in “Rianna Furaha Children Home – Versus - Kenya National Highways Authority [2016] eKLR”;

“That the reading of the said letter does not disclose any claim of right by the Petitioner or any intention to take legal action to pursue any such claim against the Respondent. The letter does not therefore satisfy the requirement of Section 67 of the *Kenya Roads Act* 2007.”

84. From the Petitioner's own pleadings and documents filed before this Honourable Court, it was clear that the only time in which the Petitioner addressed the 2nd Respondent was vide its letter of 12th October 2022 denying a request for a joint entry meeting. The said letter was directed towards this particular issue and the Petitioner in fact proceeded to lay the blame for the denial on the 1st Respondent. The said letter did not satisfy the provisions of Section 67 as it was focused on the Issue of



a joint entry meeting, never disclosed its claim of right nor any Intention to take legal action to pursue such a claim. As such, there was no notice that was issued to the 2nd Respondent in this matter.

85. Further, in the case “Michael Otieno Nyaguti & 5 Others – Versus - Kenya National Highways Authority & 5 Others [2015] eKLR” the Court considered the impact of section 67 vis-à-vis the right of access to justice and held as follows;

“The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of Court settlement and is in line with the provision of Article 159 of *the Constitution*, which at sub-article 2(c) encourages “alternate forums of dispute resolutions. The provision of Section 67 of the Kenya Road Act 2007 is not in contravention with *the Constitution* 2010.”

86. The Court of Appeal in “Michael Otieno Nyaguti (Supra)” wherein the Court (Nambuye, Okwengu & Sichale JJ.A.) in considering whether the trial court had directed itself properly on the question of a Preliminary Objection dismissing a suit under the provision of Section 67 held that:-

“Our construction of the above provision leaves no doubt in our mind that it is couched in mandatory terms as contended by the respondent. The Act is an Act of Parliament. It therefore has the force of law. The P.O on noncompliance with this provision is, therefore, on a pure point of law as there is no other way of addressing the Respondent's, P.O other than by way of construction and application of Section 67(a) of the Act as construed and applied by the Learned Judge at the trial and now by us on appeal which we have done and are satisfied as did the learned Judge that item 1 of the Respondent's P.O was on a pure point of law and fell for merit consideration before the learned judge as such.

The trial court also rightly held a position we affirm on appeal that the P.O left no room for exercise of discretion by the trial court and now us on appeal. Once upheld, the trial court had no discretion to sustain the suit. Likewise, as we have already alluded to above when dealing with element/ingredient(iii), that, if the conclusions reached by the trial court are affirmed, the appeal will stand dismissed is the correct position in our view.[Emphasis ours]”

As such, the Learned Counsel urged this Honourable Court ought to dismiss the entire suit as against the 2nd Respondent as the same was fatally defective for non-compliance with the mandatory terms of Section 67 and a violation of the 2nd Respondent's rights.

87. Thirdly, whether the Petitioner misinterpreted the provisions of Section 120 of the *Land Act*, No.6 of 2012. The Learned Counsel submitted that the Petitioner has relied on an earlier and now amended provision of the *Land Act*. In its submissions, the Petitioner relied at length on Section 120 of the *Land Act*, 2012 as originally enacted;

120.

- (1) Only after the award has been made, and the amount of the first offer has been paid, the Commission shall take possession of the land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county governments as the case may be.
- (2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal



procedures of compulsory acquisition under this Act, the Commission may take possession of that land in the manner prescribed by subsection (1).

88. The Learned Counsel argued that this section was however amended vide the Land Value (Amendment) Act, 2019, No. 15 of 2019 which commenced on the 19th August, 2019. The new provision reads as follows;

120.

- (1) After an award has been made, the Commission may take possession of the respective land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless.
- (2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of the land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).

89. The Learned Counsel submitted that when this compulsory acquisition process was instituted vide the Gazette Notice No.12299 of 2021 dated 11th November 2021, the amended provision had been in place for over two years. This then would imply that the Petitioner was deliberately trying to mislead this court. There existed no provision in law for any initial compensation to be paid before taking possession of the properties nor is urgent necessity limited to uncultivated or pasture or arable land. As such, a claim that the acquisition was illegal could stand.

90. It was uncontested that the request for acquisition of the properties for purposes of the Mombasa Gateway Project was initiated way back in 2021. It was also not contested that the properties in question were required for the initial phases of the project. This was what necessitated taking possession as a matter of urgent necessity. It was as a result of the Petitioner's uncooperative stance and delays that had created hurdles in the implementation of the project and led to its delay for over 2 years. This had been to the great detriment of the millions of Kenyan people who would have benefitted from the project and the contractual implications on the Kenyan government due to its obligations to strategic partners in this project. At all times, the Respondents herein had operated within the law and been very accommodating to the Petitioner. This Court ought not to allow the Petitioner who has occasioned the delay in the acquisition of the properties to then come before this court to claim that there was no urgency over the same.

91. Finally, whether the Petitioner had made out a cause of action as against the 2nd Respondent. The Learned Counsel submitted that they wholly relied on the submissions made in support of the preliminary Objection to urge this court that there was no cause of action against the 2nd Respondent and that it ought not to be a party to these proceedings. Further to the above, it was now settled in law that the procedure and process of compulsory acquisition of land is vested within the National Land Commission, the 1st Respondent herein. In the case of:- "Mombasa ELC Petition 58 of 2019, Shamsudin Khosla & 2 others – Versus - Kenya National Highways Authority & another [2021]eKLR" the Court surmised the role of the 1st Respondent as follows;

- (a) Issue notice of intention to acquire the land (in the notice show the purpose for which the land is to be acquired, its location, general description and approximate area) -Section 107.



- (b) Issue notice of an inquiry giving at least 15 days' notice-Section 112.
 - (c) Make an award-Section 113
 - (d) Notify parties of the award-Section 114.
 - (e) Pay compensation promptly-Section 115.
92. The Court therein, in a matter similar to the one before this court held as follows with regards to reliefs available;
29. I believe that my findings that an award needs to be made, so that the process moves forward, takes care of the prayers (b) and (c). There are prayers for a permanent injunction being prayers (d) and (e). What I order the parties is to proceed to implement Sections 113, 114 and 115 of the *Land Act*. I will not make any order for a permanent injunction because given the time that this petition has taken, it may very well be the position that the project is well under way, and it will not be in public interest to stop the process, while the parties herein are sorting out the amount payable. I am therefore not persuaded to make the orders of permanent injunction. Prayer (f) seeks orders to award compensatory damages. I need not make this order for it will naturally follow the award. In other words, the award is the compensation payable to the petitioners.
31. In conclusion, there will only be one substantive order which I shall make, and it is as follows:
That the 2nd respondent is hereby ordered to make an award over the properties MN/VI/2552, MN/VI/2920 and MN/VI/3028 and notify the petitioners of its award within the next 21 days.
93. From the pleadings and evidence submitted in court, and the clear provisions of the law, it was clear that the 2nd Respondent could only had participated in the compulsory acquisition process in two stages:-
- 1. In requesting the 1st Respondent to compulsorily acquire the said properties for a public purpose to wit; the construction of the Mombasa Gateway Project; and
 - 2. Transferring of the compensation to the 1st Respondent for onward transmission to the Petitioner once the 1st Respondent issued an award over the same.
94. Further, the Learned Counsel submitted that any steps that the 2nd Respondent made with respect to the said properties were with the direction and authorization from the 1st Respondent. The attempt to have a joint entry meeting and access to the said properties was done only after the 1st Respondent had issued it with a Notice of Taking Possession dated the 21st October 2022. (Reference was made to annexure marked as “AJ – 15” attached to the Petitioner's application dated 9th November 2022.). It was also evident from the prayers enumerated in the Petition that the positive reliefs sought by the Petitioner, which go to the core of this entire suit to wit, the payment of full and just compensation can only lie as against the 1st Respondent. As such, the Petitioner had failed to set out a cause as against the 2nd Respondent herein.
95. The Learned Counsel humbly submitted that the 2nd Respondent was not a proper party in this suit. The rules as to who constituted a proper party were discussed at length in the case of:- “Unilever Tea Kenya Limited – Versus - National Land Commission & 2 others [2018] eKLR”;



20. Havelock J when faced with a similar issue took into cognizance the case of *Amon v Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, in which Devlin, J held at p. 286-287 as follows:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

26. The relevant tests for determination whether or not to join a party in proceedings were restated Odunga J in *Laisa Mpoye & 2 Others v Kajiado Central Milk Project ‘The Board’ & 5 Others* [2012]eKLR where the learned judge was guided by *Kingori – Versus - Chege & 3 Others* [2002] 2 KLR 243 where Nambuye, J (as she then was) listed the guiding principles as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the Respondent there must be a relief flowing from that Respondent to the Petitioner.
4. The ultimate order or decree cannot be enforced without his presence in the matter.

96. In the instant suit, no relief flowed from the 2nd Respondent directly as any compensation to be paid could only be channeled through the 1st Respondent. Further, the question as to issuance of an award and full and just compensation could be settled without the 2nd Respondent being a party herein. If at all this Honourable Court were to find any lapses in the compulsory acquisition process, the same could only lie with the 1st Respondent being the body mandated to undertake the same. As such, no cause of action can lie as against the 2nd Respondent.

97. In conclusion, the Learned Counsel submitted that the Preliminary objection dated 28th November, 2022 ought to be upheld and the entire suit be dismissed as against the 2nd Respondent. Further, Petition has failed to disclose a cause of action against the 2nd Respondent and was based on a misapprehension of the land. As such, the Learned Counsel prayed that the same be dismissed with the 2nd Respondent’s costs in the cause.

A. The Supplementary submissions of the 2nd Respondent

98. Likewise, though without the leave of this Court, (it was only the Petitioners who on 4th October, 2023 who sought and were granted leave to file a Supplementary Submissions) the 2nd Respondent through the Law firm of Messrs. Rachier & Amollo LLP Advocates filed their written submissions dated 1st December, 2023 where the learned Counsel submitted that these submissions were further to and supplemental to the 2nd Respondent’s erstwhile submissions dated 17th August 2023. He stated that The matter before the Honourable Court was a matter of trite law, on a well-trodden path. It



required this Honourable Court to reiterate the question of lawful compulsory acquisition of land, the principles that apply to the process, persons liable to compensate an owner of private land and the reliefs available in case of any lapses in the due process of compulsory acquisition. To that end, this Honourable court was basically called upon by the 2nd Respondent to determine whether it is a proper party to this suit, and whether any cause of action established against it.

99. He reiterated on whether the case against the 2nd Respondent was duly instituted as read with the provisions of Section 67 of the [Kenya Roads Act](#), No. 2 of 2007 which was instructive in the procedure to be followed when suing the 2nd Respondent. It is clear and unambiguous to that effect. The Learned Counsel over stressed on the fact that it was an undisputed fact that a one-month notice containing particulars of the claim and the intention to commence legal action was required to be served upon the 2nd Respondent herein by the party intending to sue or its agent before legal proceedings are commenced against the 2nd Respondent. The above provision left no doubt that it was couched in mandatory terms.
100. From the Petitioner's own pleadings and documents filed before this Honourable Court, it was clear that the only time in which the Petitioner addressed the 2nd Respondent was vide its letter of 12th October 2022 denying a request for a joint entry meeting. The said letter was directed towards this particular issue and the Petitioner in fact proceeded to lay the blame for the denial on the 1st Respondent. This cannot be construed as a valid notice to the 2nd Respondent. The said letter dated 12th October, 2022 never satisfied the provisions of section 67 as it was focused on the issue of a joint entry meeting and did not disclose its claim of right nor any intention to take legal action to pursue such a claim. As such, there was no notice that was issued to the 2nd Respondent in this matter. Conversely, had the Petitioner served the required notice on the 2nd Respondent prior to instituting this suit, it would have afforded the 2nd Respondent an opportunity to respond and possibly resolve the dispute out of court. The Learned Counsel submitted that the Kenya Road Act, 2007 is an Act of Parliament. It therefore had the force of law and under the said Act, the Petitioner was required to seek redress from the Cabinet Secretary before commencing the petition and to issue a 30 days' notice of intention to sue on the 2nd Respondent. As such, this Honourable Court ought to dismiss the entire suit as against the 2nd Respondent as the same was fatally defective for non-compliance with the mandatory terms of Section 67 and a violation of the 2nd Respondent's rights.

VI. Analysis and Determination

101. I have carefully considered all the filed pleadings pertaining to the Petition dated 21st July, 2021, the Supporting, replying and Supplementary affidavits, the written submissions, the myriad cited authorities by the parties provisions of [Constitution of Kenya, 2010](#) and the Provisions of the law.
102. For the Honourable Court to reach an informed, fair and just decision on the subject matter, it has crystalized it into the following three (4) issues for its determination. These were:
- a. Whether this Honourable Court is vested with the primary jurisdiction to adjudicate the dispute in this Constitutional Petition
 - b. Whether the Petitioner has met the threshold of a Constitutional Petition.
 - c. Whether the Petitioner's fundamental rights and freedoms have been infringed upon and whether the Petitioner is entitled to Compensation; and
 - d. Who should bear the costs of the Petition?



Issue No. a.) Whether this Honourable Court is vested with the primary jurisdiction to adjudicate the dispute in this Constitutional Petition.

103. Under this Sub – heading, first and foremost, the Honourable Court wishes to deliberate on an issue of Jurisdiction of this Court raised by the 1st and 2nd Respondents herein as a matter of preliminary dispensation. Both the Learned Counsels to the 1st and 2nd Respondents averred the objection on two fold: Firstly that the entire Petition offends the provision of Section 67 of the Kenya Road Act, No. 2 of 2007 for failure to issue a notice prior to instituting the suit and Secondly, that the Petition was framed can ably be determined by the Land Acquisition Tribunal which in any event is the body with original and Appellate jurisdiction at first instance. Notably the Tribunal is clothed with jurisdiction to determine complaints arising under Articles 23 (2) and 47 (3) of *the Constitution* and apply the Fair Administrative Actions Act and any other law. This effectively means that the Tribunal can determine violation of Constitutional rights and exercise supervisory jurisdiction as well as Appellate jurisdiction over the decisions, acts or omissions of the 3rd Respondent herein in the first instance. The provision of Section 133 (6) of the *Land Act*, No 6 of 2012 uses the mandatory term “shall” to underscore that all disputes relating to compulsory acquisition shall at first instance be determined by the Tribunal.

104. Certainly, the Learned Counsel for the 1st Respondent has extensively expended a sizable moment in citing numerous authorities on this subject issue. Undoubtedly, the Honourable Court finds then relevant and fully agrees with him on them. The centrality of the concept of jurisdiction in Kenya’s legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in “Owners of Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd (Supra) in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

105. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in “Samuel Kamau Macharia & ano – Versus - Kenya Commercial Bank Limited & 2 others [2012] eKLR” as follows:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or



tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

106. The broad jurisdiction of this court is set out in Article 162(2) of the Constitution as follows:

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
- (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”

107. The 1st Respondent has argued the Jurisdiction of the Court is ousted by the Provisions of Section 133B and 133C of the Land Act, 2012(2016) amended by the Land Value (Amended) Act 2019 which sets up a tribunal known as the land Acquisition Tribunal .

108. First and foremost, with regard to the elaborately raised objection by the 2nd Respondent on failure by the Petitioner to issue a notice to the 2nd Respondent before instituting the Petition and its legal efficacy as founded under the provision of Section 67 of the Act. From the filed pleadings, the 2nd Respondent in their own admission held that they inadvertently failed to file a Replying Affidavit where perhaps they would have controverted the numerous correspondences exchanged prior to the institution of the suit between the Petitioner’s Advocate and the 1st , 2nd and 3rd Respondents over the subject matter letter. These included the letter dated 12th October, 2022 by the 2nd Respondent to the Petitioner inviting them for a joint meeting – annexed and marked as “AJ – 9” of the Petitioners annexures and which on the same date the Petitioner’s Advocate wrote a rapid and terse response declining the proposal for Joint meeting with a raider on intention to institute the suit. It is annexed and marked as “AJ – 10” of the Petitioners annexures. Additionally, there was meeting held between the 1st , 2nd and 3rd Respondents on 14th October, 2022 as evidenced from the annexure marked as “AJ – 11” but from which no tangible results were realized. Hence, from the surrounding inferences and facts, all these correspondences and sessions do constitute expressly a notice within the ambits of the provision of Section 67 of the Act. It was clear that the efforts to explore an out of Court negotiation over this dispute and which was the intention of the provision of Section 67 of the Act had become a cropper and obviously the 2nd Respondents was on notice that the next cause of action by the Petitioner was definitely to institute legal action before this Court. To impute that there a breach of this provision of the law is splitting hairs and superfluous hiding behind the curtains of the provisions of the law out of Court. With regard to the objection by the 1st Respondent on the provisions of Sections 133A, 133B and 133C of the Land Act, 2012 only deal with the establishment of the land Acquisition Tribunal and also set the terms of office of the members of the tribunals and not otherwise. On the other hand, Section 133C of the Land Act, 2012 provides for the functions and the powers of the tribunal to hear Appeals from decisions of the National Land Commission in matters pertaining to and/or concerning compulsory acquisition to hear such matters of land acquisition issues. They have argued that it gives parties a chance of second appeal before this Court which is an appellate court.

109. Notwithstanding the foregoing, from the onset I beg to point out that the contention by the 1st Respondent that this Honourable court does not have original jurisdiction on matters pertaining to compulsory acquisition of land and in relation to the Doctrine of Exhaustion, is not well founded. For clarity, the said submissions have missed the import and tenor of the provision of Section 13 (2) (b) of the Environment and Land Court Act, No. 19 of 2011 which provides as hereunder;

13. Jurisdiction of the Court



- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes?
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs”

110. Undoubtedly, it is clear from the wording of the Petition and from the reliefs sought thereof, Petitioner is challenging the intended compulsory acquisition of the parcels of land specified in the Gazette Notice. The concept of compulsory acquisition of private land by the state is popularly known as the doctrine of eminent domain. The doctrine of eminent domain refers to the eminent power of the



state to compulsorily acquire privately owned land for public use. Scholars, jurists and policy makers concur that when the state requires privately owned land for public use, it cannot be stopped from compulsorily acquiring the privately-owned land.

111. The framers of *the Constitution* of Kenya 2010 deemed it necessary to provide a clear framework on how the state is to exercise the power of eminent domain. Article 40 (3) of *the Constitution* provides thus:

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

- (a) results from an acquisition of land or an interest in land or conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –
 - (i) requires prompt payment in full, or just compensation to the person; and
 - (ii) allows any person who has an interest in or right over, that property a right of access to a court of law.

112. In addition to the above constitutional framework, Part VIII of the *Land Act* provides an elaborate framework on how the power of eminent domain is to be exercised. Part VIII A provides a framework on how disputes relating to the state’s exercise of the power of eminent domain are to be adjudicated. Under Section 112 of the Act, the National Land Commission is obligated to publish a notice of intention to compulsorily acquire land on behalf of either of the two levels of Government. The Section obligates the National Land Commission to appoint a date for an inquiry into the intended compulsory acquisition. At the stage of inquiry, the Commission hears issues relating to propriety and claims for compensation by persons interested in the land. Under Section 123, the Commission is mandated to withdraw or revoke a notice of intended compulsory acquisition provided this is done before possession of the land is taken by the Commission.

113. Because of the many disputes that arise in relation to the state’s exercise of the power of eminent domain, Parliament established the Land Acquisition Tribunal. The provision Section 133C of the *Land Act* sets out the jurisdiction of the Tribunal as follows:

- 1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
- 2) A person dissatisfied with the decision of the Commission may, within thirty days apply to the Tribunal.
- 3) Within sixty days after the filing of an application under this part, the Tribunal shall hear and determine the application.
- 4) Despite subsection (3) the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
- 5) If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the commission



did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.

- 6) Despite the provision of Sections 127, 128 and 148(5) a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
 - 7) Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
 - 8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23(2) and 47(3) of *the Constitution*, using the framework set out under Fair Administrative Action or any other law.
114. This Court fully concurs to the position that, In its wisdom, Parliament through the Kenya Gazette No. 15 of 2019 enacted Section 133D of the *Land Act*, vesting in this court appellate jurisdiction in disputes relating to the exercise of the state’s power of eminent domain in the following terms:
- (1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds:
 - (a) the decision of the Tribunal was contrary to law or to some usage having the force of law;
 - (b) the Tribunal failed to determine some material issue of law or usage having the force of law; or
 - (c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
 - (2) An appeal from the decision of the Tribunal may be made on a question of law only.
115. Therefore, it is clear from Part VIII and Part VIIIA of the *Land Act* that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under the provision Section 112. However, it is instructive to note that this provision with the term “May” is discretionary as opposed if it was couched in mandatory terms as the 1st Respondent seem to be implying from their submissions. Nay. Far from it. It is a matter of choice by the parties herein to decide where their matter should be referred to. Hence, if there is no satisfactory resolution of the dispute, as it is in the instant case, the next port of call, as a matter of election by the parties would be the Land Acquisition Tribunal established under Section 133A of the *Land Act*. If a party is dissatisfied with the determination of the Tribunal, the next port of call would be this court. In that case, then the appellate jurisdiction of this court would, however, be restricted to issues of law and not facts. Definitely, in so doing, the parties would be missing out the second right of appeal before this Court.
116. From the brief facts of the Petition, the Petitioner claims that the acquisition process was commenced way back in November 2021, which is almost three (3) years ago and there is no urgent necessity to take possession of the suit properties because the Respondents are the ones who have been indolent and have delayed with the acquisition and compensation process for one year. Further, the construction of Gate Bridge Project has not commenced and has not been commissioned by the National Government so as to justify the 2nd Respondent’s action and step/move to “access the site to commence construction works with immediate effect.” The suit properties were not uncultivated or pasture or arable land



which is the only nature of land that the 1st Respondent is permitted to take possession of under section 120 (2) of the *Land Act*. The suit properties are developed plots within an urban setting of Mombasa County. The acquisition process has taken over one year which delay has been caused by the 1st Respondent's failure to offer or make compensation award to the Petitioner.

117. The delay has been inordinate and has been caused by the Respondents themselves and the Respondents cannot now claim that the acquisition will be delayed against public interest. Since they have delayed the acquisition process for over one year, the Respondents should expedite the compensation process and not purport to invoke the provision Section 120 (2) of the *Land Act* as a remedy for the Respondents' own delay under the guise of urgent necessity, there is nothing urgent in the subject compulsory acquisition process of the suit properties otherwise the Respondents would have concluded the process without delaying for one year. The notice of intention to acquire the suit properties was published on 11th November, 2021. A period of fifteen (15) days from the said date expired long ago (on 26th November 2021). Effectively, the Respondents have taken possession of the suit properties without paying compensation to the Petitioner because the effective date indicated in the notice dated 21st October, 2022 has long expired (15 days from 26th November, 2021 expired on 11th December 2021).
118. It was after full participation of the full trial of this matter, during the submissions that the 1st Respondent seem to have all of a sudden remembered that this Court did not have jurisdiction to entertain the dispute in this Petition. To me this was the last-minute decision and perhaps an afterthought. In so doing, they contend that the Petitioners had invoked the jurisdiction of this court prematurely. They argued that the Petitioner should exhaust the dispute resolution mechanisms.
119. Suffice it to say, and to give the 1st Respondent some benefit of doubt, our courts have umpteen times stated that where Parliament has, through statute, provided a clear procedure for seeking redress, that procedure must be followed. Prior to the promulgation of *the Constitution* of Kenya 2010, the Court of Appeal reiterated this principle in "Speaker of the National Assembly – Versus - James Njenga Karume [Supra]" in the following words:-
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
120. The Supreme Court of Kenya rendered itself on this principle in the case of "Benard Murage – Versus - Fine Serve Africa Limited & 3 others [2015] eKLR" as follows:-
- “Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”
121. Not too long ago, the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings in "Kibos Distillers Limited & 4 others – Versus - Benson Ambuti Atega & 3 others [2020] eKLR" [the Kibos Distillers case]:
- “To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original



jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that is “Speaker of the National Assembly v James Njenga Karume [1992] eKLR” where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

122. This Honourable Court has opined itself before in the case of “Geys International Assets Limited v Attorney General & 3 others (Constitutional Petition 209 of 2015) [2023] KEELC 21591 (KLR) (6 November 2023) (Judgment)”, that:-

“

- “ 119. The import of the doctrine of stare decisis [precedent] is that where a higher court has made a pronouncement on a question, that pronouncement is the one that prevails on that question. Be that as it may, as I had already started pronouncing herein, I have a few reservations to the fore going and in as far as this matter is concerned. Firstly, I have noted the that the provision of Section 133C (2) which states:-

“A person dissatisfied with the decision of the Commission may, within thirty days apply to the Tribunal.

Is crafted in a discretionary nature as opposed to be mandatory. A party aggrieved by the decision by the Commission as it is in the instant case may opt to institute an appeal before the tribunal or not. The Petitioners herein decided to institute its case and submit itself before this Court instead.

120. Secondly, it is important to note that the 1st Respondent waited until the point where this Honourable court was to render itself with a final decision before raising the issue of jurisdiction. I do note that the Petitioner approached the 3rd Respondent in regard to its claim for compensation before the 3rd Respondent at public hearings held by the 3rd Respondent at Changamwe in Mombasa. The inordinate and unreasonable delay in raising this objection is unfair, unjust and inexplicable contrary to the doctrines on Judicial authority founded under the provision of Article 159 (1) and (2) of *the Constitution* of Kenya, 2010.

121. Thirdly, as it has become rather conventional and common where “quasi Judicial bodies” are statutorily created but are never implemented nor properly executed. This Court would have expected e the 1st and 3rd Respondents to have displayed and demonstrated with empirical documentary evidence such as affidavits or otherwise on the existence and operational mechanisms in form of proceeding and/or decisions or precedents emanating from the said Tribunal for the past few days. Without that evidence, this Court would rudely throwing the Petitioners out there in the wilderness contrary to the



provisions of Section 70 of *the Constitution* of Kenya, 2010 and the Doctrine of Exhaustion. This Court in the case of Constitution Petition No 33 of 2021 – Okiya Omtatah Okoiti – Versus – the National Assembly & 5 others” where I equally declined to send the Petitioners away from this Court based on the fact that the Court had no Jurisdiction. I am persuaded by the scripture quote from Psalms 121 which the petitioner would querying from this Court in the given circumstances:

“I Lift my eyes to the Hills. From whence does my help come? My help comes from the Lord, who made heaven and earth. He will not let your foot be moved, he who keeps you will not slumber.....”

123. Indeed, I dare state that there are special and exceptional case to the Doctrine of Exhaustion. From the surrounding facts and inferences the instant case stands out as one of such cases. It will be an art of abdication and dereliction of duty and its responsibility by this Court to send this matter before the tribunal. That is after the Court will have already heard the matter and the submissions herein from the year 2022 to date after a period of over two (2) years and awaiting to deliver this Judgement to be sending it away to the Tribunal. It is unacceptable and tantamount to travesty of Justice in all angles of the matter.
124. For the above reasons, therefore, it is my own finding that this Honourable Court is clothed with the jurisdiction to hear and determine the matters raised from the Petition. Thus, the objection on the doctrine of exhaustion and the jurisdiction based on the provision of Section 133A, 133C and 133D of the Land (Amendment) Act, 2012 is concerned is hereby rejected outrightly in the interest of justice.

Issue No. b.) Whether the Petitioner have met the threshold of a Constitutional Petition.

125. Under this sub heading, the Honourable Court assesses the Petition dated 9th November, 2022 where the Petitioner seeks for the following reliefs:-
- a. A declaration be and is hereby issued that the 1st Respondent’s decision to grant the 2nd Respondent access to the Petitioner’s suit properties known properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108(Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County as contained in the 1st Respondent’s notice dated 21st October 2022 before paying just compensation to the Petitioner is illegal, unconstitutional, null and void.
 - b. A declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents by their actions pleaded in this petition have breached and violated and/or threatened to breach and violate the Petitioner’s constitutional right.
 - c. An order of mandatory injunction and/or mandamus be and is hereby issued to compel the 1st and 2nd Respondents to pay just and full compensation to the Petitioner for the compulsory acquisition of the Petitioner’s properties known as MSA/MS/ Block 1/107(Mombasa/Mainland South/Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block I/108) situate in Likoni in Mombasa County within thirty (30) days of this order or such other reasonable time as the court may determine.
 - d. An order of permanent injunction be and is hereby issued prohibiting and restraining the Respondents, whether by themselves, agents, employees, contractors, servants and/or whomsoever is acting under their authority or instruction, from accessing, entering onto, developing, undertaking any constructions works, taking over possession and ownership of



and/or in any manner whatsoever interfering with the Petitioner's properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County before full and just compensation is paid to the Petitioner.

- e. An order of permanent injunction be and is hereby issued to restrain the 4th Respondent from registering any restriction, entry or transaction regarding the compulsory acquisition of the Petitioner's suit properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County by the Government and the Respondents before full and just compensation is paid to the Petitioner.
 - f. Costs of this Petition be borne by the 1st, 2nd and 3rd Respondents jointly and severally.
 - g. Any further relief or orders that this Honourable Court shall deem just and fit to grant.
126. Under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a petitioner must disclose facts relied upon, constitutional rights and freedoms violated, nature of injury caused, capacity to bring the petition, details relating to related civil/criminal matter and the reliefs sought.
127. This Honourable Court must establish the constitutional basis of the Petition which is founded under several Paragraphs which include:-
- a. Article 10 - all state officers and public officers are bound to adhere to national values and principles of governance.
 - b. Article 20 (1) (2) and (3) (b) - protection of fundamental rights to be mandatorily protected by the court by adopting the interpretation that most favors the enforcement of a right or fundamental freedom.
 - c. Article 23 (1) (3) - the right to a conservatory order.
 - d. Article 25 - the right to a fair trial.
 - e. Article 27 - right to equality and freedom from discrimination.
 - f. Article 40 (1) (2) & (3) - right to private property and compulsory acquisition of the property for public use.
 - g. The Petitioner's fundamental rights as set out in *the constitution* shall be infringed if the interim measures of protection are not granted as stipulated under Articles 22 and 23 of *the Constitution* of Kenya.
128. As a matter of course, *the Constitution* of Kenya under Article 259(1) provides a guide on how it should be interpreted as such:-
- “This Constitution shall be interpreted in a manner that:-
- a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and



d. Contributes to good governance.....”

129. This Honourable Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
130. Under the contents of Paragraphs 1 to 6 of the Petition dated 9th November, 2022 describes the parties to this Petition, whereas paragraphs 7 to 25 gives the factual basis of the Petition stating that the Petitioner has at all material times had an elaborate plan and vision to develop a multi-billion project on the suit properties. Vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. Vide another Gazette Notice No. 199 dated 14th January 2022, the 1st Respondent on behalf of the 2nd Respondent gave notice that the inquiry to hear claims to compensation for the land required for construction of Mombasa Gate Bridge Project in respect of the suit properties would be held on 23rd February 2022. The inquiry was conducted on 23rd February 2022 as per the said Gazette Notice No. 199 during which the Petitioner made representations on compensation (Compensation Claim) which were acknowledged by the 1st Respondent.
131. At paragraph 12 the Petitioner averred that the vide a letter dated 23rd June 2022, the 1st Respondent also acknowledged receipt of the Petitioner's Compensation Claim. Despite receiving the Petitioner's Compensation Claim, the 1st Respondent deliberately declined to make compensation award to the Petitioner. At paragraph 33, the Petitioner averred that Article 60 (1) (b) of *the Constitution* of Kenya, 2010 requires that land in Kenya be held, managed and used in a manner that guarantees land rights. The Respondents have violated Article 60 (1) (b) of *the Constitution* of Kenya by moving to compulsorily acquire the Petitioner's properties without paying just compensation in full and in prompt manner or at all. Under Article 40 (1) of *the Constitution* of Kenya, 2010, the Petitioner has the right to own the suit properties and not to be arbitrarily deprived of the same or to be restricted from enjoyment of the same. Further, under Article 40(3) of *the Constitution* of Kenya, the State is prohibited from depriving the Petitioner of its interest and right over the suit properties unless just compensation is paid in full to the Petitioner.
132. Under the contents of Paragraphs 33 to 39 of the Petition dated 9th November, 2022 the Petitioner lay out the Constitutional violations by the Respondents contending that under Article 40 of *the Constitution* of Kenya 2010, the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop the property. The Petitioner argued that Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010 requires prompt payment of compensation before taking possession of land by way of compulsory acquisition. Article 40 (3) (b)(i) of *the Constitution* requires prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents have taken possession of the Petitioner's properties, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to just compensation, the same requires prompt and full payment of compensation before taking possession of land by way of compulsory acquisition. By delaying the payment of compensation to the Petitioner by nearly one year, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to payment in full of just compensation.



133. According to the Petitioner, since the 1st and 2nd Respondents have taken possession of the suit properties, it is imperative that they pay just compensation to the Petitioner promptly as mandated by Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010. The 4th Respondent herein has threatened to register a restriction on the register of the Petitioner's properties on instructions of and in favour of the 1st, 2nd and 3rd Respondents on the basis that the Petitioner's property had been compulsorily acquired by the Government.
134. The petitioner proceeded to seek for 7 (seven) key prayers. The threshold of what amounts to constitutional petition was set out in "Anarita Karimi Njeru – Versus - Republic [1979]eKLR" and "Trusted Alliance Society of Human Rights – Versus - Attorney General & 5 Others [2013] eKLR". Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:
- “We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to *the Constitution* it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” where the court is satisfied that the Petitioner's claim were well pleaded and articulated with absolute particularity. It held:-
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
135. Further, in the case of:- “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
- “The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.
- In other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”
136. In the case of:- “Meme – Versus - Republic [2004] 1 E.A. 124”, the court held a Petitioner must set out with reasonable degree of precision the complaint and the manner in which the rights have been infringed with clear focus on fact, law and *the Constitution*. This was the same position taken in the case of:- “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Others [2013] eKLR” and “John Mbogua Getao – Versus - Simon Parkoyiet Mokare & 4 others [2017] eKLR”.
137. The Petitioner is required to demonstrate that an impugned decision or action violates or threatens to violate the bill of rights or *the Constitution* for that matter. The test is whether the decision, act or omission complained about falls within the ambit of an administrative action in line with the provisions of Section 2 of the *Fair Administrative Action Act*, 2015.
138. Before examining whether the Constitutional rights of the Plaintiff were violated, this Honourable Court must examine whether or not the title of the suit land held by the Petitioner is valid and lawful. According to the Petitioner, it was the registered owner of two properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block(/108) situate in Likoni in Mombasa County (hereinafter “the suit Properties”). The



Petitioner has at all material times had an elaborate plan and vision to develop a multi-billion project on the suit properties. Vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. Vide another Gazette Notice No. 199 dated 14th January 2022, the 1st Respondent on behalf of the 2nd Respondent gave notice that the inquiry to hear claims to compensation for the land required for construction of Mombasa Gate Bridge Project in respect of the suit properties would be held on 23rd February 2022. The Petitioner went ahead to annex an affidavit and copies of the respective title deeds.

139. The 1st Respondent on the other hand told the Honourable Court that the Petition raises no Constitutional issues and the proper forum for determination of the dispute herein is a Civil Court or an Appeal to Land Acquisition Tribunal under the provision of Sections 133A and 133(c) of the *Land Act*. In their submissions, the 1st Respondent herein averred that the Petition which quoted *the Constitution* and Constitutional provisions does not make it a Petition that discloses pure Constitutional issues.
140. It is evident, a legally and absolute registered owner to land is vested with indefeasible rights, interests and rights vested in him/her by law. Particularly, these provisions are clearly set out under the provision of Sections 24, 25 and 26 of the *Land Registration Act* 2012, which provide as follows; -
24. “Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
141. Further Section 25(1) provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. This Honourable Court is satisfied that the Petitioner is the bona fide owner of the suit property.
142. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioner herein pleaded with reasonable precision as founded in the “Anarita Karimi (Supra)”. To respond to this query, and despite of the Petitioner making such general allegation that there has been breach, violation and denial of the provisions of Articles 22, 23, 24, 40, 60 and 162 (2) (b) of *the Constitution* of Kenya 2010; Section 111, 113 and 120 of the *Land Act* and Rules 3, 4, 10, 11 and 20 of *the Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 perpetrated by the 1st, 2nd, 3rd, 4th and 5th Respondents, the Honorable court is completely satisfied that the Petitioner had dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and for the prayers sought. The next question would be whether the Petitioner had proved the alleged breach of the rights particularized in the Petition as to fair administration in furtherance to the rights of the Petitioner on the suit property.

Issue No. c.) Whether the Petitioners’ fundamental rights and freedoms have been infringed upon and whether the Petitioner is entitled to Compensation

143. Under this sub heading, it’s imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. 6 of 2012 and Article 40 (1), (2) and (3) of *the Constitution* of Kenya (See Viranda Ramji Gudka & 3 Others – Versus - The AG (2014)eKLR as read together with Part V of The Land Regulations of 2017.



144. The Petitioners have alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Another (Supra)” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

145. The Petitioner has contended that vide a Gazette Notice No. 12299 dated 11th November 2021, the 1st Respondent gave notice of intention to compulsorily acquire the suit properties on behalf of the 2nd Respondent for the purpose of construction of Mombasa Gate Bridge Project to connect to Mombasa Island to South Coast. Annexed in the affidavit and marked as “AJ - 3” is a true copy of Gazette Notice No.12299. Vide another Gazette Notice No. 199 dated 14th January 2022, the 1st Respondent on behalf of the 2nd Respondent gave notice that the inquiry to hear claims to compensation for the land required for construction of Mombasa Gate Bridge Project in respect of the suit properties would be held on 23rd February 2022. Annexed in the affidavit and marked as “AJ 4” is a true copy of Gazette Notice No.199. The inquiry was conducted on 23rd February 2022 as per the said Gazette Notice No. 199 during which the Petitioner made representations on compensation (Compensation Claim), Annexed in the affidavit and marked as “AJ - 5” is a true copy the Petitioner’s letter to that effect. The 1st Respondent acknowledged the Petitioner’s representation on the face of the letter. Further, vide a letter dated 23rd June 2022 but received by the Petitioner via WhatsApp on 5th October 2022, the 1st Respondent acknowledged receipt of the Petitioners Compensation Claim. Annexed in the affidavit and marked as “AJ - 6” is a true copy of the 1st Respondent’s letter dated 23rd June 2022.

146. Despite receiving the Petitioner’s Compensation Claim, the 1st Respondent deliberately declined to make compensation award to the Petitioner. Instead, the 1st Respondent, while well aware that the suit properties belong to the Petitioner made very wild, generalized and unsubstantiated allegation that the suit properties were designed as the Existing Site for the Kenya Navy, Mtongwe. The allegation was made as an excuse to delay and avoid making compensation award to the Petitioner. The Petitioner addressed the 1st Respondent’s allegations vide letters dated 19th September 2022 and 11th October 2022 in which the Petitioner was categorical that the Petitioner is the owner of the suit properties and attached documents to support the Petitioner’s ownership thereof. Annexed in the affidavit and jointly marked as “AJ - 7” are true copies of the Petitioner’s letters dated 19th September, 2022 and 11th October, 2022.

147. The 1st Respondent made its unsubstantiated allegations real when it reduced the same into writing in a backdated letter dated 22nd July, 2022 but received by the Petitioner via WhatsApp on 5th October 2022. Annexed in the affidavit and marked as “AJ - 8” is a true copy of the Respondent’s letter dated 22nd July, 2022. Despite the clarification by the Petitioner that it is the legal owner of the suit properties, the 1st Respondent still declined to make compensation award to the Petitioner. Meanwhile, without making any compensation award to the Petitioner, the 1st, 2nd and 3rd Respondents made many attempts to illegally and forcefully take over ownership and possession of the suit properties from the Petitioner without following the law and procedure as pleaded hereunder. Vide a letter dated 12th October, 2022, the 2nd Respondent invited the Petitioner to attend a joint entry into the sui properties together with the 3rd Respondent and the National Government which entry was scheduled to take place on 13th October, 2022. Annexed herewith and marked as “AJ - 9” is a true copy of the 2nd Respondent’s letter dated 12th October, 2022. The Petitioner declined the 2nd Respondent’s request for joint entry and



communicated the refusal vide a letter dated 12th October, 2022. Annexed in the affidavit and marked as “AJ - 10” is a true copy of the Petitioner’s letter dated 12th October, 2022.

148. On 14th October, 2022, officers and representatives of Japanese Nationals from JICA Study Team, Engineers and Surveyors from the 2nd Respondent and officials from the 3rd Respondent visited the Petitioner’s offices and held a meeting in which they explained that the 2nd Respondent was desirous of commencing the Gate Bridge Project and that the 3rd Respondent intended to demolish the buildings on the suit properties to pave way for the implementation of the Gate Bridge Project. Annexed in the affidavit and marked as “AJ - 11” is a true copy of the attendance sheet for the said meeting. In the said meeting, the Petitioner clearly indicated that it would not allow entry onto or yield possession of the suit properties until its compensation is processed. Vide undated letter sent to the Petitioner via email on 14th October, 2022, the 3rd Respondent requested to access the suit properties for one (1) week up to and including 22nd October, 2022. Annexed herewith and marked as “AJ - 12” is a true copy of the 3rd Respondent’s undated letter. Once again, vide a letter dated 15th October, 2022 the Petitioner declined the request in the manner proposed by the 3rd Respondent and only granted access on the following conditions:

- i. Access be limited to purpose of undertaking documentation of the cultural heritage assessment.
- ii. There be no excavation or digging of the suit properties.
- iii. Access should not be construed as handing over possession of the suit properties to the Respondents.

149. The Petitioner’s refusal to grant access was communicated vide the Petitioner’s letter dated 18th October, 2022. Annexed in the affidavit and marked as “AJ - 14” is a true copy of the Petitioner’s letter dated 18th October, 2022. Knowing well that the Petitioner was reluctant and had indeed declined to grant unlimited access and to cede possession and ownership of the suit properties to the Respondents before receiving an compensation award, the Respondents changed their tact and approach so as to achieve their ill-intentioned goal of illegally taking over the suit properties from the Petitioner without a compensation award having been made by the 1st Respondent. Vide a notice dated 21st October, 2022, the 1st Respondent invoked section 120 (2) of the Land Act and indicated its intention to take possession of the suit properties by granting access to the 2nd Respondent to commence construction works thereon with immediate effect. Annexed in the affidavit and marked as “AJ - 15” is a true copy of the 1st Respondent’s notice dated 21st October, 2022.

150. The 1st Respondent’s actions are in violation of the land and statute as pleaded in the petition and the application filed herewith. The 1st Respondent’s notice of intention to acquire the suit properties dated 21st October, 2022 is illegal and contrary to the provision of Section 120 (2) of the Land Act because of the following reasons:

- i. The acquisition process was commenced way back in November 2021, one year ago and there is no urgent necessity to take possession of the suit properties because the Respondents are the ones who have been indolent and have delayed with the acquisition and compensation process for one year. Further, the construction of Gate Bridge Project has not commenced and has not been commissioned by the National Government so as to justify the 2nd Respondent’s intention to “access the site to commence construction works with immediate effect.”
- ii. The suit properties are not uncultivated or pasture or arable land which is the only nature of land that the 1st Respondent is permitted to take possession of under the provision of Section



120 (2) of the [Land Act](#). The suit properties are developed plots within an urban setting of County Government of Mombasa.

- iii. The acquisition process has taken over one year which delay has been caused by the 1st Respondent's failure to offer or make compensation award to the Petitioner. The delay has been inordinate and has been caused by the Respondents themselves and the Respondents cannot now claim that the acquisition will be delayed against public interest. Since they have delayed the acquisition process for over one year, the Respondents should expedite the compensation process and not purport to invoke the provision of Section 120 (2) of the [Land Act](#) as a remedy for the Respondents' own delay under the guise of urgent necessity. There is nothing urgent in the subject compulsory acquisition process of the suit properties otherwise the Respondents would have concluded the process without delaying for one year.
 - iv. There is no urgency to justify taking possession of the suit properties before compensation award is made to the Petitioner. Other than the Petitioner's properties, no other property in the area where the Gate Bridge Project is intended to be constructed has been gazetted or compulsorily acquired by the Government. It is not logical or justified to only take possession of the Petitioner's suit properties yet the rest of the land where the project is intended to be constructed has not yet been acquired or even gazetted. The fact that the Respondents are only keen on taking over possession of the Petitioner's properties and not any other property within the area mapped up for the Gate Bridge Project is an indication of ill motive intended to dispossess the Petitioner of its rightfully owned properties without following the due procedure and without paying due compensation.
 - v. The notice of intention to acquire the suit properties was published on 11th November, 2021. A period of fifteen (15) days from the said date expired long ago (on 26th November, 2021). Effectively, the Respondents have taken possession of the suit properties without paying compensation to the Petitioner because the effective date indicated in the notice dated notice dated 21st October 2022 has long expired (15day from 26th November, 2021 expired on 11th December, 2021).
151. The Petitioner contends that the Respondents' actions are in breach of the Petitioner's constitutional rights as pleaded in the Petition. The Respondents' decision to take possession of the suit properties without paying compensation to the Petitioner using the notice dated 21st October, 2022 which is itself is in violation of the Petitioner's rights to own property under Article 40 of [the Constitution](#) of Kenya for the reasons that:
- i. The Petitioner has not been paid just compensation or at all.
 - ii. The notice dated 21st October 2022 through which the Respondents expressed intention take possession of the suit properties cannot be used as the basis and justification for the compulsory acquisition of the suit properties from the Petitioner without first paying just compensation to the Petitioner in full.
 - iii. Article 40 (3) (b)(i) of [the Constitution](#) requires prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents are threatening to take possession of the suit properties, the Respondents have violated or threaten to violate the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of [the Constitution](#) which entitles the Petitioner to just compensation.



152. The 4th Respondent herein according to the Petitioner has threatened to register a restriction on the register of the Petitioner's properties on instructions of and in favour of the 1st, 2nd and 3rd Respondents on the basis that the Petitioner's properties have been compulsorily acquired by the Government. The 4th Respondent has no colour of right to register any interest and make any entry that is adverse to the Petitioner's title to the suit properties without the Petitioner's consent.
153. The Petitioner contended that under Article 40 (1) of *the Constitution* of Kenya, 2010, the Petitioner has the right to own the suit properties and not to be arbitrarily deprived of the same or to be restricted from enjoyment of the same. Further, under Article 40(3) of *the Constitution* of Kenya, the State is prohibited from depriving the Petitioner of its interest and right over the suit properties unless just compensation is paid in full to the Petitioner. The Respondents' decision to take possession of the suit properties without paying compensation to the Petitioner using the notice dated 21st October 2022 is in violation of the Petitioner's rights to own property under Article 40 of *the Constitution* of Kenya for the reasons that:
- i. The Petitioner has not been paid just compensation or at all.
 - ii. Article 40 (3) (b)(i) of *the Constitution* of Kenya, 2010 requires prompt payment of compensation before taking possession of land by way of compulsory acquisition. Article 40 (3) (b)(i) of *the Constitution* requires prompt payment of compensation in full before taking possession of land by way of compulsory acquisition. By delaying the Petitioner's compensation by nearly one year yet the Respondents have taken possession of the Petitioner's properties, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to just compensation.
 - iii. requires prompt and full payment of compensation before taking possession of land by way of compulsory acquisition. By delaying the payment of compensation to the Petitioner by nearly one year, the Respondents have violated the Petitioner's rights as guaranteed by Article 40 (3) (b)(i) of *the Constitution* which entitles the Petitioner to payment in full of just compensation.
154. The Petitioner's right to the suit property as provided under Article 40 of *the Constitution* of Kenya, 2010 has been violated by the Respondent in the manner in which the Petitioner's house and perimeter wall were destroyed without prior notice having been given to the Petitioner by the Respondent. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.
155. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.
156. In the case of "Republic – Versus - Kombo and 3 Others ex-parte Waweru [2008] 3 KLR (EP) 478" which was cited by the Petitioner it was held, inter alia, that:
- “The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in



every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

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

40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

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

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

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

Section 24 stipulates as follows;

Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides;

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that;

Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

160. Under the provisions of the *Land Act*, No. 6 of 2012, the provisions of Section 107 of the Act holds that, the NLC - the 1st Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land



must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of *the Constitution* of Kenya. In this case the threshold must be met. Significant variation in the law includes the provision of Section 107 (3) of the *Land Act*, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in Section 107 (3) of the *Land Act* and Article 40 (3) of *the Constitution* of Kenya. Under the provision of Section 108, as part of the NLC's due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. (See "Nas Auto Spares – Versus – Land Acquisition & Compensation Tribunal & 2 Others (2015) eKLR). This process is thereafter followed by a verification meeting (See Section 107 (2) with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, Cadastral Maps of the affected areas, a Resettlement Action Plan (RAP) accompanied by a list or Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of Sections 107 (5) & 110 (1) of the Act, the 3rd Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and national governments – Section 107 (8) of the *Land Act* for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under Section 108 of the *Land Act*. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC.

161. The land owners plays no role at all hereof. Under the provision of Section 112 of the *Land Act* is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen (15) days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry (See Section 112 (2) of the Act. At this stage, the NLC exercises a quasi - judicial powers.
162. For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents (See Section 112 (5) of the Act makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of Sections 113-119 of the Act. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act.
163. Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value does not exceed that amount of money the NLC considers should



have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such award is not subject to taxation. A compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision of Sections 120-122 of the Land Act.

164. In the case Patrick Musimba (Supra) the word compensation was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence. Therefore, from the above detailed statutory analogy, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person's private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's an extremely delicate balance to be weighed with utmost case.
165. In what has now become "the Classicus Locus" case on compulsory acquisition of land, the case of: "Patrick Musimbi –Versus - National Land Commission & 4 Others" Petition No. 613 of 2014" held inter alia:-

"As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory"

166. This Honourable Court is of the opinion that the Petitioner had demonstrated a violation of their legal and constitutional rights being the registered proprietor of the suit property, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to



this case, the Honourable court is fully satisfied that the Petitioner herein had not dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought.

167. I now examine the material before court as to whether it supports the Petitioner’s prayer of conservatory orders. The circumstances under which the court will grant conservatory orders were discussed by Odunga J in “Michael Osundwa Sakwa – Versus - Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR”:-

“What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petition. However, apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her.”

168. It is trite law that mandatory orders are meant to protect a Petitioner from the results of violations of constitutional rights and freedoms. A “prima facie case” in this case, would therefore be the establishment of a legal wrong caused by the Respondents to the Petitioner, which has resulted into violation of rights. The aim of a conservatory order would be to protect the petitioner from the preventable perils or risks of human rights violations.

169. The Supreme Court in “Gatirau Peter Munya - Versus - Dickson Mwenda Kithinji & 2 others [2014] eKLR” held that:-

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

170. This Honourable Court opines that when it comes to mandatory injunctions, courts have been hesitant to grant the same particularly at the interlocutory stage, save in clear-cut cases. Such was the reasoning taken by the court in “Lucy Wangui Gachara – Versus - Minudi Okemba Lore [2015] eKLR” when it rendered itself thus:

“...the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.



Persuasive judicial pronouncements by Indian courts have also affirmed that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In *Bharat Petroleum Corp Ltd V. Haro Chand Sachdeva*, AIR 2003, Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

171. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Respondents in order for the rights of the Petitioners to be protected.
172. Generally, an injunction is sought in addition to other remedies. It is often difficult to seek an injunctive relief as a stand-alone remedy. In most cases it accompanies declaratory orders.
173. In this instant case, the Honourable Court has already established that the Petitioner has proved its case as against the Respondents and therefore it is inclined to proceed to award the orders as sought by the Petition.

Issue No. d). Who will bear the Costs of the Petition dated 9th November, 2022.

174. The Black Law Dictionary defines “Cost” to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

175. It is not well established that and from Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost.
176. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of *Jasbir Rai Singh Rai – Versus- Tarhochan Singh* (2014) eKLR and *Mary Wambui Munene –Versus- Ihururu Dairy Cooperative Societies* eKLR (2014). The Courts held:

“the basic rule on attribution of costs is that Costs follow the events...it is well recognized that the principles that costs follow the events is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case.”



177. In the instant case the Petitioner has succeeded in protecting its case and gotten the orders sought. Thus, they are entitled to costs to be paid by the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally.

VII. Conclusion and disposition

178. Ultimately, having cause an intensive and thorough deliberation and analysis on all the framed issues herein, this Honorable Court arrives at the finding that: -

- a. That notwithstanding the provisions of Sections 133A and 133C of the Land Act, No. 6 of 2012 as Amended by the Land Value (Amendment) Act, 2019 which are couched in discretionary manner and the provision of Section 67 of the Kenya Roads Act No. 7 of 2007 and the Preliminary Objection dated 28th November, 2022 by the 1st and 2nd Respondents herein be and are both dismissed as this Honourable Court has Jurisdiction to hear and determine this Petition through the Petition dated 9th November, 2022.
- b. That Judgment be and is hereby entered in favour of the Petitioner in terms of the Petition dated 9th November, 2022 in its entirety with costs.
- c. That a declaration be and is hereby issued that the 1st Respondent's decision to grant the 2nd Respondent access to the Petitioner's suit properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/Block 1/108 (Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County as contained in the 1st Respondent's notice dated 21st October 2022 before paying just compensation to the Petitioner is illegal, unconstitutional, null and void.
- d. That a declaration be and is hereby issued that the 1st, 2nd and 3rd Respondents by their actions pleaded in this Petition breached and violated and/or threatened to breach and violate the Petitioner's constitutional right;
- e. That an order of mandatory injunction and/or mandamus be and is hereby issued to compel the 1st and 2nd Respondents to pay full, adequate, fair, reasonable and just compensation to the Petitioner for the compulsory acquisition of the Petitioner's properties known as MSA/MS/ Block 1/107(Mombasa/Mainland South/Block 1/107) and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block I/108) situate in Likoni in Mombasa County within the next thirty (30) days from the delivery of this Judgment;-
- f. That an order of Permanent injunction be and is hereby issued prohibiting and restraining the 1st, 2nd, 3rd, 4th and 5th Respondents, whether by themselves, agents, employees, contractors, servants and/or whomsoever is acting under their authority or instruction, from accessing, entering onto, developing, undertaking any constructions works, taking over possession and ownership of and/or in any manner whatsoever interfering with the Petitioner's properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107)and MSA/MS/ Block 1/108 (Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County before full, adequate, fair, reasonable and just compensation is paid to the Petitioner.
- g. That an order of permanent injunction be and is hereby issued to restrain the 4th Respondent from registering any restriction, entry or transaction regarding the compulsory acquisition of the Petitioner's suit properties known as MSA/MS/ Block 1/107 (Mombasa/Mainland South/ Block 1/107) and MSA/MS/ Block 1/108(Mombasa/Mainland South/ Block 1/108) situate in Likoni in Mombasa County by the Government and the Respondents before full and just compensation is paid to the Petitioner.



- h. That an order be and is hereby issued that the valuation of the suit land be undertaken, the value of which shall be paid to the Petitioner by the 1st Respondent within the next 30 days of this Judgment.
- i. That an order that the Petitioner be awarded general and exemplary damages at 5% of the value of the suit property arising from the delay in the payment of the award of compensation from the compulsory acquisition of the suit land being that the same was not.
- j. That costs of the suit to be awarded to the Petitioner to be borne by the 1st, 2nd, 3rd, 4th & 5th Respondents jointly and severally.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF FEBRUARY 2024.

.....

HON. JUSTICE MR. L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT,
MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula, – the Court Assistant.
- b. M/s. Machogu Advocate holding brief for Mr. Oluga Advocate for the Petitioner.
- c. No appearance for the 1st, the 2nd, the 3rd, the 4th Respondent & the 5th Respondents

